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2. ,, ,, Syed Fazl Ali, Barrister-at-Law. (*Acted as Chief Justice from 14th May to 17th July*, 1938. *On leave from 26th August to 28th September*, 1938.)
3. ,, ,, Sir Khaja Mohamad Noor, C.B.E., (*On leave from 10th to 21st September*, 1938.)
4. ,, ,, Sir J. F. W. James, I.C.S. (*On leave from 29th August to 28th September*, 1938.)
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7. ,, ,, S. P. Varma, Barrister-at-Law. (*On leave from 29th August to 28th September*, 1938.)

8. The Hon'ble F. G. Rowland, I.C.S. (*On leave from 3rd January to 5th May*, 1938.)

9. ,, ,, Manohar Lall, Barrister-at-Law. *Acting Additional Judge.* (*On leave from 10th October to 28th October* 1938.)

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PATNA HIGH COURT
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J. C.*
1937.

November,
6.

RAJA BRAJA SUNDER DEB

v.

RAJA RAJENDRA NARAYAN BHANJ DEO.

(On Appeal from the High Court at Patna.)

Court of Wards Act, 1879 (*Bengal Act IX of* 1879), *s.* 51—*Assumption of superintenaence during pendency of suit—Necessity for reconstituting suit—Absence of formal order reconstituting suit—effect.*

A suit against a proprietor becomes defective upon his becoming a ward of the Court of Wards during the pendency of the suit and the suit should be reconstituted to satisfy section 51 of the Bengal Court of Wards Act. A proper formal order to that effect should be made, but, if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void a decree on a compromise arrived at by the parties.

Appeal (no. 32 of 1936) from a decree of the High Court (January 5, 1934) which reversed a decree of the Subordinate Judge of Cuttack (July 9, 1930).

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

**Present* : Lord Wright, Sir George Lowndes and Sir George Rankin.

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RAJA BRAJA SUNDER DEB v. RAJA RAJENDRA NARAYAN BHANJ DEO.

1937, *November* 8. *Wallach*, for the appellant, submitted that the appellant was not bound by the compromise decree in suit no. 67 of 1920. He was the 1st defendant in the suit and the Manager of the Court of Wards was added as the 2nd defendant before the Court of Wards took possession of the estate. After the Court of Wards took possession, the compromise was entered into and the deed was signed by the pleader for the Court of Wards and the pleader for the plaintiff. In the compromise the Manager is described as having been substituted as guardian for the suit and this description is followed in the decree, but no order was ever made appointing the Manager guardian ad litem of the 1st defendant. It is clear on the face of the record that the 1st defendant was an independent party. He was not a party to the compromise and is, therefore, not bound by the decree.

Reference was made to sections 5, 6, 7, 14, 15, 18, 20, 22, 35 and 51 of the Act.

Dunne, K. C. and Pringle, for the respondent. This is not a case to which Order XXII, rule 10, of the Code of Civil Procedure would apply. There was no devolution of interest. The property was still in the appellant. The Manager of the Court of Wards was, under the Act, the guardian ad litem of the 1st defendant and the compromise was rightly entered into by him on behalf of the 1st defendant and the 1st defendant, that is the appellant here, is bound by it.

Wallach, replied.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—The appellant and respondent are each possessed of an estate in the district of Cuttack in Orissa. These estates are situated on opposite banks of the river Kharsua—the appellant's estate of Aul being on the southern or right bank and the respondent's estate of Kanika on the northern or

left bank. The dispute between the parties is as to the ownership of an island chur which by 1913 had formed in the bed of the river at a spot between the appellant's mauza of Ekmania and the respondent's mauza of Patarpur. The chur is about 70 acres in extent.

The appellant on the 19th November, 1928, sued the respondent in the Court of the Subordinate Judge of Cuttack claiming title not only to the chur but also to 48 acres of the river. The trial Judge by his decree dated 9th July, 1930, found for the appellant as to 19.51 acres of the chur and 24 acres of the river The respondent's appeal to the High Court at Patna was limited to the 19.51 acres of the chur. On the 5th January, 1934, the High Court allowed the respondent's appeal and dismissed the entire claim of the appellant in respect of the chur. There were certain cross-objections by the appellant which were dismissed.

The chur by 1915 or 1916 became fit for cultivation to some extent, and in 1917 the appellant and respondent were both claiming to be in possession of it. Proceedings under section 145 of the Criminal Procedure Code resulted on the 6th March, 1917, in an order by the Subdivisional Magistrate declaring the appellant to be in possession. The respondent on the 28th February, 1920, filed a suit [No. 67 of 1920] in the Court of the Subordinate Judge at Cuttack claiming sole right to the chur and possession thereof. The appellant was the sole defendant to this suit as originally brought. The appellant on 18th March, 1921, made an application under section 6 (*e*) of the Court of Wards Act, 1879 [Bengal Act IX of 1879] asking that he be declared to be disqualified to manage his own property and that the Court of Wards should take charge thereof. Possession was taken by the Court of Wards thereunder on 16th June, 1921, but in the meantime the respondent on the 23rd May, 1921, applied as plaintiff in suit no. 67 of 1920 to have the Court of

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SIR GEORGE RANKIN.

Wards' manager, Babu Padma Charan Das, appointed guardian *ad litem* of the appellant. This application was dealt with by the Subordinate Judge on the 2nd June, 1921. It was objected on behalf of the appellant that the Court of Wards had not yet taken possession of the appellant's estate. In view of this the Subordinate Judge directed that the manager be added as an additional defendant to the suit. The cause title was amended by inserting as a second defendant "Babu Padma Charan Das, Court of Wards' Manager" without any other amendment being made in the plaint.

On the 21st June, 1921—a few days after the Court of Wards had taken possession of his estate—the appellant brought in the same Court a suit [No. 134 of 1921] against Babu Padma Charan Das, Mr. H. D. Van Griecken (the Subdivisional Magistrate) and Mr. H. K. Briscoe (the Collector). In this suit—to which the respondent was not a party—the appellant sought (among other reliefs) a declaration that his letter of 18th March, 1921, asking that he be declared a disqualified proprietor had been obtained from him by undue influence and that he was under no obligation to make over his estate to the Court of Wards. On the 10th July, 1922, the appellant filed a petition withdrawing this suit. The Court of Wards was in fact in possession of the appellant's estate from 16th June, 1921, until 16th June, 1926, when it was released to the appellant.

The appellant's explanation of his varying attitude towards the Court of Wards is that his original application in March, 1921, to be treated as a disqualified proprietor was due not to financial embarrassment but to the fact that there were pending against him a number of criminal prosecutions, and that these were withdrawn in April, 1921, as a result of his having made the application. It is in evidence that when in June, 1921, the Court of Wards took charge of the appellant's property a quantity of arms

were found thereon, and a criminal charge under the Arms Act was brought against the appellant in respect thereof. The appellant now seeks to explain his withdrawal on 10th July, 1922, of his suit against the manager and the district officers, by saying that he did so to obtain withdrawal of this prosecution which in fact was shortly afterwards withdrawn. These explanations, even if they be accepted, do not now enable the appellant to dispute that for five years from 16th June, 1921, the Court of Wards was in fact and in law in charge of his estate, he being their ward and a disqualified proprietor.

On 22nd December, 1922, a petition was presented to the Court in the respondent's suit no. 67 of 1920. Its heading and contents were as follows :—

" Raja Rajendra Narayan Bhunj Deo ... ... *Plaintiff,*

versus

" Raja Brajasunder Deb, a Ward of Court by his next friend and guardian Padma Charan Das, Manager, under the Court of Wards ... ... *Defendant.*

" The humble petition of the abovenamed plaintiff and defendant respectfully showeth :—

" That after the institution of this suit the original defendant's estate has been taken over by the Court of Wards in its charge, and the Manager under the Court of Wards has been substituted as guardian for the suit.

" That all the civil suits pending between the plaintiff and the defendant having been agreed to be settled out of Court and the land in dispute in this suit which is a bit of Chur land within the river Kharsua being situated nearer to the boundary of Kanika, and the intervening water channel being fordable from the Kanika side and not from Aul, the parties agree that plaintiff should get a decree in this suit for the land claimed without cost. The plaintiff gives up his claim to mesne profits and damages and the parties pray that the suit may be disposed of accordingly."

It appears that there were pending between the appellant and respondent a number of suits and applications and that a general settlement of them all had been come to. The petition in suit no. 67 was only one out of a number of such petitions presented in different suits. It was signed by Mr. Das Gupta, the

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Government Pleader, whose duty it was to advise the Court of Wards, and by the pleader for the present respondent. It was signed on the following day by Mr. P. C. Das, the Manager. The Subordinate Judge decreed the suit in terms of the compromise and a formal decree bearing date 22nd December, 1922, was drawn up. In that decree the names of the appellant and of "Babu Padma Charan Das, Court of Wards' Manager" were given as defendants (1) and (2) and the decree follows the terms of the petition *verbatim*, including the statement that "the manager under the Court of Wards has been substituted as guardian for the suit". In execution of this decree possession was on 30th March, 1923, obtained by the respondent, who was still in possession on 19th November, 1928, when the present suit was brought by the appellant.

In reviving his claim to the chur lands in suit the appellant had necessarily to get the compromise decree of 22nd December, 1922, set aside as not binding upon him. By his plaint he sought to obtain this relief by charging the manager, Mr. P. C. Das, and the respondent, with fraud in the matter of the compromise. He alleged that the manager held land under the respondent and was under obligation to the respondent in other ways: that the respondent took advantage of his influence over the manager; that fraudulent reports in favour of the compromise were submitted to the Board of Revenue whose sanction was obtained by misrepresentation of facts. At the trial the Subordinate Judge accepted this case, holding that the compromise decree was "tainted with fraud and misrepresentation". This conclusion the High Court on appeal thought to be "without any basis and altogether unjustifiable". Their Lordships have no difficulty in upholding the decision of the High Court upon this issue. There was no evidence of any fraudulent reports or of any misrepresentation by the manager: the compromise was negotiated at

the Collector's suggestion, provisional terms being obtained from the respondent and elaborately examined by the Collector and the Commissioner with the advice and assistance of the Government Pleader. The terms were only accepted after certain alterations had been agreed to, though the alterations did not refer to the particular chur now in question. The manager's father had held land under the respondent, but there was no other basis for the suggestion that the manager was under obligation to the respondent or under his influence. Upon the merits of the compromise the burden lay heavy on the appellant to show the precise effect of the complete bargain and its unfairness when taken as a whole. The trial Judge did not properly appreciate this: as the appellant's claim to this chur was given up, he thought the respondent had to show that there was due compensation in respect of the other cases. Their Lordships hold with the High Court that the compromise was made in good faith and was in the interest of the Aul estate.

In these circumstances learned counsel for the appellant has sought before their Lordships to maintain this appeal upon a point which was not taken at the trial but was raised for the first time in argument before the High Court. This is a technical point and depends entirely upon the form of the order made on 2nd June, 1921, in suit no. 67 of 1920. It is said that because the Court of Wards' manager, Mr. P. C. Das, was made an additional defendant and not made guardian *ad litem* of the appellant, the appellant can contend that the compromise decree in that suit is not binding upon him unless it be shown that he consented to it. It appears that letters written to him about the proposed compromise on behalf of the Court of Wards were returned as the appellant refused to receive them, but he can hardly expect credence for a suggestion that he did not soon come to know of the compromise as to the island in the

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Kharsua and all other matters between him and the respondent. If he were an independent party entitled as defendant no. 1 to act on his own behalf he could not stand by from 1921 till November, 1928, and then repudiate the compromise; nor could he repudiate it as regards the chur now in suit without repudiating it as a whole. In fact and in law, however, his position in December, 1922, was that he was a disqualified proprietor: without the Court of Wards upon the record the suit as against him was defective: strictly and formally his consent was not necessary and his dissent mattered nothing. The validity of the compromise depends entirely upon whether the Court of Wards consented on his behalf. If they did, the absence of a formal order making their manager guardian *ad litem* as distinct from an additional defendant does not invalidate the decree. If it be taken that the recitals in the decree itself did not make the manager guardian for the appellant—still they recognised his authority as such. Whether a suit be brought before or after the Court of Wards has assumed charge of the property of a disqualified proprietor, the Court of Wards' manager or the Collector should be made guardian and must represent the ward in the suit. It is impossible to suppose that the ultimate constitution of the suit is to be different according to the date of institution. If an amendment is required owing to the Court of Wards taking charge pending suit the amendment must produce the result set forth in section 51 of the Act. Whether to such a case the machinery of rule 10 of Order XXII, Civil Procedure Code, applies is arguable, but the suit as against the proprietor becomes defective upon his becoming a ward of the Court of Wards, and the suit should be reconstituted to satisfy section 51. A proper formal order to that effect should always be made; but if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void the bargain of the parties and the decree of the Court.

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

Solicitors for the appellant: *Hy. S. L. Polak and Co.*

Solicitors for the respondent: *A. J. Hunter and Co.*

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FULL BENCH.

Before Courtney Terrell, C.J., James and Manohar Lall, JJ.

KESHARINANDAN RAMANI

v.

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November, 8.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 476 *and* 476*B*—*order directing prosecution passed by an appellate court under section* 476*B*, *if appealable.*

An order passed on appeal under section 476*B* of the Code of Criminal Procedure, 1898, is not appealable.

Ahamadar Rahman v. *Dwip Chand Chowdhury*(1), *Hikmatullah Khan* v. *Sakina Begam*(2), *Moideen Rowthen* v. *Miyassa Pulavar*(3), *Govind Hari Prabhu Mirashi* v. *Emperor*(4), *Ma On Khin* v. *N. K. M. Firm*(5) and *Muhammad Idris* v. *The Crown*(6), followed.

Ranjit Narayan Singh v. *Ram Bahadur*(7) *and Narayan Meher* v. *Dhana Meher*(8), overruled.

Appeal from an appellate order passed under section 476*B* of the Code of Criminal Procedure, 1898.

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*Criminal Appeal no. 3 of 1937, from an order of A. D. Banarji, Esq., District Magistrate of Patna, dated the 4th May, 1937.

(1) (1927) I. L. R. 55 Cal. 765.
(2) (1930) I. L. R. 53 All. 416.
(3) (1928) I. L. R. 51 Mad. 777.
(4) (1934) I. L. R. 59 Bom. 340.
(5) (1927) I. L. R. 5 Rang. 523.
(6) (1924) I. L. R. 6 Lah. 56.
(7) (1926) I. L. R. 5 Pat. 262.
(8) (1930) I. L. R. 10 Pat. 446.

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The case was first heard by Madan, J. who referred it to a Division Bench by the following judgment:

The applicant Kesharinandan was prosecution witness in a criminal case brought against the opposite party who were acquitted on appeal. The opposite party applied before the trying Magistrate for the prosecution of the applicant for perjury. This application was allowed on appeal by the District Magistrate, and this Court is being moved against that order. Mr. K. N. Moitra for the applicant informs me that his intention was to file an application in revision against the District Magistrate's order, and he maintains that that is in fact the correct procedure which ought to be followed. He, however, converted the application into an appeal on the strength of *Ranjit Narayan Singh* v. *Ram Bahadur*(1) where a Division Bench of this Court has held that where the trying court rejects an application for prosecution, but the appellate court allows it, there is also an appeal against the order of the appellate court, in which case the present appeal ought to have been filed before the Sessions Judge, and not before this Court. The decision mentioned above was followed by another Division Bench of this Court in *Narayan Meher* v. *Dhana Meher*(2) but the attention of their Lordships in that case was not drawn to a case of this Court, *Ramchandra Padhi* v. *King-Emperor*(3) where Macpherson, J. doubted the correctness of the earlier decision and suggested that on a proper case arising that authority might require re-examination by the Patna High Court. Since then all the other High Courts of India have dissented from the view taken by the Patna High Court and have held that no appeal lies.

I would refer to *Ahamadar Rahman* v. *Dwip Chand Chowdhury*(4), *Hikmat-Ullah Khan* v. *Sakina Begam*(5), *Moideen Rowthen* v. *Miyassa Pulavar*(6), *Govind Hari Prabhu Mirashi* v. *Emperor*(7), *Ma On Khin* v. *N. K. M. Firm*(8) and *Muhammad Idris* v. *The Crown*(9). In all these cases, except the Lahore case, the Patna authorities have been referred to but not followed. I therefore find this is a fit case for reference to a Division Bench which may consider whether the matter is suitable for being placed before the Full Bench.

The case then came on for hearing before James and Madan, JJ. who referred it to a larger Bench.

On this reference.

(1) (1926) I. L. R. 5 Pat. 262.
(2) (1930) I. L. R. 10 Pat. 446.
(3) (1928) I. L. R. 8 Pat. 428.
(4) (1927) I. L. R. 55 Cal. 765.
(5) (1930) I. L. R. 53 All. 416.
(6) (1928) I. L. R. 51 Mad. 777.
(7) (1934) I. L. R. 59 Bom. 340.
(8) (1927) I. L. R. 5 Rang. 523.
(9) (1924) I. L. R. 6 Lah. 56.

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K. N. Moitra, for the appellant: An order passed on appeal under section 476*B*, Code of Criminal Procedure, is not appealable.

The decisions in *Ranjit Narayan Singh* v. *Ram Bahadur*(1), *Faujdar Rai* v. *The King-Emperor*(2) and *Narayan Meher* v. *Dhanu Meher*(3) are contrary to the meaning and scope of section 476*B*. The correctness of the decision in *Ranjit Narayan Singh* v. *Ram Bahadur*(1) was doubted by Macpherson, J., in *Ramchandra Padhi* v. *King-Emperor*(4).

I rely on *Ahamadar Rahman* v. *Dwip Chand Chowdhury*(5), *Govind Hari Prabhu Mirashi* v. *Emperor*(6), *Moideen Rowthen* v. *Miyassa Pulavar*(7), *Hikmatullah Khan* v. *Sakina Begam*(8), *Muhammad Idris* v. *The Crown*(9) and *Ma On Khin* v. *N. K. M. Firm*(10).

The Assistant Government Advocate, for the Crown, conceded that no appeal lay.

S. A. K.

COURTNEY TERRELL, C.J., JAMES AND MANOHAR LALL, JJ.—The appellant Kesharinandan moved this Court against an order of the District Magistrate directing his prosecution for an offence under section 193 of the Indian Penal Code passed in an appeal from the order of the Sub-Deputy Magistrate of Patna City refusing to take action under the provisions of section 476 of the Code of Criminal Procedure. Upon the appeal being placed for final hearing before a Judge of this Court, a preliminary objection was

(1) (1926) I. L. R. 5 Pat. 262.
(2) (1925) 7 Pat. L. T. 199.
(3) (1930) I. L. R. 10 Pat. 446.
(4) (1928) I. L. R. 8 Pat. 428.
(5) (1927) I. L. R. 55 Cal. 765.
(6) (1934) I. L. R. 59 Bom. 340.
(7) (1928) I. L. R. 51 Mad. 777.
(8) (1930) I. L. R. 53 All. 416.
(9) (1921) I. L. R. 6 Lah. 56.
(10) (1927) I. L. R. 5 Rang. 523.

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of section 204(5), which give the Collector an unrestricted power of revision, by treating his appellate decision as one in revision.

It is unnecessary, in my view, for the purposes of the present case to decide finally the extent of the Collector's power of revision under section 204(5). I would like to say, however, that I much doubt whether the provisions of that sub-section admit of the narrow construction placed upon them by my brother Manohar Lall, in his separate judgment, which I have had the advantage of seeing.

The provisions of section 204 are peculiar in this respect that they provide in some cases for a course of appeal running Deputy Collector, Collector, Commissioner, and in others Deputy Collector or Collector, District Judge, High Court. In certain cases, moreover, there is a provision that the judgment of the Collector shall be final; and, lastly, in clause (5) there is a provision that

> "Notwithstanding anything hereinbefore contained, the Collector may call for the record of any case in which any Deputy Collector has passed a decree or order to which this section applies, if it appears that such officer has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of his jurisdiction illegally or with material irregularity; and the Collector may pass such order as he thinks fit."

The provisions with regard to appeal amount (with a saving as regards certain express provisions elsewhere in the Act) to this, that orders of the Collector, which are not judgments in suits, or orders in the course of suits relating to their trial, or orders relating to execution, shall be appealable to the Commissioner, and in the case of similar orders of a Deputy Collector appeal will lie to the Collector.

In the case, however, of suits and orders other than the residuary orders already provided for, where the subject-matter does not exceed Rs. 100 in value and no question as to whether rent is payable for land or not, or question of title is involved, the judgment of the Collector is made final, and an appeal from the

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to make a complaint is given a right to appeal to the higher authority under the provisions of section 476*B*. That section is very clearly worded. It says that

"any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate and the superior Court may thereupon direct the withdrawal of the complaint or 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"

(to quote only the relevant words in the section). The last provision in this section underlined above has been taken by this Court, in the decisions under consideration, to mean that the person against whom the complaint is made by the appellate Court has further the right to appeal under section 476*B*. In our opinion this is not the meaning. The words clearly mean that after a complaint is made on appeal the procedure to be followed in forwarding the complaint and the accused and in taking recognizance from a witness shall be as laid down in section 476. This matter appears to us to be very clear and but for the decisions of this Court which we now proceed to consider it would be difficult to conceive that any other interpretation could be put on it. The first decision of this Court on this point is in the case of *Faujdar Rai* v. *The King-Emperor*(1) where a single Judge of this Court dealt with the matter which arose before the revenue courts in this way. A Collector acting as a revenue court had set aside an order of the Sub-Deputy Collector refusing to make a complaint against the petitioner in that case and himself directed the filing of a formal complaint. Thereupon the petitioner in that case appeared before the Commissioner and presented an appeal. The Commissioner refused to entertain the appeal on the ground that no second appeal lay to him. Against that order the High Court was moved and the learned

(1) (1925) 7 Pat. L. T. 199.

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Judge, who decided that case, held that the Collector acting as a revenue court was subject to the superintendence of the High Court and that his order was revisable under section 115 of the Code of Civil Procedure. He also held that the High Court had jurisdiction to interfere under section 107 of the then Government of India Act, and inasmuch as the Collector had refused to apply his mind to the evidence which was in favour of the petitioner the High Court held that the Collector had refused to exercise the jurisdiction vested in him and therefore set aside the order acting under section 115 of the Code of Civil Procedure as well as under section 107 of the Government of India Act. Towards the end of the judgment there is a paragraph which states that "under section 476*B* of the Code of Criminal Procedure it appears that when an appellate Court sets aside the order of the original court, the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate court ordinarily lie". This was entirely obiter dictum and not at all necessary for the decision of that case, which was indeed decided upon its own facts.

The other cases which are referred to in the referring order are an authority for the proposition that a first appeal will lie again from an appellate court's order under section 476*B* when it directs the filing of a complaint on reversing the refusal of the first court. As indicated above, in our opinion this view is wrong. The crux of the matter is very clearly set out in the judgment of the Calcutta High Court in *Ahamadar Rahman* v. *Dwip Chand Chowdhury*(1) where Rankin, C.J. has dealt with the question exhaustively and with great respect we adopt that decision. In our view it was never the intention of the legislature to provide two first appeals; the language used by the legislature gives no warrant for the contrary view. The decisions of the

(1) (1927) I. L. R. 55 Cal. 765.

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other High Courts in *Hikmat-ullah Khan* v. *Sakina Begum*(1), *Moideen Rowthen* v. *Miyassa Pulavar*(2), *Govind Hari Prabhu Mirashi* v. *Emperor*(3), *Ma On Khin* v. *N. K. M. Firm*(4) and *Muhammad Idris* v. *The Crown*(5) are also to the same effect.

We, therefore, answer the reference in these terms that the decisions of this High Court reported in *Ranjit Narayan Singh* v. *Ram Bahadur*(6) and *Narayan Meher* v. *Dhana Meher*(7), were wrongly decided, that the appellant has no right to prefer an appeal against the order of the District Magistrate passed under section 476B of the Code of Criminal Procedure.

This appeal will now be treated as an application in revision and will be heard by a single Judge of this Court in the ordinary course.

Order accordingly.

APPELLATE CRIMINAL.

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October, 25, 26, 27, 28, 29. *November*, 9.

Before Courtney Terrell, C.J. and Manohar Lall, J.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 162—*admission made by party, how far admissible—admission by accused, not amounting to confession, if admissible—Evidence Act*, 1872 (*Act* 1 *of* 1872) *section* 73—*legality of comparison of handwriting by Judge.*

*Death Reference no. 45 of 1937 and Criminal Appeal no. 268 of 1937, from the order of J. A. Byers, Esq., I.C.S., Sessions Judge, Ganjam-Puri Division, Berhampore, dated the 15th of September, 1937.

(1) (1930) I. L. R. 53 All. 416.
(2) (1928) I. L. R. 51 Mad. 777.
(3) (1934) I. L. R. 59 Bom. 340.
(4) (1927) I. L. R. 5 Rang. 523.
(5) (1924) I. L. R. 6 Lah. 56.
(6) (1926) I. L. R. 5 Pat. 262.
(7) (1930) I. L. R. 10 Pat. 446.

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Admissions by a party to litigation whether civil or criminal differ fundamentally from previous statement made by a witness. An admission is direct evidence of the relevant fact admitted. A previous statement by a witness is not direct evidence of the fact stated by the witness, but is material which may be used either to corroborate the oral testimony of the witness or it may be put to him in cross-examination for the purpose of destroying his credit. It cannot be used to supplement that oral testimony, that is to say, a previous statement of fact by a witness cannot be tendered as evidence in direct proof of the fact stated. The evidence upon which the court is to consider the material allegation of fact must be the evidence in court. This fundamental distinction cannot be ignored. An admission by a party (or accused) although in itself evidence of the fact admitted may be attacked on the ground that the party or accused has not made the admission. He may also reduce or destroy its weight as evidence by producing evidence to show that the true facts are contrary to admission. It will then be for the tribunal to weigh the evidence afforded by the admission and the evidence produced at the trial by the defence.

Section 162 of the Code has no reference whatever to statements made by accused persons, but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses.

Azimuddy v. *Emperor*(1), *Rannun* v. *The Crown*(2) and *Jagwa Dhanuk* v. *King-Emperor*(3), followed.

Syamo Mahapatro, In re(4), dissented from.

An accused against whom a previous statement by him is tendered in evidence is entitled to have the whole statement placed before the court. If that statement taken as a whole amounts to a confession, the whole statement must be excluded. It is not permissible to place a part of statement as a mere admission or series of admissions and to omit merely the strictly confessional part of it.

(1) (1926) I. L. R. 54 Cal. 237.
(2) (1926) I. L. R. 7 Lah. 84.
(3) (1925) I. L. R. 5 Pat. 63.
(4) (1932) I. L. R. 55 Mad. 903, F. B

Emperor v. *Kangal Mali*(1), *Legal Remembrancer* v. *Lalit Mohan Singh Roy*(2), *King-Emperor* v. *Haji Sher Muhammad*(3), *Rannun* v. *The Crown*(4) and *Azimuddy* v. *Emperor*(5), reviewed.

Where the accused while in custody stated to the investigating officer that the deceased had come to his house on the evening of the 21st of March and that he had slept in one of the outhouse rooms during the night and objection was taken that the statement was not admissible, *held* that the statement did not contain any admission of the offence charged, nor indeed of any offence and as such was admissible in evidence.

Held, also that the statement that the deceased left the house of the accused on the evening of the 22nd March being a statement in favour of the accused was inadmissible in evidence.

Emperor v. *Balmakund*(6) and *Sher Gul* v. *Emperor*(7), distinguished.

Rannun v. *The Crown*(4), followed.

In the absence of any conflict of evidence on the point a Judge is entitled to compare the signature in question with the admitted signature and to form an opinion as a result of his comparison.

Kessarbai v. *Jethabhai*(8), explained.

Per Manohar Lal, J.—The true rule to decide whether the statement by the accused to the Police Officer is admissible or not is that each case must be decided as it arises with reference to the question whether the particular statement, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession.

Barindra Kumar Ghose v. *King-Emperor*(9), relied on.

(1) (1905) I. L. R. 41 Cal. 601.
(2) (1921) I. L. R. 49 Cal. 167.
(3) (1921) I. L. R. 46 Bom. 961.
(4) (1926) I. L. R. 7 Lah. 84.
(5) (1926) I. L. R. 54 Cal. 287.
(6) (1930) I. L. R. 52 All. 1011, F. B.
(7) (1935) A. I. R. (Lah.) 671: 156 Ind. Cas. 529.
(8) (1928) A. I. R. (P. C.) 277.
(9) (1909) I. L. R. 37 Cal. 467.

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The only test to decide whether a statement is a confession or not is to see whether the accused stated that he has done certain things which amount to an offence and thereby accusing himself of committing an offence.

Santokhi Beldar v. *King-Emperor*(1), followed.

Section 162 of the Code must be read along with sections 160 and 161. The marginal notes to these sections show that they refer to the examination of witnesses by the police when called upon to make an investigation under Chapter XIV (the investigation must necessarily be regarding the allegations made against some person known or unknown of an offence having been committed by that person or by an unknown person) and this is also borne out by the language employed in these two sections.

The question of the admissibility of the statement of an accused is governed by the general provisions of the Evidence Act.

P. C. Manuk (with him *S. N. Dutta* and *B. K. Sen*), for the appellant.

The Advocate-General for Orissa, *G. P. Das* and *G. C. Das*, for the Crown.

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 Courtney Terrell, C. J.

COURTNEY TERRELL, C. J.—The appellant Pakala Narayana Swamy was tried together with his wife Pakala Sowbhagyavatamma before the Sessions Judge of Berhampore for the murder of one Kurree Nukaraju of Pithapur. They were also charged with conspiracy to murder this man, and the first accused was also charged with causing the disappearance of the body under section 201 of the Indian Penal Code. The murder is said to have been committed on the

(1) (1932) I. L. R. 12 Pat. 241, F. B.

21st or the 22nd of March, 1937, at Berhampore, and the disappearance of the body is alleged to have been effected on or about the 23rd of the same month. The appellant's wife was acquitted of any offence, and the appellant was convicted under section 302 of the Indian Penal Code and sentenced to death.

The judgment of the learned Sessions Judge is very clear and concise and, save for some minor and not very material points which I will indicate in the course of this judgment, I agree with it and I do not propose to set forth the evidence in greater detail than is required for the purpose of appreciating the arguments raised in support of the appeal.

The deceased at his death was aged about 40. He was married to his wife Kurray Veeramma (p. w. 15) about the year 1915. At that time he was a peon under the Dewan of Pithapuram, who is the father of the second accused. Pithapuram is at a distance of roughly 300 miles to the south-west of Berhampore and is connected therewith by rail. His widow states that in 1918 when the second accused would have been about 12 or 14 years of age an intrigue sprang up between the accused no. 2 and the deceased. To avoid further developments he was ordered to be transferred to Parima, some distance away, but resigned his service under the Raj and set up as a shop-keeper. She says that he used to get letters of an intimate character from the second accused which she (the witness being illiterate) used to get read to her by her husband's sister. She says that two years later the second accused was married to the first accused and they left for Berhampore where they resided from 1920 to 1933. They had four children. There is no evidence that the intrigue between the deceased and the female accused continued during this period. The first accused appears to have been at one time a man of some substance, and he later became an Honorary Magistrate at Berhampore. In 1933 the two accused

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returned to Pithapur to live in the Dewan's house, and this seems to have been because they were in a very low financial condition.

The widow produced in the Magistrate's court and before the Sessions Judge a series of four letters which she said she had in her possession from about 1918. Translations of these letters are set forth at pages 89 to 91 of the paper-book. They are in Telugu and are signed 'K. Sowbhagyavatamma' a form which the second accused had adopted. In three out of four letters the signatures are in English. The Judge has compared the signatures with undisputed signatures of the second accused and in his opinion they are genuine. No attempt was made by the defence to show that these letters were not in fact written by the woman. It was, however, contended in this appeal that the handwriting of the letters should have been proved by evidence of a handwriting expert. The police visited the house of the deceased on the 5th of April, 1937, but they were not produced by the widow and she did not produce them until she gave evidence before the committing magistrate. A perusal of the letters would certainly indicate that the writer and the addressee were on very intimate terms. It is suggested in appeal that these letters have not been satisfactorily proved to have come from the second accused. Reference is made to the decision of the Judicial Committee of the Privy Council in *Kessarbai* v. *Jethabhai Jivan*(1). In that case there was a serious conflict of evidence as to the genuineness of a signature and their Lordships said:

"They would have thought it unsatisfactory and dangerous in any event to stake a decision in such a case as this on the correct determination of the genuineness of a signature by mere comparison with admitted signatures especially without the aid in evidence of microscopic enlargements or any expert advice."

(1) (1928) A. I. R. (P. C.) 277.

The decision related to the facts of that case only and no general principle can be derived from it. In the case before us there is no such conflict of evidence, and the Judge in the circumstances was entitled to form his own opinion after comparing the signatures on the letters produced by p. w. 15 and admitted signatures. Such procedure is expressly contemplated by section 73 of the Evidence Act. The contents and style of the letters are not consistent with fabrication and there was no attempt on the part of the accused to prove that they had been fabricated, nor to suggest any likelihood of fabrication having been committed.

Recently while at Pithapur the second accused began borrowing money from the deceased. When the police visited the house of the deceased on the 5th of April they took possession of a large series of documents (Exhibit E series), translations of which are set forth at pages 91 to 108 of the paper-book. They consist of letters and receipts, which in the opinion of the Judge, uncontradicted by any evidence on behalf of the accused, are in the handwriting of the second accused and indicate the borrowing of money by the second accused from the deceased during the period between May and December of 1936. The original documents bear a stamp which would indicate that they had been submitted to the Government handwriting Expert, but he has not given evidence. As in the matter of the objections to Exhibit D series it is contended that unless positive evidence were forthcoming that these documents are in the handwriting of the second accused they should not have been admitted and that the Judge was not entitled to form his own opinion even if no evidence in denial were afforded by the defence. On the other hand, the widow states that from time to time chits arrived for her husband which she read clandestinely with the aid of her nephew (p. w. 17) and that she knew from them that the accused no. 2 was borrowing money from the deceased and that Exhibit E series are some of these

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chits which were taken possession of by the police when they searched her house on the 5th of April. It will be noticed that some of the chits are in form of letters not to the deceased but to one Sooranna (p. w. 18) who had been a cook in the service of the Dewan, the father of the second accused. He says that he acted as a go-between in the matter of loans by the deceased to the second accused on several occasions and that finally when the deceased would not lend more money he lent money himself. The chits relating to the particular loans said to have been made by p. w. 18 were, however, found in the house of the deceased and there could be no doubt that in reality the loans were made by the deceased in the name of the cook. Prosecution witness no. 17, the nephew, says that the signatures on the E series are those of the second accused and that he has seen her signature from time to time on chits sent by her to expedite the delivery of orders from the cloth shop of the deceased where he works and that he himself at the request of the police opened an almirah in the deceased's house and there found a bag in which were the Exhibit E series. In my opinion the learned Judge was right in concluding that the Exhibit E series emanated from the second accused and that at the time of his death the deceased was a creditor of the second accused. The Judge compared the Telugu signatures on Exhibit E series with genuine signatures of the second accused and is of opinion that they are identical. He does not mention in this connection the evidence of prosecution witness no. 17. The defence, however, criticised the evidence of this witness on the basis of the answer obtained in cross-examination on page 43, lines 18 to 22 of the paper-book.

"My knowledge of the actual handwriting of accused no. 2 is limited to standing about 5 yards away from her while she wrote a receipt for cloths on two or three occasions." (This answer is obtained only after great prevarication when he attempted to state that he had seen accused no. 2 write her signature)."

The point to be noticed is that the witness saw the signature immediately after it was written

although he saw it written from a distance of 5 yards away. It may well be that he could not actually see the signature while the accused no. 2 was writing it, but it was handed to him by her as being her signature. The witness was clearly puzzled by the form of the question and imagined himself to be in difficulties because he had stated that he had seen her sign her name at a distance from which he could not have read the signature as it was being written; but the circumstances related by the witness clearly entitled him to state that he had seen the witness writing, that he knew her signature and that the signatures on Exhibit E series are her signatures and in my opinion the signatures were sufficiently proved. The Exhibit E series account for debts aggregating about Rs. 3,000. It is argued that there is no direct evidence that the appellant knew anything about this indebtedness of his wife, but the appellant was in very acute financial stress during the period when the loans evidenced by the E series were advanced, and in my opinion the Judge was right in concluding in the absence of evidence to the contrary that he must have been so aware.

On the 17th of March, 1937, it is undisputed that the two accused returned to Berhampore and this seems to have been in connection with certain litigation that was going on at the latter place. Between the 17th and the 21st the deceased received a letter from the accused no. 2, requesting him to go to Berhampore. The defence criticised the evidence to prove the despatch and receipt of this letter and it was urged in appeal that secondary evidence as to its contents was not admissible. But the letter has never been found, and the evidence of the fact of its receipt and the secondary evidence of its contents was entirely admissible. Prosecution witness no. 12 carries on a business at Pithapur on behalf of his father Kotta Nookaraju. He states that on March the 19th he received a letter addressed to K. Nookaraju, Bazar Street, Pithapuram. Thinking that it

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was for his father he opened it but decided that it was not for his father at all. It was a request to come to Berhampore by Saturday's mail, as the writer was going away by the Sunday's mail, and saying that they would be able to talk not merely for an hour but for a long time. A phrase also occurred in it" I will convince the Babu ". This witness has a cousin also named K. Nookaraju (p. w. 13), who trades in Pithapuram, and thinking that the letter might be intended for him p. w. 12 handed the letter to him. K. Nookaraju also saw that the letter could not have been intended for him and confirms p. w. 12 as to the contents of the letter. The name Nookaraju appears to be common in Pithapuram. The deceased came to p. w. 13 and told him that he had heard from someone in the bazar that he had received a letter intended for the deceased and the witness handed the letter to the deceased. The widow (p. w. 15) says that the deceased had discussed with her and with the witness Sooranna (p. w. 18) the matter of the loans by the deceased to the second accused, that the deceased on a Saturday about six months ago (she was giving evidence on the 7th of September) showed her a letter and told her that he was going to Berhampore as the second accused had written to him and told him to go and receive payment of his dues and that he left the house on the following morning in time for the Madras-Calcutta mail. This is perfectly good evidence in support of the contention of the prosecution as to the reason why the deceased left Pithapur. On the 3rd of April the widow (p. w. 15) left Pithapur to go to Berhampore, as she was anxious about her husband because of the letter which he had received inviting him to that place. On the 3rd of April she was intercepted at Ichapur by the police who went with her to Berhampore which was 15 miles further on and she arrived there on the 4th and she there identified the photograph of the body. On the 4th April Seshagiri Rao (p. w. 17) lodged an information at Pithapuram thana at 8 P.M. narrating the missing of his uncle (the deceased), his departure for

Berhampore on receipt of a letter by the morning mail of the 21st March and the departure of the widow on the 3rd April to search for her husband at Berhampore. The mention in this information of a letter as having been received by the deceased which led him to leave Pithapuram for Berhampore on the 21st March is very strong corroboration of the evidence of the witnesses just mentioned above.

There is no evidence dealing with the deceased's journey to Berhampore, and he certainly did not take the chits (Exhibit E series) with him. It is a matter of conjecture as to why the deceased never seems to have taken anything in the way of a hand-note or other legal security from the accused no. 2 in the matter of the loans, but two theories suggest themselves—either he may have retained a sentimental affection for the second accused, or what is far more likely he knew that the story of his former relationship with her gave him a hold on his debtor which she would be very reluctant to have made public and that the threat of publicity would be found more effective than any legal security. But the visit of the deceased to Berhampore after receiving the letter is very clearly established by evidence to which objection was taken on behalf of the accused as to its admissibility. It was admitted by the Judge and in my opinion rightly admitted, but the objection has been again urged on appeal and is in fact the main ground upon which the appeal rests. The investigating Sub-Inspector having taken the accused and his wife into custody at their house on April 4th, examined them and has given evidence as follows :—

"I examined the accused and declined to allow them to leave, and in the afternoon I took them to the police-station as suspected person. In the course of his statement made to me in the forenoon A/1 told me that the deceased had come to his house on the evening of 21st March, slept in one of the outhouse rooms for the night and left on the evening of the 22nd by the passenger train. A/1 further told me that on the morning of 23rd March he went to the station with Gangulu in his jetka and went off by the passenger train to Chatrapur on some private business with one Delhi Cheeranjivi Rao. Hearing at the Chatrapur station that this man was away he returned by the

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Vizagapatam passenger train as far as Jagganathapuram, whence he went to Narendarapur to see one Jorianayak. He too was absent, so A/1 returned to Berhampore by jetka ".

Two arguments are advanced in support of the contention that this evidence was inadmissible. Firstly, it was contended that it was inadmissible by reason of section 162 of the Code of Criminal Procedure. Before dealing with the authorities I will attempt to set forth in my own way a principle which I think should be borne in mind. Admissions by a party to litigation whether civil or criminal differ fundamentally from previous statements made by a witness. An admission is direct evidence of the relevant fact admitted. A previous statement by a witness is not direct evidence of the fact stated by the witness, but is material which may be used either to corroborate the oral testimony of the witness or it may be put to him in cross-examination for the purpose of destroying his credit. It cannot be used to supplement that oral testimony, that is to say, a previous statement of fact by a witness cannot be tendered as evidence in direct proof of the fact stated. The evidence upon which the court is to consider the material allegation of fact must be the evidence of the witness as given in court. This fundamental distinction cannot be ignored, and I think that in some of the decisions cited in support of the contention by the defence it has been lost sight of. It must, however, be observed that an admission by a party (or accused) although in itself evidence of the fact admitted may be attacked on the ground that the party or accused has not in fact made the admission. He may also reduce or destroy its weight as evidence, by producing evidence to show that the true facts are contrary to the admission. It will then be for the tribunal to weigh the evidence afforded by the admission against the evidence produced at the trial by the defence.

The High Courts of Madras and Bombay have been oppressed by the words "any person" in

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section 162 and in view of the generality of these words have decided that they include not only witnesses but accused persons and, therefore, it must be inferred, apply to admissions strictly so called by the accused as well as to prior statements of witnesses. Without noticing the fundamental difference between the two kinds of statements above mentioned, the discussion has proceeded solely upon the construction of the words "any person" and whether such words are to be limited by reference to the adjacent sections of the Code. They have also acted upon an assumption as to the intention of the legislature to exclude statements by an accused person although there is no direct reference to statements by accused persons in the section. It was argued before each of the two said High Courts that upon their construction of the section, section 27 of the Evidence Act is by implication repealed, and the learned Judges dealt with this difficulty by saying that general provisions do not derogate from special provisions and therefore section 27 of the Evidence Act is not affected by section 162 of the Code: [*see* the judgment of Reilly, J. in *In re Syamo Maha Patro*(1)]. The two contentions seem to me contradictory. The words "any person" are either of general application in which case they ex-hypothesi apply to accused persons and statements made by them, or they have no reference to accused persons at all; but the arguments of the learned Judges of the Madras High Court would seem to be that the words are of general application in the matter of their application to statements by accused persons but of limited application in the matter of the kind of statements made, for, according to the views of these Judges, an exception to the general application is provided by section 27 of the Evidence Act. This method of dealing with the difficulty produced by section 27 of the Evidence Act is, if I may say so with all respect, clearly inconsistent. All of the other High Courts

(1) (1932) I. L. R. 55 Mad. 903, F. B.

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are of opinion that section 162 has no reference at all to accused persons or to their statements, and such modifications of the law as it affected are merely as to the provisions of the Evidence Act. It is not necessary to discuss the authorities in detail, but the reasoning of Rankin, J. in *Azimuddy* v. *Emperor*(1) and of Sir Shadi Lal, C. J. in *Rannun* v. *The Crown*(2) is to my mind convincing and more specially in that they approve the decision of this Court in *Jagwa Dhanuk* v. *The King-Emperor*(3), we are bound by them. I may add that for my part I entirely agree with the reasoning of the learned Judges that section 162 has no reference whatever to accused persons but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses.

Secondly, it was argued that the admissions by the accused were inadmissible because they partake of the nature of a confession, and it was suggested that a confession was not necessarily limited to an admission of guilt of the crime charged but covers any statement of fact which is material to the case of the prosecution and that if the prosecution contend that the facts so stated by the accused are true and rely on the fact admitted as part of their case, such statements must be taken as confessions and inadmissible under the Evidence Act. This argument seems to have been built upon the following passage in the judgment of Woodroffe and Mookerjee, JJ. in *Emperor* v. *Kangali Mali*(4) [followed in *Legal Remembrancer*, v. *Lalit Mohan Singh Roy*(5) and *King-Emperor* v. *Haji Sher Mahomed*(6)] :—

" A useful test as to admissibility of statements made to the police is to ascertain the purpose to which

(1) (1926) I. L. R. 54 Cal. 237.
(2) (1926) I. L. R. 7 Lah. 84.
(3) (1925) I. L. R. 5 Pat. 63.
(4) (1905) I. L. R. 41 Cal. 601.
(5) (1921) I. L. R. 49 Cal. 167.
(6) (1921) I. L. R. 46 Bom. 961.

they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, as in the case of the statements to which we have just referred, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and that, as the defence is untrue, this is a circumstance tending to prove the guilt of the accused."

But the learned Judges there do not state that admissions to the police are always confessions, but merely that *in many cases* they would be found to amount to confessions. If they do amount to confessions they will necessarily be excluded. Reference was also made to the early case of *Empress* v. *Pandharinath*(1) and it was said that this supports the proposition that the fact of admission of "criminating circumstances on which the prosecution mainly relies", though probably not intended as a confession of guilt, cannot be admitted in evidence. I do not know what is meant by the "admission of a criminating circumstance" unless it be a confession. If it means a confession, then it is clearly to be excluded. In *Queen-Empress* v. *Javecharam*(2) the decision in *Empress* v. *Pandharinath*(1) seems to have been understood as laying down the proposition contended for by the defence in this case. Two persons were tried, *J* for that being a ticket collector he had sold certain railway tickets and appropriated the proceeds to his own use and with abetment of the offence of criminal breach of trust. The second accused *A* was charged with dishonestly receiving the tickets knowing the same to be stolen. There was a statement by accused no. 2 to the police that he had received the tickets found upon him from

(1) (1881) I. L. R. 6 Bom. 84.
(2) (1884) I. L. R. 19 Bom. 363.

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J. Jardine and Ranade, JJ. considered that this was an admission of "criminating circumstance on which the prosecution relied" and applying the decision in *Empress* v. *Pandharinath*(1) decided that it was inadmissible. The discussion on this point consists of a few lines only and no attempt seems to have been made to ascertain the facts in *Empress* v. *Pandharinath*(1) or the true meaning of the decision, which was that the statements in that case amounted to a confession. It is from these two cases that the erroneous argument now urged on behalf of the defence has arisen. I agree with the view expressed by Sir Shadi Lal in *Rannun* v. *The Crown*(2) that in order to be considered as a confession, the statement must involve an admission of guilt of the offence charged, and with the opinion of Rankin, J. in *Azimuddy* v. *Emperor*(3) that an admission if it be not a confession is admissible. Furthermore, if an admission has a damaging effect by facilitating the proof by the prosecution of material circumstances, it is none the less on that account admissible. It is entirely immaterial that the admissions are oral or in writing provided that they are proved.

I would attempt to sum up the law as I understand it. An accused against whom a previous statement by him is tendered in evidence is entitled to have the whole statement placed before the court. If that statement taken as a whole amounts to a confession the whole statement must be excluded. It is not permissible to place a part of a single statement as a mere admission or series of admissions and to omit merely the strictly confessional part. Thus, if a person be charged with murder and the facts alleged are that on a specified date he entered the house of the deceased, quarrelled with him and in the course of an ensuing fight drew his dagger and stabbed the deceased, if the accused in a statement to the police

(1) (1881) I. L. R. 6 Bom. 34.
(2) (1926) I. L. R. 7 Lah. 84.
(3) (1926) I. L. R. 54 Cal. 237.

admitted all the facts alleged it would not be permissible to tender in evidence those parts of his statement which consisted of all the preliminary incidents and to stop short at the point where he stated that he stabbed the deceased. On the other hand, if the statement by the accused had been that on the specified date he had entered the house of the deceased and had quarrelled with him and that after the quarrel the deceased had retired into his inner rooms and that he (the accused) had left the house, that statement considered as a whole would be not a confession but a denial of guilt and the whole of it would be receivable in evidence as *pro tanto* a series of admissions.

In the present case the statement tendered in evidence does not contain any admission of the offence charged nor indeed an offence of any kind, and there is no indication whatever that it is part of a larger statement making any admission of guilt. In the circumstances it is admissible and each of the statements made is evidence against the accused of the truth of the facts stated, that is to say,

(*1*) that the deceased had come to his house on the evening of the 21st of March,

(*2*) that he had slept in one of the outhouse rooms during the night.

As to the statement that the deceased left on the evening of the 22nd March by the passenger train, this, though admissible against the accused to support the contention that he put up a false case, cannot be considered in his favour, for a person cannot make admissions in his own favour, although he was perfectly at liberty to tender evidence at the trial in support of this part of the statement.

(*3*) That on the morning of the 23rd he went to the station with the witness Gangulu (P. W. 7) in the latter's jetka; and

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(4) that he went off by the passenger train to Chatrapur.

As to the statements which follow, my comment that they cannot be considered as admissions in his favour applies.

It was further contended that inasmuch as the statement was exculpatory the damaging admissions therein contained cannot be accepted while rejecting the exculpatory parts and in support of this proposition there was cited the case of the *Emperor* v. *Balmakund*(1) and the case of *Sher Gul* v. *Emperor*(2). In both of these cases, however, it was attempted to support the conviction purely on the evidence afforded by the statement of the accused. In the Allahabad case the judgment, with the greatest respect, seems to me illogical, for the statement seems to have been one in which the accused admitted that he had slain the deceased but put forward circumstances which reduced the offence to one of culpable homicide. No other evidence was tendered against the accused. There was therefore no evidence whatever that the accused committed an offence under section 302 of the Indian Penal Code. He might have been convicted of an offence under section 304 but the court does not seem to have realised this. It is undoubtedly true that if in the case before us the accused had admitted merely the commission of an offence other than that of murder and if there had been no other evidence he could not have been convicted of the offence of murder. Similarly, in the case before the Lahore High Court—*Sher Gul* v. *Emperor* (2)—the accused admitted that he had slain the deceased but said that he had done so in self-defence. There was no other evidence and the statement of the accused was a denial of any offence. It does not require much

(1) (1930) I. L. R. 52 All. 1011, F. B.

(2) (1935) A. I. R. (Lah.) 671: 156 Ind. Cas. 529.

legal learning to decide that the entire statement of the accused which was the only evidence must in such circumstances be accepted or not at all. In *Rannun* v. *The Crown*(1) where the accused was charged with murder, the only evidence was a statement of the accused to the effect that he had concealed the dead body. There was no evidence or confession of murder. It was rightly held that he was guilty and must be convicted of an offence under section 201 of the Indian Penal Code but that he could not be convicted under section 302. None of these cases supports the proposition of the defence.

Keeping the narrative in chronological order the prosecution established very clearly the fact of the departure of the deceased from Pithapur, his arrival at the house of the appellant on the 21st and the fact that he passed the night in that house.

We have now to trace the conduct of the appellant, and we have it admitted by him that he left Barhampore on the early morning of the 23rd for the railway station in company with a witness Gangulu (p. w. 7) in the latter's jetka and that he went off by the passenger train in the direction of Chatrapur. But we must at this point deal with certain conduct on the part of the appellant on the afternoon of Monday, the 22nd of March. On that afternoon two witnesses (p. ws. 21 and 22), who are employed at the shop of a metal trunk maker in Berhampore, were called to prove the purchase of a metal trunk similar to that in which the dead body of the deceased was ultimately found, and a Dhobi (p. w. 23) was called to show that on the instructions of the two accused he had negotiated the purchase. The trunk in question was taken by p. w. 21 and the Dhobi (p. w. 23) from the shop to the house of the accused and delivered to them personally.

(1) (1926) I. L. R. 7 Lah. 84.

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Prosecution witness no. 21 said that he could not give the day of the week on which it took place. He says that before he was examined by the police, the proprietor of the shop asked him if he had sold a 26″ trunk and he told him that he had sold one. He says that he was not in the town when the police came to the shop with the trunk. This visit by the police was on the 27th of March. The identification of the trunk was later on the 8th of April before a Magistrate and it was picked out from a number of other trunks (paper-book, page 118). Prosecution witness no. 22 recorded the sale in Exhibit J, the "rough chitha". It seems that there are two kinds of 26″ suit cases sold at the shop. The Exhibit M. O. 1 is known as a "high suit case", and the entry in the "rough chitha" is Exhibit J—1, and next to the figure 26 are written the letters "Ha Su Tu" (H. S. T.) in Oriya, the abbreviation for "high suit case". The witness has said that there were three of such in stock out of a total of 153 of which 150 had already been sold, but these 150 were made for a special contract and were all painted with a flower design. M. O. 1 is, he says, one of the three remaining in stock which were not painted with the flower design. Both witnesses identified the box as having been made in their employer's factory by means of the design of the knobs, the letter pockets and the lock. The proprietor of the shop was not called. According to p. w. 22 the proprietor is in the habit of making up the accounts from the "rough chitha" into the Exhibit K, which is the fair copy, and exhibit K—1 under the date of the 22nd is the entry relating to this sale in the handwriting of the proprietor, and here also the letters "Ha Su Tu" are entered against this sale of a 26″ suit case. It is to be noticed that on that day there were no other sales of 26″ suit cases of either kind. The 26″ low suit case made in the shop is of the same plan dimensions but its height is less by some inches. Much capital was made by the

defence of the way in which the letters "Ha Su Tu" were written in the two account books. In the "rough chitha" the letter "ha" is squeezed somewhat tightly against the figure 26, and in the fair copy the long stroke which follows the figure 26 seems to pass through the combination of the letters "Ha Su Tu", and it is contended that these indicate that the letters are interpolations made after the date of the sale and that the original entries were merely in respect of a 26″ suit case without specification of its height. The learned Judge is inclined to think that the letters may possibly have been interpolated and with a view of strengthening the evidence, but he attaches no importance to the fact though regrettable. We have examined the same records and are not impressed by the suggestion of interpolation. In any case, we are in agreement with the learned Judge that the matter is immaterial, firstly because there was only one sale of a 26″ suit case on the 22nd but also for the further reason that the prosecution have called p. w. 23, the Dhobi, employed by the accused to wash their clothes. He has narrated that he received instructions from the accused to go out and buy a suit case and was given a note for Rs. 5. He remembers visiting this particular trunk shop and he remembers, as does the witness (p. w. 21), the purchase of the suit case and the taking of it by p. w. 21 and p. w. 23 to the house and its personal delivery to the accused. The only criticism of the evidence of p. w. 23 is based on the fact that when he was cross-examined he said that this occurrence was on a Saturday and that he remembers it because it was a "shandy day" (fair day) and that he purchased a brass vessel that same day, the shandy ground being opposite to the trunk shop. Now he had said nothing of this before the Magistrate, and in my opinion the cross-examiner knew perfectly well what answer he was going to receive. As very commonly happens, a witness of the sessions court is quite unwilling to say anything which would contradict his evidence before

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the Magistrate for fear of the risk of proceedings for perjury, but he can often be induced to add something favourable to the defence, and it is a curious fact that certain other witnesses to whose evidence I will refer have most probably received the same coaching from the defence to specify other occurrences as having taken place on the Saturday and to say that they remember that date because it was a shandy day. Whether this be so or not, it must be remembered that the defence have denied altogether the purchase of a trunk at any time. If the defence had contended that a purchase of a trunk by the accused had in fact occurred, but that such purchase was on the Saturday, that is to say, after the discovery of the dead body, the admission by the prosecution witness no. 23 would have been a most important point in their defence. As it is, the statement of the prosecution witness no. 23 in cross-examination is of no importance. In my opinion, the prosecution have satisfactorily proved the purchase of the trunk by the accused in which the body was ultimately found.

The appellant has admitted that he went to the station in a jetka driven by the witness Gangulu (p. w. 7) and went off by the passenger train to Chatrapur. He says that he alighted at that place. Now the train from Barhampore to Chatrapur continues on its way from Chatrapur to Puri and Calcutta. The witness Gangulu (p. w. 7) says that he was summoned by the appellant at 4 A.M. "some four months ago" to bring his jetka; that he drove to the front of the appellant's house and was there joined by one Satyam (p. w. 8) who had arranged to render him assistance by running by the side of the pony, because the pony was somewhat fresh; that he left the place for a quarter of an hour for a natural purpose and on his return he saw a trunk like M. O. 1 put inside the jetka with some bedding with the appellant standing besides the jetka. He then drove the appellant with the box and the bedding to the

station, p. w. 8 running beside the pony. Then at the station the appellant alighted, and the witness took out the box and the bedding and put them down beside the weighing machine and having collected the hire went off to the waiting shed. He says that he did not notice that the box was particularly heavy and that he is in the habit of carrying even heavier luggage. He had been examined and had made a statement before the Magistrate under section 164 and had there said that the trunk was green. In the appellate court we examined the trunk by artificial light and we agree with the Judge that it certainly appeared to have a greenish tinge by that light. At 4 o'clock in the morning it would be practically dark, and I agree with the learned Sessions Judge that the mistake of the witness in calling the trunk green was a very natural one in the circumstances. The witness is supported by p. w. 8. He states that he put the trunk inside the jetka, having brought it up from inside the appellant's house, but he did not notice its colour because it was dark. The prosecution witness no. 9, another jetka driver, states that he was at Barhampore railway station at about half past five in the morning and he saw p. w. 7 arrive with the appellant and that p. w. 7 took out a box and a roll of bedding. He was unable, however, to identify the box which is not surprising. A witness (p. w. 11), who is the editor of a local newspaper, was at the station on the early morning of the 23rd of March, having arrived at about 6 A.M. from Haripur. As he was leaving the station he saw the appellant about to board a train which was still at the platform when he left the station. The two jetka drivers (p. ws. 7 and 8) state that this event took place on a Saturday which was Barhampore shandy day, but they did not say this before the Magistrate. My comment on this statement has already been made in connection with the evidence of p. w. 23. The statement is of no importance whatever. In my opinion it has been satisfactorily proved

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that the appellant left Barhampore by the early morning train in the direction of Chatrapur and Puri with a tin box. Whether he travelled in a third class carriage or not is not very material. The tin box containing the remains of the deceased was found abandoned in a third class carriage at Puri. It is argued on behalf of the appellant that his social position would have prevented him from travelling in a third class carriage. This may be so, but his financial position was low and as he was taking a heavy box with him, and the box was found in a third class compartment he must in all probability have travelled in a third class compartment because it is not likely that the box, having regard to its weight and contents, was transferred from one class to another in the course of the journey. Some time after mid-day on the 23rd of March the Vizagapatam Puri train, which passes through Berhampore and Chatrapur, arrived at Puri and in a third class carriage was found the tin trunk M. O. 1. At the time of its finding all the passengers had left the train. It was opened and a dead body cut into seven pieces was found. This was identified as the body of the deceased, and, although a contest took place on this point before the Sessions Judge, we were expressly told by Mr. Manuk on behalf of the appellant that he was no longer in a position to dispute the identity of the body and we have looked into the evidence and are satisfied that the identification by the widow is correct. The head, legs and arms had been severed and the trunk had been divided into two halves. The viscera had been removed, and the wounds on the face, neck and on the right arm were considered by the medical witnesses to indicate that they were inflicted ante mortem.

On the 4th of April the police arrived at the house of the accused. They searched the house and arrested the appellant and his wife. It seems that at that time they were looking for papers, and they do not seem to have suspected that the murder had

been committed in the house: (see the evidence of the investigating Sub-Inspector at page 54). On the 7th, however, they had received further information and then made a further detailed search of the house, and on this occasion they removed some pieces of the cement surface with bricks from the top edge of the front side of the platform of the water tap situated in the back yard, some cement from the front verandah of the living house and a piece of stone slab from the front hall close to the western wall, which they suspected bore traces of blood stains. The Chemical Examiner, however, has not confirmed the suspicion. They found a broken dealwood box with pieces of rag which was still wet on which the Chemical Examiner has found human blood stains, and hanging up in the stand also in the bath-room a piece of cloth about three yards long and one yard four inches broad which bore blood stains which have, however, not been identified as human blood. In a trunk in the main hall they found a Liliput razor, an ordinary table knife and a pen-knife with two blades alongside of the cover bearing stains which the Chemical Examiner has, however, not identified as human blood. They also searched the compound outside the main building and dug up the ground in various places where it seemed to have been disturbed. They excavated two pits, and in one of them found a bundle containing torn pieces of cloth, cotton and burnt paper. No blood was found on these; and in another they found three torn pieces of white shirts which were found to bear human blood stains, a torn red-dotted piece of cloth, which bore blood stains which have not been identified as those of human blood, and 26 pieces of rags, fragments of various garments and a piece of a small quilt, all of them bearing human blood stains. Much comment has been made by the defence on the fact that these things were not found on the 4th on the occasion of the first search, but were found on the 7th, and whereas the house was left unguarded in the interval it is suggested that some one may have "planted" these

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articles in order to throw suspicion on the accused. Now it is certainly within the bound of physical possibility that the articles to which I have referred were in fact planted on the premises between the 4th and the 7th when admittedly the house was unguarded. Access to the house was certainly possible on all sides. The key was in the possession of one Ramamurti, a music master, who lives on or near the premises and it was from him that the key had to be obtained on the occasion of the second search; but there is another and far more probable alternative. The murder and the dissection of the body are such as to have required almost certainly the co-operation of at least two or more persons. After the arrest and removal of the accused it is quite likely that persons still at large but guilty or sympathisers with the accused may have made further efforts to remove even the faintest traces of the murder and, the premises having already been searched, would have had little fear in disposing of the rags and other articles used in the final clearing up on the same premises. The rags found in the bath-room and those in the pits were still wet and the latter had been buried at a depth of about one cubit so that in neither case is it likely that the wetness could have been due to rain and the fact that the rags were wet on the 7th makes it highly unlikely that they were last used on the night of the 22nd, for they would by the 7th of April have become dry. This again points to the fact that they had become wet and had been used between the 4th and the 7th. An attempt was made to argue that these rags, or at least those found in the bath-room, might have been intended and used for an intimate purpose by women and they might have acquired their blood stains in this manner and had been subsequently washed for the blood stains were very faint. But if this were so, those in the box in the bath-room would hardly have been flung back wet in the box but would have been hung up to dry. As to the rags found in the pit, they are obviously pieces

of garments which could hardly have been put to the suggested use and even had they been so used, if it had been intended to throw them away they would not have been washed as these have been washed and the blood stains upon them would have been conspicuous. It is certainly regrettable that the articles were not found on the 4th if in fact they were then there. The police have stated that they did not search carefully on that occasion because at that time they did not suspect that the murder had been done in the house and that their search was mainly directed to the recovery of correspondence, and this is a possible explanation. But I think a far more probable explanation is that which I have suggested that the articles were not on the premises on the 4th and are to be accounted for by operations of cleaning up between the 4th and the 7th when they were found. It may be said that had the two knives found in the box in the hall been used in the commission of the murder they would hardly have been left in such a conspicuous place between the 4th and the 7th and if they had been there on the 4th they could hardly have been missed by the police who were opening boxes wherever found for the purpose of finding correspondence. An examination of the large knife, however, convinces me that it is not such a knife as would have been used in cutting up the dead body. It is an old blunt and very flexible table knife without any point. The blood stain on the pen-knife has not been shown to be human blood and might be accounted for in many ways. It is possible on the theory that these articles in the hall came to that position between the 4th and the 7th, that they were articles swept up and collected together by the persons engaged in the final cleaning up and the knives themselves may have been used for scraping away any suspicious traces. I see no justification whatever for attributing to the police any complicity in planting the articles found on the 7th and indeed had there been any such intention the blood stains would have been made more conspicuous.

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There is a further piece of evidence in connection with the search of the house. It was noticed that the walls of the bath-room, the hall, the southern verandah and one room of the outhouse had been freshly white washed and the floor of the outhouse room had been freshly covered with cowdung. From the outside of the bath-room wall an open drain passes under the path through the outside compound wall so that waste water from the bath-room flows out to the outside drain ditch. The police found a bad putrifying smell in this neighbourhood. The outside of the bath-room wall had been freshly tarred where the waste water issues forth. A pleader G. Raghava Rao (p. w. 19), a member of the local bar, who has known the appellant for the last 11 years, says that at 8 A.M. on the morning of the 30th of March accompanied by his father-in-law and his son he passed the house of the appellant and he saw him outside the southern drain and the outlet in the front wall with a coolie. The coolie had a pot and a black brush in his hand and the appellant was in a stooping posture and pointing out at the mouth of the outlet which appeared to have been freshly painted. Now there is no doubt that tar is commonly used for such purposes, but this action on the part of the appellant is certainly one of the circumstances which must be taken into consideration.

There is no evidence of the movements of the appellant [except that of the pleader (p. w. 19) to the effect that he was seen on the 30th at Barhampore supervising the tarring operation] from the time when the train left Barhampore for Chatrapur on the 23rd and he has offered no evidence as to what he was doing in the interval between the departure of the train and his arrest.

Mr. Manuk wished to make use of certain evidence of the widow to the effect that some seven days after the departure of the deceased the brother of the second accused came to her and demanded the return

of the chits showing the moneys lent by the deceased and hinted that her husband might not return. Presumably this was for the purpose of arguing that others besides the accused were involved in the murder. We indicated our impression that this evidence was inadmissible because the brother of the appellant's wife was neither an accused nor a witness and in any case if admissible it might damage the interests of his client, and on the following day he stated that having reflected upon this matter he would not press it further. There is in the paper-book (page 166) a First Information Report which is similarly inadmissible and has rightly not been referred to by any one and is not an exhibit in the case.

I have endeavoured to deal with all the points of fact and law urged on the part of the appellant. In my opinion none of them is of any avail. The learned Judge has delivered a most careful and searching judgment and in matters of fact has, in my opinion, been almost overcareful in excluding from consideration the prosecution evidence where he felt the faintest doubt as to the credibility of witnesses. He has reached the right conclusion and the circumstances all converge to a common centre, that is to say, the guilt of the appellant.

In the matter of sentence, Mr. Manuk suggested that if the prosecution theory was correct the deceased was a person who was threatening the wife of the appellant with the disclosure of painful circumstances if she did not produce the money, that the appellant may have been overcome with righteous indignation at the idea of the blackmail of his wife and may either have struck down the deceased in a moment of rage or may have decided to murder a blackmailer, in either of which cases he should have the sympathy of the Court. Had the appellant offered any evidence in support of either of these theories, or had the evidence of the prosecution even justified the belief that either was true, we would have taken it into consideration;

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but in my opinion no sufficient ground has been shown for not inflicting the capital punishment which is appropriate in cases of deliberate assassination.

For these reasons I am of opinion that the reference must be accepted, the appeal dismissed and the conviction and sentence of death confirmed.

MANOHAR LALL, J.—I have arrived at the same opinion and I desire to say that in so doing I have excluded altogether from consideration the evidence of the search made on the 7th of April, 1937, and the recent whitewashing of the outhouse; this has had no effect on my mind for the reasons about to be stated. The other circumstances, which are well established as detailed in the judgment which is just delivered by my lord the Chief Justice, are in my opinion quite sufficient to establish the guilt of the appellant beyond any reasonable doubt. The chain of circumstantial evidence is complete and is incompatible with the innocence of the accused on any reasonable hypothesis and points conclusively to the guilt of the appellant as being a party to the murder of the deceased, an offence punishable under section 302 of the Indian Penal Code. I reject the suggestion on behalf of the accused that the offence established is consistent with this that somebody else murdered the deceased and that the appellant was obliging enough to dispose of the dead body for him or them. To my mind it is incredible that the accused would have disposed of the dead body had he not joined another person or persons in the murder. This is not a case where a long period elapsed between the murder and the disposal of the corpse: it is clear that the body was disposed of immediately after the night of or following the murder. The circumstances point unmistakably and naturally to the direct complicity of the appellant in the murder of the deceased with the result that the conviction must be recorded against him under section 302 of the Indian Penal Code.

I now give briefly the reasons why in my opinion no reliance can be placed upon the recovery of the articles said to have been made at the search of the house of the accused on the 7th of April, 1937.

The first search of the house of the appellant in Berhampur was made on the 4th of April, 1937, at 11 A.M. The evidence on this point is afforded by witness no. 27 for the prosecution who is the detective Sub-Inspector of police. He states that he went to the house of the appellant and his wife at Berhampur on that day at 11 A.M., and found them present. They were examined and the house was searched for a letter said to have been sent to the deceased by accused no. 2 and for documents covering her transactions with the deceased but the search proved useless. The two accused were arrested at the end of the proceedings but nothing else was searched for that day. He states in cross-examination that a large pile of correspondence was recovered from the house of the accused and it took the police a long time to go through the correspondence some of which being in Telegu had to be translated. The search was continued till 2 P.M., when it began to rain and became dark making search difficult. He states definitely that he went into the bathroom but adds that he did not search the bathroom as a general search was not being conducted. The party left the place at about 5 P.M. I find it difficult to believe that the police were confining their search only for the letter and other papers—otherwise the police would have been grossly negligent in the discharge of their duties in failing to look for some other articles. I am unable to accept this explanation of gross negligence readily because the police appears to have conducted their investigation under unusually difficult circumstances with commendable skill, energy and expedition. It may be that the police were under the impression that the murder was committed somewhere else—in a field or in a neighbouring village or

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in another building. But whatever the true explanation may be the accused is entitled to urge that nothing incriminating was found from his place on the 4th of April, 1937.

The second search of the house was conducted on the 7th of April, 1937, and the search was done under the supervision of the Inspector of police (p. w. 26) who was also present at the latter part of the earlier search on the 4th of April, 1937. From his evidence it is clear that he went to conduct the search on that date in consequence of certain information which he had received and which, the learned Advocate-General states, was received from p. w. 19. It must be remembered here that both the accused were arrested on the 4th of April, 1937, and were kept in hajat from that day. The house was thereafter unoccupied, closed and locked up and the key was with one music master. The police evidence is to the effect that on the 7th April they found the outlet of the bathroom drain newly tarred and from the drain outlet pipe a bad smell was coming and also a similar smell from the southern side of the compound which is described as a putrefying smell. Nevertheless the police did not take the trouble to dig out the drain. The articles found in the main building and also the earth scraped from the drain were sent to the Chemical Examiner who did not find any trace of human blood on them except on seven pieces of white rags which were washed " and still wet " and on a thin velvet bordered torn white cloth found hanging to the stand of the bathroom. The accused's explanation is that he was not in the house from the 4th of April and he can only suggest that these things must have been introduced into his house in his absence—this is not an impossible theory because the key of the house was with the music master and fresh things could be brought to the house by means of this key which could be procured from the music master. I also attach considerable importance to the fact that the police found seven pieces of rags *still wet* on the 7th of April, 1937. In my opinion

it will be difficult to draw any safe conclusion adverse to the accused from these things recovered from the main building. The learned Sessions Judge appeared to accept the defence suggestion that these rags have been used for some ordinary domestic purpose and that owing to their particular shape had been brought to her personal use by the woman accused. The police also dug the compound on the same day on the south-east side at two places marked H and K and recovered from there (*1*) a bundle containing burnt pieces of cloth, cotton and papers, etc., (*2*) three torn pieces of white shirts (these contain some stains which are reported by the Chemical Examiner to be of human blood), (*3*) a torn red-dotted piece of cloth, (*4*) a red bordered white torn rag as well as twenty-six pieces of rags including petty coat, boys' knickers, etc. (these rags are reported by the Chemical Examiner to contain human blood marks) and (*5*) a small boys' quilt. It is suggested by the prosecution that these articles found are strong corroborative evidence of the fact that these rags were used to remove traces of the blood marks which must have flowed at the time of murder. Reliance is also placed upon the nature of the smell felt by the police officer on the 7th of April. The map prepared in the case and the oral evidence shows that there is a fence of cocoanut branches dividing the house and the immediate part of the compound from the rear part of the compound but the fence was in a poor order and any one could jump over and through it. There were openings in it here and there. On the far side of the compound there were Jatkawallahs and other poor people living and there would be no difficulty for any of them to get to the spot where the pits were dug or for people to scale the wall from the road outside which immediately adjoins the compound (*see* the evidence of p. w. 25). The articles recovered from the pits in the compound were buried about one cubit deep and some of the other pits were giving out bad smell (p. w. 26). It seems to me on a careful consideration of this evidence that the articles were

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recovered from a place which was not in the occupation of the accused on that date, the place was easily accessible to any outsider, that nothing was recovered from the main building on the 4th of April, 1937, containing any human blood marks, that some of the rags recovered from the main building on the 7th of April, 1937, were " still wet ", that another bundle recovered from the compound is said to have contained burnt pieces of cloth, cotton and papers (in consonance with the police theory of how the looked for papers disappeared). In my opinion it follows that the accused cannot be reasonably asked to account for the recovery in their absence of these articles and no inference should be drawn against him from these findings apart from the fact that the recovery itself is made under highly suspicious circumstances. The prosecution also sought to rely on some recent white-washings in an outhouse room. The dhobi, p. w. 23, definitely states in his evidence that when he went to get the soiled clothes from the accused (about the 19th or 20th March) he found that the house was being repaired and whitewashing was also going on—I am satisfied that this is a natural explanation and true. The accused had been absent from their house for about three years and the house required immediate repair and whitewashing—I am unable to draw any inference against the accused from this whitewashing. But the rejection of these two pieces of evidence, as indicated above, does not detract from the completeness of the chain of circumstantial evidence which appears to be conclusive.

At one time I felt some difficulty on the case law in deciding whether the statement made by the accused to the police officer on the 4th of April, 1937, was or was not a confession within the meaning of the Evidence Act. A large number of authorities were cited at the Bar beginning from *Empress* v. *Pandharinath*(1). In my opinion the true rule to decide whether

(1) (1881) I. L. R. 6 Bom. 34.

the statement by the accused to the police officer is admissible or not is carefully considered by Mr. Justice Carnduff in the case of *Barindra Kumar Ghose* v. *King-Emperor*(1) and I respectfully agree with his opinion at page 523 that " each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession ". The question, therefore, is whether the statement made by the accused in the present case, which will be found at page 54, line 28, of the Paper Book, is or is not a confession.

Mr. Manuk contends that any statement which is of an incriminating character and from which, coupled with other evidence in the case, an inference of guilt can be made against the accused must amount to a confession and therefore should be excluded from consideration in arriving at a decision as to whether the accused is guilty or not. He strongly relies upon the case of *Emperor* v. *Kangal Mali*(2) and on the observation of the learned Judges at page 612 with regard to the admissibility of the statement made to the police by the accused that " A useful test as to admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statement of the accused to the police as being true then they may, and probably in many cases will, be found to amount to confessions ". The learned Judges then proceed to give reasons for excluding the statement which was said to have been made to the police. The statement was with reference to the mark on the dhoti of the accused which was stated by the prosecution to be the mark of blood. The police Inspector deposed as follows :

" My attention was drawn to the accused's cloth by a constable. On my asking accused what the marks were, he first said they were tobacco stains, then he said they were stains of betel nut and then he said it was blood."

(1) (1909) I. L. R. 37 Cal. 467.
(2) (1905) I. L. R. 41 Cal. 601.

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In my opinion it is clear that the statement made by the accused in that form could carry no conviction to the mind of any court. It is a prevaricating statement. It suggests an inference that the accused was reluctant to make any statement and that he was being goaded on to make this incriminating statement. At page 613 I find that the learned Judges were themselves in doubt as to whether this statement was in fact made and they commented upon the prevaricating character of this alleged statement as rendering it at least of doubtful admissibility. It is true that there are some general observations to be found in this case but as remarked by the House of Lords in the case of *Quinn* v. *Leathem*(1), " a case is only an authority for what it decides ". The general observations to be found in a case must not be divorced from the context. I, therefore, do not understand the observation in *Emperor* v. *Kangal Mali*(2), to mean anything more than that where the statement by the accused is a confession it must be excluded from consideration by a judicial tribunal before whom it is produced by the prosecution. The only test to decide whether a statement is a confession or not is to see whether the accused " states that he has done certain things which amount to an offence thereby accusing himself of committing an offence [*per* Courtney Terrell, C. J. in *Santokhi Beldar* v. *King-Emperor*(3)]. In my opinion the statement in the present case is not a confession although the statement undoubtedly turns against the accused and is damaging to him. I agree with my lord the Chief Justice in holding that the statement is quite accurately recorded by the police officer.

It was also suggested by the learned advocate for the appellant towards the end of his argument that the above statement of the accused (assuming it is not a confession) cannot be admitted into evidence by

(1) (1901) A. C. 495.
(2) (1905) I. L. R. 41 Cal. 601.
(3) (1932) I. L. R. 12 Pat. 241, 247, F. B.

virtue of the supposed prohibition under section 162 of the Code of Criminal Procedure. The contention on his behalf is that this was a " statement made by a person to a police officer in the course of an investigation under Chapter XIV which was also reduced into writing " and therefore neither this " statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record ", can be used for any purpose at the trial of the appellant. In my opinion this argument is untenable. Section 162 of the Code of Criminal Procedure must be read along with sections 160 and 161 of the Code. The marginal notes to sections 160 and 161 show that these two sections refer to the examination of witnesses by the police when called upon to make an investigation under Chapter XIV (the investigation must necessarily be regarding the allegation made against some person, known or unknown, of an offence having been committed by that person or by an unknown person) and this is also borne out by the language employed in these two sections. Section 160 directly mentions that the police officer can require the attendance before himself of any person who appears to be acquainted with the circumstances of the case (obviously referring to a person who, in the opinion of the police officer, can give evidence as a witness of the crime under investigation against an accused known or unknown). Section 161 then provides that the police officer who can summon such person under section 160 can examine him orally when he appears before the police officer. These two sections, again it may be noticed, impose liabilities upon the persons, who appear to the police officer to be witnesses, in this way that section 160 obliges a person to attend when so required and section 161 obliges a person when attending to answer all questions relating to the case put to him by the police officer. Section 162 is a necessary corollary to these sections and enacts that the statements made by such witnesses shall not be used except for the purpose of contradicting a witness

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when called for the prosecution. It is to be noticed that in section 162 the proviso definitely uses the words "when any witness is called for the prosecution, etc.". Furthermore these three sections do not contemplate the case of an accused person whose attendance is to be secured as provided for in other sections of the Code dealing with the arrest of the accused or issuing summons or warrant to the accused. In my opinion it was never the intention of the legislature, as is clear from the language employed, that these three sections should apply to the case of an accused. The question of the admissibility of the statement of the accused is governed by the general provisions of the Indian Evidence Act. Where a party makes an admission of a relevant fact it is admissible in evidence as against him to prove that relevant fact. In the case of the accused persons the legislature has provided safeguards that the confessions made by the accused while in custody of a police officer shall be inadmissible as provided in the Evidence Act and are admissible to a limited extent if the conditions mentioned in section 27 of the Evidence Act are satisfied. Upon a careful consideration of the language of the sections of the Criminal Procedure Code and the provisions of the Evidence Act, I do not see any reason to hold that the admission of a relevant fact (not being a confession) made by the accused to a police officer is prohibited from being used by virtue of the supposed prohibition under section 162 of the Code of Criminal Procedure. The authorities which took the contrary view have been examined exhaustively in the judgment of my lord the Chief Justice just delivered and I do not think any useful purpose will be served to add to his survey of these authorities; it is sufficient to say that I entirely agree with his reasonings.

J. K.

Reference accepted.

Sentence confirmed.

FULL BENCH.

Before Courtney Terrell, C.J., James and Manohar Lall, JJ.

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November, 10, 11.

SUKHOO SAO

v.

SITA RAM HAJJAM.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 174—*certificate of satisfaction by the decree-holder coupled with a deposit of five per cent. for the auction-purchaser, whether sufficient.*

Where the decree-holder and the judgment-debtor certified to the court that the decree had been satisfied and the judgment-debtor deposited five per cent. of the purchase money for payment to the auction-purchaser in court, *held,* that this was a sufficient compliance of section 174 of the Act, and the sale should be set aside.

Syed Mohammad Zakiruddin v. *Mohammad Naeem*(1), followed.

Hanuman Singh v. *Baijnath Prasad Singh*(2) overruled.

Application in revision by the mortgagees of a portion of the holding.

The facts of the case material to this report will appear from the following order of reference made by Khaja Mohamad Noor, J. while admitting the application :

This is an application in revision against an order of the Munsif of Patna refusing to set aside a sale under section 174 of the Bihar Tenancy Act. It appears that within the period prescribed in that section the petitioners, who are ijaradars of a portion of the holding sold, and the decree-holder filed a joint application certifying to the court that the decree had been satisfied and the petitioners deposited 5 per cent. of the purchase money for payment to the auction-purchaser and asked that the sale be set aside. The auction-purchaser, however, objected to the sale being set aside as the provisions of section 174 of the Bihar Tenancy Act were not strictly complied with. The learned Munsif relying upon the case of *Raghunandan Pandey* v. *Garju Mandal*(3) decided by Mullick and Ross, JJ. refused to set aside the

*Civil Revision no. 307 of 1937, from an order of Babu R. P. Singh, Munsif, 3rd Court, Patna, dated the 25th February, 1937.

(1) (1937) 18 Pat. L. T. 776.

(2) (1936) 18 Pat. L. T. 409.

(3) (1925) I. L. R. 4 Pat. 718.

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sale, and therefore the petitioners have come up to this Court in revision.

There are two Division Bench cases of this Court both decided by Mullick and Ross, JJ. One of them has already been referred to, and the other is *Sham Narayan Singh* v. *Basdeo Prasad Singh*(1). The first mentioned case is based upon the observation of the Calcutta High Court in the case of *Kabilaso Koer* v. *Raghu Nath Saran*(2). No authority seems to have been cited in the second case. Since then Rowland, J. has come to the same conclusion in *Hanuman Singh* v. *Baijnath Prasad Singh*(3). It is clear, therefore, that the trend of authorities in this Court is in favour of the view taken by the learned Munsif, but it is mostly based upon the view taken by the Calcutta High Court in *Kabilaso Koer* v. *Raghu Nath Saran*(2). The observation of Petheram, C.J. was, in my opinion and I say so with all respect, obiter dictum, as it was not necessary for the decision of that case, his Lordship having held that the suit itself was not maintainable at all. Since then there have been two decisions in the Calcutta High Court where a contrary view was held. One of them is a Division Bench case. They are *Rani Hemanta Kumari Debi* v. *Rajendra Kishore Nath Sarkar*(4) and *National Insurance Company, Limited* v. *Ezekiel Aaron David*(5). With all respect to the views of the Judges of this Court I feel doubt about the correctness of the decisions. It may be argued that payment of money to the decree-holder and then filing an application for setting aside a sale comes within the purview of the section 174, B. T. Act which provides for deposit of the amount recoverable under the decree. There is no provision that the decree-holder is not entitled to realise the decretal amount after the sale and before its confirmation. If the decree is satisfied after the sale, there is nothing recoverable under it and, therefore, nothing need be deposited so far as the decretal amount is concerned. At any rate the question requires consideration.

This application will be heard. Notices will be issued. I direct that the case may be placed before a Division Bench for hearing.

The case was then ordered to be heard by a larger Bench by Courtney Terrell, C.J.

On this reference.

Naemul Huq, for the petitioner: There has been a sufficient compliance with section 174 of the Bihar Tenancy Act. It makes no difference whether the money is *deposited in court* to the credit of the decree-holder or is paid direct to the decree-holder.

(1) (1925) 7 Pat. L. T. 25.
(2) (1891) I. L. R. 18 Cal. 481.
(3) (1936) 18 Pat. L. T. 409.
(4) (1926) A. I. R. (Cal.) 1236.
(5) (1937) 41 Cal. W. N. 998.

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The learned Munsif has followed *Raghunandan Pandey* v. *Garju Mandal*(1). To the same effect is the decision in *Sham Narayan Singh* v. *Basdeo Prasad Singh*(2). But I rely on *Rani Hemanta Kumari Debi* v. *Rajendra Kishore Nath Sarkar*(3) and *Syed Mohammad Zakiruddin* v. *Mohammad Naeem*(4).

[At this stage their Lordships called upon the respondent.]

B. C. Sinha, for the respondent: Section 174 of the Bihar Tenancy Act contains a complete procedure which must be followed. The interest of the auction-purchaser has to be protected. That has been made clear by their Lordships of the Judicial Committee when they point out that after the sale has been held, it can be set aside only on strict compliance with the provisions of Order XXI, Rule 89, Code of Civil Procedure [*See Seth Nanhe Lal* v. *Umrao Singh*(5).]

[LALL, J.—That case arose out of a suit brought to set aside an execution sale on the ground that the decree-holder had been paid off, but there was no application for setting aside the sale made to the executing court within thirty days.]

If direct payment to the decree-holder were to be countenanced, it will open a door to collusion and fraud.

[LALL, J.—Where is the question of collusion when both the decree-holder and the judgment-debtor inform the court within thirty days that the former has received the full amount?]

After the sale there can be no adjustment of the decree between the decree-holder and the judgment-debtor alone. I rely on *Raghunandan Pandey* v.

(1) (1925) I. L. R. 4 Pat. 718.
(2) (1925) 7 Pat. L. T. 25.
(3) (1926) A. I. R. (Cal.) 1236.
(4) (1937) 18 Pat. L. T. 776.
(5) (1930) 35 Cal. W. N. 881, P. C.

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Garju Mandal(1), *Hanuman Singh* v. *Baijnath Prasad Singh*(2), *Kabilaso Koer* v. *Raghunath Saran*(3) and *Shiva Prasad* v. *Tapsi Singh*(4).

Naemul Huq, not called upon in reply.

S. A. K.

COURTNEY TERRELL, C.J., JAMES AND MANOHAR LALL, JJ.—This is an application in revision against an order of the Munsif of Patna refusing to set aside a sale under section 174 of the Bihar Tenancy Act. The application was originally heard by Mohamad Noor, J. sitting singly and he referred it to a Division Bench and it has ultimately come over to this Bench. The reason why the learned Judge referred it to the Division Bench was that a certain conflict of opinion appeared to exist between two points of view—the one represented by a judgment of Rowland, J. in *Hanuman Singh* v. *Baijnath Prasad Singh*(2) and the other represented by a later decision of Manohar Lall, J. in *Syed Mohammad Zakiruddin* v. *Mohammad Naeem*(5).

The facts are simply stated. After a sale and within thirty days of the sale the decree-holder and the judgment-debtor certified to the court that the decree had been satisfied and fully paid and the ijaradars deposited five per cent. of the purchase money for payment to the auction-purchaser and asked that the sale be set aside. It was contended by the auction-purchaser that the provisions of section 174 had not been fulfilled and that it was necessary for the judgment-debtor, notwithstanding any satisfaction of the decree which may have taken place, to deposit the amount of the decretal debt in court for the benefit of the decree-holder (whether or not the decree-holder could afterwards take it out or not) in addition to depositing the five per cent. of

(1) (1925) I. L. R. 4 Pat. 718.
(2) (1936) 18 Pat. L. T. 409.
(3) (1891) I. L. R. 18 Cal. 481.
(4) (1935) Civil Revision no. 478 of 1935.
(5) (1937) 18 Pat. L. T. 776.

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the purchase money. On the other hand, it was contended that there had been a substantial compliance of section 174, and the question before the Court is as to whether in the circumstances the section has been complied with.

We have carefully read the two judgments in question in which numerous prior decisions have been dealt with, and we desire merely to say that we are in full agreement with the judgment of Manohar Lall, J. that in such circumstances the section has been complied with and the Munsif should have set aside the sale. It is unnecessary to review the authorities because Manohar Lall, J. has already done so in his judgment and we think correctly.

In the result the application in revision will be allowed and the sale will be set aside and the auction-purchaser must pay the costs throughout: hearing fee three gold mohurs.

It would appear that the petitioners, who were ijaradars of a portion of the holding sold, also lodged an appeal before the District Judge. The District Judge felt himself bound by the authority of the judgment of Ross, J. in *Raghunandan Pandey* v. *Garju Mandal*(1) and dismissed the appeal for that reason. He, however, also might properly have come to the conclusion that no appeal lay, and it is not argued before us that any appeal does lie in law from the order of the Munsif being the matter in revision only. In these circumstances all we need do is to set aside the judgment of the District Judge, but no further order in respect of costs is necessary beyond what we have just made.

Rule made absolute.

J. K.

(1) (1925) I. L. R. 4 Pat. 718.

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THE SECRETARY OF STATE

v.

SUNDERJI SHIVJI.

(On Appeal from the High Court at Patna.)

Railways Act, 1898 *(IX of* 1890), *sections* 55 *and* 56—*sale of goods by private treaty instead of public auction—Railway Company, whether protected.*

Charges due on a consignment of goods were not paid and the Railway Company sold the goods by private treaty. In a suit by the consignee against the Railway Company for damages for conversion,

Held, that the Railway Company, not having sold the goods by public auction as prescribed by sections 55 and 56 of the Indian Railways Act, were not protected.

Appeal (no. 15 of 1937) from decrees of the High Court (July 4, 1934) which reversed two decrees of the Subordinate Judge of Dhanbad exercising Small Couse Court Jurisdiction (June 29, 1933 and August 18, 1933).

These were suits for damages for conversion on the ground that the sale of consignments by the Railway administrations had not been conducted with the formalities prescribed by the Railways Act.

The High Court held that section 55 of the Act provided that the Railway Company could sell by auction on the expiration of fifteen days' notice of the intended sale and that the object of a public notice of auction and the provision that the notice should be inserted in the local newspapers indicated that the local public should be informed of the auction in order

**Present:* Lord Thankerton, Lord Alness and Sir Lancelot Sanderson.

to attract persons to bid at the auction, and that, for that purpose, the notice should contain adequate materials so that possible bidders might be informed of the class of goods to be sold, the quantity of the goods and the time and place where the sale was to be held, that the sale had not been conducted with the formalities prescribed by the Act and that the Railway Company was not, therefore, protected and the owner of the goods was entitled to damages for conversion.

1937, October 29. *Willink, K. C.* and *Wallach*, for the appellant: Submitted that the Railway Company's practice of giving notice that the goods will be sold by auction and then proceeding to call for offers in the best market for the goods was within the spirit and sufficiently within the letter of sections 55 and 56 of the Act to protect it from an action for conversion. In a small place without a local newspaper, a notice posted in the station and published with beat of drum in the bazar would be a compliance with the provisions of the section. Information would be conveyed to the local buyers. An auction might be dispensed with in a case in which that method of sale would be fantastic. The Railway Company is not bound by the statute to accept the highest bid however bad it may be. It is open to the Railway Company to deal with the matter in the best way possible in the circumstances of the case. The High Court was wrong in holding that the statute required details to be given in the notice of sale regarding the goods and place and time of sale. Where the legislature requires details to be given it says so as in the Code of Civil Procedure, Order XXI, Rule 66. There is no provision like that in the Railways Act. Here the Railway Company took the steps which it considered would bring the best price for the goods and are protected.

The respondents were not represented.

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The judgment of the Judicial Committee was delivered by—

SIR LANCELOT SANDERSON.—These are two consolidated appeals against the decrees of the High Court of Judicature of Patna, dated the 4th July, 1934. The first appeal relates to a suit brought in the Subordinate Court of Dhanbad exercising Small Cause Court jurisdiction in which Sunderji Shivji and Company sued the Secretary of State for India in Council representing the East Indian Railway and the North-Western Railway for damages for the conversion of certain coal, of which the plaintiffs claimed to be the proprietors. The other appeal relates to a suit brought by Deoji Shivji and Company against the Secretary of State representing the East Indian Railway and the Bengal and North-Western Railway Company in the abovementioned Court in which a claim of a similar nature was made in respect of certain coal which the plaintiffs alleged had been sold by the Railway administration in a manner which was illegal, irregular and *ultra vires*.

The Small Cause Court Judge dismissed both suits with costs.

The plaintiffs in both suits applied to the High Court under section 25 of the Provincial Small Causes Courts Act for revision. The applications were disposed of in one judgment, by which the High Court held that the plaintiffs in both suits were entitled to succeed and decreed the suits for the amounts claimed with costs. Leave to appeal to His Majesty in Council was granted to the Secretary of State and the Bengal and North-Western Railway Company, Limited, for although the amount claimed in each suit was small, the learned Judges of the High Court held that the cases were fit for appeal under section 109(*c*) of Act V of 1908 as substantial questions of law were involved.

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The plaintiffs in the two suits were not represented at the hearing of the appeals before their Lordships.

The same important question arose in both cases, and related to sections 55 and 56 of the Indian Railways Act (IX of 1890). They are as follows :—

"55.—(1) If a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession.

"(2) When any animals or goods have been detained under sub-section (1) the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction, published in one or more of the local newspapers, or, where there are no such newspapers, in such manner as the Governor-General in Council prescribe, sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice and sale, including in the case of animals, the expenses of the feeding, watering and tending thereof.

"(3) ... ...

"(4) ... ...

"(5) ... ...

"56.—(1) When any animals or goods have come into the possession of a railway administration for carriage or otherwise and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the animals or goods.

"(2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the animals or goods as nearly as may be under the provisions of the last foregoing section, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto."

In both suits the Secretary of State relied upon the provisions of the abovementioned sections as protecting him from any liability in respect of the acts of which the plaintiffs complained.

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The learned Judges of the High Court in their judgment dealt with the applications for revision upon the facts which were proved in the first of the abovementioned suits, stating that the facts in the two cases were similar in so far as they were material for their decision.

Their Lordships propose to adopt the same course.

The material facts in the first suit are as follows :—

The plaintiffs are coal merchants carrying on business at Jharia. On the 8th March, 1929, Messrs. Villiers, Ltd., who were the managing agents of Bagdiji Colliery, acting on behalf of the plaintiffs, consigned a wagon of coal to Sikri Brothers: the destination, described in the declaration note of the East Indian Railway, was Doaba: this was a mistake. The wagon should have been sent to Adampur. The wagon of coal was received at Doaba on the 26th March, 1929, and it appears that on the 15th April, 1929, a letter in the following terms was sent by the Railway Company's agent at Lahore to the consignees, viz., Sikri Coal Merchants at Lahore :—

DEAR SIRS,

Please take notice that the following consignment of coal booked to your address is lying undelivered at the station named below and that the wharfage is due to the Railway on it up to date. You are now given this final notice and warning that if within 15 days from date the consignment of coal is not taken delivery of and coal removed from Railway premises on payment of full wharfage and all other charges due, we reserve to ourselves the right to take civil action against you for recovery of all charges including wharfage. If the consignment is not removed within 15 days from date, it will be sold by public auction under sections 55 and 56 of the Indian Railway Act (IX of 1890) at your risk. The coal is being advertised for sale.

Invoice no. I.	Railway receipt no. 27940.
Station from Pathardih.	Station to Doaba.
Weight in tons 21 cwts. 13.	Dated 18-3-29.

Coal Wagon no. 14714, Railway freight Rs. 342-3-0.

On the 22nd April a letter was sent to the consignors, Messrs. Villiers, Ltd., at the Bagdiji Colliery, asking for instructions regarding the disposal of the coal, and stating that if delivery was not effected within a week of the receipt of the letter and all charges due thereon paid, arrangements would be made to dispose of the same under sections 55 and 56 of the Indian Railways Act (IX of 1890).

On the 26th April, 1929, Messrs. Villiers, Ltd., sent to the plaintiffs a copy of the letter which they had received from the Railway Company and asked for instructions.

On the same date Messrs. Deoji Shivji & Co., the plaintiffs in the second suit, wrote to the Railway Company's agent at Lahore the following letter :—

P.O. Jharia

(Manbhum).

Dated the 26th April, 1929.

Devji Shivji and Co.,

Colliery Agents.

Best Bengal Coal Suppliers and Contractors.

The Agent,

North-Western Railway, Lahore.

DEAR SIR,

Pathardihi to Doaba Bagdigi Slack Wagon no. 14714 Con-Sikri Bros.

With reference to your letter no. 208/P/CC/29 of the 15th inst. to Messrs. Sikri Bros., Lahore, please note that the wagon was misdespatched to Doaba and hence we had to hand over the R/R to Messrs. Punjab United Coal Co., who state that on account of heavy wharfage occurred they could not take delivery.

We shall thank you if you will please instruct the Station Master, Doaba, to deliver the consignment free of wharfage so that the delivery may be effected and thanking you in anticipation.

Yours faithfully,

Deoji Shivji and Co.

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Negotiations by the Punjab United Coal Company for delivery free of wharfage charges came to nothing.

There was no local newspaper at Doaba, so on the 27th June, 1929, there was inserted in the Civil and Military Gazette which was published at Lahore a notice in the following terms :—

NORTH-WESTERN RAILWAY.

SALE OF UNCLAIMED PROPERTY.

Notice is hereby given that unless the undermentioned consignments lying undelivered are removed on payment of all charges due before the 16th July, 1929, they will be sold by public auction and the sale proceeds disposed of in terms of sections 55 and 56 of the Indian Railways Act IX of 1890.

Then followed a list of 21 consignments which had been sent from various stations to other stations: giving in each case the numbers of the invoice and the railway receipt, the date, the number of the wagon, the names of the sender and of the consignee.

The consignment in question was one of the items: the information relating thereto was that it had been sent from Pathardih to Doaba by Villiers Co. to Sikri Brothers on the 18th March, 1929: the numbers of the invoice, railway receipt and the wagon were given.

It is to be noted that in the abovementioned notice there was no information given as to the nature of the consignments, or of the time or place of the public auction referred to in the notice. It appears that the notice of the proposed sale was proclaimed locally at Doaba and a copy thereof was posted on the station notice board.

Delivery of the wagon of coal was not taken, and the station master at Doaba under instructions from the chief commercial manager of the Railway Company endeavoured to sell the coal for a sum which would be at least sufficient to cover the freight charges

due on the consignment. The result of the station master's efforts was that the highest offer for the coal was Rs. 40, which the abovementioned manager refused to accept. The station master was then directed by the manager to send the wagon to Mogalpura: this was done and the wagon arrived at Mogalpura, about the 18th August, 1929. At Mogalpura there was "a sale proclamation", as it was called, in the Bazaar and notice of the proposed sale was placed on the notice board at the station. Certain persons made offers to the station master at Mogalpura and eventually the sum of Rs. 205, which was the highest offer, was accepted by the chief commercial manager of the Railway Company and the coal was sold for that price.

Notice of the sale was sent by the Railway Company to Messrs. Villiers, Ltd., in a letter, dated the 15th September, 1930, in the following terms:—

To

The Manager,
Messrs. Villiers Limited,
Bagdigi Colliery, post Jharia.

Pathardihi to Doaba Jun (?).

No. one of 10-3-29 Wg. no. 14714.

The above consignment having been sold for Rs. 205 a sum of Rs. 1,170-4-0 is still due to the Railway on account of freight, wharfage and advertisement charges, *vide* details below:—

	Rs.	a.	p.
Invoiced freight	328	4	0
Sale proceeds	205	0	0
Loss in freight	123	4	0
Demurrage	—		
Wharfage	1,044	0	0
Advertisement charges	3	0	0
Total ...	1,170	4	0

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SIR, LANCELOT SANDERSON.

This is to advise you that I am agreeable, strictly without prejudice to our claim for the entire amount, to forego amount of wharfage and shall look to you to make good the loss in freight Rs. 123-4-0 and the out-of-pocket advertisement cost, viz., Rs. 3. (Total Rs. 126-4-0) if the consignees do not pay.

Please acknowledge.

Yours faithfully,

(Sd.) .....

Offg. Distt. Traffic Manager, Coal.

(Sd.) Illegible, 18-9-30.

Messrs. Villiers, Ltd., paid the sum of Rs. 126-4-0 to the Railway Company, and subsequently recovered the amount so paid from the plaintiffs. That sum was an item in the total amount claimed by the plaintiffs against the Secretary of State, viz., Rs. 256-13-6 as damages for the alleged wrongful conversion of the coal by the Railway Company.

It was contended on behalf of the appellant, the Secretary of State, that the abovementioned acts of the Railway Company constituted a compliance with the provisions of sections 55 and 56 of the Indian Railways Act and that consequently the Railway Company was not liable to the plaintiffs for any compensation or damages in respect of the sale of the coal.

This was the only point raised for their Lordships' consideration. It was argued that as there was no local newspaper at Doaba or Mogalpura, and as the Governor-General in Council had not prescribed any manner for the publication of the notice referred to in section 55, the Railway Company had taken all such steps as could reasonably be required to give notice of the intended sale by public auction. It is not necessary to consider that part of the case in any detail, for in their Lordships' opinion the first question to be considered and decided is whether there was in fact any public auction of the coal. It was contended on behalf of the Secretary of State that there was such a public auction.

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In their Lordships' opinion it is clear that whether the right of the Railway Company to sell the coal arose by reason of section 55 (*2*) or by reason of section 56 (*2*) the sale should have been by public auction and in no other way. It is true that in section 56 (*2*) it is provided that the Railway Company is to "sell the goods as nearly as may be under the provisions of the last foregoing section," but no suggestion has been made that there were any facts in this case which would prevent the Railway Company from selling by means of a public auction in the event of the Company putting in force the right to sell given to the Railway Company by section 56 (*2*).

There is no definition in the Act of the words "public auction" and their Lordships are of opinion that there can be no doubt that they must bear the meaning which is ordinarily given to them in the English language.

The words mean a public sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder.

This involves the auction being held in public, all members of the public having a right to attend, and a valuable element being the competition between the persons who are openly bidding for the subject matter of the sale. This is of importance not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price.

Their Lordships are of opinion that in this case there was no public auction of the coal in question.

Notice of the intended sale was given in the manner already mentioned, by proclamation and notice on the board at the station, and some offers were sent to the station master at Mogalpura which

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were forwarded by him to his superior officer who directed him to accept the offer of Rs. 205 which was in fact the highest.

But there was no public auction in the ordinary meaning of the words: there was no sale in public, there was no opportunity for competitive bidding: in fact, what was done bore no resemblance to a "public auction".

This conclusion is sufficient to dispose of the appeal, for the Railway Company did not sell the coal in the manner prescribed by the abovementioned sections, and therefore the Railway Company cannot rely on the protection given by the Act.

As already stated the question of the sufficiency of the notice was referred to in the course of the agrument, and while their Lordships, in view of the conclusion already mentioned, do not consider it necessary to give any decision on that part of the case, they are of opinion that it is difficult to see how a notice of an intention to sell at a public auction can be sufficient or effective, unless it specifies the time and place of the proposed public auction, the nature of the goods intended to be sold and all other particulars necessary to enable the members of the public to appreciate what it is which it is intended to put up for sale at the public auction.

Their Lordships were informed that the facts relating to the second appeal were not exactly the same as in the first appeal, but that they were similar to those in the first appeal in all material respects, and that the decision in respect of the first would govern the second appeal. Their Lordships, therefore, are of opinion, that the two appeals should be dismissed and they will humbly advise His Majesty accordingly.

Solicitor for the appellants: *The Solicitor, India Office.*

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J.C.*
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November, 19.

THE SECRETARY OF STATE

v.

THE KUCHWAR LIME AND STONE COMPANY, LTD.

(On Appeal from the High Court at Patna.)

Contract—Construction—Transfer of interest in immoveable property.

A contract under which the lessees of a quarry appoint a person as their local agent with liberty to quarry, burn, manufacture and sell lime and stone from the lands on his own account without being liable to the lessees for any of the profits or loss thereof is not a sub-lease but is a transfer of an interest in immovable property and, where the interest transferred is of the value of more than Rs. 100, registration is necessary to make it effective.

Horsey Estate, Limited v. *Steiger*(1), referred to.

Appeal (no. 24 of 1937) from a decree of the High Court (February 7, 1936) which reversed a decree of the Subordinate Judge of Arrah (March 7, 1935).

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

1937. October, 25, 26. *Morton, K. C., and Wallach,* for the appellant: The acts of the lessees clearly amounted to an under-letting, if not to a transfer. Bose was clearly not an agent. The term 'agent' may have been employed with the intention of avoiding any question of forfeiture. The clause for the payment of royalties to the vendors suggests a sub-lease. So does clause 5. Bose entered into possession of the quarries and worked them. The rights of the Company became vested in Bose. The substance of the agreement must be looked at. 'Agent' is defined in section 182 of the Contract Act. Bose

*Present: Lord Alness, Sir Lancelot Sanderson and Sir George Lowndes.

(1) (1898) 2 Q. B. 259.

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was not a person who was to do an act for another. Under clause 7 he was working for his own benefit. The court looks at what a person has to do under an agreement to ascertain what he is by whatever name he is called. The High Court failed to give effect to the four things the lessees were prohibited from doing, (*a*) Assign, (*b*) Transfer of any right under the lease, (*c*) Transfer any right, (*d*) Sublet; (*b*) and (*c*) contemplate something which is not an assignment or under-letting. If the lessees have done any of these things, the lease is determined. The description of Bose as an agent is merely a misnomer and does not affect the question. Transfer is one of the widest terms that can be used.

[SIR GEORGE LOWNDES: Is it necessary to go beyond the Transfer of Property Act?]

Morton: The word is used in the lease without any technical meaning.

The acts of the Company coupled with delivery to Bose amount to under-letting or transfer of an interest. Lease is defined in section 105 of the Transfer of Property Act. The right to quarry is immovable property. That was transferred to Bose. The covenant was against under-letting all or any of the premises. One of the premises was the right to quarry. If there is transfer of a right in immovable property for a time, that is a lease. Immovable property is defined in the General Clauses Act, 1897, section 3(*25*). The right to quarry is a benefit arising out of the land within the definition. The definition in the Transfer of Property Act is a negative one and does not help in this case. Reference was made to *Glenwood Lumber Co.* v. *Phillips*(1). The document, read as a whole, is a sub-lease within the Transfer of Property Act. But, whether a sub-lease or not, it is a transfer of a right under the lease. Before the

(1) (1904) A. C. 405, 408.

document was executed the Company had the right to quarry. After execution Bose had it and the Company could not turn him out.

As regards the necessity for registration, here the right transferred is not of the value of more than Rs. 100. Bose had to bear the loss, if any. The sum mentioned is a sum which the vendors hold as stakeholders. It is a deposit to secure sale. If the sale goes on, it will be credited as part payment. The document is a contract to sell subject to certain conditions and an agreement with Bose that he shall work the quarries. It does not create an interest within section 54(*e*), Transfer of Property Act. There is nothing in section 107 which requires registration of such a document as this. This is a contract for sale which does not require registration. There may be a sale of a lease and this is a contract to sell a lease subject to conditions. Lease does not come within the first part of section 107. So long as there is delivery of possession a lease can be made by oral agreement and, having a lease, it might be reduced to writing. It would be an anomalous position if one could have a good oral lease and that the lease would be bad if reduced to writing. That position is fortified by section 18(*c*), Registration Act. The conclusion is that one can have a lease that is not registered so long as one has possession. If section 107 of the Transfer of Property Act provides only one way in which one can have an unregistered lease, it is inconsistent with section 18(*c*), Registration Act. This is a non-testamentary instrument which creates a right or interest and that interest is not worth Rs. 100. In fact nothing was paid for it.

As regards damages no evidence was given and that amounts to abandonment.

It was also submitted that the suit was not maintainable on the ground that the plaintiffs were not in possession and, therefore, could not sue for a mere declaration.

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In the course of summing up *Horsey Estates, Ltd.*, v. *Steiger*(1) was referred to.

Pugh, K. C. for the respondents: [The Board intimated that it did not wish to hear him on the question of the mantainability of the suit]. On the true construction of the agreement, Bose was an agent, remunerated in a certain though unusual way. One can hold possession by an agent.

[LORD ALNESS: It is a novel concept that an agent should bear the loss and take the profit.]

Pugh referred to the definition of agent in the Contract Act. Bose never got possession and the Company never lost it—clause 9 of the contract. It is the substance and not the form of the contract that must be looked at—*Inland Revenue Commissioners*(2). Here both the Company and Bose wished to avoid forfeiture. Their intention as shown in the deed was that Bose should hold as agent and that the Company should not part with possession. There was no transfer and no under-lease. There is nothing in the document to make Bose a tenant under the Company.

As regards registration, Mulla's Transfer of Property Act was referred to. Under the second part of section 107, a lease can be made only in the two ways there stated. There is no third way. If the document is a lease, it requires registration *Ningappa Marbasappa* v. *Gyanaji*(3).

It was not suggested till the argument here that the value of the interest transferred was not more than Rs. 100. The royalties paid by Bose for the 3rd quarter was Rs. 743-13-9 for lime quarried in two months. The value of the land is the amount of the royalty that can be obtained from it: *Livingstone*

(1) (1898) 2 Q. B. 259.
(2) (1936) A. C. 1, 19, 24, 30, 31.
(3) (1926) I. L. R. 51 Bom. 231.

v. *Rowyards Coal Co.*(1). It is the value of the concession that has to be considered. It is immaterial whether Bose made a profit or not. The statement in the written statement of the defendant and stamp on the lease to the Company show the value and it is what the Company got from the Government it is now suggested has been transferred. It is further submitted that Government has waived the forfeiture, if any, by receipt of the sums paid. Forfeiture is not complete without notice. There must be notice of intention to forfeit. The notice here purports to be retrospective and is invalid—section 111(*8*), Transfer of Property Act, was referred to.

As regards damages, it was agreed that this should be reserved. There was a joint petition which is not on the record. Arguments were heard on the documents and the suit was dismissed. In the decree of the High Court the case is referred for an inquiry into damages and Government has applied for a stay.

[LORD ALNESS: The Subordinate Judge says in his judgment that no evidence was given on the 2nd issue. That does not show damagès was reserved.]

Pugh: Under section 2 of the Code of Civil Procedure a decree may be preliminary or final. The Subordinate Judge passed a final decree dismissing the suit on a point of law. If he had decided the other way, he would have had to decide whether he would pass a preliminary or a final decree—Order XX. The High Court passed a preliminary decree. Stamp duty was paid in both Courts and the question of damages was never intentionally abandoned.

McDonnell, following: The court-fees paid shows the appeal was valued at Rs. 11,500, the value of the suit for a declaration and damages. The damages were valued at Rs. 11,000. The valuation in appeal shows damages was not abandoned.

(1) (1880) 5 A. C. 25.

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Morton, K. C., in reply: The Company may have intended to avoid a forfeiture, but the question is what was in fact the effect of the deed. Was Bose merely appointed as an agent as defined in the Contract Act? He had none of the attributes of an agent under sections 211—215.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE LOWNDES.—The principal question in this appeal is whether two quarrying leases granted by the appellant to the respondents have been forfeited by reason of the breach of a covenant contained in each against assignment.

The quarry lands were situated in the Shahabad district of the then Province of Bihar and Orissa; the leases were dated the 1st April, 1928, and were for terms of 20 years. The covenant against assignment was in similar terms in each, and provided that neither the lessee (the respondent company) nor any person claiming through or under it should assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises comprised in such lease without the assent of the Board of Revenue of Bihar and Orissa first being obtained, and that the penalty for infraction of this condition should be the forfeiture of the lease.

In January, 1933, the respondent company went into liquidation, and on the 30th September of that year the company, through its liquidators, contracted with one Subodh Gopal Bose for the sale to him of the leasehold rights under both leases for the sum of 6,000 rupees, but subject to the sanction of the Board of Revenue: the agreement to stand cancelled if such sanction was not obtained. It was also provided that in the meantime Bose should act as the agent for the respondents in respect of the leasehold rights in the quarries; that he should pay to the company the

royalties and any other sums payable by it to the Government; and that he should be entitled to work the quarries for his own profit.

The contract was in writing but was not registered. Clauses 4, 6, 7, 8 and 9 upon which the question stated above mainly depends were as follows:—

"4. It is stipulated in the leases in respect of the lands set out in the schedule that the lessees shall not assign the leases or transfer any right or interest thereunder without the assent of the Board of Revenue first obtained. The vendors shall apply for such assent, but shall not in any way be responsible and this agreement for transfer of the vendors' leasehold right to the lands set out in the schedule hereto shall stand cancelled if such assent be not given by the said Board of Revenue.

"6. The purchaser shall be appointed local agent of the vendors in respect of the leasehold right of the vendors to the lands set out in the schedule hereto and continue to act as such until the transfer of the leasehold right be effected or until it is finally decided that such transfer cannot be made on and after the purchaser's furnishing guarantee to the vendors of regular payment of all royalties and other dues on despatches from the Murli Centre or otherwise in respect of the lands set out in the schedule hereto and on and after his depositing with the Liquidators a sum of Rs. 4,000 (Rupees four thousand) in cash by way of security for such payment, such deposit bearing interest at the rate of five per cent. per annum from the date of deposit till the transfer of the said leasehold rights or final decision that the leases should not be transferred.

"7. Subject to the purchaser's furnishing guarantee and depositing the said sum of Rs. 4,000 (Rupees four thousand) as aforesaid the purchaser shall be at liberty to quarry, burn, manufacture and sell lime and stone from the said lands on his own account without being liable to the vendors for any of the profit or loss thereof.

"8. During the term of his local agency the purchaser shall—

"(a) submit to the vendors plans and details of working and monthly statement of account relating to quarrying, despatching and selling lime and stone from the said lands and regularly pay to the vendors the royalties and other dues if any payable to Government,

"(b) bear and pay all expenses of working the quarries, manufacturing, despatching and selling lime and stone and of otherwise using the said lands and shall perform and observe the covenants and conditions contained in the said leases under which the said lands are held,

"(c) indemnify the vendors against any loss or damage which the vendors may sustain by reason of the purchaser's working the quarries or burning, manufacturing, despatching and selling lime and stone from the said lands or Murli Centre,

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"9. If the purchaser do not take any appointment as local agent of the vendors as provided in clause 6 aforesaid he shall not do any work in the quarries of the lands set out in the schedule or burn or manufacture lime thereon nor despatch lime and stone from the said Murli Centre until the transfer of the said leases has been accomplished."

Bose entered into possession of and worked the quarries upon the terms of this agreement, but the Board of Revenue refused their assent to the sale, and on the 18th July, 1934, they declared the leases to be forfeited on the ground that the respondent company had transferred or sublet the rights and interests under the lease to Bose in breach of the covenants above referred to.

On the 24th September, the respondent company instituted the suit out of which the appeal arises, in the Court of the Subordinate Judge of Shahabad claiming a declaration that the leases had not been validly forfeited, an injunction and Rs. 11,000 damages.

A written statement of defence was put in by the appellant justifying the forfeiture, and the case went to trial before the Subordinate Judge upon the following two issues only—

"1. Whether the plaintiff has under the terms of the indenture, dated 1st April, 1928, forfeited the lease by reason of the transaction between the plaintiff and Subodh Gopal Bose under the indenture, dated 30th September, 1933.

"2. Is the plaintiff entitled to any damage? If so, what amount?"

The Subordinate Judge delivered his judgment on the 7th March, 1936. He held that the agreement of 30th September, 1933, though purporting to appoint Bose to work the quarries as agent of the respondent company, was in substance and reality a sub-lease to him of the quarrying rights, and being without the consent of the Board of Revenue, was in breach of the covenants contained in the leases, and that they had therefore been duly forfeited. He accordingly passed a decree dismissing the suit with costs.

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The respondent company appealed to the High Court at Patna. The appeal was heard by Khaja Mohamad Noor and Varma, JJ., who delivered their judgment on 7th February, 1936. On the question of forfeiture the learned Judges disagreed with the Subordinate Judge, holding that the agreement with Bose did not amount to either a sub-lease or a transfer within the covenants in question. They were also of opinion that if the agreement could be so construed it would be void for want of registration. They accordingly allowed the appeal and granted the respondent company the declaration and injunction which it claimed. They also dealt with the question of damages to which their Lordships will revert later on in this judgment.

From this decision the Secretary of State appeals to His Majesty in Council seeking to reinstate the decree of the Subordinate Judge for the dismissal of the suit.

Before the Board a preliminary point was taken by the appellant that the suit was not maintainable on the ground that the respondent company was out of possession at the date of filing their plaint. This question had not been raised in the trial Court and the High Court held that the question, depending as it obviously did upon facts for which evidence would be necessary, was not open before them. On this their Lordships are in full agreement with the High Court and have not deemed it necessary to hear the respondents' counsel with respect to it.

The main contention for the appellant has been that the agreement was in reality a sub-lease to Bose. The High Court coming to the contrary conclusion had relied on the judgment of Lord Russell, C.J., in the case of *Horsey Estate, Limited* v. *Steiger*(1) and their Lordships think that the passage cited by the learned Judges is directly in point. There is, in their

(1) (1898) 2 Q. B. 259.

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opinion, nothing in the agreement which points to a relation of landlord and tenant between the parties. Bose was to be appointed the local agent of the respondent company and his right to work the quarries was dependent on his accepting this position. The Subordinate Judge thought the agency was a mere cloak to disguise a sub-tenancy, but their Lordships do not think that it should be so regarded. There may have been many ways in which Bose could have served the Company as their agent, e.g. in respect of the care of buildings, plant, material, etc. No doubt he was not to be their agent in working the stone and manufacturing the lime and selling it, all of which was to be done on his own account and at his own risk. But it is not unusual to have an agency coupled with an interest and their Lordships think that this was the real effect of the agreement in the present case. There is, however, nothing in the document to suggest that the interest which Bose took was that of a sub-lessee. For these reasons their Lordships agree with the learned Judges of the High Court that there was no sub-letting by the respondent company.

Their Lordships are, however, unable to agree with the High Court in their view that " the transaction does not amount to a transfer of any interest in the leasehold property ". They think it clear that pending the completion of the proposed sale the agreement purported to invest Bose with a definite interest in the quarries. He was entitled under it to dig the stone, convert it and sell the resultant product on his own account and this, in their Lordships' opinion, if it was an effective transfer, would be a breach of the covenants in the leases to the company and would entitle the appellant to forfeit them. The only question their Lordships think is whether it was an *effective* transfer. The judgment of the High Court continues, after the sentence quoted above, " assuming that it does, it is inoperative for want of registration of the document. Being an interest

created in an immovable property of more than Rs. 100 the document was compulsorily registrable under section 17 of the Indian Registration Act and not having been registered has not affected the property under section 49 of that Act." Reading this sentence as meaning that the interest transferred was of the value of more than Rs. 100, as their Lordships think they must do, and assuming it to be correct, Counsel for the appellant does not dispute the accuracy of the dictum, nor does he contend that if it was merely an attempted but wholly ineffective transfer there would be a breach of the covenants. His only answer is that there is no proof that the interest was, in fact, of the value of more than Rs. 100, and if not, registration would be unnecessary and the transfer would be effective. Their Lordships do not think that it is open now to the appellant to raise this objection. There was no contention before the Subordinate Judge as to registration or as to the value of the interest transferred. But it would clearly have been open to the appellant to take the point before the High Court if the value had really been in doubt. The High Court seem to have assumed that the value was over Rs. 100, but no protest or objection was made on the Secretary of State's behalf either to the Court or in the application for leave to appeal from their judgment. Nor indeed is the point raised in the appellant's printed case before the Board. If there had been any substance in the objection, the value could obviously have been determined either by the High Court or by a reference back to the Subordinate Judge. But their Lordships have little doubt that it cannot have been seriously disputed in India that the value of the concession was worth more than Rs. 100. The appellant's contention is obviously one dependent upon proof of facts, and not merely a question of law, and their Lordships must hold therefore that it is not now open to him.

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It only remains to deal with the question of damages. As already stated the respondent company by their plaint claimed Rs. 11,000 damages and at the trial an issue was raised as to this in the ordinary form. In the judgment of the Subordinate Judge the issue is dealt with in the following words:—

"In view of my findings on the issue no. 1 the plaintiff is not entitled to any damage or to any other relief in the suit. In fact no evidence on the question of damage was adduced on behalf of the plaintiff."

The High Court nevertheless affirmed the respondent company's right to damages and ordered the amount to be ascertained by further proceedings in the lower Court; the judgment contains the following passage:—

"The next question urged by the learned Government Pleader was that the plaintiff was not entitled to any damages for interference with the leases as it had abandoned the claim for them. I do not find any abandonment. In fact an issue about the damages was raised, but no evidence was given as parties very rightly wanted the determination of the main issue. When dealing with the question of damages the learned Subordinate Judge has stated that the plaintiff adduced no evidence. The remark is not justified. Both parties seem to have agreed that no oral evidence should be adduced and the case should be decided on the pleadings and documents."

Their Lordships can find no justification for this conclusion or for the learned Judges' criticism of the Subordinate Judge. The order sheet of the proceedings in the trial Court is on the record of the appeal and it contains nothing to suggest that the trial of the issue as to damages was postponed, or that there was any agreement between the parties to that effect. Nor can Counsel for the respondent company throw any further light on the matter. In their Lordships' opinion the proper inference is that the claim for damages was abandoned, and they think that the decision of the High Court on this point was erroneous.

For the reasons given above their Lordships think that the decree of the High Court, dated 7th February 1936, should be affirmed only in so far as it granted

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the respondent company the declaration and injunction prayed in the plaint and that the claim for damages should be disallowed. In their Lordships' opinion the respondent company was entitled to its costs against the appellant in the first Court and to half its costs in the appeal to the High Court, and the appellant to half his costs before the Board against the respondent company; they will be set off in the usual way.

Their Lordships will humbly advise His Majesty to this effect.

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitors for the respondent: *Sanderson Lee & Co.*

APPELLATE CIVIL.

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

JUGESHWAR SINGH

v.

RIJHAN SINGH.*

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November, 26.

Partition suit—appeal against final decree is like a second appeal—question of law and principle can only be considered —practice.

A first appeal to the High Court from the final decree of the Subordinate Judge, in a partition suit, is really in the nature of a second appeal in which only questions of law and principle can be considered. It is impossible for the High Court to go down to the area in question, inspect the land, hear the various objections and review the decision of the commissioner on facts. The power to review the decision of the commissioner on facts is for the Subordinate Judge and his view of the facts ought to be final as a first appellate decision on facts.

* Appeal from Original Decree no. 161 of 1934, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Darbhanga, dated the 13th August, 1934.

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Appeal by the defendants.

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

Janak Kishore, for the appellants.

S. S. Bose (with him *B. N. Rai* and *R. Misra*), for the respondents.

COURTNEY TERRELL, C.J.—This is a first appeal against the final decree in a partition suit, the appellants objecting to the takhtas which have been allotted to them by the order of the Subordinate Judge. Having regard to the frequency with which appeals from final decrees come to us it is desirable that the principles upon which such appeals must be heard should be restated with emphasis. The Subordinate Judge when he makes the final decree considers, first, the report of the commissioner; the commissioner has been to the spot, has heard the contentions of the parties and the evidence which the parties produced before him and then to the best of his ability directed the partition by metes and bounds, taking into consideration the element of compactness, the element of equality, the nature of the land to be divided and many other circumstances which he must take into account and then submits his report to the Subordinate Judge. It is then open to any party, who is dissatisfied with the takhta allotted, to ask the Subordinate Judge to disregard the report of the commissioner; and the Subordinate Judge again reviews the facts and corrects the award of the commissioner. Therefore, a first appeal to this Court from the order of the Subordinate Judge is really in the nature of a second appeal in which only questions of law and principle can be considered. It is quite impossible for this Court to go down to the area in question, inspect the land, hear various objectors and in fact review the decision of the commissioner

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on fact. The power to review the decision of the commissioner on the facts is a matter for the Subordniate Judge and his view of the facts ought to be final as a first appellate decision on fact. The High Court should only interfere when it is shown that the judge in his decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree, and I think much money and trouble would be saved to parties to partition suits if they realised that principle and they would in the majority of cases refrain from coming before the High Court in an attempt to upset the allocation of the takhtas. In this particular case before us the appellants notwithstanding that they were ably represented could not indicate that any mistake in principle was made by the Subordinate Judge and the learned Advocate on their behalf was driven to an attempt to induce us to review the findings of fact which had been arrived at before the commissioner and to re-divide certain parts of the land and award to the parties takhtas other than those they have already received. In this attempt he was bound to fail, and the appeal must accordingly be dismissed with costs, which we assess at five gold mohurs to be divided equally between the contesting parties, that is to say, half to the party represented by Mr. Bose and half to the party represented by Messrs. B. N. Rai and R. Misra.

CHATTERJI, J.—I agree.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

1937.

October, 22.

Before Wort and Varma, JJ.

MIR WAJID ALI

v.

FAGOO MANDAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 9 *and* 11—*Order XLIII, rule* 1 (*k*)—*order refusing to set aside abatement of an appeal, whether appealable.*

Order XLIII, rule 1 (*k*), read along with Order XXII, rule 11, makes it clear that an order refusing to set aside an abatement of appeal is appealable.

Hari Saran Singh v. *Saiyid Mohammad Eradat Hussain*(1) followed.

Akkas Mia v. *Abdul Aziz Bepari*(2), dissented from.

Appeals by the defendant.

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

M. N. Pal and *K. P. Upadheya*, for the appellant.

R. S. Chatterji and *R. Misra*, for the respondents.

VARMA, J.—This is an appeal against the order of the Subordinate Judge of Purnea who dismissed the appeal before him on the ground that the appeal had abated.

It appears that the appeal before the Subordinate Judge was filed by Mir Wajid Ali, the present appellant, and Karu Mandal happened to be one of the respondents and that he died on the 4th January,

* Appeal from Original Order no. 14 of 1936 from an order of Maulavi Saiyid Abul Fath, Subordinate Judge of Purnea, dated the 20th September, 1935, and appeal from appellate decree no. 955 of 1936, from a decision of Maulavi S. A. Fath, Subordinate Judge of Purnea, dated the 20th September, 1935, affirming a decision of Babu Tribhuvan Nath Singh, Additional Munsif, Purnea, dated the 30th August, 1932.

(1) (1924) 85 Ind. Cas. 1010.

(2) (1929) 49 Cal. L. J. 538.

1933. But before his death notice of the appeal was served on him on the 28th November, 1932, and he appeared in court on the 16th December, 1932. The formal information of his death was given by his brother on the 25th July, 1933, and on the 1st August, 1933, a petition was filed by the present appellant for setting aside the abatement. The lower appellate court has held that the reasons given by the appellant for his inability to come before the court earlier are not satisfactory. He has disbelieved his evidence and come to the conclusion that he must have known the date of death of Karu Mandal much earlier than the appellant professes to do.

The case for the appellant was that he was informed that his father-in-law was seriously ill and that he went to see him at the village Sanha in the subdivision of Beguserai in the district of Monghyr. He also says that he usually lives at Sahidganj, a place which is at a distance of about four miles from the residence of Karu Mandal, the name of the village being Barhari. The learned Judge has disbelieved the evidence of the appellant on the ground that from the records of the case it appears that he appeared in the Purnea court on the 4th March, 1933, on the 1st April, 1933, and on the 8th May, 1933. Even accepting that he was at Purnea on the dates mentioned by the court below, it is not difficult to imagine that a man could come to Purnea without knowing all that was going on in the house of Karu Mandal at Barhari. Moreover, when the opposite party came out with a story that it was not only that Karu Mandal was a very big man in the locality but that the appellant was actually invited to his sradh, the lower appellate court has clearly come to the conclusion that this story is rather far-fetched. Moreover, when the appellant had already succeeded in serving the notice of the appeal on Karu Mandal before his death he had done all that was expected of him to do in connection with the appeal. It would

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not be reasonable to expect that he would be inquiring about the health of various respondents from day to day and to find out as to how they were getting on. The lower appellate court has also held that as Karu was suffering from phthisis the appellant ought to have known that he was in a weak state of health and any day he might pass away. But the learned Judge does not say as to what type of phthisis he was suffering from or that his condition was so bad that there was imminent danger of Karu Mandal passing away. In this connection I would like to refer to two decisions of this Court in which it has been pointed out as to what the responsibilities of an appellant are in the case of an appeal about finding out the condition of the respondent. The first case is *Mir Nanoo* v. *Muni Lal*(1) where a Division Bench of this Court remarked:

"The most that can be said on behalf of the respondent is that in the circumstances the appellant should have known of the death of the respondent. But it has been held on more than one occasion that an appellant having served notice on the respondent is not bound to inquire from day to day as to the state of the health of the respondent or whether he is dead or alive".

There is an earlier decision of this Court in *Sadhu Saran Pandey* v. *Nand Kumar Singh*(2) where it was held:

"No doubt the appellant is required to be diligent in prosecuting his appeal; but after he gets the notice served upon the respondent he is not required to watch the movements of the respondent and as to whether he is dead or alive".

In this view of the matter I am of opinion that the lower court has erred in holding that it was proved that the appellant knew that Karu Mandal

(1) (1929) 118 Ind. Cas. 826.
(2) (1925) 7 Pat. L. T. 746.

was dead long before the notice of his death was given to the court by his brother.

A preliminary objection was taken by Mr. R. S. Chatterji for the respondents to the effect that no appeal lay against an order refusing to set aside an abatement. He refers to Order XLIII, rule 1 (*k*), which runs as follows:—

"an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit."

Mr. Chatterji emphasises the word "suit" and says that it does not apply to an appeal. In support of this contention he has referred to a decision of the Calcutta High Court in *Akkas Mia* v. *Abdul Aziz Bepari*(1), where their Lordships of the Calcutta High Court observed:—

"There is nothing in Order XLIII, rule 1 (*k*), which enables us to apply the word 'suit' to an appeal".

But looking at clause (*k*) which I have just now reproduced, we find a reference to Order XXII, rule 9. When we refer to Order XXII we find that rule 11 lays down that

"In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

If rule 11 applies to rule 9, I fail to see, how we can read Order XLIII, rule 1 (*k*), without reference to rule 11. I need not pursue the matter any further; for it appears that in a case in this Court, *Hari Saran Singh* v. *Saiyid Mohammad Eradat Hussain*(2) it was held that an appeal lay from an order refusing to set aside an abatement. No case of this Court has been cited before us which has in any way differed from the decision in *Hari Saran Singh* v. *Saiyid Mohammad Eradat Hussain*(2) on this point. For the reasons

(1) (1929) 49 Cal. L. J. 538.
(2) (1924) 85 Ind. Cas. 1010.

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that I have given above and the fact that this seems to be the acknowledged opinion in this Court, I hold that this objection cannot prevail.

I would, therefore, allow these appeals with costs against respondents first party.

WORT, J.—I entirely agree. I should like to add one word on the question of preliminary objection to make my remarks with the judgment just pronounced quite definite. In my opinion when Order XLIII, rule 1, clause (*k*), of the Code of Civil Procedure is read with reference to Order XXII, rule 9, it seems to me, with great respect to the decision of the learned Judges of the Calcutta High Court in *Akkas Mia* v. *Abdul Aziz Bepari*(1), quite obvious that the construction which the Code itself places on Order XXII, rule 9, cannot be disregarded in construing Order XLIII, rule 1, clause (*k*). Otherwise, quite an anomalous and, if I may say so, ridiculous position would arise. It is admitted, and indeed the Code provides that there is an appeal from an order refusing to set aside an abatement in a suit. How can it be said on the parity reasoning that there is no appeal in a similar order in an appeal ? See what would happen. If there was no appeal from an order refusing to set aside an abatement, nothing more can be done; and the Legislature has given a right of appeal in that particular case. If no right of appeal exists in an appeal, then the same result would happen, and no further proceeding could be taken in that appeal. Imagine what would happen in this case. If, as Mr. Chatterji contends, there is no right of appeal because the matter can be raised when the appeal comes before the court on merits, the first point he would take will be that the appeal has abated; and if we hold that the appeal has abated, there is nothing to be done. That seems to me to be a reason for, if I may respectfully say so, disagreeing with the

(1) (1929) 49 Cal. L. J. 538.

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learned Judges of the Calcutta High Court in the conclusion which they have arrived on this point. It seems to me consonant with the view of Mr. Justice Kulwant Sahay in *Hari Saran Singh* v. *Saiyid Mohammad Eradat Hussain*(1), where it appears to have been admitted by the Bar that so long as it was an application for refusing to set aside an abatement an appeal would lie. For these reasons expressed in my own way, I entirely agree with the judgment of my learned brother. I agree also that the appeals should be allowed with costs with the result that the abatement will be set aside and the heirs of respondent no. 3 will be substituted as parties to the appeal in the Court below. There will be one set of costs. The costs will be paid by the respondents first party.

J. K.

Appeals allowed.

APPELLATE CIVIL.

1937.

October, 29.

Before Wort and Varma, JJ.

BODANAND RAI

v.

NABU KUMAR SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXVIII, rule* 5—*application for attachment before judgment —ingredients necessary for an order for attachment before judgment.*

Before the provisions of Order XXXVIII, rule 5, can come into play the court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the object of obstructing the plaintiff, if he won the suit, in executing the

* Appeal from Original Order no. 11 of 1937, from an order of Babu Raghunandan Prasad, Subordinate Judge of Purnea, dated the 14th of December, 1936.

(1) (1924) 85 Ind. Cas. 1010.

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decree, and that mere allegations were of no avail but the facts must be positively proved by satisfactory evidence.

Chandrika Prasad Singh v. *Hira Lal*(1), *Sardar Nowroji Pudamji* v. *The Deccan Bank, Limited*(2), *Durgdas Das* v. *Nalinchandra Nandan*(3) *and Badri Prasad* v. *Chokhe Lal*(4), referred to.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Varma, J.

Hareshwar Prasad and *P. Jha*, for the appellants.

Nitai Chandra Ghosh and *Sudhir Kumar Ghose*, for the respondents.

VARMA, J.—This appeal is directed against an order of the learned Subordinate Judge of Purnea, dated the 14th of December, 1936, under Order XXXVIII, rule 6, of the Code of Civil Procedure, attaching before judgment the properties of the defendants. The plaintiff instituted a suit on the basis of a hand-note executed by defendant no. 1 on the 26th of February, 1934, for a sum of Rs. 16,300. The plaint in the suit was filed on the 18th of July, 1936, and the petition for attachment before judgment was made on the same day stating that certain transfers had been made by defendant no. 1 and that the plaintiff had heard from Ramprasad Singh of Sapni that the defendant was prepared " to alienate through collusive sale and *benami rehan*, etc., his remaining properties in the names of his creatures ". Notices were served upon the defendants, evidence was gone into, and the learned Judge in the Court below has

(1) (1923) 5 Pat. L. T. 124.
(2) (1921) I. L. R. 45 Bom. 1256.
(3) (1934) I. L. R. 61 Cal. 814.
(4) (1926) I. L. R. 48 All. 510.

discussed the evidence adduced by both the parties. The learned Judge on the evidence of the witnesses has come to the conclusion that major portion of the properties has been transferred and says:

"For the purpose of disposing of the present petition, it has to be taken that the transactions are real"

and unless an attachment is made the plaintiff will not be able to realize his dues. He ultimately finds:

"There are sufficient circumstances in this case as above pointed out which would lead one to suspect that the defendants had an intention of disposing of their properties".

It is important in this connection to mention some of the transfers that had taken place. The transfers referred to in the evidence of the witnesses are—

(*i*) a sale deed, dated the 22nd of September 1935;

(*ii*) a rehan deed, dated the 27th of May 1936; and

(*iii*) another rehan deed, dated the 28th May 1936.

From the dates it will appear that all the transactions took place before the suit was instituted. At this stage I had better refer to Order XXXVIII, rule 5, of the Code of Civil Procedure to see the conditions that are to be satisfied before an attachment before judgment under rule 6 of that Order can be made. Rule 5 of Order XXXVIII, provides:

"(*1*) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(*a*) is about to dispose of the whole or any part of his property, or

(*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

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(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof."

If the defendants before us failed to satisfy the Court, then an order for attachment before judgment could be passed under Order XXXVIII, rule 6.

VARMA, J.

Now, in this case the evidence discloses that the three transfers mentioned above took place before the date of the suit. On the question as to what the future intention of the defendants was with regard to the alienation, there is only a statement in the affidavit which refers to an information received from Ram Prasad Singh that the defendant was going to transfer the property. The plaintiff in his evidence says that he learnt about the said transfers and about the intention of the defendants to transfer from one Ram Prasad Singh. He says—

"He spoke to my cousin Gogindra Nath Ghosh who in turn spoke to me. I sent for Ram Prasad and had it confirmed."

In cross-examination he says:

"Ram Prasad told me before suit, that the sale deed in favour of the wife of defendant no. 1 had already been executed and that the other transfers were going to be effected in course of 2 to 4 days. He said that the Rehan bonds were to be executed in the name of the man—relation of the defendants, but he did not give the name nor did I enquire about it. I enquired from him which properties had been transferred and which properties were going to be transferred. He said he did not know so much. I did not make enquiry in the registry office for I had no time to lose regard being had to the suspicion in my mind."

It is clear that the evidence on this point is vague. The plaintiff does not say what properties were going to be transferred, to whom they were going to be transferred, and under what circumstances. One of the important conditions that the alienation should take place or that the intention of the defendants should be to alienate the property after the suit is filed has not been satisfied, still less satisfied is the second condition which is that it must be with the object of obstructing the plaintiff from realizing his dues.

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In *Chandrika Prasad Singh* v. *Hira Lal*(1), it was held that the power under Order XXXVIII, rule 5, of the Code of Civil Procedure, should be exercised only when the Court is satisfied, not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. In *Sardar Nowroji Pudamji* v. *The Deccan Bank, Limited*(2) it was held that a mere agreement to sell property was not sufficient to prove intent to defraud; and similarly in *Durgadas Das* v. *Nalinchandra Nandan*(3), it was held that the Court must be thoroughly satisfied that the defendants had the intention of obstructing or delaying the execution of any decree, which might be passed against them, or, with such intent, were about to dispose of their property, and it was further emphasised that mere vague allegations of fraud were not sufficient. In the Allahabad High Court also in *Badri Prasad* v. *Chokhe Lal*(4) Walsh, J. said: "Cases in which either an attachment or an injunction ought to be issued before judgment are extremely rare. The plaintiff ought to be able to satisfy the Court of the practical certainty of his success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment."

Reading the provissions of Order XXXVIII, rule 5, of the Code of Civil Procedure I have no doubt in my mind that before the provisions of this rule would come into play, the Court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers

(1) (1923) 5 Pat. L. T. 124.
(2) (1921) I. L. R. 45 Bom. 1256.
(3) (1934) I. L. R. 61 Cal. 814.
(4) (1926) I. L. R. 48 All. 510.

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were with the object of obstructing the plaintiff, if he won the suit, in executing the decree; and that mere allegation to this effect were of no avail but the facts must be positively proved by satisfactory evidence.

Mr. Netai Chandra Ghosh, on behalf of the respondents, urges that the conduct of the parties before the institution of the suit can be taken into account for the purpose of coming to a conclusion whether the intention of the defendant was fraudulent or not. For this proposition he relies upon the decision in *Macgregor* v. *The Cawnpore Sugar Works, Limited*(1), where their Lordships of the Calcutta High Court held: "It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention". The previous transaction according to this decision may be referred to for the purposes of finding out the intention with which the subsequent transactions were going to be entered into. But that there must be a transaction subsequent to the filing of the suit is also clear from this decision.

In my opinion in view of the reasons that I have given, namely, that the Court below has not found all the circumstances under which Order XXXVIII, rules 5 and 6 of the Code of Civil Procedure comes into play, the order of the Court below should be set aside and the appeal allowed with costs.

WORT, J.—I agree.

J. K.

Appeal allowed.

(1) (1909) 11 Cal. L. J. 19.

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ARJUN RAUTARA v. MAHARAJA KRISHNA CHANDRA GAJAPATI NARAYAN DEO.

MANOHAR LALL, J.

being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in *Kamaraju* v. *Secretary of State for India in Council*(1), a decision which was given in 1888 and has been acted on in Madras ever since."

The critical words to notice, in these observations, are "when proceedings of this character reach the District Court". In my opinion, under the Orissa Tenancy Act proceedings for recovery of rent can only reach the District Court if they are above Rs. 100 in value, and it is only when proceedings reach the District Court then that Court is appealed to as one of the ordinary Civil Courts. It follows, therefore, that proceedings which are of a value below Rs. 100 are not proceedings in Courts which may be called the ordinary Civil Courts of the country; and, indeed, as I have shown above, those Courts are the Revenue Courts as defined in section 5 of the Civil Procedure Code.

For these reasons I would hold that this Court has jurisdiction to examine the correctness of the order passed by the Collector on the 10th of June, 1939, because the order was passed in a proceeding of which the value was over Rs. 100 and from which appeal lay to the District Judge and then to this Court if the requirements of Order XLII of the Code of Civil Procedure were satisfied.

S. A. K.

Rule discharged.

(1) (1888) I. L. R. 11 Mad. 209, F. B.

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KHETRAMONI DEBYA, *In re*

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.

Stamp Act as a release. The District Judge is of opinion that the deed ought to have been stamped as a deed of gift or conveyance.

The widow has died since the reference was made, but since the reference is made by the District Judge for instructions on a point of difficulty arising under the Indian Stamp Act no question of abatement arises on account of the death of the widow. It is suggested by the learned Advocate, who originally represented the widow, that the execution of a deed of this kind is a mere effacement of the widow's interest, and that it should therefore be regarded as governed by Article 55. Article 55 governs instruments whereby any person may renounce a claim upon any other person or against any specified property, but in this deed the widow is not renouncing her claim upon property but transferring possession of it. The deed was an instrument of gift governed by Article 33 of the First Schedule of the Act; and duty was payable on the value of the property conveyed, as described in the deed of gift. The value should have been stated, not as the capital value of the property conveyed, but as the present value of the life-interest of the widow, whatever that may have been at the time of execution of the deed.

J. K.

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November, 11.

SPECIAL BENCH.

Before Courtney Terrell, C. J., James and Manohar Lall, JJ.

AKHOURI BANWARI PRASAD, MUKHTAR, *In re.**

Legal Practitioners Act, 1879 (*Act XVIII of* 1879), *sections* 13 *and* 14—*professional misconduct—Mukhtar not*

* Civil Reference no. 1 of 1937. In the matter of proceedings under sections 13 and 14 of the Legal Practitioners Act instituted by E. T. Prideaux, Esq., I.C.S., Deputy Commissioner of Ranchi, and Civil Revision no. 284 of 1937, from his order, dated the 30th of March, 1937.

depositing money entrusted to him in court of Certificate Officer—Deputy Commissioner, whether can draw up proceeding under the Act.

It is within the competence of a Court before whom a pleader practises to draw up proceedings under the Legal Practitioners Act for any professional misconduct committed by the pleader in connection with any instruction which he received from his client generally or in connection with a particular matter. Therefore the Deputy Commissioner had full jurisdiction to take proceedings under the Legal Practitioners Act against a Mukhtar, who did not deposit the money entrusted to him by a client for deposit in the court of the Certificate Officer.

Rabindra Chandra Chatterjee, In re (1), followed.

U. Thein Nyun v. *District Superintendent of Police*(2), distinguished.

Reference under sections 13 and 14 of the Legal Practitioners Act, 1879.

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

R. S. Chatterjee, for the legal practitioners:—The whole proceeding is bad and without jurisdiction. The proceeding should have been drawn up by the Revenue Officer who was the Presiding Officer. As to the meaning of the words "Presiding Officer" *see* the cases of *Mukhtar Manzurul Haq* v. *The King-Emperor*(3) and *Janak Kishore, In re*(4). For the purposes of section 14 of the Legal Practitioners Act the Presiding Officer is the Court in which the case, in relation to which the proceeding against the legal practitioner was drawn up, was pending.

[MANOHAR LALL, J.—The test is whether the matter happened in Court.]

The Full Bench decision in *Rabindra Chandra Chatterjee, In re*(1) has not noticed the judgment of

(1) (1922) I. L. R. 49 Cal. 850, S. B.
(2) (1935) I. L. R. 13 Rang. 737.
(3) (1922) 4 Pat. L. T. 97, S. B.
(4) (1916) 1 Pat. L. J. 576.

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Page, C. J. in *U. Thein Nyun* v. *District Superintendent of Police*(1), which follows the Patna decisions.

[CHIEF JUSTICE.—In the Patna cases the offence was committed in a proceeding pending before the Court.]

The Advocate-General, for the Crown, not called upon to reply.

S. A. K.

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.—The Deputy Commissioner of Ranchi drew up proceedings against the petitioner, a mukhtar practising in his court, under sections 13 and 14 of the Legal Practitioners Act. After notice to the mukhtar and after evidence was recorded the Deputy Commissioner has made a report recommending that the mukhtar should be debarred from further practising in the courts on the charge that the mukhtar in the month of Magh, 1992, was entrusted by his client Laldeo Ohdar with a sum of Rs. 166 for deposit in the court of the Certificate Officer, Ranchi, in satisfaction of a Certificate Case no. 76 of 1935-36 against the client, but he failed to deposit the sum in court as a result of which the holding of Ohdar was sold up on the 28th of May, 1936, notwithstanding the fact that the amount was expressly deposited with the mukhtar earlier in the same year.

The learned Advocate for the petitioner has argued that the proceedings drawn up by the Deputy Commissioner were entirely without jurisdiction, because in his submission the offence was committed, if any, by the mukhtar before the Certificate Officer or in the court of the Certificate Officer, and not before the Deputy Commissioner, and therefore he submits that the Deputy Commissioner, not being the presiding officer of that court, had no jurisdiction to draw up any proceedings against the mukhtar under section 14 or section 13 of the Legal Practitioners Act. He relies upon a decision of the Rangoon High

(1) (1935) I. L. R. 13 Rang. 787.

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Court in *U. Thein Nyun* v. *District Superintendent of Police*(1). The facts of that case, however, were entirely different. In that case in the course of a proceeding before a Sessions Judge the petitioner was suspected to be guilty of professional misconduct in attempting by means of bribe to induce the witnesses for the prosecution to resile from the statements that they had made. The District Magistrate purporting to act under section 14 of the Legal Practitioners Act, drew up charges of professional misconduct against the pleader. The learned Judges of the Rangoon High Court held that as the professional misconduct alleged took place in the course of proceedings pending before the Sessions Judge and not before the District Magistrate, the proceedings were liable to be quashed. In the course of his observations the learned Chief Justice referred to a Calcutta decision in *In re, Rabindra Chandra Chatterjee*(2) and expressed his view that the observations of the learned Judges of the Calcutta High Court were not in accordance with law. In our opinion it was not at all necessary for the learned Chief Justice to have considered the effect of that Calcutta case and therefore his remarks must be treated as obiter. In any case we are of the opinion that the decision of the Calcutta High Court is perfectly correct and that it is in accord with the plain meaning of sections 13 and 14 of the Legal Practitioners Act. If, as in the present case, the pleader who practises in a court commits an offence of professional misconduct in connection with any instructions which he received from his client generally or in connection with a particular case then it is within the jurisdiction of any court before whom the pleader is practising, if brought to its notice that the pleader has committed any professional misconduct, to take action against him and those proceedings will be entirely with jurisdiction. In the present case the professional misconduct charged against the mukhtar was brought to the

(1) (1935) I. L. R. 13 Rang. 373.
(2) (1922) I. L. R. 49 Cal. 850, S. B.

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notice of the Deputy Commissioner in whose court the mukhtar practises and that officer had ample jurisdiction to initiate these proceedings. The charge against the mukhtar is that he was entrusted with money by his client and which he has misappropriated. We, therefore, overrule the preliminary objection and hold that the proceedings before the Deputy Commissioner were intra vires and with jurisdiction.

It was next argued by the learned Advocate for the petitioner that the High Court should itself now give some notice to the mukhtar so that he may be able to offer some further evidence in support of his case. If we had felt that the mukhtar was at all hampered in his defence in putting forward his case we would have readily given him some further opportunity, but a perusal of the proceedings, as they went on before the Deputy Commissioner, leaves the impression in our minds that the mukhtar was anxious to avoid a report by the Deputy Commissioner on the chance of having a favourable decision from his successor. Indeed a Barrister who appeared for him refused to argue or conduct his defence on this charge, but all the lawyers including the Barrister confined their attention to the second charge for which the mukhtar has been acquitted. This course was adopted for an obvious reason, because the mukhtar had no defence whatsoever to this charge. The sum of Rs. 166 was admitted by him to have been received and in the letter (Exhibit 2), which is on the record, he says that the money was with him and he had spent some part of it. In truth the real matter is that he had misappropriated the money and was unable to produce it at the proper time in accordance with the directions of his client. He endeavoured to meet the difficulty by suggesting that the deposit ought not to be made because some of the judgment-debtors were minors. We do not see how this fact could be any excuse in favour of the mukhtar's conduct. If any further objections were suggested to be filed on behalf

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SRI SRI BAIDYANATHJI v. URMILA DEVI.

LORD RUSSELL OF KILLOWEN.

Balusami Ayyar(1) in which Mr. Ameer Ali, in delivering the judgment of the Board, used the following language in reference to high priests of temples and persons in like positions:—

"Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trueee in the general sense for maladministration."

This judgment of the Board is without doubt a correct statement of the general law. It was a novel view when propounded, and it was followed by the amendment made to section 10 by the Indian Limitation Amendment Act (I) of 1929. But the present case is one which on its facts is an exception to the general rule.

In the present case the Court has exercised the powers conferred upon it by the Code. viz., to appoint a trustee and to vest the property in the trustee. The words of section 539 and the words of the decree are equally plain: and by virtue of the decree pronounced under the section, the late high priest was a "trustee of all the properties moveable and immoveable devoted to the service" of the temple God. The war bonds were accordingly in fact vested in him in trust for a specific purpose, and the plaintiff's suit, falling within the words of section 10 of the Indian Limitation Act (IX) of 1908, cannot be barred by any length of time.

The appeal should therefore be allowed, the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored. Their Lordships will humbly advise His Majesty accordingly.

The first respondent will pay to the appellant his costs of the appeal to the High Court and of the appeal to His Majesty in Council.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 Ind. App. 302, 311.

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We think, therefore, that the mukhtar should be visited with the utmost penalty and he should be removed from the rolls.

The civil revision application is rejected.

J. K.

Order accordingly.

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1937.

November, 15.

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

MULCHAND HIRA LAL

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 10—*assessee, if entitled to deduction on account of loss by theft.*

An assessee is not entitled to deduction on account of loss by theft under section 10 of the Income-tax Act, 1922.

Jagarnath Therani v. *Commissioner of Income-tax*(1) and *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras* (2) (judgment of Ayyar, J.) distinguished and doubted.

Statement of case under section 66(3) of the Income-tax Act, 1922.

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

Mrs. Dharmashila Lall and *G. C. Das*, for the assessee.

S. M. Gupta, for the Income-tax Department.

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* Miscellaneous Judicial Case no. 10 of 1935. *In re* Statement of Case under section 63(3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, dated the 15th July, 1935.

(1) (1925) I. L. R. 4 Pat. 385.

(2) (1930) I. L. R. 53 Mad. 904.

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COURTNEY TERRELL, C. J.—This is a case stated by the Commissioner of Income-tax by direction of the Court. The assessee carries on business as a shop-keeper where he sells retail groceries and he also carries on business by selling goods on commission, the two businesses being in fact separate. He has made, however, a return of his entire income, and he claims allowance in respect of two separate items. The first item is composed of two separate sums, respectively, Rs. 313 and Rs. 700, and the assessee claims to be entitled to deduct the amount of these two items from his assessment in the following circumstances. In the accounting year 1931-32 it would appear that in making up his accounts he confused the accounts in respect of the shop business with the accounts in respect of the commission business in the matter of two items. Certain goods had been sent to him to be sold on commission, but the accounts in respect of two of the parcels of goods sent to him for sale on commission were as a matter of fact entered as having been made in respect of the shop business, and he put down in the accounts the two items of goods Rs. 313 and Rs. 700 as being goods purchased by him, and in making up the accounts for that year these were taken upon the assets side of the account and figured in the profit for the year. They should have gone into that account which deal with the commission business, in which case they would not have been put down as coming into the business as assets at all. The result was that for the year 1931-32, if the statement of facts be correct, he had to pay income-tax on a sum which had been arrived at by accounting these two items as receipt, and so he paid income-tax on a sum of Rs. 313 and Rs. 700 which he need not have paid if he had made up his books correctly. After the closing of the account for 1931-32 and the payment of income-tax, he discovered his mistake and now seeks to deduct those sums in the present account for 1932-33, and the ground upon which he claims to be entitled to deduct

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them is that if he paid tax on them he would be paying tax twice over. This argument is not tenable. On a proper application to the Commissioner of Income-tax, the Commissioner of Income-tax would be entitled to find that in respect of the year 1931-32 the assessee had paid more tax than he should have paid, and in making up the account for 1932-33 (which is the year under consideration) he need not include these sums at all; but he cannot do it both ways. His proper remedy should have been to go to the Commissioner in the matter of the accounting year 1931-32, show to the satisfaction of the Commissioner that in respect of that year he had made a mistake in making up his accounts and get a refund of the income-tax in respect of the assessment for 1931-32. He cannot recover it in the accounting for 1932-33. The Commissioner was right in our opinion in his finding, and to the question "Whether the disallowance of the claim for deductions of two sums, namely, Rs. 313 and Rs. 700, is legal", I would answer it, in agreement with the Commissioner, in the affirmative.

The second item in respect of which the assessee claims a deduction from the amount upon which he is to be assessed is in respect of some money that appears to have been stolen from him. In the accounting year 1931-32 he was sending some of his money to the bank and sent it by a messenger in his employ. The money disappeared, and the assessee seems to have been under the impression that the employee had embezzled the money, with the result that there was a criminal trial. The criminal court held that the money had not been in fact embezzled by the employee but had been stolen from him by a coolie. In my opinion, the decision of the Commissioner that the loss did not occur in the year of accounting (1932-33) is one of the facts which is fatal to the contention of the assessee. But quite apart from this, a loss, in my opinion, whether by embezzlement or whether by theft, is not one of the allowances which is available to the assessee under section 10 of

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the Act. It is true that there is a decision of this Court in *Jagarnath Therani* v. *Commissioner of Income-tax*(1) in which the facts were that the loss was produced by embezzlement, and the learned Judges there held, and I am at some difficulty to understand the reasoning upon which the decision was based, that the loss was incidental to the conduct of the business and allowance ought to be made on that basis. In my opinion the decision in that case was erroneous, but the whole decision was based upon the fact that the loss in that case was by embezzlement and it can be distinguished from this case very clearly, because in this case the loss was by theft, and not by embezzlement. The test of whether a claimed allowance is or is not allowable is to be found by referring to the Act itself, and section 10 sets forth a list of permissible allowances. They are specified in sub-section (*2*). Paragraphs (*i*) to (*viii*) of that sub-section admittedly do not apply and this particular loss cannot be classified under any of the items in that particular sub-section. Paragraph (*ix*) is as follows:

"any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

Now, I have failed altogether to understand how a theft can be considered as expenditure, and in any case the reference to the "expenditure incurred solely for the purpose of" must refer to the mind of the person who is claiming allowance. It cannot refer to the mind of the thief. When money is stolen, the person from whom such money is stolen is parting with the money unwillingly or unknowingly and he cannot be said to lose the money for the purpose of earning such profits or gains. A theft therefore clearly is outside this paragraph, and it was on this paragraph alone that the claim to the allowance was based. Mrs. Lall has in support of her argument quite reasonably, in my opinion, said that if an embezzlement was rightly to be considered as an expenditure the same reasoning by which it was

(1) (1925) I. L. R. 4 Pat. 385.

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so held would also apply to a theft and therefore urged that the decision to which I have referred ought to be considered as much an authority in favour of a claim for allowance by theft as it expressly was for an allowance by embezzlement. I think this argument is sound, and for that reason I am of opinion that the decision of Ross, J. was erroneous. But the decision itself was based on a case of embezzlement and it was reasoned on the basis of embezzlement and therefore it is not an authority for the proposition that loss by theft is equally allowable. I would make the same observation in respect of the dissenting judgment of Avyar, J. in the case of *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*(1). In that case there had been a loss which was incurred by theft of money in a money-lending business, and it was held by the majority of the learned Judges that that could not be allowed for in computing the income-tax. The dissenting judgment of Avyar, J. was on somewhat the same lines as the decision of this Court in *Jagarnath Therani* v. *Commissioner of Income-tax*(2) and is to my mind equally open to objection. Should a case arise in which a claim to loss by embezzlement is made, it will be necessary to reconsider the decision in *Jagarnath Therani* v. *Commissioner of Income-tax*(2).

In my opinion the Commissioner of Income-tax was right in disallowing this claim, and the answer to the second question "Whether in the circumstances the sum of Rs. 2,365 should be lawfully deducted from the assessee's returns" should, in my opinion, be in the negative. The assessee having failed must pay the costs of the Department, which we assess at rupees one hundred and fifty.

AGARWALA, J.—I agree.

J. K.

Order accordingly.

(1) (1930) I. L. R. 53 Mad. 904.
(2) (1925) I. L. R. 4 Pat. 385.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Varma, JJ.

1937.

November, 30.

BALMAKUND MARWARI

v.

FIRM PIRTHIRAJ GANESHDAS.*

Code of Civil Procedure, 1908 (*Act V of* 1908). *Order XXI, rule* 90 *and Order XLIII, rule* 1(*j*)—*application for setting aside sale—deposit of security—court, whether can accept security in landed property—order refusing to accept security in landed property and dismissing the application to set aside the sale, if appealable.*

In an application to set aside a sale under Order XXI, rule 90, the court has a discretion in appropriate cases to accept security in landed property.

An order refusing to accept landed property as security is not appealable, but the consequential order dismissing the application to set aside the sale is appealable.

Appeal by the judgment-debtor.

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

B. C. De and *G. C. Das*, for the appellant,

N. N. Sen, for the respondents.

KHAJA MOHAMAD NOOR, J.—This is an appeal against an order of the Special Subordinate Judge of Ranchi rejecting an application for setting aside a sale in execution of a decree on the ground of the appellant not making the deposit required by law.

The appellant judgment-debtor's property was sold on the 3rd September, 1936, and an application for setting aside the sale was filed on the 2nd October, 1936. The application was registered and the appellant was ordered to deposit the necessary cash security. On the 3rd October the appellant applied

* Appeal from Original Order no. 23 of 1937, from an order of Maulvi Saiyid Muhammad Ibrahim, Special Subordinate Judge, Ranchi, dated the 5th October, 1936.

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that he was a poor man and was unable to deposit cash and prayed that immoveable property be taken as security. The learned Subordinate Judge ordered as follows:—

"The applicant's petition is rejected as it is simply to undo the effect of the amended rule".

Thereafter the application for setting aside the sale was rejected on the 5th October, 1936. It appears from his order that the learned Judge thought that accepting security other than cash deposit was in contravention of the rule. But the rule itself has deliberately provided that the court may accept security other than cash as the circumstances justify. The rule has been framed to eliminate frivolous applications and not to shut out genuine ones. It fixes 12½ per cent. as the maximum security which can be required from an applicant for setting aside a sale. Within this limit the courts have been given ample power to fix such amounts as they think fit or to take any security other than the cash deposit or to dispense with any deposit or security altogether. The rule, as it stands, means that the court is to fix the amount and the nature of the security and then the order is to be complied with; if not, the application is to be rejected.

The first order of the learned Subordinate Judge directed the applicant to deposit the "necessary security". The order perhaps meant that the court wanted the deposit of the maximum amount provided in the rule, but it is unfortunately not clear. It ought to have been clear as to what amount was to be deposited. However, when the applicant applied for permission to offer immoveable property as security the court ought to have considered the application on its merits and if it thought that there was no ground for granting it, it could reject it but not on the ground that it defeated the rule. The framers of the rule had in their minds cases in which discretion can be exercised in accepting landed property as security instead of cash. The learned Subordinate

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Judge did not apply his mind to the facts of the case and his order and the consequential order refusing the application for setting aside the sale must therefore be set aside.

Now, the judgment-debtor's appeal was at first both against the order, dated the 3rd October, 1936, refusing to accept landed property as security and of the 5th October, 1936, rejecting the application for setting aside the sale. The office objected that there could not be one appeal against two orders and the learned Advocate for the appellant scored through the date "5th October, 1936" and left the date "3rd October, 1936".

An objection has been raised on behalf of the respondent that this appeal is incompetent on the ground that no appeal lies against the order refusing to accept landed property as security. That contention so far as it goes, is well-founded. An appeal against an order can only lie if it is specifically provided. But long before the filing of the appeal the application itself has been rejected and that order is appealable. In fact, the appeal expressly mentions Order XLIII, rule 1(*j*), which refers to appeals against an order setting aside or refusing to set aside a sale. The confusion has arisen on account of the fact that the learned Advocate scored through the "5th October" instead of "3rd October". This mistake has been corrected under our order and the appeal is against the order refusing to set aside the sale on the ground that the applicant did not deposit cash security. Apart from this, this is a case in which interference in revision will be justified on the simple ground that the Court did not exercise a jurisdiction vested in it by law inasmuch as it did not fix the amount of security and did not judicially determine the application for permission to give landed property in security.

In the end the order rejecting the application for permission to give landed property in security

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and refusing to set aside the sale and the order of confirmation of sale are set aside. The case is remanded to the learned Subordinate Judge with a direction that he will judicially dispose of the application of the appellant about furnishing security in landed property, and then dispose of the application for setting aside the sale according to law. If the application is ultimately rejected, the sale will stand confirmed. Otherwise, it will follow the result of the order on the application. There will be no order for costs.

VARMA, J.—I agree.

J. K.

Appeal allowed.

Case remanded.

PRIVY COUNCIL.

J. C.*
1937.

November, 30.

RAJA JAGADISH CHANDRA DEO DHABAL DEB.

v.

MIRZA SANTAL.

(On Appeal from the Board of Revenue of the Province of Bihar and Orissa.)

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908 *as amended by Bihar and Orissa Act VI of* 1920), *ss.* 74*A and* 231—*Vacancy in tenancy held by headman—Right to apply for determination of successor—Limitation.*

The right to apply to the Deputy Commissioner to determine who should be village headman under section 74A is a continuing right which endures so long as there is a vacancy.

Appeal by Special Leave (no. 38 of 1936) from a resolution of the Board of Revenue (November 10, 1933) which confirmed an order of the Commissioner of Chota Nagpur ((June 11, 1933).

* *Present* : Lord Wright, Sir George Lowndes and Sir George Rankin.

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

1937, *November* 9. *Dunne, K. C. for the appellant*: The Act is not retrospective. The tenancy was determined by the death of Ramu Kol in 1917. The tenancy was not one 'vacated' within s. 74A. Ramu Kol held under a lease and not "in accordance with custom". He was appointed after the death of the ghatwal. A ghatwal is not a pradhan or headman. The application under s. 74A is the action. The mere occurrence of a vacancy will not give a cause of action, but, as soon as the landlord gave notice that he was going to collect rent, that is to make the possession khas, there was a cause of action. Limitation under 231 would apply. It would be hard to say villagers may wait years and years before making an application.

Pringle, following: Legislation in this matter is founded on Read's Settlement. At the time Ramu Kol died in 1917, the landlord had a right to step in and abolish the tenancy. Section 74A was enacted to limit the landlord's right. On the death of Ramu Kol the tenancy became vacated.

The respondents were not represented.

The judgment of the Judicial Committee was delivered by—

LORD WRIGHT.—This appeal is brought by special leave of His Majesty in Council and raises questions of some difficulty and somewhat out of the ordinary course. It is an appeal from a resolution of the Board of Revenue of Bihar and Orissa, dated 10th November, 1933, which confirmed an order of the Commissioner of Chota Nagpur, dated 11th June, 1933, affirming on appeal the order of the Deputy Commissioner of Singhbhum, dated 6th March, 1933.

As will appear later, these orders seem rather of an administrative nature than judgments in the ordinary acceptance of the term, and in that sense

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may well appear not to be proper to be brought before the Board. They have, however, now come before the Board; it may be because of the observations of the Board of Revenue that the question was difficult and that it was much to be desired that the law should be clarified. The Board will accordingly deal with the position as it now presents itself.

The question arises under the Chota Nagpur Tenancy Act (Bengal Act VI of 1908) and in particular under a section later added to that Act, namely section 74A by an amending Act of Bihar and Orissa Act VI of 1920. These two Acts will be referred to subsequently in this judgment as "the Act". The proceedings relate to a village called Lango which is situate in Taraf Atkosi of Perganna Dhalbhum. The district in which Lango is situated is part of a backward tract inhabited by certain tribes who are described as aboriginal and who have their own primitive traditions and customs. The dispute which arose was between the Raja of Dhalbhum, who is the appellant in this appeal and certain inhabitants of the village. The respondents have not appeared. The case has been argued ex parte, but Mr. Dunne and Mr. Pringle, for the appellant, have laid the whole position very fully before their Lordships, who also have the benefit of the very careful resolution of the Board of Revenue delivered by Mr. Dain.

The question relates to the appointment of a village headman or pradhan for Lango. The appellant contends that in the facts of this case, no village headman should be appointed but that he is entitled to khas possession of the village properties. It will be convenient to refer to the relevant sections of the Act of which the most material section is section 74A which is in the following terms:—

"74A.—(1) Where a tenancy which in accordance with custom is held by a village-headman, has for any reason been vacated, any three or more tenants holding land within the said tenancy, or the landlord, may apply to the Deputy Commissioner to determine the person who in accordance with custom should be village-headman entitled to hold the tenancy.

"(2) Such application may be made notwithstanding that a person is in possession of the land of the tenancy, or part thereof, under the authority or with the consent of the landlord.

"(3) On receiving such application the Deputy Commissioner shall, after giving notice in the prescribed manner to the landlord, the person, if any, referred to in sub-section (2), the heirs of the last village-headman, the tenants and such other persons, if any, as he considers should be parties to the proceeding, make such inquiry as appears necessary, and determine the person who in accordance with custom should be village-headman entitled to hold the tenancy, and shall place such person in possession of the tenancy, if such person is not already in possession thereof.

"(4) In every such inquiry the Deputy Commissioner shall have regard to the entries in a record-of-rights finally published under this Act or under any law in force before the commencement of this Act, and to the suitability of a person in respect of tribe or caste, membership of the village family or of the late village-headman's family (if it be not the village-family), residence, character and other matters, to be the village-headman of the particular village or group of villages comprised in the tenancy."

It is also necessary to consider section 231 which runs as follows:—

"231. All suits and applications instituted or made under this Act, for which no period of limitation is provided elsewhere in this Act, shall be commenced and made respectively within one year from the date of the accruing of the cause of action.

"Provided that there shall be no period of limitation for applications under sections 28, 31, 34, 50, 61, 75, 105 or 121."

The Act by Chapter XV provided for the preparation of a record-of-rights and obligations of *raiyati* and other classes of tenants, and by section 132 provided that when a record has been finally published the entries made therein should be conclusive evidence of the rights and obligations of the tenants to which such entries relate and of all particulars recorded in such entries. It will be necessary therefore to refer to the record-of-rights which has been put in as evidence in the case. This record-of-rights was published in 1910; it is headed "Record-of-rights of pradhan in pradhani mauza of Lango." It gives as the name of the pradhan, Ram Kol, resident in the village; it finds that he orginally held under a patta for three years from the 5th April, 1931, which provided that a

expiry of the term but that no fresh settlement was made under a patta. It states the various rights which the pradhan, either has, or has not, and certain grounds on which the pradhan might be ejected. The record also states that the landlord as superior *jotdar* has no right to get the pradhani rent enhanced during the term of the lease; that the pradhani rights are not heritable but that the pradhan has the right to hold possession in the absence of a patta; it states the right of the landlord or superior *jotdar* to make pradhani settlements with a different person in certain events and it further affirms or negatives various other rights. It is stated in the notes of the Assistant Settlement Officer in reference to Lango that one Jadab Bhumij of Dablabera was Ghatwali Atirikta pradhan of the village, that he resigned in 1891 and that then the village was settled in ordinary pradhani with one Ramu Kol. This record would seem clearly on its face to show that there was by custom a pradhan in Lango. There is also certain evidence given in the course of the proceedings before the Deputy Commissioner from which it appears that Ramu Kol died leaving no sons in about 1917. The villagers who gave evidence say that his brother Ambra then succeeded, or was regarded by them as succeeding, as pradhan. At that time the village with other land was under lease to the Midnapore Zemindary Company. The evidence of the tenants is somewhat conflicting. They claim that Ambra became a pradhan by custom on the death of Ramu Kol but it seems that, at least in many cases, they either paid rent to the Company or deposited the rent in Court. So matters seem to have proceeded until the appellant became possessed of the estate on the expiration of the lease on the 14th September, 1929. The appellant then proceeded to attempt to enforce his rights to khas possession. An application was thereupon

It may be noted that the headman or pradhani system is characteristic of the social organisation of the aboriginal tribes who established themselves in Chota Nagpur before the advent of the Hindus; in some cases the headmen seem to have had police duties also imposed upon them so that such tenancies came to be regarded as ghatwali tenancies.

The application under section 74A came before the Deputy Commissioner of Singhbhum. He heard the villagers who presented the petition, now respondents herein, and objections on the part of the appellant. On the 28th April, 1930, he gave his decision, which stated that after the death of Ramu Kol,

> "the Midnapur Zamindari Co., made the village khas. Since then there had been nothing but trouble to the tenants, the landlord and every one else concerned."

Some of the raiyats deposited their rents in court, and the others did not do so because they could not afford it. He thought it unnecessary to discuss the questions raised on behalf of the appellant as to limitation, custom, etc.; he was of opinion that Lango was a village which obviously required the aboriginal pradhan both from the point of view of the landlord and from that of the villagers. He appointed Ambra Ho as the natural pradhan of the village.

The appellant then brought an action in the Civil Court for a declaration that this order of the Deputy Commissioner was made without jurisdiction and the Munsif on the 16th January, 1931, in the suit which was no. 93 of 1930, declared that the decision of the Deputy Commissioner was made without jurisdiction because he had no jurisdiction under the section without first deciding whether Lango was held by a pradhan by custom. He also discussed the facts of the case,

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August, 1932, expressed the view that his predecessor who made the previous order was of opinion that the village did by custom have a headman. The matter then went before the Commissioner who directed the Deputy Commissioner to decide the question of custom and also the question of limitation raised under section 231. A further enquiry was then held by the Deputy Commissioner who held in effect on the evidence before him that there was a custom of pradhani at Lango which had not been broken and decided that 'Ambra should be appointed as headman. From this decision an appeal was brought before the Commissioner who made an order on the 11th June, 1933, holding that it was clear that the custom of the village headmanship extended to this village and that the custom had not been broken because the villagers had stood out resolutely against the attempt of the landlord to break the custom of headmanship and had never acquiesced in the wrong, and that there was a continuing wrong so that the cause of action referred to in section 231 had accrued within one year of the application.

There was a further appeal to the Board of Revenue, who on the 10th November, 1933, gave their decision in a reasoned resolution delivered by Mr. Dain. As regards custom, the resolution held that the decisions of the courts below were the outcome of their views as to the facts, and that the Board of Revenue would not intervene in regard to their agreed finding. On the question of limitation the Board of Revenue did not agree that the cause of action could be put as a continuing wrong for purposes of section 231, but decided that the section did not bar the suit because the competence of an application under section 74A depended on the existence of the vacancy rather than on its occurrence at a particular moment. Emphasis was placed on the language of the section which was not " when " a tenancy has been vacated and from

that the inference was drawn that the cause of action was as has just been defined. The resolution concluded with these words.

"On the merits the orders of the Courts below are obviously right. In a remote aboriginal village, the presence of the headman is essential to village welfare. The Board therefore declines to interfere."

On the question of custom, there are clearly findings of fact of the Deputy Commissioner and the Commissioner and this Board sees no reason whatever for going behind or interfering with these findings. It has been strenuously argued that the findings are vitiated either because there is no evidence on which they could be based or because a custom must be an ancient custom of the village, whereas on the evidence this village was of quite recent foundation; according to one view it was clear that the village was founded for the first time by Ramu Kol not long before 1891, or on the other view stated in the village notes of the Assistant Settlement Officer it had been in existence some time before 1891 because Jadab Bhumji of Dablabera had been made Ghatwali pradhan. But in either case, it was argued, there could be no ancient custom. Their Lordships are unable to accept this view. In their judgment, assuming that the village was of recent foundation it was founded by members of the tribe who brought to its foundation their ancient custom. The Board are satisfied that there was abundant evidence of a pradhani custom in the village and this is abundantly clear from the record-of-rights. Accordingly they see no ground in law for reviewing the findings of fact of the Commissioner or the Deputy Commissioner. It was, however, further contended that the findings of fact cannot stand and indeed that the whole proceeding was incompetent because in 1917, when Ramu Kol died, section 74A which was only enacted in 1920 was not in force and could not have a retrospective effect. Their Lordships cannot accept this contention. At the time when section 74A was enacted there was, according to the findings of the

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Deputy Commissioner and the Commissioner, in fact a vacancy; the tenancy of the village headman had in fact been vacated and there appears to be no reason why section 74A as soon as it came into operation should not be applied to that state of things.

The question of limitation which arises under section 231 is somewhat peculiar. It was forcibly contended on behalf of the appellant that section 231 of the Act applies to applications under section 74A, because it deals with applications made under the Act and because section 74A is not one of the sections which are expressly excluded from the Limitation provisions. That may be accepted, but the difficulty which arises is to apply to the position under section 74A the words "the cause of action." Section 74A according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event of a vacancy and that application may be made either by the landlord or by the tenants. It pre-supposes that there is a custom requiring the appointment of a village headman and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear, therefore, more natural to say that as there is not in the strict sense a cause of action under section 74A but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants or both, section 231 is incapable of application. It has, however, been dealt with in the proceedings below on the footing that section 231 does apply and cause of action has been construed somewhat liberally as including a right of making an application. Where the propriety of the application being granted has, as here, been disputed by the landlord, the view accepted by the Commissioner and the Deputy Commissioner was that there was a continuing

wrong. It is not, however, easy to apply the idea of a wrong, to a case of this sort where either side may apply and all that has happened is that there has been a delay in making the application. The delay no doubt was due to the fact that matters were allowed to drift until the appellant, the landlord, took possession on the termination of the lease. If then the idea of a continuing wrong is rejected there remains to be considered the view accepted by the Board of Revenue, namely, that the right of application is a continuing right which endures so long as there is a vacancy. Their Lordships are prepared to accept that as the most reasonable construction on the assumption that section 231 does apply. It would fit in with the exigencies of the case and indeed with the language of section 74A which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary the section makes the right of applying conditional on a state of facts, namely, where a tenancy has been vacated. While that condition exists there is no ground for fixing on any specific moment of time. If the language had been "when a tenancy has been vacated" the matter, it may be, would have required to be considered differently and it may be that the limitation period, if these were the words, would run from the moment of the vacancy occurring, but that is not the language of the section, and Counsel for the appellant had refused to argue that time ran from the moment of the vacancy which in this case would be 1917. The alternative which they proposed was that it should run from the time when the landlord was taking active measures to enforce khas possession. Their Lordships cannot so construe the section. Accordingly there is no reason to differ from the conclusions arrived at by the Board of Revenue.

Their Lordships' judgment is that the appeal should be dismissed and they will humbly so advise His Majesty.

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Solicitors for the appellant.—*A. J. Hunter and Co.*

The respondents were not represented.

FULL BENCH.

Before Courtney Terrell, C. J., James and Manohar Lall, JJ.

PRATAP NARAIN JHA

v.

RAMASRAY PERSHAD CHAUDHURY.*

1937.
November, 8. December, 15.

Landlord and Tenant—rent suit—appraisement, mode of—onus—proof necessary to entitle the landlord to succeed in a suit for produce rent.

In a suit for produce rent the burden initially lies upon the plaintiff to prove his claim.

Hafiz Zeauddin v. *Jagdeo Singh*(1), overruled.

Shaikh Mohammad Ibrahim v. *Shaikh Abad*(2), followed.

Before a record of appraisement can be treated as in itself evidence on which liability may be imputed, it should be proved that the appraisement was made with proper formality, that the raiyat was not merely present but actually was a party to the proceedings and that he signified his assent to the appraisement by signing the record, or that appraisement was made by a *salis* to whose appointment in that capacity the raiyat consented, or that points of difference were determined by some customary mode of arbitration. Otherwise, to entitle the landlord to a decree for the amount described in the papers, it must be proved not merely that the appraisement was made, but that the appraisement was correct, that is to say, the person who made the appraise-

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* Appeal from Appellate Decree no. 310 of 1936, from a decision of P. C. Chaudhuri, Esq., I.C.S., Additional District Judge of Darbhanga, dated the 20th December, 1935, reversing a decision of Babu Anjani Kumar Saran, Munsif, 2nd Court, Samastipur, dated the 23rd July, 1934.

(1) (1928) I. L. R. 8 Pat. 418; 10 Pat. L. T. 692.
(2) (1930) I. L. R. 10 Pat. 166.

ment must prove, not merely that he wrote down on a piece of paper a certain number of maunds and seers, but that this was the correct estimate of the outturn.

Appeal by the defendants.

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

The case originally came up for hearing before James, J. who referred the case for hearing by a larger Bench.

On this reference.

B. N. Rai, for the appellant: In a suit for produce rent, as in any other rent suit, the onus of proving the rate of outturn during the years in suit always lies on the plaintiff. The plaintiffs' case must be proved or admitted before he can obtain a decree.

[MANOHAR LALL, J.—Your point is that the onus lies on the party who wants a decree.]

Yes. In *Hafiz Zeyauddin* v. *Jagdeo Singh*(1) the court had made a consent order and the remarks of Das, J. were in the nature of *obiter dicta*. No reasons were given in support of the observations. If no evidence were given in such a suit, who would lose? Obviously the plaintiff, as there must be some evidence in support of his claim. [Section 102 of the Evidence Act referred to.] The decision of *Ibrahim* v. *Sheikh Abad*(2) is correct. In *Bhuneshwari Kuer* v. *Sukhdeo Singh*(3) the Court had found that the onus, if upon the landlord, had shifted on to the tenants. No doubt there are some observations in the judgment of Jwala Prasad, J. which lend support to the landlords' contention, but I submit they do not lay down correct principles and should not be followed.

(1) (1928) I. L. R. 8 Pat. 418; 10 P. L. T. 692.
(2) (1930) I. L. R. 10 Pat. 166.
(3) (1924) 6 Pat. L. T. 419.

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L. K. Jha (with him *R. Choudhury*), for the respondent: Ordinarily the onus of proving the claim lies on the plaintiff, but this rule is subject to the exception that where a particular fact is within the special knowledge of a party, the onus of proving such fact lies on that party—section 106 of the Evidence Act. It was not possible for the landlord to make a true estimate of the crops in possession of the tenants. In such circumstances the tenants should not be permitted to take advantage of their own wrongful acts and their failure to dislcose the true and proper produce of the lands in their actual possession. As was observed by Jwala Prasad, J. in *Bhuneshwari Kuer* v. *Sukhdeo Singh*(1), the tenants "had special means of knowledge and the onus of proving what was in their knowledge in such cases must rest upon them". [Sections 69 and 71(*4*) of the Bengal Tenancy Act referred to.]

[CHIEF JUSTICE.—If the tenant adduces no evidence, on what material should the court pass a decree ?]

Upon the statement in the plaint. I rely on the decision of Adami, J. in *Hargobind Singh* v. *Kishun Dayal Gopel*(2).

B. N. Rai, in reply:—Adami, J. concedes that where a plaintiff claims a certain amount of rent in cash and the defendant admits a lesser amount, unless the plaintiff can give good proof of the larger amount being payable the suit will be decreed on the defendants' admission. But he goes on to say that "a different situation arises in the case of a claim for bhauli rent". I submit no such distinction exists.

[CHIEF JUSTICE.—There is no evidence of any appraisement having been made and no evidence that any rent (by appraisement) has been paid. The ordinary contract is that you are bound to pay half

(1) (1924) 6 Pat. L. T. 419.
(2) (1926) 7 Pat. L. T. 671.

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the produce. In that case you are liable to account.] I submit not. The landlord is entitled to that crop only which is determined by appraisement.

[CHIEF JUSTICE.—So your point is that unless he proves appraisement, he proves no right whatever.]

Yes.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.—The suit out of which this appeal arises was instituted for recovery of arrears of produce rent for the years 1337 to 1340 Fs. The Munsif finding the evidence regarding the appraisement which was adduced on behalf of the plaintiffs to be untrustworthy and insufficient, decreed the suits in part on the admissions of the defendants. His decision was reversed on appeal by the Additional District Judge of Darbhanga who held, on the authority of the decision in *Hafiz Zeyauddin v. Jagdeo Singh*(1), that in a suit for arrears of produce rent the entire onus was upon the tenant-defendants to satisfy the court as to what was the produce during the years in suit. He found that the tenants had failed to prove that appraisement had not been made as claimed by the plaintiffs; and that their own account of the produce could not be accepted, partly because certain receipts which had been granted on behalf of a co-sharer of the plaintiffs for his share of the produce rent for the years 1337 and 1339 had not been formally proved. He decreed the plaintiffs' suit in full, and the defendants preferred a second appeal against his decision. The second appeal originally came up for hearing before a Judge sitting singly, at whose instance it was referred to a larger Bench, in order that the question of the correctness of the expression of opinion of the Division Bench in *Hafiz Zeyauddin* v. *Jagdeo Singh*(1) might be considered.

(1) (1928) I. L. R. 8 Pat. 418; 10 Pat. L. T. 692.

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In the first place it is to be observed that the remarks in the decision in *Hafiz Zeyauddin's* case(1), on which the head-note in the report in the Patna Law Times is based are at the most *obiter dicta*, because the decree in that appeal was made by consent, based on the figures given in the landlord's road-cess return, and the question of onus did not arise. In *Sheikh Mohammad Ibrahim* v. *Sheikh Abad*(2) where in the argument the decision in *Hafiz Zeyauddin's* case(1) had been cited, it was observed that in a suit for arrears of produce rent, as in any other rent suit, the plaintiff's case must be proved or admitted before he can obtain a decree; that is to say, in a suit for arrears of produce rent as in any other suit, the burden of proof initially lies upon the plaintiff. In our judgment the account of the matter given in *Sheikh Mohammad Ibrahim* v. *Sheikh Abad*(2) is the more correct of the two; and since we have to decide whether the *obiter dictum* in *Hafiz Zeyauddin* v. *Jagdeo Singh*(1) should be accepted or not, we are of opinion that it should be regarded as incorrect, so far as as it lays down that in a suit for arrears of produce rent the onus is on the defendant to satisfy the court what was the produce during the years in suit. As we have observed, the report cannot properly be considered as authority for that proposition, but since it has been so considered, and so far as *obiter dicta* of this kind can be regarded as authority, it must for the future be treated as overruled.

The learned Additional District Judge erred in law in treating the receipts of the plaintiffs' co-sharer which were produced on behalf of the defendants as inadmissible in evidence, because they had not been formally proved. They were admitted into evidence without objection, and they were proved by the evidence of the defendants' witness Chatra Singh.

(1) (1928) I. L. R. 8 Pat. 418; 10 P. L. T. 692.
(2) (1930) I. L. R. 10 Pat. 166.

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He described himself as karpardaz of the co-sharer landlord on whose behalf the receipts had been granted; and he stated that the receipts had been granted by the patwari after the payment of the produce rent. He was not cross-examined on either of these points.

The learned Munsif, discussing the papers which purported to be records of an appraisement made on behalf of the plaintiffs, came to the conclusion that these were not papers prepared in the field, partly because he noticed that the ink was far too fresh for records which purported to be three or four years old. The learned Additional District Judge, when he came to hear the appeal seventeen months later, was not satisfied that the ink looked fresh; but the learned Advocate for the appellants remarks with reason that ink which looked fresh in July of 1934 would necessarily not look fresh in December of the following year. This would be a question of fact and not in itself a ground for interference in second appeal.

The learned Munsif did not allow the plaintiffs' claim because he was not satisfied that the papers produced before him were records of actual appraisement, which was without question a sufficient ground for declining to grant a decree in accordance with the claim. The learned Additional District Judge in dealing with the matter in appeal, misled by his view regarding the party on whom the burden of proof lay, discussed the question of whether it had been proved that these papers had not been prepared in the field at the time of the so-called appraisement, criticising the learned Munsif's grounds for holding that the defendants had demonstrated that the papers were not genuine. But the learned Advocate for the appellants points out that the learned Additional District Judge did not at any time apply his mind to the question of whether it had been proved that the actual outturn had been that claimed by the plaintiffs,

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He argues that in the absence of such proof, plaintiffs' claim could not be decreed; and he points out that though there is evidence regarding the writing of the appraisement papers, there is no evidence on the record to prove that the outturn was as described in those papers. It therefore becomes necessary to consider in what circumstances records of appraisement may properly be treated as evidence in themselves of the correctness of the appraisement.

The meaning of the term 'appraisement' as it is used in the Tenancy Legislation of this Province, may be understood from the often quoted description given in 1858 by the Commissioner of the Division in which Darbhanga district lay when Act X of 1859 was under consideration. (Papers relating to the passing of Act X of 1859, pages 104 and 105: Proceedings of the Lieutenant-Governor of Bengal during May, 1859, page 86):

> "When the crop is ripe the patwari, the gumashta, the amin, a jaribkas or measurer, a salis or arbitrator, a navisinda or writer, and the jeth raiyat of the village, with the raiyat himself, proceed to the field in which the crop is growing. The salis first makes an estimate of the produce. The amin then makes another. If the two estimates agree the matter is considered settled. If they differ, the raiyat cuts a cottah where the crop is thinnest, the zamindar's people cut another where it is heaviest. The produce is threshed out, mixed together and weighed, and the produce of the whole field is estimated from this sample. A memorandum of the result, called a danabandi, is made out by the patwari and his writer and signed by those present. The raiyat is then at liberty to cut and store his grain. The patwari next prepares a paper called a bihree, shewing the amount of grain in the possession of the raiyat and the respective shares of the malik and the raiyats, and sends for the malik's share which the raiyat either pays in grain or in money."

It may be said to be not necessary, in order that a record of appraisement should, on proof of the record and of the procedure followed, be treated as evidence in itself of the correctness of the plaintiffs' claim, that the procedure should be exactly in accordance with that described by Mr. Samuells. But before a record of appraisement can be treated as in itself evidence on which liability may be imputed, it

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should be re-tried to meet the charge of criminal misappropriation of Rs. 28-8-0 and Rs. 26-11-0. The prosecution should have been astute to see that the charges were carefully prepared. The evidence in support of these charges does not appear to be sufficient or strong. There is only one witness to prove each of these payments. Their conduct in handing over the money to the accused was itself irregular.

It was strongly argued on behalf of the accused before us that the whole trial was vitiated by misjoinder of charges. The argument ran thus. While it is permissible to try the accused for one charge under section 409, Indian Penal Code, and for three charges under section 477A of the Indian Penal Code relating to that charge of misappropriation, it is not permissible to try the accused, as was done in the present case, for one charge under section 409, Indian Penal Code, and 28 charges under section 477A of the Indian Penal Code. The learned Judge overruling the objection as to misjoinder of charges, which was raised before him, held that he was conclusively bound by the decisions of this Court and pointed out that all the items of falsification in the charges under section 477A were committed within the course of one year.

Three cases of this Court appear to conclude the matter.

In *Gajadhar Lal* v. *Emperor*(1) there was a single charge of criminal breach of trust for a lump sum of Rs. 1,301 and odd and three charges under section 477A of the Indian Penal Code giving details of only three omissions from the counterfoil of rent receipts which were included in the gross sum mentioned in the charge under section 408, Indian Penal Code. This case was followed in *Michael John* v. *Emperor*(2). Here the charge of embezzlement

(1) (1920) 60 Ind. Cas. 422.
(2) (1930) 12 Pat. L. T. 696.

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claimed by the landlord. The learned Additional District Judge was misled in supposing that the onus lay upon the defendants to prove that the amounts witten in the papers produced did not represent the proper amount of crop. He was also misled in supposing that there was lack of proof in the technical sense, to prevent him from accepting the apparently trustworthy evidence put forward by the defendants in support of their case that the outturn was very much less than that claimed. But in the state of the record which we have noted, it would be useless to remand this case for rehearing in appeal, since no decree can be claimed except so far as liability has been admitted by the defendants.

The decree of the lower appellate court must accordingly be set aside and the decree of the Munsif will be restored. The appellants are entitled to their costs in this Court and in the court of the Additional District Judge.

J. K.

Appeal allowed.

APPELLATE CIVIL.

1937.

December, 21, 22.

Before Dhavle and Varma, JJ.

SHAIKH DARSAN ALI

v.

SURAJ MAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 47 *and Order XXI, rule* 2—*instalment decree—court whether entitled to enquire into payments made more than* 90 *days before objection—Limitation Act*, 1908 (*Act IX of* 1908), *article* 174.

* Appeal from Appellate Order no. 205 of 1937, from an order of A. Mukharji, Esq., I.C.S., District Judge of Purnea, dated the 9th February, 1937, affirming an order of Maulavi S. M. Hasan, Munsif, Second Court, Kishanganj, dated the 21st July, 1936.

the accused would, in the circumstances, be embarrassed in his defence, it is hard to believe that this evidence is only to have effect as to one of the offences committed in the same transaction. One would expect the legislature at least to permit a joint trial of all the offences in the series forming the same transaction in spite of the fact that one of the offences of the series is by another provision triable along with two other offences of the same kind. We consider that it has done so and we can see no reason why sections 234 and 235 are not to be regarded as cumulative in their effect in a proper case".

By the application of the principle which has been consistently followed in the above three cases by this Court it is clear to my mind that the charges as framed under section 477A of the Indian Penal Code in this case were illegal. The prosecution selected more than three charges although by the device adopted by the Public Prosecutor 28 charges relating to three registers were condensed into various sub-headings under each charge. It should also be pointed out that the series of charges under section 477A, Indian Penal Code, even though committed in the course of one year are not permitted to be lumped up together as section 222(*2*) of the Code of Criminal Procedure refers only to the offence of criminal breach of trust or dishonest misappropriation of money and not to falsification of accounts [*see* the case of *Emperor* v. *Manant K. Mehta*(1)].

To apply these cases in all of which the charges framed under section 477A were limited to three charges only to the facts of the present case. I have already shown more than once that it is not the case of the Crown that the accused set about to defalcate Rs. 76-9-6 from the very beginning, but their case is that as occasion arose and opportunities offered themselves he went on defalcating such sums as he could conveniently do so without attracting the

(1) (1925) I. L. R. 49 Bom. 892.

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rule 2, but within section 47 of the Code of Civil Procedure so that there could be no question of the limitation of ninety days applied by the lower courts under article 174. This contention is rested on the ground that the decree was an instalment decree, that the judgment-debtor was to pay certain sums by certain dates and that the decree-holder was to be entitled to execute only in the event of default in respect of any instalment. It is argued that before the decree-holder could be permitted to execute it was necessary for him to show that there had been a default in respect of some instalment and that, therefore, this was not a case where it was necessary for the judgment-debtor to show that he had paid. The words of sub-rule (*3*) of Order XXI, rule 2, are, however, far too clear to permit us to accept this contention, whether the onus of proving payments lay on the judgment-debtor or of proving default lay on the decree-holder (a point to which reference will be made again). What the sub-rule provides is that

> "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree."

On this wording the attempt to take the case out of Order XXI, rule 2, and bring it within section 47 cannot be supported: see *Radha Kant Lal* v. *Musammat Parbati Kuar*(1) and *Harihar Prasad Singh* v. *Bhubneshwari Prasad Singh*(2). The learned Advocate has endeavoured to find support for his contention in *Wali Shah* v. *Bihari Lal*(3) in which Dalip Singh, J., purporting to follow *Ligraj Patjosi* v. *Mahadeb Rani*(4), seems to have held that it was permissible for a judgment-debtor to prove that certain conditions on which a decree depended had been complied with irrespective of Order XXI, rule 2, sub-rule (*3*). The report of *Wali*

(1) (1921) 6 Pat. L. J. 337.
(2) (1936) I. L. R. 15 Pat. 422.
(3) (1926) A. I. R. (Lah.) 641.
(4) (1912) 30 Cal. L. J. 118.

Shah's case(1) is, however, obscure and differs from the report of the same case in *Wali Shah* v. *Bihari Lal*(2). The obscurity is enhanced by the fact that the learned Judge considered *Ligraj Patjosi's* case(3) " to be directly in point ". In this last case, however, it appears that the decree provided that the defendant was to carry out certain terms and to notify compliance to the court, that he did so, and that when the decree-holder objected and the court of first appeal directed an investigation under Order XXI, rule 2, Mookerjee, J., with whom Beachcroft, J., agreed, held that the judgment-debtor's " application is clearly not one under sub-rule (2) of rule 2 of Order XXI and no action ought to have been taken thereon.". This was the decision in *Ligraj's* case(3), and it does not seem to have any bearing on the facts in *Wali Shah's* case(1) so far as one can ascertain them from the report. It may be that the learned Lahore Judge had in mind the following observations in *Ligraj's* case(3) :—

" The proper course for the plaintiff is to apply for execution of the decree if his case is that the terms of the decree have not been faithfully carried out by the defendant. If such application is made, it will be open to the defendant to show that he has as a matter of fact carried out the terms of the decree. The Court will then be in a position to consider whether the terms of the decree have been carried out."

There is no reference in these observations to Order XXI, rule 2, or to limitation under article 174. The point about limitation under this article, it is true, was raised on behalf of the decree-holder in *Ligraj's* case(3), but it was overruled on the ground that " the proceedings have been throughout misconceived ". It seems to me, therefore, that in that

(1) (1926) A. I. R. (Lah.) 641.
(2) (1926) 93 Ind. Cas. 369.
(3) (1912) 30 Cal. L. J. 118.

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case there was no pronouncement that when the decree-holder would apply for execution, the defendant's objection would not be barred under article 174 if Order XXI, rule 2, were applicable in the circumstances. The contention of the learned Advocate that the onus was on the decree-holder to make out his right to proceed in execution by establishing that the defendant was in default is plainly opposed to the ruling in *Radha Kant Lal's* case(1) (already referred to) that when no payment or adjustment of a decree has been certified under Order XXI, rule 2, and where the verified application for execution does not state under Order XXI, rule 11(*e*), that any payments have been made, but under Order XXI, rule 11(*g*), the decree-holder applies for execution of the entire amount awarded by the decree, the executing court has to assume that there has been no adjustment of the decree either in whole or in part, and cannot, after the lapse of the period fixed by article 174 of the Limitation Act, permit the judgment-debtor to plead any adjustment, or, it may be added, payment, under Order XXI, rule 2(*2*). The decree in the case before us required the judgment-debtor to pay Rs. 1,100 in certain instalments and in the event of his default empowered the decree-holder to proceed in execution. The alleged payments were therefore payments of "money payable under" the decree within the meaning of Order XXI, rule 2. *Wali Shah's*(2) was not a case of payments at all. It may sometimes be difficult to distinguish between conditions precedent to the decree-holder taking out execution and adjustments of a decree or payments towards satisfaction of a decree. The decision in *Wali Shah's* case(2) apparently turned on such a distinction. There is no room for such a distinction in the present case, nor can the judgment-debtor be permitted to evade Order XXI, rule 2(*3*), by giving to these payments towards satisfaction of the decree the

(1) (1921) 6 Pat. L. J. 337.
(2) (1926) A. I. R. (Lah.) 641.

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name of conditions precedent to the decree-holder taking out execution. No payment towards the satisfaction of a decree for money can be recognized by the executing court unless it is certified or recorded under the rule, and no decree-holder is entitled to realise any money by execution if he has been already paid out of court, entirely irrespective of whether or not the decree provides for instalments with execution in default. Where the decree makes such provision and the decree-holder applies for execution, it must be taken that his case is that default has been made and the judgment-debtor will have to meet it by proving payment, a positive fact within his knowledge. As this will have to be done in the executing court, the bar of Order XXI, rule 2(*3*), will come into play, and it is impossible to evade it by invoking section 47, as I showed in some detail in *Harihar Prasad Singh's* case(1) (already referred to)—*see* also *Imamuddin Khan* v. *Bindubasini Prasad*(2). So far, therefore, as the bulk of the payments—the first four payments in alleged satisfaction of the first two instalments—are concerned, it must be held that it is not open to the executing court to recognize them in any way. As regards the two later payments, there are concurrent findings of fact against the appellant. The learned Advocate for the appellant has endeavoured to show that these findings are contrary to law, because the lower court declined to compare the signature on the receipt put forward by the appellant with an admitted signature of his. It is difficult to see any error of law in the lower courts' expressing their inability as laymen to arrive at a conclusion merely on a comparison of handwriting. It was for the appellant to produce evidence to the satisfaction of the courts of fact, and this he clearly failed to do. I may add that we have looked at those signatures in this Court and that in our opinion it would have been surprising if any court with any

(1) (1936) I. L. R. 15 Pat. 422.
(2) (1919) 5 Pat. L. J. 70.

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sense of responsibility could on a comparison of those signatures have come to the conclusion that they were the work of one and the same man.

I would dismiss the appeal with costs.

VARMA, J.—I agree

J. K.

Appeal dismissed.

APPELLATE CIVIL.

1938.

December, 16 January, 25.

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

BAMDEB DAS

v.

RAJA BRAJASUNDER DEB.*

Hindu Law—marriage—gandharva form—minor, whether competent to contract—custom of delivering immature children to be made concubines, whether can be upheld in a court of law.

A minor girl is incompetent to contract a marriage in *gandharva* form which means a union by mutual exchange of garlands, as she is incapable of giving the necessary consent which is essential in such a union.

A custom of delivering immature children to be made concubines is a diabolical one and invalid and cannot be upheld in a court of law.

Appeal by the defendants.

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

P. Mahanti (with him *B. N. Das*, *B. K. Ray*, *B. Mohapatra* and *S. N. Ray*), for the appellants.

G. Jagati and *N. N. Mitra*, for the respondents.

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* Appeal from Original Decree no. 2 of 1933, from a decision of Babu Akhoury Nityanand Singh, Subordinate Judge of Cuttack, dated the 28th December, 1932.

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BAMDEB DAS v. RAJA BRAJA SUNDER DEB.

COURTNEY TERRELL, C.J.—The circumstances which have given rise to this case should provide useful material for the student of social conditions. The appeal is from a judgment of Babu Akhoury Nityanand Singh who has since, I am glad to say, retired from his office as Subordinate Judge of Cuttack. This Subordinate Judge decreed a suit by the plaintiffs for damages for malicious prosecution. The plaintiff no. 1 is one Raja Brajasunder Deb, a wealthy Rajput zemindar in the district of Cuttack and commonly known as the Raja of Aul. Aul was at one time one of the independent Tributary States of Orissa but it is now an ordinary zemindari and the proprietor is fortunately subject to the ordinary law of British India. The plaintiffs nos. 2 and 3 are servants of the Raja, the plaintiff no. 3 being his distant relative, and amongst the services which they render they appear to be pimps for procuring girls to gratify his lusts. The defendants, three in number, are respectively one Bamdeb Das, a petty land-holder under the Raja, Nanda Kishore Das, a young lawyer, and Nishamani Das, another petty landowner. The three defendants are Karans by caste. The prosecution which is alleged by the plaintiffs to have been falsely initiated by the defendants began with a first information which was lodged on the 27th April, 1927, by one Jugal Kishore Das who was the son of the defendant no. 1 in the present suit but has since died. Jugal Kishore Das lived at a village named Chatra Chakada and he laid information that on the 19th day of September, 1926 (that is to say, what is known as the "Sunia day" of the Bengali year 1333), two officers of the Raja of Aul. i.e., the plaintiffs nos. 2 and 3, and one Mangobind Dhal had negotiated with one Hare Krishna Mahanty, a Karan of the village, the purchase of Hare Krishna's daughter Kanaka Dei, 12 or 13 years old, for the use of the Raja of Aul for the sum of Rs. 500, and that the said Hare Krishna had sold the girl for that sum to the plaintiffs nos. 2 and 3, that Mangobind had arranged for a palanquin and bearers to take the

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girl to the Raja of Aul and that in fact she was taken off crying and struggling and he accused the plaintiffs nos. 2 and 3, Mangobind and Hare Krishna, the father of the girl, of buying and selling a minor girl for the purpose of illicit intercourse, an offence under section 372 of the Indian Penal Code. The police took up the investigation with the result that the four persons named in the first information were eventually put on trial before an incompetent Magistrate named B. Misra. If the investigation had been placed in the hands of a police officer with a better regard for duty no doubt the Raja would have been charged with the other accused and he would have been made to answer also for the death of the girl. He should have been put on trial and his activities should have been brought to a satisfactory termination. The story which was unfolded in the evidence at the trial was again repeated in the civil suit which is now before us. It has been demonstrated that Hare Krishna Mahanty had two daughters by his first wife and after her death he had married again. The elder of the two daughters, Kanaka Dei, was on the *Sunia* day aged between 12 and 13 years. The witnesses are unanimous that she was healthy and beautiful and the evidence is quite overwhelming that she had not attained puberty. Hare Krishna attempted to set up the story that she was 18 or 19 years of age but this attempt to excuse his subsequent conduct is manifestly and utterly false. Co-villagers who were in a position to observe the girl stated that she commonly appeared in public which is not the custom for girls after they attain puberty and that in fact she was 12 or 13 years old. Hare Krishna stated that he himself had offered the girl to the Raja of Aul and that the two servants, plaintiffs nos. 2 and 3 in the present suit, had taken her to the Raja. In court he denies having received any money but the evidence that he in fact did receive money is overwhelming and also the fact that the sum received was Rs. 500 and there is also evidence of the public

admission by Hare Krishna before a subsequent caste meeting of Karans and to several witnesses that he had in fact taken the money. The same evening a feast took place at Hare Krishna's house paid for with funds supplied by the Raja which was attended by about half the Karans in the village, the rest having declined the invitation and the girl was sent off crying and struggling in the charge of the plaintiffs nos. 2 and 3 and Mangobind to the Raja. With her went one of her brothers and the village barber has stated that he was one of the party. On arrival at the Raja's palace the girl was taken inside and the brother and the barber remained outside. Kanaka disappeared into the palace and little more than a month afterwards she was dead. I repeat that at this time Kanaka was a girl of tender years who had not attained puberty but was healthy and beautiful. The Raja at this time was aged about 42 years and had a numerous harem. The accused persons in the criminal case and the plaintiffs in the present case have tried to set up a story that the girl died of "fever, dropsy, etc.". Girls at this age do not develop dropsy in one month. She does not seem to have received any medical attention but the cause of 'her' death in the darkness of the Raja's harem can easily be imagined.

The defendant no. 2, Nanda Kishore Das, is a young educated man and a graduate. He belongs to a party of reform and was anxious to rescue the members of his caste who live in the Raja's zamindari from the servile degradation in which they live and from the suggestion that they were a proper hunting ground for replenishing the Raja's harem. Learning of the circumstances including the death of the unfortunate child he endeavoured to stir up public indignation against Hare Krishna and the Raja of Aul and his servants. Until the decision of this appeal he has met with the fate which might be expected having regard to the contemptible mentality of the majority of his caste in the Raja's

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zamindari, and to the neighbourhood of a wealthy brutal and unscrupulous landlord. Nanda Kishore is the nephew of the defendant no. 3 and he is also a relative of Hare Krishna Mahanty. Nand Kishore and Jugal Kishore by notice, dated the 20th March, 1927, called a meeting at Chatra Chakada, of the Karan community and Nanda Kishore addressed them on the degrading circumstances of the sale of Kanaka, and Hare Krishna was summoned to defend himself against the allegation and the further charge that he was suspected of being about to sell his second daughter, a girl even younger than Kanaka, to the Raja. It is instructive to observe that the majority at the meeting does not seem to have been inspired with any particular indignation at the bestial inhumanity of Hare Krishna in sacrificing a mere child. The subjection of a little immature girl to the brutality of sexual intercourse with an elderly man did not excite particular resentment. The serious charge against Hare Krishna seems to have been the social slight upon the caste. It was suggested to Hare Krishna that he should return the money to the Raja but he explained that he had spent it, whereupon his caste fellows excused him on the ground of "old custom" and were content with a humble apology and a promise not to repeat his conduct. It may be noted that soon afterwards Hare Krishna and a son of his were appointed by the Raja to hold posts on his own staff.

Jugal Kishore however was not satisfied and lodged the first information, and it is clear that Nanda Kishore in spite of a weak denial in this case was very properly assisting him, as was Jugal Kishore's father who is the defendant no. 1. The police were unable to ignore the complaint and two police officers of the subordinate service undertook the investigation and visited the village and ultimately the Deputy Superintendent of Police visited the Raja. I desire to say with all the emphasis at my command that in the case of such an accusation

against a person like the Raja of Aul the investigation should have been undertaken by a thoroughly trustworthy police officer and it should never have been left to the individuals who undertook it. In this matter the higher Police authorities neglected their obvious duty. It was as necessary to prevent the Raja from being blackmailed as it was to prevent the bribery of the police by the Raja and either possibility is too notorious to be ignored. The Raja told the Deputy Superintendent of Police and the Inspector that the girl had been brought by her father who was too poor to maintain her, that he (the Raja) had not given any order for her to be brought and that she remained in his harem and was looked after by his maidservants out of charity and he had heard that she later died of "fever and dropsy" and that a kaviraj and doctor treated her. In fact he denied any intercourse with the girl at all and denied that there had been any ceremony to make her a member of his household whether as a wife or as a concubine. The police officers concerned, to their eternal disgrace, made no further effort to investigate the exact circumstances of Kanaka's death and dropped the whole case as against him.

After certain vicissitudes in the way of applications for transfer the case against the four accused, that is to say, the plaintiffs nos. 2 and 3 in the present case and Mangobind Dhal and Hare Krishna was brought before the Magistrate Misra. Here again it would have been better if the District Magistrate had transferred the case to his own file. All the material facts were found against the accused, that is to say, the payment of the money, the age of the girl as between 13 and 14, and the fact that she was taken away to the Raja, but an extraordinary defence was set up by the accused and it is astounding that it found favour with the Magistrate. It was to the effect that the Raja was entitled by custom as evidenced by a book known as the Pachis Sawal to contract marriages with Karan girls whether they

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be minors or not. It is true that the Pachis Sawal states in connection with the Aul family that in matters of succession and in the absence of an heir born of one of the legitimate Ranis the successor to the Raj may be the offspring of a secondary wife to be taken from a lower caste, and this, it was held, justified the taking by the Raja of the girl Kanaka. But the quasi-marital unions contemplated by the Pachis Sawal can only begin with a formal expression of mutual consent born of mutual desire and must be recognised by the custom of both parties to the union and the consent is expressed by the formal exchange of garlands. But the evidence of the practical recognition of such a custom is of the most meagre kind and quite insufficient to establish it in fact. The Raja has many concubines who receive the names, according to their grade, of Chaukibai, Fulbai or Malabai. But it is abundantly clear that the unhappy women designated by the titles I have mentioned are nothing but concubines without any married status and they are not wives in any sense of the word. They are given a miserable pittance on which to live, they are prisoners in the Raja's harem and he retains proprietorship of their bodies for as long as he may choose or until death releases them.

The accused endeavoured to rely, as have the plaintiffs in the present case, upon explanation II to section 372 of the Indian Penal Code which is as follows:—

"For the purposes of this section 'illicit intercourse' means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation."

The Magistrate seems to have ignored the fact that the Raja himself expressly denied that any form of union took place and that he did not appear to give evidence in the case. There was not a particle of evidence either before the Magistrate or in the civil

case with which we are now dealing that any ceremony of any sort took place. The only ceremony, if it can be called such, which was in evidence was the feast given by Hare Krishna at his own house out of the money supplied by the Raja. There is not the slightest evidence of any marriage whatever having been celebrated.

It was argued that the form of "marriage" for these concubines was of the "Gandharva" form. This means a union by mutual desire formally expressed by exchange of garlands but it is impossible to believe that there could have been any willingness on the part of a child of Kanaka's age for union with this elderly ruffian. The "Gandharva" form of marriage is in fact recognized by Hindu Law but a minor girl cannot contract such a marriage as she is incapable of giving the necessary consent which is essential to such a union. Indeed she had never seen him and the evidence shows that she said she would rather commit suicide and that she was carried off crying and struggling. It is useless to argue that it has been the custom for Karan parents to deliver their immature children to the Aul Rajas to be made concubines. No such custom has been established and even if it had been proved it is a diabolical one, and in so far as the law is administered in British India I refuse to recognize it as having any legal validity whatever. It is astonishing that such a plea can have met with success, but such is the fact and the accused were actually acquitted on this ground. The case lasted nearly a year, the accused being represented at the cost of the Raja by eminent lawyers. It must surely have attracted the notice of the higher officers of the Government, and it is shameful that no appeal against this outrageous decision was ever attempted. It is a gross slur upon the British administration that such a clear miscarriage of justice, in a prosecution initiated in the name of the King-Emperor, should have been allowed to pass unchallenged.

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Having defeated the party of reform the Raja and his pimps now attempted to crush it altogether and fortunately began the present suit for malicious prosecution. In this case the Raja himself appears as a plaintiff although how he can have had any cause of action it is difficult to see. The fact that again the Raja was afraid to give evidence is treated as of no account. The same silly argument based on the alleged custom was again successful notwithstanding the overwhelming evidence as to the age of Kanaka. The Judge professed disbelief in the evidence that she was only 12 or 13 years old and his finding on this fact is a piece of wicked perversity. He failed to observe that there was no evidence whatever of any marriage having taken place. He found truly enough that the defendants had actively taken part in the prosecution of the Raja's servants and seems to have thought that the fact of the acquittal by the Magistrate showed that the prosecution was without reasonable and probable cause, whereas even if the so-called marriage had in fact taken place at the palace of the Raja, the party of the prosecution, having regard to the secrecy of the matter, had a very good and just cause to take proceedings. There is no evidence whatever that in assisting the prosecution the defendants or any one of them attempted to procure any false evidence or to do anything which an honest citizen should not have done. Notwithstanding that there was no evidence of a marriage the Subordinate Judge held that the positive denial of the marriage by the Raja was to be excused because it was a lie inspired by fear of prosecution and that finding was arrived at in face of the fact that the Raja did not appear to deny his own statement. The Raja was awarded damages amounting to Rs. 2,000 for "mental pain and anguish" and having regard to the expense to which he had been put in the defence of his servants a further sum of Rs. 3,000 was awarded. The plaintiffs nos. 2 and 3 were also awarded damages and a joint decree in favour of the plaintiffs for Rs. 6,000 was awarded against all

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the defendants. It is shocking to think that the administration of justice should ever have been entrusted to such a Judge.

Only one gleam of light relieves the gloom of this miserable story. I refer to the rise of a party of reform amongst the younger and educated members of the Karan caste and the courageous exhibition of that reforming spirit by the defendant no. 2, Nanda Kishore Das. Pioneers of better ideals in a land of social darkness must expect to incur suffering for their cause and their upward path is necessarily stony and difficult. Appeals based on the ideals of humanity have little hope of success among a servile backward people whose customs show little care for the health and happiness of their daughters. For the time being doubtless attempts must be limited to arousing some sense of caste dignity.

In conclusion I would recommend to the authorities that a close watch be kept upon the Raja of Aul and others of his kind by officers of a thoroughly trustworthy character

For the reasons given above we on the 16th day of December, 1937, made an order allowing this appeal with costs to the appellants throughout and such costs will be borne by the Raja of Aul.

KHAJA MOHAMAD NOOR, J.—I agree entirely.

J. K. *Appeal allowed.*

LETTERS PATENT.

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

RAJA RAM RAI

v.

NIRANJAN RAI.*

1938.

January, 26, 27.

Landlord and tenant—co-sharer mortgaging his proprietary share to another co-sharer—mortgagor cultivating certain plots on payment of produce rent to mortgagee—

*Letters Patent Appeal no. 2 of 1937, from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 18th December, 1936.

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twelve years' continuous possession—co-sharer mortgagor, whether acquires occupancy rights—Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 20 and 21—partition—plots in cultivating possession of mortgagor allotted to mortgagee—mortgagee or his representative, whether entitled to eject mortgagor or his transferee.

R a co-sharer landlord along with others gave certain shares in a village in usufructuary mortgage to *A* another co-sharer landlord and thereafter continued to cultivate specific plots of land which were in his possession from before and to divide half the produce to *A*. *R* subsequently sold his right in the land to *D* and *A* accepted *D* as tenant and received his share of the produce from him. *A* subsequently assigned his mortgage interest to another person who also accepted the produce from *D*. Thereafter there was a partition and the plots held by *D* were allotted to the patti of *A*.

Held, that *D* had acquired the status of a tenant and in course of time he had acquired occupancy right and could not be ejected.

Held, also that the representatives of *A* were estopped and could in no circumstance eject *D*.

Obiter: In the application of section 99 of the Estates Partition Act it is clear that some distinction is to be drawn between occupancy rights which are the creation of statute, and the rights of a lessee or tenure-holder which are the result of a contract between a single co-sharer and the person in possession.

Thakur Raghunandan Sahai Singh v. *Thakur Dripa Nath Sahai Singh*(1), referred to.

Appeal by the defendants.

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

Sunder Lall, for the appellants.

Tarkeshwar Nath, for the respondents.

(1) (1928) I. L. R. 8 Pat. 258.

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JAMES, J.—Bechan Singh, Brijmohan, Rajkumar and Ramkumar possessed a share of 6 pies and 13 karants in the estate bearing tauzi no. 6787 on the revenue roll of Shahabad. In 1895 they gave a usufructuary mortgage of their share to Jaimangal; and ultimately the area with which we are here concerned came into possession of Achhaibar Singh, another co-sharer landlord of the village, as usufructuary mortgagee. This area of 3.04 acres had apparently been in the khas possession of Raj Kumar Singh before the mortgage; and after the mortgage of the proprietary interest Rajkumar continued to cultivate the land, delivering half the produce to the mortgagee Achhaibar Singh. Rajkumar Singh conceived that in thus cultivating under the mortgagee he had some kind of tenancy right, and in 1910 he executed a sale deed, whereby he conveyed to the ancestors of the defendant-appellants his right to cultivate this land describing it as *sharah moyyan bhaoli kasht*. The ancestors of the defendants thereupon entered upon this land, paying half the produce to the mortgagee Achhaibar Singh, and in subsequent years, after Achhaibar Singh had assigned his mortgage interest, paying rent to the assignee. In 1924 the whole estate came under partition, with the result that this area of 3.04 acres became a part of a new estate which was allotted to Achhaibar Singh and defendants nos. 9 to 11 of this suit. In 1926 this mortgage was redeemed by Ram Sarup Tewari to whom Rajkumar had conveyed the equity of redemption; but we are not concerned here with that transaction; and it is sufficient to say that the proprietary interest unencumbered by the mortgage is in possession of the plaintiffs and defendants 9 to 11. The representatives in interest of Achhaibar Singh instituted this suit for the ejectment of these defendant-tenants, impleading as co-defendants their co-sharers in the new estate. The other co-sharers do not support the representatives of Achhaibar Singh in their claim to eject the defendants, so that we are

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JAMES, J.

here only concerned with the representatives of Achhaibar Singh and the representatives of the cultivators who were paying bhaoli rent to Achhaibar Singh in 1910.

At the trial of the suit the tenant-defendants endeavoured to demonstrate that Rajkumar before he acquired his proprietary interest had possessed a raiyati interest which had been transferred to them by the sale of 1910 (and Rajkumar may have made some such representation to them before the sale); but they were unable to prove that Rajkumar had any such raiyati interest to transfer and that claim has now been abandoned. The Subordinate Judge who heard the appeal of the defendant-tenants has found that the area of 3.04 acres was in possession of Rajkumar as a tenant-at-will on behalf of the mortgagee, that is to say, under the mortgagee; and he has found that the right which Rajkumar transferred to the ancestors of the appellants was the right of cultivating the land on behalf of the mortgagee Achhaibar Singh, and that they have been quietly in possession since that time delivering half of the produce to the mortgagee.

Mr. Sunder Lal on behalf of the defendant-appellants argues that on these facts it should be found that the defendants have acquired an occupancy right in this land. It is argued on behalf of the respondents that the defendants could not by the transfer from Rajkumar obtain a higher right than that which was enjoyed by Rajkumar himself; and indeed it appears that more attention has been given by the courts in this case to the rights which were enjoyed and transferred by Rajkumar than to the question of what might be the effect of the new relationship, established after the transfer, between the mortgagee of the proprietary right and the tenants who were paying the produce rent. It may be difficult to define the status of Rajkumar in terms of the definitions contained in the Bengal Tenancy

Act; and possibly the learned Subordinate Judge is right in considering that his status under the mortgagees was that of a tenant-at-will, because of his peculiar position as a proprietor in the village and as mortgagor of the proprietary interest by virtue of which he had cultivated the land before the mortgage. But Rajkumar did not necessarily confer his own status on his transferees by the sale deed of 1910 and he did not convey any interest in the equity of redemption or in the proprietary rights. For practical purposes the effect of that sale should be regarded as merely that Rajkumar for consideration stepped out of the way, and the purchasers were permitted to enter and cultivate this land on produce rent under the mortgagee. The learned Subordinate Judge based his decision on his view that, stepping into the shoes of Rajkumar Singh, these defendants in some way or other entered into the position of a mortgagor who was cultivating land under his own mortgagee in spite of the fact that no interest in the equity of redemption had been conveyed to them. This was apparently the view taken by the Settlement Officer when the record-of-rights was under preparation, but as Mr. Sunder Lal points out, this view does not take properly into account the relationship between the new cultivating tenants and the mortgagee. These cultivators acquired no proprietary right; they did not acquire any interest in the equity of redemption of the mortgage. Thus this conveyance of 1910 did not convert the new cultivators into mortgagors: it did not confer upon them the status, whatever it may have been, of Rajkumar Singh; and the real effect of this so-called conveyance was merely to eliminate Rajkumar Singh from the picture as cultivator of the land, and to clear the way for the new tenants. All that they acquired by this deed, which purports to convey to them certain rights, was the power of cultivating this land without obstruction from Rajkumar Singh, but this right was only against Rajkumar Singh and it was a right which could not be

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exercised unless the mortgagee Achhaibar Singh accepted the purchasers as his tenants. Thus the finding that these defedants remained in possession delivering half of the produce to the mortgagee, is a finding that they were the tenants of the mortgagee. The mortgagee in possession of proprietary rights was obliged under section 76 of the Transfer of Property Act to manage the property as a person of ordinary prudence would manage it if it were his own. The leasing out of " bakasht " land to raiyats on an adequate rent is an act of ordinary management of property such as a mortgagee in possession is entitled to do: and when these defendants thus cultivated the land and delivered rent to the mortgagee in possession of the proprietary interest they became raiyats under the mortgagee as representing the proprietor. In due course after they held as raiyats for twelve years they would acquire occupancy rights.

We come now to the effect of the partition. Section 99 of the Estates Partition Act provides that if any proprietor of an estate held in common tenancy has given his share in lease, or has created an encumbrance thereon, the lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands. In *Mahadeo Prasad Singh* v. *Jagarnath Prasad*(1) co-sharers to whom an estate had been allotted wherein a mukarraridar was holding on a tenure created by a single co-sharer were held to be entitled to eject the mukarraridar. In that case the decision in *Thakur Raghunandan Singh* v. *Thakur Dripa Nath Sahai Singh*(2) was cited with approval, but there the interest concerned was a thika doami tenure and the learned Judges remarked that if the disputed land had been rated as raiyati land the plaintiff must have had greater difficulty in succeeding in his suit. In the application of the provisions of section 99 of

(1) (1933) I. L. R. 13 Pat. 303.
(2) (1928) I. L. R. 8 Pat. 258.

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the Estates Partition Act it is clear that some distinction is to be drawn between occupancy rights which are the creation of statute, and the rights of a lessee or a tenure-holder which are the result of a contract between the single co-sharer and the person in possession, and it may be doubted whether after occupancy rights have accrued by twelve years' continuous possession by virtue of the provisions of sections 20 and 21 of the Bengal Tenancy Act any other co-sharer would be entitled to eject the raiyat by the application of the provisions of section 99 of the Act. The provisions of section 25 of the Bengal Tenancy Act would appear to bar such a possibility. In the present case that question strictly speaking does not arise, because the persons who are seeking to apply the provisions of section 99 of the Estates Partition Act represent the person who first admitted these raiyats to occupation; and under the terms of section 99 itself, whatever tenure or lease Achhaibar Singh might have created while he was usufructuary mortgagee would be binding on his representatives in respect of this land. The co-sharers other than the members of Achhaibar Singh's family accept these defendants as raiyats; and since it is only the members of Achhaibar Singh's family who object, no advantage can be taken of the provisions of section 99. In that view of the matter, since the defendant-appellants acquired raiyati interest when they were accepted as tenants by Achhaibar Singh, and they have enjoyed this interest for twelve years, they cannot now be ejected except under the provisions of section 25 of the Bengal Tenancy Act and the plaintiffs' suit must fail.

I would, therefore, allow this appeal and set aside the decrees of the Judge of this Court and the courts below. The plaintiffs' suit will be dismissed with costs throughout to defendants 1 to 8.

COURTNEY TERRELL, C. J.—I agree.

J. K.

Appeal allowed.

APPELLATE CIVIL.

1937.

September, 23, 24

Before Wort and Manohar Lall, JJ.

MAHARAJADHIRAJ SIR KAMESHWAR SINGH BAHADUR

v.

BIBI FATMA.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* 1, *rule* 9—*nonjoinder of necessary party, whether fatal—suit framed under section* 104-H *of the Bengal Tenancy Act*, 1885 (Act VIII of 1885)—*prayer for declaration of defendant's status as that of occupancy tenant—persons recorded as occupancy raiyats not joined as defendants—suit, whether maintainable.*

In a suit framed under the provisions of section 104-H of the Bengal Tenancy Act, 1885, the plaintiff alleged that the status of the defendants, who were entered in the record-of-rights as tenure-holders, was that of occupancy tenants, and the relief claimed was that

> "after determining and declaring the correct status of the defendants let a decree be passed in favour of the plaintiff as against the defendants settling the proper annual rent payable by the defendants....."

The plaintiff, however, failed to implead certain persons who, according to his allegation, were merely under-tenants, but who were recorded as occupancy raiyats in the record-of-rights in respect of a portion of the holding.

Held, that the so-called under-tenants were necessary parties to the suit and, therefore, that the suit was not maintainable in their absence.

Jogendra Nath Singh v. *Secretary of State for India in Council*(1) and *Jogendra Mohan Das* v. *Janaki Nath Saha*(2), distinguished.

*Appeal from Appellate Decree no. 157 of 1935, from a decision of Babu Kshetra Mohan Kunar, Subordinate Judge of Bhagalpur, dated the 6th of September, 1934, confirming a decision of Babu Raghunandan Prasad, Munsif of Madhipura, dated the 6th of June, 1933.

(1) (1912) 16 Cal. L. J. 385.

(2) (1916) 21 Cal. W. N. 427.

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MAHARAJA-DHIRAJ SIR KAMESHWAR SINGH BAHADUR v. BIBI FATMA.

Appeal by the plaintiff.

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

Murari Prasad, (with him *R. Misra* and *K. P. Upadhaya*), for the appellant.

Syed Ali Khan and *Syed Raza Imam*, for the respondents.

WORT, J.—The question in this appeal is whether the so called under-tenants were necessary as well as proper parties to the action. The learned Judge in the Court below has so held, and it is against that decision that this appeal is preferred. The question whether parties are both necessary and proper parties must of necessity depend upon the circumstances of the particular case.

Mr. Murari Prasad in this case contends that they are not necessary parties as the judgment, if pronounced in his favour, does not bind parties who are not joined. That is, if I may say so, trite law, but does not answer the contention in this case, that the under-tenants who have been recorded as occupancy raiyats are necessary parties. If the matter had been dependent upon contract, that is to say, had the rights as between the plaintiff and the defendants depended upon contract, or, to put it perhaps more precisely, had the matter concerned the general law of landlord and tenant in contradistinction to the law as provided by the Bengal Tenancy Act, something might have been said in support of the contention which Mr. Murari Prasad puts forward. It certainly would be the case there that any judgment pronounced as against the present defendants to the action would not have bound nor affected in any way the rights of the so called under-tenants. But here we are concerned with the question of status. In paragraph 7 the plaintiff alleges

" that the defendant is an occupancy tenant and as such his status should be " Kaimi " or mokarrari nahin, etc. ".

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WORT, J.

The plaintiff then proceeds to claim the relief that,

"after determining and declaring the correct status of the defendants let a decree be passed in favour of the plaintiff as against the defendants settling the proper annual rent payable by the defendants for the tenancy in suit in accordance with the instruction laid down by the Board of Revenue."

Needless to say that the defendants in this case are recorded as tenure-holders. Now, assuming for the purpose of argument that the plaintiff succeeded in this action, he would succeed in varying or amending the entry in the record-of-rights in this way that the defendants would be recorded as occupancy raiyats. But as we know the under-tenants are already recorded as such. It is not possible for there to be two occupancy raiyats of the same holding and the contention of Mr. Murari Prasad is that their occupancy rights may be not as occupancy raiyats but as under-tenants with occupancy rights. It does not in the circumstances in my judgment meet the point about their being recorded as occupancy raiyats. Shortly stated therefore such a judgment, as I have indicated, would not only affect the status of the defendants but would affect the status of the so called under-tenants who have not been joined as parties to the suit. In the course of the argument the case of *Jogendra Nath Singh* v. *Secretary of State for India in Council*(1) was referred to. That case was discussed in the course of the judgment in a later case, *Jogendra Mohan Das.* v. *Janaki Nath Saha*(2), where in a case not dissimilar in certain respects from the present it was held that it was not necessary to join an under-tenant, in other words the under-tenant was not a necessary party. But it is to be noted that in *Jogendra Nath's* case(1) there was no contest as between the under-tenant and the defendant in the action and the judgment pronounced against the defendant in the action in no way affected the status of the under-tenant although, as it was

(1) (1912) 16 Cal. L. J. 385.
(2) (1916) 21 Cal. W. N. 427.

stated, he might have been interested in the matter and possibly therefore was a proper party although not a necessary party.

In my judgment in this case the learned Judge was clearly right, having regard to the fact which I have already stated that the under-tenant's status was affected, in holding that he was a necessary party. For those reasons in my opinion the appeal fails and must be dismissed with costs.

I should have added in my observation that neither in the Courts below nor in this Court was any request made that the under-tenant be joined as a party.

The appeal is dismissed with costs.

MANOHAR LALL, J.—I agree. In my opinion the reliefs claimed in the plaint must determine the question whether the under-tenants are or are not necessary parties in the action framed under the provisions of section 104-H of the Bengal Tenancy Act. Mr. Murari Prasad strongly relied upon the observation of the Calcutta High Court in the case of *Jogendra Nath Singh* v. *Secretary of State for India in Council*(1). It is to be noted that the suit as framed in that case was not allowed to be proceeded with in the Calcutta High Court where Sir Rash Behary Ghosh for the appellant deleted the first two prayers in the plaint, with the result that after the amendment of the plaint the suit stood as asking for a mere declaration that the amount of rent settled under the settlement record should be altered. It is obvious that for such a prayer an under-tenant was not a necessary party. The other case relied upon, viz., *Jogendra Mohan Das* v. *Janki Nath Saha*(2), was also a case in which no declaration was sought for as to the status of the plaintiff. The only relief claimed was that the Court would settle a fair and

(1) (1912) 16 Cal. L. J. 385.
(2) (1916) 21 Cal. W. N. 427.

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MAHARAJA-DHIRAJ SIR KAMESHWAR SINGH BAHADUR v. BIBI FATMA.

MANOHAR LALL, J.

equitable rent. In the present case the declaration asked for in the plaint is very clear and specific: the plaintiff asks for a declaration that the status of the defendant should be altered. Such a suit in my opinion is not maintainable in the absence of the persons who have been recorded as occupancy raiyats of a portion of the same holding. I find another difficulty also in the way of the plaintiff and that is this. The plaintiff sued for a declaration that the entry regarding a portion of the holding is incorrect although in my view he is aggrieved by the entry in respect of the whole holding. For those reasons I agree that the appeal fails and should be dismissed with costs.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Rowland, JJ.

1937.

September, 24.

ABU MOHAMMAD MIAN

v.

BABU DEODUTT.*

Mortgage—subrogation—purchaser of equity of redemption—arrangement with mortgagor by which portion of purchase money retained by purchaser for payment of prior mortgage—purchaser, whether entitled to benefit of subrogation—intention to keep alive to be presumed.

Where a purchaser of the equity of redemption pays off a prior mortgage under an arrangement with the mortgagor by which a portion of the purchase money was left in the hands of the purchaser for such payment, *held*, that, in the absence of any indication of a contrary intention, the purchaser must be presumed to have kept alive the mortgage,

*Appeal from Appellate Decree no. 229 of 1935, from a decision of Babu K. N. Singh, Subordinate Judge of Muzaffarpur, dated the 6th of July, 1934, modifying a decision of Babu Uma Shanker Prasad, Munsif of Hajipur, dated the 17th of May, 1933.

so as to entitle him to the benefit of subrogation as against subsequent encumbrancers.

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Mohesh Lal v. *Mohuni Bawan Das*(1), *Gokuldas Gopaldas* v. *Rambaksh Seochand* (2), *Dinobundhu Shaw Chowdhry* v. *Joymaya Dasi*(3) and *Malireddi Ayyareddi* v. *Gopala Krishnayya*(4), followed.

Jagmohan Das v. *Jugal Kishore*(5) and *Lakshmi Amma* v. *Sankra Narayana Menon*(6), distinguished.

Appeal by the plaintiffs.

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

Syed Hasan, for the appellants.

B. C. De, for the respondents.

WORT, J.—The substantial question in this appeal is whether the plaintiffs have a right to stand in the shoes of mortgagees under a mortgage of 1921, in other words, whether they had a right to subrogate. The learned Judge of the trial Court held that they had and in the result gave the plaintiffs a decree for two-thirds of the land in dispute and a mortgage decree for Rs. 500 against defendants 1 and 2 with the condition that defendants 1 and 2 would be entitled to retain one-third of the property on payment of Rs. 500, that sum representing that part of the property. The learned Judge on appeal, however, has reversed that decision granting the plaintiff a decree for Rs. 850 disallowing their claim for two-thirds of the land. That decision was based on a consideration of the question whether the purchase by the defendants was in respect of the whole of the interest in the land or one-third only being the interest of Ram Gopal, one of the brothers who were members

(1) (1883) I. L. R. 9 Cal. 961; L. R. 10 Ind. App. 62.
(2) (1884) I. L. R. 10 Cal. 1035; L. R. 11 Ind. App. 126.
(3) (1901) I. L. R. 29 Cal. 154; L. R. 29 Ind. App. 9.
(4) (1923) I. L. R. 47 Mad. 190; L. R. 51 Ind. App. 140.
(5) (1932) 36 Cal. W. N. 4, P. C.
(6) (1935) I. L. R. 59 Mad. 359.

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WORT, J.

of a joint family to whom this property belonged. It would appear that one of the contentions of the defendants in the Court below was that Ram Gopal had separated from his brothers and that this portion of the land in dispute had fallen to his share of the property on division. The Judge of the trial court disbelieved, or perhaps to put it more accurately, did not accept the defendants' case in this regard for the reason that in his view the question had not been raised in the pleadings. The learned Judge of the lower appellate court, however, took a different view, and, by his construction of the plaint and written statement, concluded that the questions had been raised. Perhaps there is some support for that view having regard to the last clause of the fifth issue which was settled by the Judge of the trial court. The issue ran

> "is the sale held in execution no. 13 of 1927 invalid and inoperative against the plaintiffs, if so, to what extent?".

It is contended in this Court that that clause of the issue raised this question at the trial. Now I think one matter is perfectly clear and that is that the learned Judge in the Court below was in error in coming to the conclusion that the question of separation was raised in the pleadings; I am clearly of the opinion that it was not. The issue to which I have referred is another matter, and having regard to the pleadings, in my judgment the issue is equivocal. What has actually happened, it is important to notice having regard to the argument of Mr. De in this matter, is that one of the plaintiffs' witnesses (we have looked into the evidence in the case for the purpose of deciding this question) had said in examination-in-chief that there was a separation between the brothers. No further questions were asked either in examination-in-chief or in cross-examination on that point; therefore as the evidence stood the most important matter arising in connection with this question did not come out, the question

being whether the land in dispute fell into the share of Ram Gopal the vendor? It is true that there is some evidence by defendants' witnesses in this regard, but in all the circumstances of the case it seems to me quite clear that the important point was not present to the mind at least of the plaintiffs' witnesses. The contention of Mr. De in this connection to which I have made reference is that, in spite of the fact that it was not raised in the pleadings, if the matter was discussed in the evidence, and therefore was present to the minds of the parties, the pleadings can be put right by a formal amendment: that is the substance of his argument. In my judgment this is not the state of the facts. The fact by itself that the plaintiffs' witness to whom I have referred was not cross-examined on this point and the omission in examination-in-chief to make any statement as regards the share of Ram Gopal is conclusive to my mind that the issue was not really before the Court, and it would be unfair and unjust in the circumstances to hold that the matter could be cured by a mere formal amendment of the pleadings. That being so, it seems to me that we must decide this case on the footing that there was no proper decision that the brothers had separated and that in selling this property Ram Gopal was selling only his right, title and interest which was one-third. I have already mentioned the mortgage of 1921 and the other two important transactions were the purchase by the plaintiffs on the 19th of March, 1925, and the purchase by the defendants in execution in 1927. There was in the meantime an attachment before judgment. Under the purchase by the plaintiffs in March 1925 it had been agreed that a part of the purchase money should be kept by the plaintiffs for the payment of the mortgage of 1921 to which I have already made repeated reference and it was in those circumstances that the question arose as to whether the plaintiffs were entitled to be placed in the shoes of mortgagees under that mortgage.

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ABU MOHAMMAD MIAN v. BABU DEODUTT.

WORT, J.

A large number of authorities have been quoted by Mr. De on behalf of the respondents and the substance of his argument which has been addressed to us against the contention of the appellant is that a distinction should be drawn between those cases in which a person purchases the equity of redemption and subsequently pays off a prior encumbrance (in which circumstances it is admitted by Mr. De that he is entitled to the benefit of the doctrine of subrogation) and those cases, as in the case before us, in which the purchaser has undertaken to pay off the encumbrance. It is suggested by the language of certain of the learned Judges who have dealt with this matter that in the latter case the purchaser is merely under an obligation and is not entitled to the equity which in this case he seeks.

The earliest case and in fact the leading case in the matter is *Mohesh Lal* v. *Mohunt Bawan Das*(1). This case was referred to in a later case, *Dinobundhu Shaw Chowdhary* v. *Jogmaya Dasi*(2), as also in the case of *Gokul Doss Gopal Doss* v. *Rambux Seochand*(3). I content myself with the reference to these two cases made by Lord Lindley in the case of *Dinabandhu Shaw Chowdhury* v. *Jogmaya Dasi*(2), where Lord Lindley makes this statement during the course of his judgment: "The law upon this subject and its application to transactions in India will be found in *Mohesh Lal* v. *Mohunt Bawan Das*(1) *and Gokul Doss Gopal Doss* v. *Rambaksh Seochand*(3). The Subordinate Judge has summed it up accurately thus:

"When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot."

(1) (1883) I. L. R. 9 Cal. 961; L. R. 10 Ind. App. 62.
(2) (1901) I. L. R. 29 Cal. 154; L. R. 29 Ind. App. 9.
(3) (1884) I. L. R. 10 Cal. 1035; L. R. 11 Ind. App. 126.

A perusal of one of the authorities to which reference was there made—the case of *Gokhul Doss Gopal Doss* v. *Rambaksh Seochand*(1), will show that Sir Richard Couch, delivering the opinion of the Board, dealt with the doctrine laid down in *Toulmin* v. *Steere*(2) and stated that it was not applicable to Indian transactions, "except as the law of justice, equity and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day." Then reference is made to the art of conveyancing in India, and Sir Richard Couch proceeds to say: "The obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charges ? He had a right to extinguish it and a right to keep it alive. What was his intention ? If there is no express evidence of it, what intention should be ascribed to him ? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance....." Then the learned Member of the Board proceeds to deal with the instances.

Now, that being the law, the question which we have to decide is whether the circumstances of this case are such as to indicate that no such intention on the part of the plaintiffs can be assumed. The only circumstance which Mr. De points out in this case and which according to his agrument would exclude the inference of the intention is the fact, as I have already stated, that the plaintiffs covenanted that the owner of the equity of redemption, in other words, the mortgagor, should pay off the mortgage of 1921. In this connection one of the principal cases upon

(1) (1884) I. L. R. 10 Cal. 1035; L. R. 11 Ind. App. 126.
(2) (1817) 3 Mer. 210.

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which Mr. De relies is the case of *Jagmohan Das* v. *Jugal Kishore*(1). In that case we have not the advantage of the reasons of their Lordships of the Judicial Committee. Lord Russel of Killowen expressed the opinion of the Board merely stating that they agreed with the judgment of the Judge in the Court below being the Court of Oudh. One of the passages, and indeed the only passage of that judgment, on which reliance can be placed is this statement (where I might say that the relevant fact was that the person there claiming subrogation had agreed to pay off one-half of the debt) which was approved of by the Privy Council: "The learned trial Judge has given the Appellant credit for this fact and has permitted him to use this redemption by way of subrogation. He has considered that he may use this redemption to the extent of one-half. In the end he did pay off one-half of the debt. He can obtain no return for that, but he is entitled to obtain credit for the remaining half inasmuch as he paid that amount on behalf of the mortgagor. He actually paid Rs. 47,278-3-0 but in this sum was included (the lesser sum of) Rs. 1,300 which he paid under the provisions of Or.21, r.89". It is upon that passage and the construction placed upon that judgment in subsequent cases in the Indian High Courts that Mr. De relies for his contention. Indeed the latest case in this regard is the case of *Lakshmi Amma* v. *Sankara Narayana Menon*(2). But the view I take of that case gives no assistance to the argument which has been addressed to us by Mr. De. It was a case of an agreement to pay off three prior encumbrances, and it seems to me, as was pointed out by my learned brother during the course of the argument, the last few sentences of the judgment of Cornish, J. dispose of the whole matter. Cornish, J. observed: "In the absence of any particular circumstance to the contrary, there is no room for inferring that the

(1) (1932) 36 Cal. W. N. 4 P. C.
(2) (1935) I. L. R. 59 Mad. 359.

appellant was intended to be substituted for the three mortgagees whom he had contracted to pay. But in any case no such inference can be drawn in favour of the appellant when in breach of his contract he has paid off only two of the three mortgages which he had undertaken to discharge ". For those reasons the appellant's claim to a right of subrogation there failed.

As I have already stated a large number of cases has been brought to our notice but not in any case have we the facts which are present in this case. In most of the authorities which have been cited, just as in the case of *Lakshmi Amma* v. *Shankara Narayan Menon*(1), there were several encumbrances and the person seeking subrogation had not performed his contract of paying up all that he had contracted to pay. The matter comes back to the question of first principle, whether there is anything in this case which would prevent the Court from drawing an inference that the intention on the part of the plaintiffs was not to keep the mortgage alive. In my judgment there is nothing. In the case of *Dinabandhu Shaw Chawdhury* v. *Jogmaya Dasi*(2) the mortgagor had made an arrangement with one Mustaphi for an advance for payment of a prior mortgage. It is true that Mustaphi was to get a mortgage security for his advance; but it was not contended nor could it be contended that that fact made any difference to the principle which is to be applied in this case. Now, what actually happened was that the mortgagor took Mustaphi's money, paid off the prior mortgages and then executed a mortgage in favour of Mustaphi. It is contended by Mr. De, at least his argument comes to this, that if as in this case the purchaser retained a part of the purchase money and actually paid off the prior mortgage, the principle to be applied is different. It seems to me

(1) (1935) I. L. R. 59 Mad. 359.
(2) (1901) I. L. R. 29 Cal. 154; L. R. 29 Ind. App. 9.

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that it is only a matter of machinery and the mere difference in the method of procedure cannot in my judgment alter the principle which is to be applied. On the authority of the cases to which I have referred, particularly the case of *Gokul Das Gopal Das* v. *Rambaksh Sheochand*(1), it seems to me that the inference to be drawn in this case was that the plaintiff were intending to keep the security of the first mortgage alive. That being so, the question arises—to what reliefs are the plaintiffs entitled? The learned Judge in the Court below has rightly held that there was some mistake in the calculations made by the Judge of the trial Court. The Judge of the trial Court appears to have held the view that it was 5 bighas and odd that was mortgaged under the mortgage of 1921. In fact it was an area of 8 bighas 17 kathas and that alteration necessarily makes a difference in the reliefs to which the plaintiffs are entitled.

It is agreed that in the result the plaintiffs if they are entitled to the relief given to them by the trial court, namely, the right to subrogation, they would be entitled to a mortgage decree for Rs. 283 as regards one-third of the land and on payment of the sum the defendants will be entitled to retain that portion of the land and the plaintiffs will be entitled to two-thirds thereof and in addition there will be an injunction restraining the defendants from taking possession of two-thirds.

The appeal succeeds and the judgment of the trial court, with the modification as regards the amount of the mortgage decree, is maintained. The plaintiffs are entitled to their costs. The cross-objection of the defendants is dismissed with costs in the circumstances.

ROWLAND, J.—I agree. There is ample authority for saying that where a purchaser has undertaken to pay two or more encumbrances he cannot after

(1) (1884) 10 Cal. 1035; L. R. 11 Ind. App. 126.

paying the first of these get the benefit of subrogation against subsequent encumbrancers whom also he has agreed to pay. But that is quite a different proposition from what Mr. De wishes us to accept. Now, the proposition that because there has been arrangement between a mortgagor and a purchaser of the equity of redemption by which the latter is to pay off an encumbrance, it must necessarily follow that the intention was that that encumbrance was not to be kept alive, is one for which we can find no authority in any of the Privy Council decisions, and these decisions form a regular series beginning from *Mohesh Lal* v. *Mahunt Bawan Das*(1), *Gokuldoss Gopaldoss* v. *Rambaksh Seochand*(2), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*(3) and finally *Malireddi Ayyareddi* v. *Gopala Krishnayya*(4), each successive decision referring to the previous cases in the series making it quite clear that the legal position is regarded by their Lordships as being consistently maintained throughout the series. There is one case of *Jagmohan Das* v. *Jugal Kishore*(5) referred to by Mr. De whereas my learned brother has pointed out. all that their Lordships did was to affirm the decisions of the Courts in India which on the facts of that case had refused to presume an intention of keeping alive a prior debt in the circumstances of the case before them. There is nothing in the decision to indicate that their Lordships intended to modify or depart from the view of law laid down in the earlier pronouncements. But that decision was considered by a Full Bench of the Allahabad High Court in the case of *Hira Singh* v. *Jai Singh*(6) in which there are some observations indicating that the Hon'ble Judges were disposed to understand the case of *Jagmohan Das* v. *Jugal Kishore*(5) as laying a new proposition

(1) (1883) I. L. R. 9 Cal. 961: L. R. 10 Ind. App. 62.
(2) (1884) I. L. R. 10 Cal. 1035; L. R. 11 Ind. App. 126.
(3) (1901) I. L. R. 29 Cal. 154; L. R. 29 Ind. App. 9.
(4) (1923) I. L. R. 47 Mad. 190; L. R. 51 Ind. App. 140.
(5) (1932) 36 Cal. W. N. 4, P. C.
(6) (1937) A. I. R. (All.) 588, F. B.

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of law in the sense contended for here by Mr. De. But the questions actually referred for the decision of the Full Bench were specifically framed with reference to the facts of that case, namely, "first, where a prior mortgage is redeemed partly by the mortgagor and partly by vendees of the mortgaged property out of the sale consideration and in terms of covenants in the sale deeds in their favour, are the vendees as against the puisne mortgagees entitled to the rights of subrogation under section 92 of the Transfer of Property Act and, secondly, does clause 3 of section 92 of the Transfer of Property Act apply to persons mentioned in section 91 of the Act". The questions for decision by us were somewhat different, and we have not thought ourselves bound to follow all the observations in the judgment of this case with some of which we find ourselves not entirely in agreement.

S. A. K.

Appeal allowed.

Cross-objection dismissed.

APPELLATE CIVIL.

1937.

October, 1.

Before Wort and Rowland, JJ.

SYED ABDUL HAKIM.

v.

MANGAL CHAND.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 103, *scope of—court, whether required to determine mere possession at the date of the adverse order.*

The view that in a suit framed under Order XXI, rule 103, Code of Civil Procedure, 1908, the court has merely to

*Appeal from Appellate Decree no. 212 of 1935, from a decision of S. P. Chatterjee, Esq., Additional District Judge of Patna, dated the 6th of December, 1934, confirming a decision of Babu Nanda Kishor Chaudhury, Subordinate Judge of Patna, dated the 17th of June 1933.

ascertain whether the plaintiff was in possession at the date of the adverse order against him is based on a misconception. In such a suit the plaintiff has to establish the right or title by which the plaintiff claims the present possession of the property.

Unni Moidin v. *Pocker*(1), followed.

Appeal by the plaintiff.

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

Syed Ali Khan, for the appellant.

Janak Kishore, for the respondent.

WORT, J.—In this case the point that falls to be determined is the meaning of Order XXI, rule 103, of the Code of Civil Procedure which provides:

"Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."

An order was made against the plaintiff who is the appellant in this case in the following circumstances. The plaintiff was the assignee of a decree obtained by the Allahabad Bank against defendant no. 2. He proceeded to execute the decree by selling the property which was the subject-matter of this action and in the result purchased the property and obtained possession. Defendant no. 1 who is the respondent in this appeal was a usufructuary mortgagee of the property under a mortgage, dated the 20th of October, 1920. On the next day he gave back possession to the mortgagor and allowed him to remain in possession by granting him a lease. In course of time that lease came to an end and the defendant brought an action against defendant no. 2 who was the mortgagor. In the meantime, as I have already indicated, the plaintiff-appellant obtained possession and he was resisted in his possession by the defendant-respondent.

(1) (1920) I. L. R. 44 Mad. 227.

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The defendant-respondent moved the Court under Order XXI of the Code of Civil Procedure and an order was made in his favour and possession was given to him. In those circumstances the plaintiff brought this action.

The learned Advocate who appears on behalf of the appellant, in his argument against the judgment of the learned Judge in the Court below, has contended that all he is bound to show is his right to possession by reason of the execution of the decree and the delivery of possession given to him by Court. The learned Judge, as I have perhaps indicated by the observations which I have already made, has held that the plaintiff is not entitled to possession. There was one contention in the Court below that the plaintiff was the mere benamidar of the judgment-debtor (defendant no. 2), but that point has been decided in favour of the plaintiff-appellant. Now, the position is a simple one. The plaintiff when he purchased in execution of the decree which had been assigned to him, purchased the mere equity of redemption: therefore he purchased such rights as his judgment-debtor had and no more and he purchased those rights subject to the rights of the usufructuary mortgagee. It matters not at all whether we consider the defendant no. 1 as the lessor who has obtained a decree for possession against his tenant, or whether we consider him as having obtained that decree by reason of his position as a usufructuary mortgagee. The fact remains that he obtained possession because the lease came to an end by the effluxion of time. There is no doubt that the usufructuary mortgagee was entitled to possession, the mortgagor was not entitled to possession, and by his purchase the plaintiff could not get more than the mortgagor himself was entitled to. That in my judgment disposes of the matter.

As to the scope of Order XXI, rule 103, of the Code of Civil Procedure there is authority in *Unni Moidin* v. *Pocker*(1). There the learned Chief

(1) (1920) I. L. R. 44 Mad. 227.

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Justice in course of the judgment said: "The Subordinate Judge allowed the appeal and decreed the suit, holding that the plaintiff having, as he found, been in possession at the date of the order under rule 98, could not be ousted in execution of a decree to which he was not a party, and that under the rule the Court was concerned with possession only. The view that in a suit of this kind the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him under rule 98 is based on a misconception of the scope of this rule. If he was, then the Court ought not to have passed the summary order against him under rule 98 but ought to have dismissed the decree-holder's application against him under rule 99."

The rule reads

"the rights which he claims to the present possession of the property."

The contention of the learned Advocate for the appellant that his client was ousted from the property he purchased is in my view quite irrelevant. He may have been ousted by force, but not as a result of a decree of the Court. The question is what right had he when he got the property back, had he any title to it. The answer which the learned Advocate for the respondent gives is a correct one, namely, that he had no title.

For those reasons it seems to me that the appeal fails and must be dismissed with costs.

ROWLAND, J.—I agree. In answering the question propounded it may perhaps assist if we contemplate the consequences of a contrary decision for at first sight it may appear an attractive supposition that seeing the duty of the executing court under rule 98 or rule 99, that duty is to refuse to give the decree-holder possession in these execution proceedings if possession is resisted by a person claiming possession in good faith on his own account. Now, the plaintiff it has been held was such a person and if the Munsif in the execution proceedings had

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so held the Munsif ought to have dismissed the application of the decree-holder to be given possession of the property. So Mr. Syed Ali Khan argues what the Court dealing with the title suit ought to do is the same as what the executing court ought to have done. But the consequences of this would be that the present title suit would be decided in favour of the plaintiff and the first defendant who has been held to be a usufructuary mortgagee would be defeated in a title suit for the right to possession over the land and this decision would be res judicata in any subsequent suit by him to declare and give effect to his title. It seems inconceivable that the legislature should have contemplated or intended such a result and therefore I agree for this reason as well as those given by my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

1938.

October, 5.

Before Wort and Rowland, JJ.

RAMKARAN THAKUR

v.

BALDEO THAKUR.*

Hindu Law—legal necessity—antecedent debt, what constitutes—benefit to family—acquiring fresh property by mortgaging ancestral property, whether beneficial to family—amendment of plaint, whether should be allowed after claim is barred by limitation.

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

*Appeal from Appellate Decree no. 288 of 1935, from a decision of Bashiruddin, Esq., District Judge of Darbhanga, dated the 26th of March, 1935, confirming a decision of Babu Umakant Prasad Sinha, Munsif of Samastipur, dated the 30th of July, 1934.

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Where the karta and one adult member of a joint Hindu family entered into a *sudbharna* transaction as mortgagees on the 19th of November, but, not having ready money with them, they simultaneously agreed to execute, in payment of the consideration money, a simple mortgage bond in favour of the mortgagors and eventually did execute it on the 3rd of December, hypothecating ancestral property :

Held, that there was no dissociation in fact between the two transactions, and, therefore, that the mortgage by the family was not based on antecedent debt.

Brij Narain v. *Mangla Prasad*(1) and *Raghunath Singh* v. *Modnarayan Singh* (2), followed.

The right of allowing an amendment of the plaint, although a matter of discretion, should not be exercised (unless there are very special circumstances) where the party affected thereby has acquired a valuable right.

An amendment might well be allowed if the application to make it is presented at a time when, failing leave to amend, it would have been still open to the plaintiffs to ask the court's permission for the suit to be withdrawn with leave to sue again, that remedy not yet being dead. But where the application is made after the claim is barred by limitation then although there is still a discretion in the court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it.

Charan Das v. *Amir Khan*(3), followed.

Per Wort, J. (Rowland, J. *dubitante*) : Although no precise definition of what is a benefit to the joint family estate can be given, it is well established that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate.

Palaniappa Chetty v. *Deivasikamony Pandara*(4) and *Rambilas Singh* v. *Ramyad Singh*(5), followed.

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(2) (1927) 9 Pat. L. T. 142.
(3) (1920) I. L. R. 48 Cal. 110, P. C.
(4) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(5) (1920) 5 Pat. L. J. 622.

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Per Rowland, J.—It is a doubtful proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property of the estate for the purpose. The transaction must be judged not by its actual result but what might have been expected to be its result at the time it was entered into.

Jagat Narain v. *Mathora Das*(1), referred to.

Appeal by the plaintiffs.

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

S. N. Roy and *Ganesh Sharma*, for the appellant.

S. M. Mullick (with him *B. N. Mitter* and *K. N. Moitra*), for the respondents.

WORT, J.—This appeal is by the plaintiffs who brought an action on a mortgage, dated the 23rd of December, 1921. The questions which arise in the appeal are these: whether the mortgage was executed for the benefit of the joint family; whether in the circumstances of the case the consideration was an antecedent debt; and further, in the alternative, whether the plaintiffs failing upon the earlier points are entitled to obtain a money decree which question will depend very largely upon whether the learned Judge in the Court below ought to have allowed the amendment in the circumstance to which I shall in a moment refer.

So far as the first point is concerned, it seems to admit of only one answer. The learned Judge in the Court below has pointed out that the *sudbharna* property which was acquired by the money raised on the mortgage in suit was only valued at Rs. 60 less certain charges, that the liability under the mortgage was in excess of that amount, and on that footing he has come to the conclusion that it was a fact that the transaction could not benefit the joint family

(1) (1928) I. L. R. 50 All. 969, F. B.

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of which the defendants were members. The question what is a benefit to the estate within the meaning of the rule of Hindu law was discussed by Lord Atkinson delivering the opinion of their Lordships of the Judicial Committee of the Privy Council in *Palaniappa Chetty* v. *Deivasikamony Pandara*(1) more particularly at page 155 where Lord Atkinson states: "No indication is to be found in any of them (i.e., the authorities cited) as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits". Delivering a judgment of this Court in a case where the question was whether the acquisition of an ijara property was a benefit to the estate, Sir Dawson Miller observed, in *Rambilas Singh* v. *Ramyad Singh*(2), as follows: "From the evidence on the record in the present case I am unable to find that any benefit to the joint family arising from the mortgage has been proved. With respect to the learned Judge I think he approached the question for decision from a wrong stand-point. Because the sum borrowed was spent in acquiring the *ijara* property and because all the defendants enjoyed the produce of that property he considered that they were benefited thereby and that the mortgage was therefore authorized. He did not consider whether the mortgage could be justified on the ground that the transaction as a whole was beneficial to the interests of the family. I think on the evidence before him he could hardly have decided that it was". Then the learned Chief Justice makes a reference to the fact that the family of the defendants collected and

(1) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(2) (1920) 5 Pat. L. J. 622.

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enjoyed the rents and profits of the *ijara* property. It is, as their Lordships of the Judicial Committee of the Privy Council pointed out in the case of *Palaniappa Chetty* v. *Deivasikamony Pandara*(1), impossible to give a definition of what is a benefit to the estate, but I have no hesitation in going so far as to say that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never under any circumstance be considered a benefit to the estate, and that proposition in my opinion is clearly borne out by a large number of authorities and well established by the decision of their Lordships of the Judicial Committee of the Privy Council. Both for that reason and for the reasons stated by the learned Judge in the Court below I come to the conclusion that the first point urged in the appeal must fail.

The second and more substantial point is whether the mortgage was for consideration being a debt which was antecedent. Their Lordships of the Privy Council in the well-known case of *Brij Narain* v. *Mangal Prasad*(2) have left no doubt as regards that matter. Lord Dunedin delivering the judgment of their Lordships states the fourth proposition thus: "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached". Now, on the findings of the Courts below in this case it is impossible in my judgment to come to the conclusion that the mortgage transaction was independent of the earlier *sudbharna* transaction. The *sudbharna* transaction was in fact some days or weeks antecedent to the mortgage transaction; but, as their Lordships pointed out, mere antecedency in time is not in itself sufficient. That matter has been discussed somewhat elaborately in this Court in the case of *Raghunath Singh* v. *Modnarayan Singh*(3).

(1) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(2) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(3) (1927) 9 Pat. L. T. 142.

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Stating the facts not dissimilar to the facts of this case with perhaps one exception, the parties to the mortgage were amongst those who negotiated the earlier transaction. Mr. Justice Das (as he then was) makes this statement: "The question which I have to consider is whether in this case there is a real dissociation in fact between the transaction of the 16th January, 1911 and that of the 21st January, 1911", having pointed out that one transaction was for the purpose of carrying out another which was the fact in this case. In course of the judgment reference was made not only to *Brij Narayan's* case(1) but also to the decision in *Sahu Ram Chandra's* case(2) referred to by their Lordships of the Judicial Committee of the Privy Council in deciding *Brij Narayan's* case(1) at page 137 of the Report. Das J, then proceeds to sum up his conclusion with regard to this matter in these terms: "But so far as the second point is concerned I have not been able to satisfy myself that there was a real dissociation in fact between the transactions. Referring again to the decision of Lord Shaw in *Sahu Ram Chandra's* case(2), the following passage may be usefully referred: 'The argument in support of the validity of the mortgage also took this shape'. It was said 'what difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage? Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground. Their Lordships cannot assent to any such proposition'. The case as put might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given by the father". Das, J. was justified, if I may be allowed to say so,

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 Ind. App. 126.

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in relying upon the decision of Lord Shaw to which he referred although that decision has been questioned. But their Lordships of the Judicial Committee limited their criticism of that judgment by making this statement in the case of *Brij Narain* v. *Mangla Prasad*(1)—. " They (i.e., their Lordships) think that *Sahu Ram Chandra's* case (2) must not be taken to decide more than what was necessary for the judgment—namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact ".

Now, in this case we are not left, nor was the Court below left to draw an inference from the fact which quite clearly appears, namely, that it was for the purpose of carrying out what I call the *sudbharna* transaction that the money was borrowed from the plaintiffs under the mortgage in suit. As the trial Court pointed out, one of the witnesses of the plaintiffs themselves made this statement. The trial Judge says:

" We have it in the evidence of the P. W. 2 that Amilal, Kamaldhari, Govind and Lachhmi executed the bond (Exh. E) in favour of Lakshman and Prayag for Rs. 998 and the latter (Lachman and Prayag) then not having ready money with them, then and there agreed to execute, in payment of the said consideration money, a simple mortgage bond in favour of Ramkaran for Rs. 998."

It is, therefore, clear that the only inference that could be drawn from the facts of this case was that one transaction was involved in another and we have the evidence of the plaintiffs' own witness with regard to that. It seems to me that the only conclusion which the Judge in the Court below could arrive at (although he has expressed himself very briefly) was the conclusion at which he has arrived, namely, that the mortgage of 1921 was not based on antecedent debt.

The only other question that arises is whether the plaintiffs could recover the money from the defendants

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129, 137.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 Ind. App. 126.

as for a money decree? On the face of the transaction, the due date being the 30th of April, 1923, the action was clearly barred by limitation. But reliance was placed in the Court below, at a very late stage of the hearing, indeed after the argument had been concluded so I understand, upon a document which was a mortgage transaction of the 22nd of January, 1929 (Exh. 1-a in the case) and which was one of the documents exhibited by the plaintiffs. There it appears that there was a recital as regards this earlier mortgage, that is to say, the mortgage in suit, and Mr. Roy on behalf of the plaintiff-appellants contends that he is entitled to rely upon that recital as an acknowledgment under section 19 of the Limitation Act. It may be that having regard to section 19 and section 21, other circumstances being equal, he might so rely upon that recital as an acknowledgment within the meaning of those sections. But he made no claim for this and his application for leave to amend was, as my learned brother pointed out during the course of the argument, made at a time when the action on the covenant was barred by limitation. If all the facts and all the possible defences to a claim based upon the allegations to which I have referred had been before the Court, and at the time the application was made the claim for a money decree had not been barred by limitation, there would seem hardly any argument which could be addressed to us entitling us to come to the conclusion that the Judge was right in deciding that the amendment should not be allowed. But the circumstances are entirely different in this case. First of all it is not a decree for money against the person who executed the mortgage; the action was against the sons of two brothers and one of the grandsons, and if the plaintiffs' claims were to succeed it must succeed on the footing of the pious obligations of the sons to pay their father's debts. I am not much impressed by Mr. Mullick's argument that there were

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certain defences open to him which were not investigated in the Court below, because as far as I read the record of the case, everything that could be said by way of defence to such an action has already been debated in full. But their Lordships of the Privy Council pointed out in *Charan Das* v. *Amir Khan*(1) that this right of allowing an amendment, although a matter of discretion, should not be exercised where the party affected thereby has acquired a valuable right and then only in very special circumstance. In the last mentioned case both the trial court and the first appellate court refused the amendment, the Judicial Commissioner of the North-West Frontier Provinces allowed the amendment, and it was in special circumstances (the details I need not go into) that their Lordships of the Judicial Committee of the Privy Council came to the conclusion that the course pursued by the learned Judicial Commissioner was correct. But, as Mr. Mullick pointed out, there are no special circumstances in the present case. The plaintiffs have allowed the time to go by, they made no claim, no application for leave to amend until their action was barred by limitation, and in those circumstances it is impossible to hold that the learned Judge in the Court below did not exercise his discretion judicially by refusing the amendment.

There was one other argument which I hardly liked to mention, because it did not seem to be based on any legal proposition that I was aware of. Mr. Roy was arguing for substantial justice to his clients by claiming some sort of undefined right against the *sudbharna* property to which he has got no possible claim whatever. It was not a trust property although Mr. Roy in some form claimed to trace it as such, and it was only in the case of trust property that the plaintiffs could follow that property and acquire some remedy against it. Neither on grounds

(1) (1920) I. L. R. 48 Cal. 110.

of law nor on grounds of equity was Mr. Roy's client entitled to any remedy against the *sudbharna* property and the point therefore fails.

For those reasons I am of opinion that the appeal fails and it must be dismissed with costs.

ROWLAND, J.—The reliefs claimed in this appeal may be divided into the claim for a mortgage decree based on the allegation of benefit to the family, the claim for a mortgage decree based on the allegation of necessity for the loan, and the prayer for a money decree based upon the pious duty of sons to pay their father's debts. There has been advanced also at the hearing a somewhat desperate prayer for a remedy against the property covered by the *sudbharna* over which until the *sudbharna* was executed the plaintiffs had a mortgage of which they accepted satisfaction in a form which has proved infructuous to them. On the facts it may appear a hard case that the plaintiffs should have lost the remedy which they had a right to against that property up till the date when the mortgage on which they now sue was executed in their favour by Lachman and Prayag; but if they wished to avail themselves of any rights that might have remained to them under the earlier mortgage that should have been done in a different proceeding and within the prescribed time. Obviously no step to establish a mortgage lien against the property hypothecated in 1915 could be taken without impleading the original mortgagors of that property, Amilal and others. It would therefore be making a very bad law in a hard case if we were to allow Mr. Roy's clients the remedy prayed for against the *sudbharna* property. Then as regards the prayer for a money decree, this, as pointed out by my learned brother, was not prayed for in the plaint as framed which was instituted about ten years after the due date of payment of the mortgage money and the cause of action for the suit as stated in paragraph 4 of the plaint is said to have arisen on the 1st of Jeth 1330

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by non-payment of the mortgage money on the due date. The amendment would set up a new cause of action at a different date. Such an amendment no doubt might well be allowed if the application to make it had been presented within six years of the new cause of action intended to be set up, that is to say, at a time when failing leave to amend, it would have been still open to the plaintiffs to ask the Court's permission for the suit to be withdrawn with leave to sue again, that remedy not yet being dead. But where the application was made as in this case more than six years after the event on which it is sought to found a fresh cause of action, then although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it and I am fully convinced that the discretion has been rightly exercised in this case.

Now, as to the claim for a mortgage decree on the ground of benefit to the estate, I am not sure that I can go so far as to endorse the proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property of the estate for the purpose. There is some difference of judicial opinion as to this, the Full Bench of the Allahabad High Court having taken the view in *Jagat Narain* v. *Mathura Das*(1) that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of defensive nature. The transaction must be judged not by its actual result but what might have been expected to be its result at the time it was entered into. Thereafter the Hon'ble Judges considered the question of the degree of prudence which was to be required from the managing member who entered into such transactions affecting the family property. But assuming the principle to be correct as laid down in that Allahabad decision, it is clear that on the

(1) (1928) I. L. R. 50 All. 969, F. B.

findings of the Courts below the transactions which we are reviewing were not such as a prudent manager would or should have entered into on behalf of the family estate. The contention then must fail that the mortgage can be supported on the ground of benefit.

Lastly there is the question of legal necessity. The case in which the law directly applicable has been laid down is that of *Raghunath Singh* v. *Modnarayan*(1), where it is said that the question for consideration is "whether there is a real dissociation in fact between the transaction of the 16th of January, 1911, and that of the 21st of January, 1911", that is to say, the question before us will be whether there is a real dissociation between the transaction of the 19th of November, 1921, and that of the 3rd of December. It is not laid down that, in circumstances such as those before us two conveyances separated from each other by a short period of time must always be considered to be connected together. They may be entirely dissociated from one another and where that is so the liability incurred at the former date will be an antecedent debt on the date of entering into the second document, but the question whether this is so or not is primarily a question of fact. I may mention that the decision just cited was a first appeal which was open to the Judges on the questions of fact. Regarding the District Judge's decision as a decision on matter of fact I think it is impossible for us to go behind it. Circumstances, he says, do not indicate that the transaction was in payment of any antecedent debt and he affirms the decision on this point of the Munsif who in his judgment had shown that the borrowing of money for the purpose of taking the zarpeshgi was contemplated by Lachman and Prayag at the very time at which they got the zarpeshgi executed in their favour by Amilal and others.

(1) (1928) 9 Pat. L. T. 142.

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ROWLAND, J.

I agree therefore that the appeal should be dismissed with costs.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1937.

November, 12.

SHAIKH TAHIR HUSSAIN

v.

SYED BASIRUL HAQUE.*

Mortgage—prior mortgagee also holding a subsequent mortgage impleaded as a puisne mortgagee—suit on basis of prior mortgage, when barred by res judicata.

D brought a mortgage suit and impleaded *P* as a subsequent mortgagee in the suit and having obtained a mortgage decree dispossessed the plaintiff who had an usufructuary mortgage of a prior date. *P* had in his written statement pleaded that he was a prior and not a subsequent mortgagee but no adjudication was made. *P* thereafter brought the present suit and prayed for a mortgage decree in respect of sudbharna money and it was contended that the decree in the mortgage suit was res judicata.

Held, that in order to sustain the plea of res judicata it was necessary for the plaintiff in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to allege a distinct case in their plaint in derogation of the priority and this not having been done the suit was not barred by res judicata.

Radha Kishun v. *Khurshed Hossein*(1), relied on.

Syed Mahomed Ibrahim Hossein Khan v. *Ambika Persad Singh*(2) *and Brijmohan Singh* v. *Dukhan Singh*(3), distinguished.

*Appeal from Appellate Decree no. 400 of 1935, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 15th of March, 1935, reversing a decision of Babu Jugal Kishore Narayan, Munsif of Begusarai, dated the 27th of November, 1933.

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

(2) (1912) I. L. R. 39 Cal. 527; L. R. 39 Ind. App. 68.

(3) (1930) 11 Pat. L. T. 883.

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Appeal by the plaintiff.

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

Khurshed Husnain and *Ahmad Raza*, for the appellant,

S. M. Mullick and *A. C. Roy*, for the respondents.

WORT, J.—This appeal raises a question as to priority of mortgages and a question whether in the events which have happened the action of the appellant who was the plaintiff in the Court below was barred by res judicata.

The facts are simple. The plaintiff-appellant had a usufructuary mortgage, dated the 30th of November, 1910; he also had a simple mortgage of the 29th of October, 1919. The defendant-respondents in the meantime had obtained a simple mortgage of the same property executed on the 12th of May, 1913, and in 1926 brought an action on that simple mortgage impleading the present appellant, who as I have already said was the plaintiff in the action in the court below, as a puisne mortgagee, and in the plaint (which my learned brother has read) claimed the relief which is usually claimed in an action of that kind calling upon the principal mortgagor and the present plaintiff-appellant to redeem if they thought fit. It is quite clear that no relief was claimed in that plaint against the present plaintiff-appellant, who was one of the defendants in that action, in his capacity as prior mortgagee under the usufructuary mortgage, dated the 30th of November, 1910, although as defendant in that action the present plaintiff-appellant mentioned in his written statement the prior mortgage of 1910. In that case the decree was passed without any reference to the prior mortgage but in the judgment this passage appears:

"Defendants 1 and 6 of the 2nd party (i.e., the present plaintiff-appellants) have prior as well as subsequent bonds. The matter requires no adjudication. It is sufficient that the defendants have asserted their claim."

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As I have said nothing was mentioned in the decree and the property was sold and purchased by the then plaintiffs. Subsequently in 1932 this action was brought by the plaintiff-appellant against the defendants amongst others who were the plaintiffs in the former action claiming possession of the property. Clause (*iii*) of the relief claimed in the plaint was:

> "The Court may be pleased to hold that as the defendant 1st party made purchase subsequent to the sudbharna bond, he is liable to pay the sudbharna money and a mortgage decree for the sudbharna money Rs. 1,124 odd.....may be passed subject to the mortgage lien on the sudbharna and the mortgaged property."

Shortly stated the Judge of the lower appellate court in allowing the appeal and reversing the decision of the trial court has held that the decree in the former suit of 1926 is a bar on the principle of res judicata to the plaintiff's present action.

It seems to me that the only question which really arises is, whether the decision of their Lordships of the Judicial Committee of the Privy Council in *Radha Kishun* v. *Khurshed Hossein*(1) is distinguishable from the facts of the present case. There in the circumstances which I shall state in a moment their Lordships of the Judicial Committee held that the action of the plaintiff in the matter before them was not barred on the principle of res judicata. The facts of that case were slightly different but in only one material point. There the plaintiff had brought an action against his mortgagors and the assignor of the plaintiff was joined as a prior mortgagee. No relief was claimed against him and judgment was obtained, the decree being silent as to the prior mortgage. Their Lordships of the Judicial Committee, as I have already said, held that the action which the plaintiff admittedly brought was not barred on the principle of res judicata. It will be seen that the difference between the facts of that case and those of the present case is this, that whereas in the case before the Privy Council the plaintiff was admittedly

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

joined as a prior mortgagee in this case he is joined admittedly as a puisne mortgagee and relief was claimed accordingly. There is perhaps the other difference which does not distinguish the case on principle and that is that in the case before us mention was made of the prior mortgage.

Before dealing with the authority quoted I would refer to one other fact, reference to which has already been made, that is, the observation made by the Judge in the former suit in this case, that no adjudication on the prior mortgage was necessary but it was sufficient that the defendants asserted their claim. Quite apart from the principle to be applied to this case, it will be seen that the plaintiff-appellant was in difficulty; he had nothing to appeal against and any observation made in the judgment was an observation to his benefit. If any party had any grievance with regard to the matter, it was the plaintiffs in that action, that is to say, if they were desirous of attacking the validity of the prior mortgagee's mortgage. To complete the history of this case, when the property was sold in execution of the former decree an application was made by the present plaintiff-appellant under section 47 of the Code of Civil Procedure, but upholding the contention of the opposite party it was held by the Judge deciding that case that the present plaintiff-appellant had no locus standi. It is urged by Mr. Sushil Madhab Mullick on behalf of the respondents that this appeal is incompetent because the appellant should have appealed from the decision under section 47 of the Code of Civil Procedure. That argument in my judgment is unfounded. It seems to me that the decision of the learned Judge under section 47 was correct. The respondents were not judgment-debtors; and if they were judgment-debtors, they were only judgment-debtors, not in the capacity of prior mortgagees but in their capacity as subsequent mortgagees in which capacity the plaintiff had joined them. They were entitled to no relief under section 47 as subsequent

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mortgagees, and they were not judgment-debtors as I have pointed out and repeat, in the action as prior mortgagees, because nothing was decided with regard to the prior mortgage.

Now, it seems to me that the point decided in *Radha Kishun's* case(1) a reference to which has already been made (the judgment being delivered by Sir Lawrence Jenkins on behalf of the Board) was to this effect: "It was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of April 24, 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear". Then later Sir Lawrence Jenkins observes: "Consequently, to sustain the plea of res judicata it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority". Then the following passage occurs: "But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same." It is quite clear in my judgment that the gravamen of the decision of their Lordships of the Judicial Committee of the Privy Council was that in order to sustain the plea of res judicata it was necessary for the plaintiffs in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to use the expression of Sir Lawrence Jenkins, "to allege a distinct case in their plaint in derogation of the priority". The one contended for by Mr. Sushil Madhab Mullick is that although the claim for relief against the present plaintiff-appellant was as subsequent mortgagee, they

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

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(the respondents) also sued him in his capacity as prior mortgagee. The correct view in my judgment would be that the respondents sued the appellant in the capacity which they stated in their plaint and more particularly by reason of the fact that under Order XXXIV, rule 1, the *Explanation* makes it no longer necessary to join the prior mortgagee as a party to the suit on mortgage.

"A puisne mortgagee may sue" says the *Explanation* "without making the prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage."

I mention that in particular as their Lordships of the Judicial Committee of the Privy Council, in referring to one of the leading cases on this point, viz., *Syed Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh*(1) say that it is a decision which although binding on them can be distinguished. And I think, if I may say so, the distinguishing feature of this case is that at the time that decision was arrived at section 85 of the Transfer of Property Act existed, under which, on the construction placed upon it by the High Courts in India, it was necessary to join prior mortgagees as persons interested in the security. That as I say appears to me to be the distinguishing feature and makes the decision inapplicable to the facts of the present case.

I need mention only one other case and that is the decision of Ross, J. and Jwala Prasad, J. in *Brijmohan Singh* v. *Dukhan Singh*(2). That was a case in which the plaintiff claimed priority by reason of subrogation. Ross, J., in delivering the judgment of the Court, in the latter part of his judgment made a statement of what he thought were the principles which emerged from the various decisions relating to this matter and the third proposition is this:

(1) (1912) I. L. R. 39 Cal. 527; L. R. 39 Ind. App. 68.
(2) (1930) 11 Pat. L. T. 883.

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"Where the party impleaded is a puisne mortgagee and therefore, a necessary party, but claims priority, he must assert and prove his priority, otherwise he is barred."

I am not quite sure, if I may say so with great respect to the learned Judge, exactly what the learned Judge there means. If the facts which were visualised by the learned Judge were such as appeared in the case which he then decided, I could quite understand the proposition—' if he claims priority he must assert and prove it '. But where, as in this case, the priority of the mortgage was admitted, where the plaintiffs made no attempt to attack it, and where it did not depend on proof of facts as was the case in that decided by Mr. Justice Ross, I have some doubt whether the proposition would apply. But with great respect to the learned Judge it must be stated that his statement of the law was unnecessary for the purpose of the decision of that case, the learned Judge having come to the conclusion that the plaintiff was not entitled in that case to rely upon the doctrine of subrogation.

In my judgment, as I have already indicated, the facts of this case cannot be distinguished from the facts to which the principle laid down in the case of *Radha Kishun*(1) applies. For that reason I would hold that the decision of the learned Judge in the Court below was erroneous and must be set aside and the judgment of the trial court restored.

The appeal is therefore allowed. The appellant is entitled to his costs in this Court and in the Court below.

VARMA, J.—I agree.

J. K.

Appeal allowed.

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1937.

November, 15.

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

SONU LAL

v.

COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 63—*service of notice on firm, whether sufficient in law.*

Where the members of a joint Hindu family carried on the family business under the name of two members, who were dead and notices under the Income-tax Act were issued in the name of the firm and served on the karta of the family, *held*, that it was a sufficient compliance with the provisions of the section.

Reference under section 66(3) of the Income-tax Act, 1922.

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

Raj Kishore Prasad, for the assessee.

S. M. Gupta, for the Commissioner of Income-tax.

AGARWALA, J.—The Commissioner of Income-tax was called upon by this Court to state a case on the following question:

> Whether the assessment made in this case in the names of Gajo Ram and Basant Ram, who are dead, is valid?

The findings of fact of the Commissioner are that the assessees, a Hindu undivided family, carry on a family business under the name and style of Gajo Ram Basant Ram. Gajo Ram and Basant Ram have been dead for some years but the business is and always has been carried on in their names. The notices required under the Act were issued in the

*Miscellaneous Judicial Case no. 39 of 1936. *In re* Statement of case under section 66(3) of the Income-tax Act XI of 1922, by the Commissioner of Income-tax, Bihar and Orissa, dated the 27th November, 1936.

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AGARWALA, J.

trading name of the family, i.e., Gajo Ram Basant Ram, and were served on the Karta of the family They were accepted by him and he appeared in the proceedings before the Income-tax Officer and filed a return. After the assessment had been made, he appealed to the Assistant Commissioner objecting to the assessment on the ground that the demand notices had been served in the names of Gajo Ram Basant Ram who were dead and challenged the assessment on that ground. Learned Counsel for the assessee in this Court referred to section 63 of the Income-tax Act, which provides that notices under the Act may be served on the person named therein either by post or as if it were a summons issued by a Court and, in the case of a Hindu undivided family, may be addressed to any adult member of the family. It is contended that the notices were not addressed to an adult member of the family but to two dead members of the family. The argument is fallacious. The family, in its trading capacity, is known as Gajo Ram Basant Ram and the notices were addressed to the family in the name by which it has chosen to be known. It would have been a sufficient compliance with the requirements of the section to address them to an adult member of the family but they were in fact addressed to the family itself, they were accepted as notices to the family and the Karta on behalf of the family filed a return of the family's income. There has been no defect in procedure either in substance or in form.

I would, therefore, answer the question submitted to us in the affirmative. The Commissioner of Income-tax is entitled to his costs: hearing fee Rs. 100.

COURTNEY TERRELL, C. J.—I agree

J. K.

Order accordingly.

APPELLATE CIVIL.

Before Fazl Ali and Rowland, JJ.

1937.

November, 19.

KEDAR NATH

v.

SAMRU KAZI.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 148 (*h*) *—assignee of a rent decree, who has not acquired landlord's interest, whether can execute it as a money decree.*

An assignee of a rent decree cannot execute the decree even as a money decree where his assignor had parted with his interest in the zamindari to another person before the assignment.

Gopendra Prosad Sukul v. *Ram Kishore Saha*(1), *Bijanbala Datta* v. *Mathuranath Sikdar*(2) and *Rahimuddi Lupti* v. *Jogendra Kumar Singha*(3), relied on.

Appeal by the decree-holders.

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

K. Dayal, for the appellants.

S. C. Misra, for the respondants.

FAZL ALI, J.—The only question to be decided in this appeal is whether section 148 (*h*) of the Bengal Tenancy Act is a bar to the execution of the decree which is sought to be executed by the appellants. It appears that the decree in question was a decree for rent and was passed in favour of Maksudan Bhagat and others on the 20th April, 1931. The decree-holders assigned the decree in favour of the appellants on the 20th March, 1934, having previous to that sold

*Appeal from Appellate Decree no. 168 of 1937, from an order of S. Bashiruddin, Esq., District Judge of Bhagalpur, dated the 31st May, 1937, reversing an order of Babu Kapildeva Sahai, Munsif of Banka, dated the 20th June, 1936.

(1) (1933) 37 Cal. W. N. 901.
(2) (1930) I. L. R. 58 Cal. 798.
(3) (1931) 54 Cal. L. J. 596.

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their interest in the zamindari to the superior landlord on the 5th January, 1933. The appellants thereupon applied for execution on the 27th April, 1935. The court of first instance held that in view of the fact that the orginal decree-holders had parted with their interest as landlords after the passing of the decree, it could be executed only as a money decree and, therefore, section 148 (*h*) of the Bengal Tenancy Act did not bar execution. The lower appellate court, however, has reversed this decision and held that the execution is barred. The assignees have therefore preferred this appeal.

In the course of the argument before us it was contended that the original decree obtained by Maksudan Bhagat and others must be treated as a money decree because the suit related only to a portion of the holding. The Munsif did not accept this contention on the ground that there were no materials before him to support it. The point does not appear to have been raised again before the lower appellate court and that fact by itself should be enough to preclude the appellant from raising it. But on a perusal of the application for execution it is clear that the decree was sought to be executed as a rent decree and there are also certain statements made in that petition which indicate that the decree had been obtained against the entire holding.

There remains only the question as to whether the landlords having parted with their interest before the execution was applied for, the decree is exempt from the bar of section 148 (*h*). On this point I need only refer to the recent decisions of the Calcutta High Court in *Gopendra Prosad Sukul* v. *Ram Kishore Saha*(1); *Bijanbala Datta* v. *Mathuranath Sikdar*(2) and *Rahimuddi Lupti* v. *Jogendra Kumar Singha*(3). The view propounded in these cases is that the assignee of a

(1) (1933) 37 Cal. W. N. 901.
(2) (1930) I. L. R. 58 Cal. 798.
(3) (1931) 54 Cal. L. J. 596.

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decree for arrears of rent who has not obtained assignment of the landlord's interest cannot make an application to execute the decree even as a simple decree for money under the Civil Procedure Code. This view is supported by very weighty arguments with which I fully agree.

I would accordingly dismiss this appeal with costs.

ROWLAND, J.—I agree.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

RAM KINKAR SINGH

v.

SRIMATI KAMAL BASINI DEVI.*

1938.

January, 4.

General Clauses Act, 1897 (*Act X of* 1897), *section* 10—*time for payment in pursuance of compromise decree, whether can be extended on the ground of last day being a holiday.*

Where the appellant a judgment-debtor sought to take advantage of the provisions of section 10 of the General Clauses Act and contended that the last date for payment of a certain instalment decree based on a compromise having expired on a date on which the court was closed, he was entitled to pay the money on the next open day.

Held, (*i*) that a compromise decree was nothing more than a contract between the parties and that time was of the essence of the contract:

Rai Saheb Bhagwat Narain Singh v. *Srinivas*(1), relied on.

(*ii*) Section 10 of the General Clauses Act applied to cases where the Act is allowed or ordered to be done by an Act of the Legislature.

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*Appeal from Original Order no. 284 of 1936, from an order of Khan Bahadur Hafiz Muhammad Abdul Aziz, Subordinate Judge at Pakaur, dated the 14th of September, 1936.

(1) (1936) I. L. R. 16 Pat. 202, s. u.

1938.

RAM KINKAR SINGH v. SRIMATI KAMAL BASINI DEVI.

Kunj Bihari v. *Bindeshri Prasad*(1), *Surendra Narayan Mustafi* v. *Souravini Dasi*(2), *Ghinna Nadar* v. *Arumugham Chetti*(3), *Sankaran Unni* v. *Raman*(4), *Sambasiva Chari* v. *Ramsami Reddi*(5), *Maine and New Brunswick Electrical Power Company, Limited* v. *Hart*(6) and *Wana Mard Ravji* v. *Natu Walad Murha*(7), discussed.

Appeal by the judgment-debtor.

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

N. C. Ghosh, for the appellants.

Sir Sultan Ahmed and *J. C. Sinha*, for the respondent.

WORT, J.—This appeal arises out of an objection petition by the judgment-debtors against the execution of a decree for Rs. 12,637-14-0. A compromise was entered into under which the decree was to be paid in a number of instalments. We are concerned in this case with the first two only: one was Rs. 200 by the month of Chaitra, 1341, and the other was Rs. 400 by the month of Chaitra, 1342, corresponding respectively to the 13th of April, 1935, and the 13th April, 1936. By the terms of the compromise if two successive instalments were in default, all the remaining instalments would be treated as in default and the decree-holder would be entitled to execute the whole of his decree. There is no dispute in this case that the first instalment of Rs. 200 was not paid and the controversy in the case is as regards the second instalment of Rs. 400.

The case of the judgment-debtors was that they tendered the second insalment of Rs. 400, on the 29th of Chaitra, 1342, but that it was refused. Then it

(1) (1928) I. L. R. 51 All. 527.
(2) (1906) 10 Cal. W. N. 535.
(3) (1917) A. I. R. (Mad.) 1196.
(4) (1925) A. I. R. (Mad.) 743.
(5) (1898) I. L. R. 22 Mad. 179.
(6) (1929) L. R. App. Cas. 681.
(7) (1910) I. L. R. 35 Bom. 85.

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was paid into Court on the 14th of April, 1936, by a petition and the order made by the Judge on that date that the deposit was allowed and that the decree-holder was to be informed so that the money could be withdrawn. The learned Judge in the Court below has disbelieved the judgment-debtors' story as to the tender. He has come to that conclusion for a variety of reasons amongst which was that if the judgment-debtors had been in earnest about the matter, they could have used the post-office for sending the money to the decree-holder. But there are other matters upon which the Judge relies for the conclusion to which I have referred.

One of the witnesses called to prove the tender was Muga Ram Pandit, an *Am mukhtar* of the judgment-debtors who states in his evidence that he offered Rs. 400 to Kumar Gyandra Narayan Singh, the husband of Kamal Basini Devi (the decree-holder), but he refused to take the money. A question which might have arisen but which has not been discussed is whether, if the evidence was accepted, the tender to the husband was a tender to the wife, the decree-holder; but that point as I have said has not been discussed. But during his cross-examination that witness states that no one was present when the money was tendered. On the other hand the second witness called by the judgment-debtors, Kashipada Lal, was put into the witness-box for the purpose of stating that he was present at the time of the tender. There is of course an obvious contradiction in his evidence and that is one of the matters which has influenced the learned Judge in coming to the conclusion at which he has arrived. It is difficult for this Court to hold that the Judge was wrong in refusing to accept this evidence—evidence of the witness who appeared before the Judge and whose demeanour was apparent to him—having regard to the matters to which I have referred and also with regard to an equally important point to which I shall now refer.

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It is quite clear, if the case of the judgment-debtors is to be believed, that the payment into Court was a payment which was necessitated in the judgment-debtors' opinion by reason of the refusal of the decree-holder to accept the money. That being so, we should suppose that the first thing they would show in their petition to pay the money into Court would be that the decree-holder had refused to accept the tender. But no such allegation is present in the petition. I find it very difficult in those circumstances to believe that any tender was made. It is unnecessary to speculate why no such tender was made—probably because it was thought, contrary to the true position in law, that the decree-holder would be either entitled to, or, would in fact, refuse any tender excepting the tender of both the first and the second instalments. I do not propose to say any more about the matter excepting to hold that the judgment-debtors have not made out their case of tender.

Now the question arises whether they were entitled in the circumstances to take advantage of the fact that between the time of the tender, in fact from the very date of the tender up to and including the 13th of April, 1936, the Court was closed—a fact which would entitle the judgment-debtors under section 10 of the General Clauses Act (Act X of 1897) to pay the money into Court on the 14th of April. That is the argument addressed to us; and, in my judgment, the whole case depends upon the proper construction to be placed upon that section which provides as follows:

> "Where, by any Act of the Governor-General in Council or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open."

The sub-clauses to that section are irrelevant for the purposes of this discussion. It is contended

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that, as the agreement of the parties was merged in the decree and therefore in a sense the instalments were by the order of the Court, it was an act or proceeding which was directed or allowed to be done within the meaning of section 10; and it is clear that there are a number of decisions of various High Courts in India which, without considering in detail the actual words of the section, have applied section 10 to circumstances not dissimilar to the present. In my opinion, however, it is quite impossible to apply that section to this case. The section, as it states, applies to a case in which an act is allowed or ordered to be done by an Act of the legislature. The short answer to this part of the case seems to me to be that this is an act which is not directed or allowed to be done by an Act of the legislature but ordered or allowed to be done by the decree. For the purpose of this statement I am disregarding entirely the fact that this was a compromise decree. There are two other provisions similar to the one to which I have referred; one is of course section 4 of the Limitation Act which enlarges the time in circumstances such as provided for by section 10 of the General Clauses Act and the other is section 148 of the Code of Civil Procedure which enables the Court to extend the time with regard to any period which is fixed or granted by the Court for the doing of any act prescribed or allowed by the Code. It was not contended (and indeed it must be obviously clear) that section 4 of the Limitation Act applies and it is equally clear that section 148 of the Code of Civil Procedure is not applicable to this case. It is therefore upon the construction of section 10 of the General Clauses Act that the case entirely depends.

In the case of *Kunj Bihari* v. *Bindeshri Prasad*(1) the Allahabad High Court held that the time was not to be extended under section 10, and Sulaiman, J.

(1) (1928) I. L. R. 51 All. 527.

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and Kendall, J., delivering the judgment of the Court, made this statement: "But assuming that the defendants had the power to make the payment direct to the mortgagees or to deposit the amount in court, they cannot take advantage of the circumstance that the civil court was closed on the 15th of June, 1924. If the only course open to them had been to deposit it in court and the court was closed on the last date on which they could have made the deposit, then the ruling in the Full Bench case would have been applicable". I am of opinion that that states in a convenient form the answer of Sir Sultan Ahmed on behalf of the respondent in this appeal.

A number of other cases to which I shall briefly refer have been relied upon by the appellants. The first is the case of *Surendra Narayan Mustafi* v. *Souravini Dasi*(1). There the compromise agreement was that the payment should be made to the decree-holder's pleader or to Court and the learned Judge there deciding the case certainly applied section 10. But if I may be allowed to say so with respect, the value of that decision is impaired by the reference the learned Judges themselves make to the section. In paraphrasing the provisions of section 10 the learned Judges state: "section 10 enacts that if any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then if the court or office be closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in time, if it is done or taken on the next day afterwards on which the court or office is open". Again, if I may say so with respect, that is exactly what the section does not say. If that was section 10, then this case from the point of view of the respondent would be unarguable. What the

(1) (1906) 10 Cal. W. N. 535.

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section says is if "By an Act of legislature" or to use the exact words of the statute if

> "By any Act of the Governor-General in Council or Regulation..... any act or proceeding is directed or allowed to be done or taken..... within a prescribed period"

then time is extended in the way provided for by the section. In a decision of the Madras High Court in *Chinna Nadar* v. *Arumugham Chetti*(1), the learned Judges deciding the matter said "where a judgment-debtor agrees to pay the decretal amount on a certain date but the court is closed on that date, a payment made on the next reopening day is a good payment" and added relying on a decision to which I am about to refer that there is no difference between a compromise decree and any other decree. The decision to which I refer and upon which the learned Judges of the Madras High Court relied is in *Sankaran Unnis* v. *Raman*(2). But again, although it may be an authority for the application of what may be described as the equitable principle, it is certainly not an authority for the application of section 10. Krishnan, J., in delivering the judgment of the Court in that case, stated that section 10 could hardly be applied to the case where a certain thing is directed to be done by a decree of the Court, and then proceeded to rely upon an earlier decision of 1898 in *Sambasiva Chari* v. *Ramasami Reddi*(3). The farther one goes back into these decisions the less do they support the argument advanced and the judgment in the later case. When we come to the case of *Sambasiva Chari* v. *Ramasami Reddi*(3) we find that it was a case in which by statute a party had to do an act (bring a suit) within a certain time. Shortly stated, a suit was to be filed within thirty days as provided by the statute, and it was in those circumstances that the principle analogous to that contained in section 10 was applied, section 10 not applying actually to the facts of the case as it was a suit of the year 1895

(1) (1917) A. I. R. (Mad.) 1196.
(2) (1925) A. I. R. (Mad.) 743.
(3) (1898) I. L. R. 22 Mad. 179.

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two years before the General Clauses Act was passed. The decision in the case was that where parties were prevented from doing a thing in court on a particular day not by the act of their own but by the act of the court, they were entitled to do it at the first subsequent opportunity. I have only one observation to make with regard to the decision of Krishnan, J., in the case of *Shankaran Unni* v. *Raman*(1) and that is the statement of Lord Tomlin in the case of *Maine and New Brunswick Electrical Power Company Limited*, v. *Hart*(2). The learned law Lord there was dealing with the application of equitable principles. I refer to the case because it was dealing with a statute of New Brunswick which was in the precise term of an Indian Statute and to that extent the observation is relevant. Lord Tomlin states: "It remains to consider whether any rule of equity entitles the plaintiff to interest. In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attract the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance". He then goes on to point out that there was nothing which would entitle them to enlarge the operation of the Act by the application of equitable principles and that, if I may say so with respect, seems to be the answer to the decision of Krishnan, J., to which I have already referred. The appellants also rely upon the decision in *Wana Mard Ravji* v. *Natu Walad Murha*(3).

I now come back to the point. There is a decision of a Full Bench of this Court which seems to me to be directly in point as regards one aspect of the case —the decision in *Rai Saheb Bhagwat Narain Singh* v. *Srinivas*(4). The question there was whether

(1) (1925) A. I. R. (Mad.) 743.
(2) (1929) L. R. App. Cas. 681.
(3) (1910) I. L. R. 35 Bom. 35.
(4) (1936) I. L. R. 16 Pat. 202, S. B.

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tender or payment four days after the date upon which the instalment was due was a payment which could be accepted. A number of arguments appear to have been advanced amongst which was that the judgment-debtor was entitled to relief against forfeiture. But, as my learned brother Khaja Mohammad Noor stated when delivering the judgment of the Court, the real question to be determined was whether time was of the essence of the contract. He came to the conclusion that it was. With the exception of one matter the case was precisely the same as this, that it depended on the terms of a contract. Sir Sultan Ahmed in his argument on behalf of the respondent contends that there is one clause which concludes the matter with regard to this point: that is the third clause of the compromise decree which states—

"To that the defendants will not be competent to raise any objection. Even if they do, it will be rejected."

The matter referred to appears to have been that if two successive instalments or any part thereof are "defaulted", the defendants will remain bound to pay the plaintiff the amount in default with interest thereon. It is contended (to repeat myself) that that concludes the matter as to the question whether time is of the essence of the contract. I doubt whether that clause adds very much to the matter, but it does seem quite clear from the judgment of the Full Bench to which I have just referred that time is of the essence of a contract of this kind. The learned Judge there pointed out, the moment the 10th of November had passed, the date upon which the payment was to be made, the rights of the decree-holder or purchaser accrued. The learned Judge expressed himself in these words: "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

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on two subsequent days the payment could have been made on the 13th of November, even then the sale stood confirmed on the expiry of that date, no order of the court being necessary." In my judgment time was of the essence of the contract in this case and the moment the 13th of April had passed the rights of the decree-holder accrued. It was pointed out in the course of the argument by Sir Sultan Ahamed—an argument which I accept—that it was not a case in which the judgment-debtors had no alternative. They were entitled to tender the sum and as an alternative under Order XXI, rule 1, they were entitled to perform their contract by payment into Court.

I shall make one further observation. It has been pointed out by a number of decisions of this Court relying upon English decisions that a compromise decree is nothing more than a contract. Reliance in cases of this kind is always placed upon one of the leading cases, namely, *Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited*(1). The decision there was that a compromise decree could only be set aside on the same grounds upon which any other contract could be set aside. *Wentwort* v. *Bullen*(2) is also an authority on this question in which decision Parke, J. made this observation: "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge". In my view although in this case there has been superadded the command of the Judge in the sense that a decree has been passed, yet the decree is none the less an agreement between the parties and time is of the essence of that contract. In those circumstances it seems to me that the decision of the learned Judge is correct in coming to the conclusion that when the 13th of April passed the

(1) (1895) 2 Ch. Div. 273.
(2) (1829) 9 B. & C. 840.

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rights of the decree-holder to execute this decree accrued. If that is the correct view of this decree, that is to say, that it is a contract between the parties, it seems to me to be perfectly obvious that section 10 of the General Clauses Act cannot apply.

For those reasons I hold that the appeal fails and it must be dismissed with costs.

VARMA, J.—I agree.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

MAKHAN LAL GOVINDRAM

v.

BHAGWAN SINGH MISTRI.*

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January, 5.

Provincial Insolvency Act, 1920 (*Act V of* 1920), *sections* 50 *and* 75—*debtor, whether can appeal against an order holding that certain debts had been proved by the creditors.*

Held on a construction of section 50 read with section 75 of the Provincial Insolvency Act that a debtor is entitled to appeal against the order of the District Court declaring that certain debts had been proved by the creditors.

Appeal by the insolvent.

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

S. N. Bose and *N. N. Roy*, for the appellant.

S. M. Gupta (with him *P. B. Ganguli* and *S. P. Srivastava*), for the respondents.

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*Appeal from Original Order no. 256 of 1936, from an order of W. W. Dalziel, Esq., District Judge of Manbhum-Sambalpur, dated the 7th of August, 1935.

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WORT, J.—The question in this appeal is with regard to two debts which are stated to have been proved in the insolvency proceedings against the petitioner who is the appellant in this Court. The matter came before the learned Judge in the court below on an application to expunge the two debts to which I have made reference.

The first question which was argued in the appeal was that the appeal was incompetent. Reliance was placed upon section 50 of the Provincial Insolvency Act read together with section 75. The contention of the respondents on this point is that the words "upon the application of a creditor" in the second sub-section of section 50 refer only to the previous sentence, that is to say, to the case of a composition or scheme. A great deal of support is given to that argument by reference to English authorities on this matter. The English rules 24, 25 and 26 of the Bankruptcy Act have been enacted in section 50 of the Provincial Insolvency Act. In England the right of a creditor to apply to the Court for the expunging of proof exists only in the case where the trustee or the receiver (to use the expression adopted in India) declines to interfere, or in the case of a composition or scheme. But the point does not strictly arise as the District Judge, being in some doubt with regard to the merits of the application of the creditor, referred the matter to the receiver who made a report recommending that one at least of the debts should be expunged from the schedule.

The other section which we have to construe for the purpose of the preliminary objection is section 75 of the Insolvency Act. On the authorities it seems to me that the correct view to take of section 50 (taking the section by itself) is that the creditor has locus standi only in cases where the receiver declines to interfere in the matter or in the case of a composition or scheme. Now, it is contended that if that be the case the right of appeal given under section 75 of the

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Act is limited to those persons who have locus standi under section 50. Now, whatever may be the correct view of section 50, it seems to me that the argument to which I have just made reference is an impossible one and for this reason. The first clause of section 75 of the Act gives the debtor, any creditor, the receiver or any other person aggrieved a right of appeal from a court subordinate to the District Court to the District Court. There can be no doubt in my opinion that the words " or any other person aggrieved by a decision " are quite immaterial for the purpose of this argument because the very first expression in the section is " The debtor " and therefore quite clearly the debtor has a right of appeal from a court subordinate to the District Court to the District Court. Now, the sub-section with which we are particularly concerned is sub-section (*2*) which provides:

" Any such person aggrived by any such decision or orded of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court."

If we are to construe those words as meaning that the debtor may appeal or the creditor may appeal or the receiver may appeal if he is the person aggrieved (and that is the contention which is put forward before us), then I think the argument would be sustainable that a person who was not a party to the proceedings or had no locus standi under section 50 could not appeal. But, as I have already stated, it is impossible to come to that conclusion, because it would give the debtor a right of appeal if the matter came before a court subordinate to the District Court but would give him no right of appeal if the matter in the first instance came before the District Court. I cannot imagine that the legislature ever had such an intention, and I think the view that I take is supported by the actual words of the sub-section " any such person ". I think they must be taken to include those persons in the first sub-section of section 75.

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NORT, J.

The next question is whether these two debts which are the subject-matter of the order of the learned District Judge are to be expunged or not. The learned Judge has declined to expunge either of them. The first is the debt of Gouri Sankar. This appears to have arisen under a building contract. Gouri Sankar was to put up a certain building and under the terms of the agreement exhibited in this case the actual price of the work and material was to be fixed by arbitration, that is to say, by an arbitrator appointed by agreement of both parties. The only contention that Mr. Bose can make with regard to this matter is not that the debt should be expunged as a whole but that the amount for which the estate in insolvency is liable should be determined by arbitration. I think a great deal could be said in support of that argument had not certain circumstances existed in this case and the circumstances to which I refer are these: that very soon after the insolvency proceedings were started the creditor gave notice to the insolvent to agree to an arbitrator fixing the amount under the contract. This was ignored. Mr. Bose contends that the insolvent had excuses for ignoring this notice; but, in my judgment, in the circumstances of the case having regard to the fact that the insolvency proceedings are going on, the insolvent cannot now make the objection which he makes through Mr. Bose, his Advocate. Ordinarily speaking, in a contract of this kind, when one of the parties refuses to appoint an arbitrator under the arbitration clause, then the other parties are entitled to appoint a person and that person can proceed with the arbitration. But, in the circumstances of this case, as I say, the position is somewhat different and in my judgment, having regard to the decision of the learned Judge, and having regard to the circumstances, he (the insolvent) is not entitled to make that objection. One of the arguments addressed to us by Mr. Bose in this regard is that the learned Judge was wrong in stating that the insolvent did not contend

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that the amount which was being charged and which was entered in the schedule as a debt was unfair. He has rightly pointed out that on no occasion had the insolvent opportunity to give evidence in the matter; but the argument, if I may say so, is fallacious because the learned Judge does not say that the insolvent omitted to give evidence as to the unfairness of the amount claimed; the learned Judge stated that he did not take the trouble to contend that it was unfair. As I understand the order made in this respect, the learned Judge intended to mean that the insolvent was not in a position to contend that it was unfair. In all the circumstances of the case I think the appeal, so far as this matter is concerned, fails.

As regards the debt of Bhagwan Mistri the matter is entirely different. Bhagwan Mistri never purported to prove this debt; one other creditor named Rekhraj came forward with an affidavit stating that the insolvent was truly indebted to the said Bhagwan Mistri of Jamshedpur in a sum of Rs. 500, that is to say, Rs. 400 principal and Rs. 100 interest, and then proceeded to state that this will appear from the account books There is no statement in the affidavit as to whether the deponent had authority to swear this affidavit or prove the debt and indeed the books of account which were filed show that they are not the books of account of Bhagwan Mistri but the books of account of Rekhraj and from the books of account it is not shown that the debt is owed by Bhagwan to the deponent. It is true there is the mention of the name of Bhagwan Singh but neither in the books nor in the affidavit is there any statement to the effect that the deponent advanced the sum of money to the insolvent on behalf of Bhagwan Singh. Had they been the books of Bhagwan Singh himself, there would have been some corroboration of the statement in the affidavit. But being what they are there is no corroboration whatever in the statement and, as I have already pointed out, there is nothing to indicate on

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WORT, J.

what authority Rekhraj had to depose in this affidavit. It is stated by the learned Advocate on behalf of the respondents that the statement was made before the Judge that he was an agent for Bhagwan but of that fact we cannot at this stage take notice. In my opinion the proof contemplated by section 49 is not present in this case and I think the insolvent in this appeal is entitled to have this debt expunged from the schedule.

In the circumstances of the case the appeal succeeds in part. The appeal is dismissed with costs as against Gouri Shankar and allowed with costs as against Bhagwan Singh.

VARMA, J.—I agree.

J. K.

Appeal allowed in part.

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January, 14.

APPELLATE CIVIL.

Before Fazl Ali and Agarwala, JJ.

NANDKISHORE LALL

v.

CHANDRIKA PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 16—*preliminary decree for ascertainment of mesne profits, whether is a decree for money—rule* 16 *of Order XXI, whether applies where the assignee of a preliminary decree for mesne profits applies for execution after the passing of the final decree.*

Held that Order XXI, rule 16, does not apply to the case of an applicant for execution who after taking an assignment of a decree for ascertainment of mesne profits is substituted in the place of the decree-holder and obtains a final decree in his name.

*Appeal from Original Order no. 49 of 1937, from an order of Babu Manindra Nath Mitra, Subordinate Judge of Monghyr, dated the 3rd March, 1937.

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In order to substantiate an objection under the second proviso to Order XXI, rule 16, it is necessary to show firstly that the decree which was transferred was a money decree and secondly that the transfer took place after the decree sought to be executed had been passed.

It may be questioned whether a decree for ascertainment of mesne profits under the present Code of Civil Procedure is strictly speaking a money decree.

Appeal by the judgment-debtor.

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

S. M. Mullick and *M. Rahman*, for the appellants.

D. C. Varma, for the respondent.

FAZL ALI, J.—This is an appeal by one of the judgment-debtors whose objection to the execution of a decree has been dismissed by the Subordinate Judge of Monghyr.

It appears that in 1927 Ram Sekhar Prasad Singh and certain other persons brought a suit for recovery of possession of certain lands and mesne profits. The suit was decreed and the plaintiffs applied for the ascertainment of the mesne profits. While the enquiry relating to the mesne profits was proceeding, the plaintiffs assigned the decree for mesne profits to the respondent Chandrika Prasad with the result that ultimately when the amount of mesne profits was ascertained, a decree was passed in favour of Chandrika Prasad. He has now applied for the execution of the decree but his application is resisted by the appellant on the ground that he is a benamidar for some of the judgment-debtors and therefore the decree cannot be executed against him under the second proviso to Order XXI, rule 16, which lays down that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. The question whether

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FAZL ALI, J.

Chandrika Prasad is or is not a benamidar for some of the judgment-debtors was enquired into by the Subordinate Judge (court below) and he has upon a consideration of the evidence adduced before him come to the conclusion that the appellant judgment-debtor has failed to establish that Chandrika Prasad is a benamidar. The learned Advocate for the appellant contends in this Court that the learned Subordinate Judge has come to a wrong decision and that the only conclusion which can be drawn from the evidence which has been adduced by the parties is that Chandrika Prasad was a benamidar on behalf of some of the judgment-debtors. In my opinion, however, that question does not legitimately arise in these proceedings. The objection which has been preferred by the appellant in the court below purports to be an objection under the second proviso to Order XXI, rule 16, and for the purpose of establishing it, it is necessary for the appellant to show firstly that the decree which was transferred to the respondent was a money decree and secondly, that the transfer took place after the decree now sought to be executed had been passed. It may be pointed out that what was transferred in this case was not a decree for an ascertained sum of money but the preliminary decree for mesne profits. The learned Advocate for the appellant contends upon the authority of *Viraragava Ayyangar* v. *Varada Ayyangar*(1) that a decree for mesne profits, even though the mesne profits may not have been ascertained is a decree for money. That case, however, was decided under the old Civil Procedure Code under which after a decree for mesne profits was passed the decree-holder had to go to the execution department and apply for the ascertainment of the mesne profits. Under the new Code the proceeding taken for ascertainment of mesne profits is a continuation of the suit and under Order XXII, rule 12, after the enquiry is concluded a final decree has to be passed in accordance with the result of such enquiry. There

(1) (1882) I. L. R. 5 Mad. 123.

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can be no doubt that under the present Code the final decree will be a money decree, but I am doubtful if the decree for mesne profits before the amount is ascertained can, strictly speaking, be regarded a money decree. Such a decree cannot be executed until it is made final and one may at least conceive of a case, though such a case will be rare, where the result of the enquiry under Order XXI, rule 12, may disclose that nothing is recoverable as mesne profits. However that may be, the second point which I have indicated above seems to me to be a complete answer to the objection raised by the appellant in this case. The second proviso to Order XXI, rule 16, which has been relied upon by the appellant, must be read along with the main provisions of that rule and, as was pointed out in *Rameshwar Prasad Bhagat* v. *Ram Ratan Ram*(1), *Order* XXI. rule 16, is primarily intended for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law. In the present case the decree which is sought to be executed is not the preliminary decree for mesne profits (if one may use that expression) but the final decree which has been passed by the court under Order XXI, rule 12, clause (*2*). The transfer in favour of Chandrika Prasad was made not after the final decree but before it, with the result that Chandrika Prasad is executing the present decree as a decree-holder and not as a person whose name has been substituted in place of that of the original decree-holder under Order XXI, rule 16. In these circumstances it appears to me that the second proviso to Order XXI, rule 16, has no application and the objection of the appellant was rightly dismissed by the learned Subordinate Judge. I would therefore dismiss this appeal with costs.

AGARWALA, J.—I agree.

J. K.

Appeal dismissed.

(1) (1934) I. L. R. 13 Pat. 519.

LETTERS PATENT.

1938.

January, 21.

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

THAKUR CHANDRA MOHAN SINGH

v.

BUTU MIAN.*

Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), sections 64 and 67—korkar, whether can confer occupancy right in the occupancy holding of another tenant.

A cultivator cannot acquire by korkar occupancy right in lands which are included in the tenancy of another cultivator, who has acquired a right of occupancy in it.

Appeal under the Letters Patent, by the plaintiff, from the following judgment of Khaja Mohamad Noor, J.—

KHAJA MOHAMAD NOOR, J.—This second appeal arises out of a suit instituted by the plaintiff-respondents for recovery of three plots of land in village Kasitaur in the district of Manbhum. Plaintiffs' case was that they took settlement of these lands under an unregistered hukumnama from the predecessor of the defendant-landlords some time in the year 1860. They complained that defendant no. 1 the landlord dispossessed them and settled the lands with the defendants 2 and 3. On these allegations they sought recovery of possession of the lands. The point for determination was, firstly, whether the hukumnama relied upon by the plaintiffs was genuine and valid, secondly, whether it related to the land in suit, and, thirdly, whether the plaintiffs' suit was barred by limitation. The trial court held that the hukumnama was genuine and that two of the plots, viz., 186 and 188, were covered by it. Regarding the third plot it came to the conclusion that its identity with the lands of the hukumnama was not established. It therefore decreed the suit in respect of the two plots mentioned above and dismissed it in respect of the third. The plaintiffs remained satisfied with this decree, but the defendants preferred an appeal to the District Judge who upheld the decree of the trial court and dismissed the appeal. The defendants have preferred this second appeal.

Three points have been urged before me on behalf of the appellants. One is that the finding about the genuineness of the hukumnama is based upon inadmissible documents. The learned District Judge has stated in this judgment that the hukumnama was found to be genuine in some previous suits whose judgments were filed in this case. The learned Advocate contended that those judgments not being inter parties were not admissible to prove the genuineness of the hukumnama. What in fact has happened is this: the defendants contended that

*Letters Patent Appeal no. 6 of 1937, from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 7th Januray, 1937.

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the hukumnama was fabricated for the purpose of the suit. The learned District Judge has held that it was not so as it was produced in court in several cases previously. On the whole in my opinion the plain meaning of the judgment of the learned District Judge is that the hukumnama saw the light of day many years before the controversy arose. There are other evidences relied upon by him for holding that the hukumnama is genuine and there is no substance in this part of the argument of the learned Advocate.

The second point urged was that as the learned District Judge was unable to find possession of the plaintiffs over the land in suit within twelve years of its institution he on the authority of the Full Bench decision of this Court in the case of *Raja Shiva Prasad Singh* v. *Hira Singh*(1) ought to have dismissed the suit. But according to the finding of the learned District Judge the lands are incapable of continuous user. In fact the finding is that they are sometimes cultivated and sometimes not. Therefore he has applied the presumption that possession must follow title. The case of *Raja Shiva Prasad Singh* v. *Hira Singh*(1) was explained by Sir Dawson Miller, C.J., himself in a later case of *Ram Nath Sarangi* v. *Gobardhan Pandey*(2) where His Lordship clearly held that though in a suit for ejectment the plaintiff must prove his possession within twelve years of the suit, the nature of proof will vary according to the nature and circumstances of the land in suit. If the land is of such a nature that it can only be occasionally occupied then it will be impossible for the plaintiff to prove continuous possession over it and in such a case the presumption of title following possession is available to the plaintiff. I therefore overrule this contention also of the learned Advocate.

The third contention of the learned Advocate was that the defendants 2 and 3 after taking settlement from defendant no. 1 made korkar in plot 186 and an application for ejectment not having been made by the plaintiffs before the Deputy Commissioner within two years of the commencement of the korkar the defendants acquired occupancy right and were not liable to be ejected.

The learned Advocate relied upon a decision of Dhavle, J., sitting singly, in *Doman Mian* v. *Ganasam Mahto*(3). In my opinion at any rate in this case, under the express provision of law, the claim of korkar right in the land in suit is not available to the defendants. The decisions relied upon by the learned Advocate is based upon three single judge decisions of this Court. The first one is of Atkinson, J. in the case of *Raham Ali Kalal* v. *Chintamani Kamar*(4). It is not clear from the judgment whether the plaintiffs who sought to eject the defendants were not of a status under whom an occupancy right can be acquired. In other words, it is not clear whether the plaintiffs of that suit who had acquired title from Government were not tenure-holders who can have an occupancy raiyat under them. In the present case we are dealing with a claim of korkar against an occupancy raiyat, who cannot have another occupancy raiyat under him.

(1) (1921) 6 Pat. L. J. 478.
(2) (1923) I. L. R. 3 Pat. 258.
(3) (1936) A. I. R. (Pat.) 39.
(4) (1917) 38 Ind. Cas. 478.

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The next case relied upon by Dhavle, J. is *Lal Sahi Palian* v. *Deba Munda*(1) in which Allanson, J. held that a man who was the Mundari Khuntkattidar of a village acquired occupancy right by korkar upon the Mundari khuntkatti land of another village. In this case also the man against whom the right of occupancy was held to have accrued to the maker of the korkar was a Mundari khuntkattidar who under the law holds a position of tenure-holder also, and the man who was held to have acquired that right was also a Mundari. A Mundari can acquire an occupancy right under a Mundari khuntkattidar. Under section 240(*4*) (*b*) a Mundari Khuntkattidar can give a lease of uncultivated land to a Mundari to enable him to cultivate it as a raiyat. Allanson, J. himself based his decision on the fact that the plaintiff of that suit was the malik Mundari Khuntkattidar of the village. Therefore the right was acquired on a land which on the face of the judgment was not encumbered by any occupancy right of another raiyat.

None of the two cases referred to above support the proposition that if a man trespasses upon the holding of an occupancy raiyat and makes korkar therein he acquires an occupancy right if no application for ejectment is made within two years of the commencement of the korkar.

The third case referred to by Dhavle, J. is an unreported decision of Ross, J. in *Akshay Mandal* v. *Phalhari Bhumij*(2).

It is a very short judgment and the question does not seem to me to have been discussed. Ross, J. was of opinion that the case was concluded by the decision of *Raham Ali Kalal* v. *Chintamoni Kamar*(3) already referred to. But as I have pointed out, that case was not one in which occupancy right was claimed by korkar under another occupancy raiyat. The learned Judge has observed that the acquisition of occupancy right is not confined to a tenant, as the word used in section 64 of the Act is "cultivator". It was not placed before His Lordship that acquisition of an occupancy right against another occupancy raiyat will completely destroy the right of the latter and will not make the former a raiyat under him. With profoundest respect to the learned Judge I beg to differ from the views taken by him. I shall later give my reason for holding that there cannot be the acquisition of an occupancy right under another occupancy raiyat.

Now, I have already said that Dhavle, J. relied upon three decisions of the learned Judges sitting singly. Two of them were not the cases in which the right of occupancy was claimed against an occupancy raiyat. The learned Judge has referred to the observation of Allanson, J. to the effect that a tenant also may be a landlord as defined in section 3(*xiv*) of the Chota Nagpur Tenancy Act. This is so and a landlord against whom a korkar right may be acquired may be of a status lower than the proprietor. But as a tenant under him holds a much lower status than he holds under his superior landlord it necessarily follows as a logical conclusion that he should be in a position of having such a raiyat under him. But a raiyat under a raiyat is an under-raiyat and he has no protected interest under the Chota Nagpur Tenancy Act

(1) (1927) 105 Ind. Cas. 58.
(2) (1928) S. A. no. 89 of 1925, decided on 14th February 1928.
(3) (1917) 38 Ind. Cas. 478.

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Rather transfer of any kind by a raiyat except those specified is prohibited by section 46 of the Act. Lease is expressly prohibited. It is obvious that if a raiyat cannot grant lease for korkar he cannot give a raiyati right by silence for two years. An occupancy right can be acquired by korkar under section 64 of the Chota Nagpur Tenancy Act if the landlord of the land does not take necessary steps for ejecting the maker of the korkar within the period prescribed by law. But if the landlord is not of a status who can give his consent for creation of an occupancy right, his implied consent cannot create a right which he could not create by express consent. If a man trespasses upon the holding of an occupancy raiyat he cannot acquire an occupancy right under him as there cannot be an occupancy raiyat under another occupancy raiyat. Acquisition of occupancy right by korkar is analogous to its acquisition by adverse possession. If a man begins korkar and the landlord of the land does not take steps to eject him for two years he shall be deemed to have given his consent. The same is the case in adverse possession. If a man goes and begins to cultivate a land claiming himself to be raiyat and if the landlord allows him to do this for the statutory period the man acquires an occupancy right because by prescription he acquires what he could acquire if he had held the land under a settlement for the required period. Atkinson, J. in the judgments above referred to has dealt with this aspect of the case. But when the man prescribes a right which is of the same character as the right of one against whom he prescribes he does not acquire a limited right of tenancy but a complete right and such a case is outside the scope of the provision of korkar in the Chota Nagpur Tenancy Act. A right of occupancy under a landlord is a right subordinate to him, but if such a right is acquired against a man who himself is an occupancy raiyat the right so acquired is the complete annihilation of the right of the raiyat and that can only be acquired after twelve years under the general law. I therefore respectfully disagree with the views of Dhavle, J. But strictly speaking the question does not arise and I therefore do not think it necessary to refer this case to a Division Bench.

In this particular case the land in question was not an altogether uncultivated land. It used to be cultivated from time to time and the defendants have converted it into paddy land. In that case the express provision of law (section 66 of the Chota Nagpur Tenancy Act) precludes the accrual of occupancy right by korkar. That section runs thus :—

"Nothing in section 64 shall authorise any cultivator to convert into korkar any orchard or cultivated or homestead land in the direct possession of another person".

If the defendants have made korkar in the face of the legal prohibition they cannot claim the protection of law. The court having found in this case that land was in possession of the plaintiffs till they were dispossessed from it and that it was a cultivated land, the conversion of it into paddy land was not authorized and therefore no right accrued to the defendants.

In my opinion the appeal fails and it is dimissed with costs.

I certify that this is a fit case for Letters Patent Appeal.

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B. C. De and *N. N. Ray*, for the appellants.

S. C. Mazumdar, for the respondents.

JAMES, J.—The plaintiffs in 1859, obtained from the landlord a lease of a certain area known as Gurua-kanali. The area apparently consisted of certain comparatively low-lying land rising on the east and west bounded on the east by a large area of low-lying land which was known as Barkagarha. The plaintiffs brought into cultivation the whole of the land settled with them with the exception of comparatively small portions contained in plots nos. 186 and 188 of the survey which lie respectively on the east and west of the block. When the record-of-rights was prepared, these two plots were entered as waste land in possession of the landlord, and subsequently the landlord leased out portions of plot no. 186 to tenants who have reclaimed the land. The plaintiffs instituted the suit out of which this appeal arises for recovery of possession from the landlord and the tenants, and their suit was decreed in the trial court. The court found that the plaintiffs had proved that the disputed plots formed part of the area settled with their ancestors in 1859; and that the plaintiffs should be regarded as having been continuously in possession. The ground on which the trial court came to this finding on the question of possession was that the area in suit consisted of land on which at the time of the preparation of the record-of-rights neither party was exercising specific acts of possession; and that therefore in this case possession should be presumed to be with the persons who had title to the land. An objection was also taken that the tenant-defendants by their acts of reclamation had acquired special rights by converting the land into korkar within the meaning of sections 64 and 67 of the Chota Nagpur Tenancy Act; but it was held that such rights could not be acquired in land which formed part of the holding of an occupancy raiyat. The defendants' appeal was dismissed on substantially the same grounds as those of the trial court, and a second appeal

to the High Court has also been dismissed; but the learned Judge of this Court gave leave to appeal under clause 10 of the Letters Patent.

Mr. B. C. De on behalf of the defendant-appellants argues in the first place that the plaintiffs' suit ought to have been dismissed as barred by limitation, because they had failed to prove actual possession within twelve years of the suit. According to the record-of-rights the land in question was waste land in possession of the proprietor; but in the present case the courts have found that neither the plaintiffs nor the defendants have proved any specific acts of possession over these particular plots up to the time of the preparation of the record-of-rights. The learned District Judge, when he said that in these circumstances it shoud be presumed that possession went with title, did not express himself very happily, and he appears to have omitted to notice or not to have laid sufficient stress upon the fact that these two plots formed part of a large area settled with the plaintiffs about seventy years before of which the greater part is being cultivated by the plaintiffs and is actually in their cultivating possession. When an area of this kind is settled with the tenant, he cannot be required to prove specific acts of possession over every square yard of his holding and the cultivation of the bulk of the demised area must be treated as enjoyment of possession of the whole in the absence of proof of specific acts of adverse possession done by some other party. Nothing of the kind has been proved in the present case and the cultivation of the greater part of the area demised must be treated as enjoyment of possession of the whole for the purposes of Article 142 of the Indian Limitation Act.

Mr. B. C. De argues in the second place with reference to plot no. 186 that defendants 2 and 3 by their acts of reclamation have acquired rights in the land as korkar land by virtue of the provisions of sections 64 and 67 of the Chota Nagpur Tenancy Act.

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The learned Judge of this Court in arriving at his decision has discussed several decisions of single Judges of this Court on which before him the argument of the appellants was based; and he has come to the conclusion that so far as these decisions might be held to suggest that korkar rights can be acquired by a trespasser on the holding of an occupancy raiyat, they must be regarded as erroneous. The first of these decisions is that of Atkinson, J., in *Raham Ali Kalal* v. *Chintamani Kumar*(1). In that case the plaintiffs had obtained settlement of certain land from the Khasmahal and the defendants trespassing on the land had converted it from *tanr* to paddy land and had remained in possession of it for twenty years. On these facts it would appear that the plaintiffs had no subsisting right to eject the defendants; but it was found that the defendants had actually acquired by virtue of the provisions of sub-section (*3*) of section 64 of the Chota Nagpur Tenancy Act korkar rights against the plaintiffs. As Mohamad Noor, J., has pointed out, it is not clear whether the plaintiffs were tenure-holders or raiyats. Mr. B. C. De points out that their tenure is described as a holding from which it might be inferred that they were raiyats; but if they actually were occupancy raiyats, it is to be observed that sub-section (*1*) (*a*) of section 64 would have excluded the operation of sub-section (*3*) of that section; and we must therefore suppose, since otherwise the decision would have been erroneous, that the plaintiffs were actually tenure-holders. In 1927, Allanson, J., in *Lal Sahi Palian* v. *Deba Munda*(2) found that certain tenants had acquired korkar right by reclaiming the land under the Mundari *khuntkattidars*; but he has there pointed out that the Mundari *khuntkattidars*, although as individuals for their own particular holdings they might enjoy the rights of raiyats, were

(1) (1917) 38 Ind. Cas. 478.
(2) (1927) 105 Ind. Cas. 58.

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actually as a body the landlords of the village and they described themselves in the plaint as *maliks*. In 1928 in *Akshoy Mandal* v. *Phalari Bhumij*(1), Ross, J. found that certain other raiyats had acquired the status of occupancy raiyats under plaintiffs who were settled raiyats of the village, regarding the matter as concluded by the decision in *Raham Ali Kalal* v. *Chintamoni Kumar*(2). Dhavle, J. considered himself bound by these decisions and came to a similar conclusion in *Doman Mia* v. *Gunaram Mahata*(3), Mohamad Noor, J., has pointed out that if an occupancy raiyat can be regarded as a landlord within the meaning of section 64 of the Chota Nagpur Tenancy Act, so that the person who trespasses on his land and reclaims it becomes his tenant under him, a status unknown to the Chota Nagpur Tenancy Act would be created, of an under-raiyat possessing rights of occupancy. Section 64 of the Chota Nagpur Tenancy Act deals with cases in which raiyats have committed what would normally be an act of trespass on the waste land of the village and laying down that in certain circumstances the landlord must be deemed to have given his consent to the reclamation, whereby the persons who would otherwise have been trespassers become occupancy raiyats under the landlord; but sub-section (*1*) (*a*) of the section excludes land included in the tenancy of a cultivator who has acquired a right of occupancy in it, so that nothing in section 64 of the Chota Nagpur Tenancy Act can be treated as applying to acts of trespass of this nature committed on land which forms part of the holding of an occupancy raiyat.

Mr. B. C. De suggests that the plaintiffs have not acquired any right of occupancy in any land forming part of their holding which they have not brought into direct cultivation; but the explanation to section 6 of the Chota Nagpur Tenancy Act makes it clear that where a tenant of land has the right to bring

(1) (1928) S. A. no. 89 of 1925, decided on 14th February, 1928.
(2) (1917) 38 Ind. Cas. 478.
(3) (1936) A. I. R. (Pat.) 39.

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it under cultivation, he is to be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he may not actually cultivate it. The suit cannot be treated as barred by limitation, and the defendants can claim no right against the plaintiffs by virtue of the provisions of section 64 of the Chota Nagpur Tenancy Act, because the plaintiffs have the status of occupancy raiyats on the land in dispute.

I would, therefore, maintain the order of the Judge of this Court and dismiss this appeal with costs.

COURTNEY TERRELL, C. J.—I entirely agree.

J. K.

Appeal dismissed.

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January, 21.

LETTERS PATENT.

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

UMASHANKAR PRASAD

v.

KUNJ BIHARI THAKUR.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 116 *zirat land—oral lease for one year, whether affected by section* 116 *of the Act—tenant taking oral lease of zirat land for one year, whether can acquire occupancy right.*

A tenant taking an oral lease of zirat land for a definite period of one year cannot acquire occupancy right in view of the provisions of section 116 of the Bihar Tenancy Act.

The word " a term of years " in section 116 of the Act is a generic term. It does not refer to the actual expression of the period in the lease itself. It means merely a period of time which can be measured in years. The true meaning of

*Letters Patent Appeal no. 26 of 1937, from a decision of the Hon'ble Mr. Justice Rowland, dated the 2nd September, 1937.

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the expression is that it must be a lease for a definite period, to come to an end at a definite date and nothing more.

A lease for a year certain is not the same as a lease from "year to year"; when the former expression is used whether the landlord takes any steps or not the tenant becomes a trespasser when his lease comes to an end, whereas when the latter expression is used, the tenant has the right to stay for a year certain, and if he does not receive notice from the landlord to quit his tenancy at the end of the year certain, then his tenancy shall extend for another period of one year.

Bishop of Bath's case (1), explained.

Appeal by the plaintiff.

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

S. M. Mullick and *A. K. Mitter*, for the appellant.

B. C. De, for the respondents.

COURTNEY TERRELL, C.J.—This is a Letters Patent appeal from the decision of Rowland, J. sitting singly and setting aside the judgment of the District Judge and restoring the decision of the Munsif by which the plaintiff's claim was dismissed. The facts are that the plaintiff owned certain zirat land. By an oral lease he let it out to the defendant for a definite period of one year (Fasli year 1339) ending on the 14th September, 1932. As the defendant did not deliver up possession on the 14th of September, 1932, when he became a trespasser, his right to occupy the land having ceased, the landlord in August, 1933, sued to eject him. Certain defences were set up by the defendant which on the findings of fact of the lower appellate Court have been found to be baseless and have not been supported either before the learned Judge sitting singly or before us. But one point was taken before the learned Judge which he accepted. The defendant said that he had acquired occupancy rights and that his case being governed by a lease for one year only was not affected by section 116 of the

(1) 6 Co. Rep. 34(b); 77 Eng. Rep. 303.

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Bihar Tenancy Act. He relied upon the wording of the last paragraph of the section:

> "A proprietor's private lands known in Bengal as khamar, nij, or nijjot, and in Bihar as zirnat, nij, sir or khamat, where any such land is held under a lease for a term of years or under a lease from year to year."

It was contended with success before the learned Judge that a lease for a definite period of one year is not on the one hand a lease from year to year, nor is it, it is said, a lease which comes under the term "a lease for a term of years". The learned Judge is of opinion that the term of years must be a term of at least two years; and I think he was completely misled by the citation of an old report of the *Bishop of Bath's* case(1). The learned Judges in that case were discussing the various expressions used in a lease and the portion of the Coke's Report relied upon runs thus: "It was resolved, if a man makes a lease from the Feast of St. Michael, for as many years as I. S. shall name, in this case if I. S. name a certain term (in the life of the lessor) it is a good lease by matter ex post facto. So it is of all leases which are to commence on a condition precedent. And as to *Potkin's* case(2) which was cited by the counsel on both sides in this case, where the case was, that Potkin, 10 H.7. demised a wood to the defendant to commence at the Feast of St. Michael next following, *pro term, unius anni and sic de uno anno in annum, quamdiu ambabus partibus placuerit*, and there two justices against two. It is now resolved, *per totam Curiam*, that in such case after three years *ad maximum*, it was but a lease at will, because beyond that, the term has not any certain continuance or determination; and on the matter is no other, than if one demises lands for such term as both parties shall please, this is but a lease at will, because the term is altogether uncertain. But if a man leases his land for years, it is a good lease for two years, because it shall be taken good for

(1) 6 Co. Rep. 34(b); 77 Eng. Rep. 303.
(2) 1 Rolle. 851.

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such a number with which at least the plural number will be satisfied, and that is with two years ".

Now the meaning of this passage is simply that if a man uses the expression " I lease my land to you for years " or " I lease my land to you for a term of years ", either of those expressions being the expressions used by the lessor in the lease, the word 'years' being in the plural, the plural must be given effect to and the plural cannot be given effect to unless the lease is understood as being for a period at least of two years' duration. But in the case before us no such expression is used in the lease at all. The lease was for one year certain. Now in the Act which we are considering and in the portion which I have quoted above, the words " a term of years " is a generic term. It does not refer to the actual expression of the period in the lease itself. That is manifest, for if the expression used in the lease itself were " I let the land to you for a term of years " although the tenant might be entitled, as was said in the English Report which I have quoted, to retain the land for two years at least, it cannot be said with certainty that he was entitled to retain the land for five years, or six years or nine years. The Act is not referring to the precise expression used in the lease but to a class of leases. Now it means merely a period of time which can be measured in years. One year is a measure of years. Six months is a measure of half of a year, i.e., it is a measure which can be reckoned in years. In other words, the true meaning of the expression is that it must be a lease for a definite period, to come to an end at a definite date and nothing more; and if the meaning were as imagined by the learned Judge to be the correct meaning, it would mean that a person who had got a lease for one year certain, would be in a better position with regard to the possible acquisition of occupancy right than a man who had a definite lease for two years. For the latter, under the construction of the Act, would most

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certainly be prevented from obtaining occupancy rights, whereas the former being outside the definition would be able to obtain occupancy rights. The misunderstanding by the learned Judge of the use of the words " a term of years " misled him throughout his decision. Similarly a lease for a year certain is not the same as a lease from year to year; where the former expression is used whether the landlord takes any steps or not the tenant becomes a trespasser when his lease comes to an end, whereas when the latter expression is used, the tenant has the right to stay for a year certain and if he shall not receive notice from the landlord to quit his tenancy at the end of the year certain, then his tenancy shall extend for another period of one year. The expression " from year to year ", therefore, also does not cover the lease for one year certain, because the rights of the tenant in the latter case are better than the rights of the tenant in the former case. It was contended by Mr. De supporting the conclusion of Rowland, J. that the true meaning of the legislaiton was that in order to prevent the tenant from acquiring occupancy rights there should be a registered lease; and by way of furthering that argument he made reference to the later Statute, the Chota Nagpur Tenancy Act, section 43, where it certainly is provided that if a lease is to cut the tenant off from obtaining occupancy rights, it must be a registered lease. There in the Chota Nagpur Tenancy Act the words expressly are ' registered lease ' and furthermore the expression marking the period, instead of being, as in section 116 of the Bihar Tenancy Act, " a term of years " is thus expressed " a term exceeding one year or on a lease, written or oral, for a period of one year or less ". It will be noticed that the demand for registration, the expression " a period of one year or less " and the further expression " written or oral " are all different and are in contrast with the expressions used in the Bihar Tenancy Act. It is not necessary for an oral lease to be registered, nor indeed do I see any manner

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in which an oral lease can be registered. The demand for registration applies purely to a written lease. The learned Judge who heard this case was I think misled by the case of *Bishop of Bath*(1) but if it is carefully read, it will be seen that the words " term of years " are used there in the sense of the actual expression used in the lease, whereas in section 116 the words " a term of years " are merely a classificatory term and mean nothing more than any definite term and any definite term of time may be measured in years though not necessarily an even number of years.

For these reasons in my opinion the judgment of Rowland, J. must be reversed and the judgment of the District Judge must be restored. The respondents must pay the costs of this appeal throughout.

JAMES, J.—I agree.

J. K.

Appeal allowed.

APPELLATE CIVIL.

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October, 20, 21, 22.

Before Wort and Varma, JJ.

SHAIKH MOHAMMAD ANAS

v.

BHUPENDRA PRASAD SHUKUL.*

Limitation Act, 1908 (*Act IX of* 1908), *Article* 182—*application for execution by the real assignee of a decree whether is an application in accordance with law—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rules* 15 *and* 16—*transferee of decree, meaning of—application under rule* 15, *requisites of.*

A obtained a decree for possession and mesne profits in 1920 and thereafter he assigned 7-annas interest in the same in favour of *N*, who took the assignment in the name of *M*. The amount of mesne profits was ascertained and a final decree

(1) 6 Co. Rep. 34(*b*); 77 Eng. Rep. 303.

*Appeal from Original Order no. 42 of 1936, from an order of Babu Dwarika Prasad, Subordinate Judge of Muzaffarpur, dated the 13th of January, 1936.

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was passed in 1923. In 1925, *A* and *N* applied for execution of the decree, but the execution was struck off as *M* claimed that he was the real assignee and the parties were referred to get the matter determined by a suit. *N* got the declaration that he was the real transferee, and thereafter in 1935, an application was filed for execution and the judgment-debtor asserted that the application for execution of the year 1925, was not in accordance with law and therefore the present application for execution of 1935 was barred by limitation.

Held, that the transferee under a deed of assignment referred to in rule 16 of Order XXI, was the person named in the deed and not the real transferee.

Abdul Kureem v. *Chukhun*(1), *Denonath Chuckerbutty* v. *Lallit Coomar Gangopadhya*(2), *Gour Sundar Lahiri* v. *Hem Chander Chowdhury*(3), *Nilkanta Ghosal* v. *Ramcharan Ray*(4), *Balkishan Das* v. *Bedmati Koer*(5), *Manikkam* v. *Tatayya*(6) and *Palaniappa Chettiar* v. *Subramania Chettiar*(7), reviewed.

Ram Sewak Lal v. *Satruhan Deo Sahai* (8), followed.

Gur Narayan v. *Sheo Lal Singh* (9) and *Bilas Kunwar* v. *Dasraj Ranjit Singh*(10), referred to.

Held, also that in view of the express provision of the law, Order XXI, rule 16, the mere fact that a declaration was made that *N* was the real transferee did not entitle him to levy execution.

Held, also, that the application for execution made in 1925, could not be taken as an application under Order XXI, rule 15, as it was not stated therein that it was for the benefit of the applicant and the other persons entitled to the decree.

Appeal by the decree-holders.

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

(1) (1879) 5 Cal. L. R. 253.
(2) (1882) I. L. R. 9 Cal. 633.
(3) (1889) I. L. R. 16 Cal. 355.
(4) (1928) 55 Cal. L. J. 82.
(5) (1892) I. L. R. 20 Cal. 388.
(6) (1898) I. L. R. 21 Mad. 388.
(7) (1924) I. L. R. 48 Mad. 553.
(8) (1927) 8 Pat. L. T. 163.
(9) (1918) I. L. R. 46 Cal. 566; L. R. 46 Ind. App. 1.
(10) (1915) I. L. R. 37 All. 557; L. R. 42 Ind. App. 202.

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Dr. D. N. Mitter (with him *Hasan Jan*, S. K. *Mitter*, *Syed Ali Khan*, *A. H. Fakhruddin*, *Syed Hasan* and *J. N. Sahay*), for the appellants.

Manuk (with him *Yasin*, *Yunus*, *S. M. Mullick* and *K. P. Varma*), for the respondents.

WORT, J.—The only point in this case is whether the application for execution which was the subject matter of the case in the Court below was barred by limitation. That depends entirely upon the question whether a previous application dated the 14th of July, 1925, was an application in accordance with law. But for the fact that there are certain authorities supporting the view of the appellants in this Court I should have entertained no doubt as to what the proper decision should be. In any event the view I hold is supported by a decision of this Court which is binding upon us unless the matter were referred to a larger Bench. The reason for such reference, however, does not in my judgment appear to exist in this case.

One or two facts are necessary for the purpose of deciding the point which, as I have said, arises in this case for determination. A decree was obtained on the 6th of March, 1923, for a sum of Rs. 30,000 by one Mohammad Anas. I had better state in advance that there were various defendants to this case and that there has been a devolution since the original decree was obtained but no question arises with regard to that matter. The original decree was obtained on the 20th December 1920, for recovery of possession and mesne profits by one Mohammad Anas. On the 24th of August of the same year the decree-holder assigned 7-annas interest in the decree to Mohammad Nazir Ahmad in the *farzi* name of one Mohammad Akhtar. Then the matter proceeded to the ascertainment of mesne profits, the decree of 6th March, 1923, being obtained by these two persons—the original decree-holder and the assignee. On the 14th of July, 1925, an application was made for execution. This

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application was made by Mohammad Anas who held 9-annas interest in the decree and by what I may describe as the real assignee, that is to say, Nazir Ahmad, and not by Mohammad Akhtar the benamidar. In course of time this application was struck off; it was struck off for this reason. The Judge before whom that application came declined to decide the question between the so-called benamidar and Nazir Ahmad, Mohammad Akhtar, the benamidar, contending that the decree was his and not that of his principal Nazir Ahmad. The parties were referred to the Court to have the matter determined in an action . Ultimately it was held by the trial court—a decision which came to this Court eventually—that Nazir Ahmad was in fact the assignee.

On the 10th of April, 1926, a second application for execution was made. On that occasion the benamidar alone made application for execution complying with Order XXI, rule 15, of the Code of Civil Procedure. Perhaps it might be inferred from what I have said, at any rate it is the fact, that the decision in the suit had not been given at the time of the second application, and I suppose it was for that reason that Mohammad Akhtar made the attempt to execute the decree for mesne profits on behalf of himself and the 9-annas proprietor. On the 14th of March, 1927, again this application was struck off pending the decision of the suit to which I have just referred.

A third application was made on the 20th of December, 1928 and on the 24th of June of the following year the execution case was dismissed as being infructuous.

On the 5th of March, 1935, a fourth application for execution, which was the subject-matter of this appeal, was made. The application was made by Mohammad Anas who was the owner of the 9-annas interest and by Nazir Ahmad the real assignee as he has been described in the deed of assignment by Mohammad Anas.

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It will be seen that the only question for decision—whether the last application of the 5th of March, 1935, is barred by limitation—depends upon the validity of the application of the 14th of July, 1925, being the first application for execution. If for any reason it is held, as the Judge in the Court below has held, that the first application of the 14th of July, 1925, was not in accordance with law within the meaning of Article 182 of the Limitation Act, then it is clear that all the subsequent applications must necessarily go, on one ground alone that they would be barred by limitation.

Now, the point can be stated in this way. It has been stated by the Judge in the Court below that the application by what I may describe as the 9-annas proprietor and by Nazir Ahmad (not the benamidar Mohammad Akhtar) who was an assignee under the deed of assignment was not in accordance with law, as the correct view was that the person named in the deed of assignment should make the application as 'assignee' and not what has been described as the real assignee. Order XXI, rule 16, provides:

"Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it."

It is the contention of Dr. Mitter before us that the expression 'transferee' at least includes the real transferee, i.e., the beneficiary under the deed of assignment and does not necessarily refer to the person named in the deed of assignment. As I have already said, I should have entertained no doubt about the matter but for certain authorities upon which Dr. Mitter relies.

The first of those is the case of *Abdul Kureem* v. *Chukhun*(1). There the question arose whether an earlier application was in accordance with law and Mitter, J. in delivering the judgment of the Court

(1) (1879) 5 Cal. L. R. 253.

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made this statement: "We are of opinion that this contention (that is to say, the contention that under section 232 of the Code of 1877, the Court executing the decree should not recognize benami transfers) is not valid. The section says that where a decree is transferred by an assignment in writing, the transferee may apply. The benamee system is recognized in this country, and a benamidar is not a transferee of the decree. The section only authorises the Court to allow the transferee of the decree to apply for execution".

The next decision of the Calcutta High Court on this point is the case of *Denonath Chuckerbutty* v. *Lallit Kumar Gangopadhya*(1). I merely mention this decision in passing.

The next case is *Gour Sundar Lahiri* v. *Hem Chander Chowdhury*(2) a decision of Prinsep, J. and Ghose, J.—to the same effect. A later decision to some extent bearing out the same view of law is the case of *Nilkanta Ghosal* v. *Ramcharan Roy*(3). I would also refer to the case of *Balkishen Das* v. *Bedmati Koer*(4) a decision of Macpherson, J. and Banerjee, J., which appears to be a decision holding the opposite view. But there the learned judges pointed out a distinction which they thought to exist in the two cases to which I have just referred, *Denonath Chuckerbutty* v. *Lallit Kumar Gangopadhya*(1) and *Gour Sundar Lahiri* v. *Hem Chander Chowdhurry*(2).

Then there are decisions of the Madras High Court. The first is the case of *Manikkam* v. *Tatayya*(5). Shortly stated the decision in that case was that the actual purchaser of a decree may apply for execution of the decree under section 232 of the then Civil Procedure Code being the Code of 1877; and I would observe in passing that section 232 of the

(1) (1882) I. L. R. 9 Cal. 633.
(2) (1889) I. L. R. 16 Cal. 355.
(3) (1928) 55 Cal. L. J. 82.
(4) (1892) I. L. R. 20 Cal. 388.
(5) (1898) I. L. R. 21 Mad. 388.

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Code of 1877 is in the same terms as Order XXI, rule 16, of the present Code—that is to say, by an assignment in writing or by operation of law. The earlier Code of 1859 did not require an assignment to be in writing. Now, the Madras Court has departed from that view in *Palaniappa Chattiar* v. *Subramania Chettiar*(1) decided by Sir Murray Coutts Trotter, C. J. and Srinivasa Ayyanger, J. The question whether the real assignee in contradistinction to the benamidar was entitled to apply in execution was dealt with by the learned Chief Justice in these words: "The rule of law that, where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless he comes within the words of Order XXI, rule 16, of the Code of Civil Procedure and there has been an assignment in his favour either in writing or by operation of law, seems to me to be no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree was not his." The learned Chief Justice then refers to the decision in *Manikkam* v. *Tatayya*(2) to which I have just referred and proceeds to say: "but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from, and an extension of the words of, the statute". The other learned Judge sitting with the Chief Justice delivered judgment to the same effect. I make no comment upon the fact apart from mentioning it that a Bench of two Judges appears to overrule the decision of a Bench of other two Judges. But in this particular matter, as I have stated at the commencement of my observation, I am supported by an authority of this Court.

The decision to which I refer is in the case of *Ram Sewak Lal* v. *Satruhan Deo Sahai*(3). In that

(1) (1924) I. L. R. 48 Mad. 553.
(2) (1898) I. L. R. 21 Mad. 388.
(3) (1927) 8 Pat. L. T. 163.

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case Adami, J. and Allanson, J. had two questions to decide: first, whether a deed of release could create title; and, secondly, whether a person other than the beneficiary (not the benamidar) could sue in execution. As regards the first, Allanson, J. is reported to have said this: "It is well-established that title cannot pass by admission when the law requires a deed. It was argued on behalf of the respondent that as either the real owner or the benamidar has the right to sue, so the real owner has the right to execute a decree obtained by the benamidar. No authority in support of this proposition was placed before us. A decree can only be transferred by assignment in writing or by operation of law". Then the learned Judge proceeded to deal with the question of the deed of release. Dr. Mitter seems to criticise that decision by saying that none of the authorities to which reference has been made in this case have been referred to in the argument or in the judgment which I have just read. But that in no way detracts from the authority of the decision, and it is a decision which is binding upon us unless there be reason for referring the matter to a larger Bench which would be in a position to deal with the case. But holding the view that I do, there appears to be no such reason for that procedure. Now it seems to me quite clear on the plain reading of the rule itself that the view that should be taken appears on the face of the rule itself. If the interest of any decree-holder in a decree "was transferred by an assignment in writing", etc., the transferee under a deed of assignment is the person who is named as a transferee. There can be no doubt about that—it is trite. But Dr. Mitter says that we should have regard to the universal practice in India of carrying out transactions in the benami names and he refers us to the decision of the Privy Council in the case of *Gur Narayan* v. *Sheo Lal Singh*(1). There Mr. Ameer Ali, in delivering the judgment of the Board, makes reference to this practice in these words:

(1) (1918) I. L. R. 46 Cal. 566; L. R. 46 Ind. App. 1.

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"The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it and it accords, within its legitimate scope, with the ideas and habits of the people". Then his Lordship refers to the opinion of their Lordships of the Judicial Committee as stated by Sir George Farwell in *Bilas Kunwar* v. *Dasraj Ranjit Singh*(1), where Sir George Farwell states "It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results—to the man who pays the purchase-money". Then Mr. Ameer Ali proceeds to say: "As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him". I must say that I fail to understand the argument of Dr. Mitter on this point. It is of course obvious to any one even with the least experience in this country that this practice of carrying out what is described as benami transaction exists, but it cannot alter the law. If every transaction was carried out in the benami name of another and that custom was universal and there was no departure from it in one single instance, then such custom might be proved and it might perhaps be said that 'you have established a custom, the effect of which would be to establish the proposition that where the word 'transferee' is used in a document in India it means the real transferee and not the benamidar'. It is only in that extreme case that the argument can avail the appellants in my judgment. The transferee under the deed of assignment we are dealing with was Mohammad Akhtar and no other; what rights a real transferee, the beneficiary under the deed, may have for the purposes of this case are neither here nor there.

(1) (1915) I. L. R. 37 All. 557; L. R. 42 Ind. App. 202.

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Indeed so far as Order XXI, rule 16, is concerned, it seems to me that the alteration of law which appeared first of all in the Code of 1877, that is to say, the requirement that an assignment of the decree should be in writing, was a provision which the legislature enacted for the very purpose of preventing difficulties of the kind, we have to deal with here. It was unsuitable, as their Lordships of the Privy Council point out in one of their decisions in this matter, that questions of this kind should be determined in execution; and that leads me to the other branch of the argument in connection with this part of the case addressed to us by Dr. Mitter.

Whilst these various applications were being made in execution as we have seen the action for a declaration that Nazir Ahmad was the beneficiary under the deed was pending in the Court and was ultimately decided. It was contended that this Court gave a declaration in favour of Nazir Ahmad and that, as his right dated back to the application of the 14th of July, 1925, therefore it was shown that he was the person who was entitled to take out the application for execution. That argument begs the question. All that the High Court decided was that Nazir Ahmad was the real owner of the 7-annas interest of the decree if I may put it in that language. The question whether he was entitled to sue out execution was not decided by any of the Courts in that case and necessarily could not be decided. But it is further contended in this regard that the Subordinate Judge in referring the parties to a properly constituted suit by inference decided that if the plaintiff succeeded in getting this declared then he was entitled to apply for execution of the decree. That in my judgment is an argument which cannot be supported. The learned Judge did not commit himself in that way and indeed we know that that application was eventually struck off. The question was never decided and furthermore there can be no inference drawn from

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what actually took place because it may very well be that the learned Judge was of the opinion that the beneficiary Nazir Ahmad might have joined with the benamidar in making the application and indeed there is no knowing what the ultimate decision of the Subordinate Judge in the execution proceedings would have been had the question come to be determined by him.

Now the other branch of the case relates to Order XXI, rule 15, of the Code of Civil Procedure. The application which is the subject-matter of this appeal is, as I have said, the fourth application of the 5th of March, 1935. Dr. Mitter would have us disregard the fact that the application was made by the 9-annas proprietor of the decree and by the real owner of the 7-annas of the decree. He would argue that it can be treated as the application of the 9-annas proprietor on behalf of himself and on behalf of the assignee of the 7-annas interest, but the authorities of this Court are against that contention. Atkinson, J. and Jwala Prasad, J. in *A. J. Meik* v. *The Midnapur Zamindary Company, Limited*(1), decided that in order to comply with Order XXI, rule 15, of the Code of Civil Procedure it was necessary to state that the application was taken on behalf of the applicant and for the benefit and on behalf of other persons entitled to the decree. That was not done in the application of the 5th of March, 1935, and therefore that argument fails.

Indeed the question comes back to the first point, namely, whether the real owner or the benamidar is the assignee within the meaning of Order XXI, rule 15. Two further cases have been referred to—one a decision of Kulwant Sahay, J. and Mullick J. in *Jogendra Prasad Narayan Singh* v. *Mangal Prasad*(2), Kulwant Sahay, J. delivering the judgment of the Court, and the matter which was before them was this. There were two brothers who were entitled to

(1) (1919) 4 Pat. L. J. 575.
(2) (1925) 7 Pat. L. T. 330.

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a decree and it was contended by the applicant that there had been a partition between the two brothers and that the applicant was entitled to the whole of the decree. It is unnecessary to state the facts of that case, but the question which came to be determined was whether a certain application upon which the other applications in execution rested was in accordance with law; and Mr. Justice Kulwant Sahay made this statement: "It has been held in *Bhagwat Prashad Singh* v. *Dwarka Prasad Singh*(1) that under Article 182 clause (5) of the Limitation Act an application is one in accordance with law if the particulars required by Order XXI, rules 11 to 14, of the Civil Procedure Code are applied. In the present case we find that all the particulars required to be stated in an application for execution by rules 11 to 14 of Order XXI, had been given in the first application" and he decided accordingly. From one point of view there is an apparent conflict between the case in *Jogendra Prasad Narayan Singh* v. *Mangal Prasad*(2), and the case which I am now referring to. It was held in the earlier case that in the application to comply with Order XXI, rule 15, it was necessary to state that the application was made on behalf of other persons entitled to the decree; but it seems to me that the facts in the two cases are not the same and in any event it will clearly appear that the decision of Kulwant Sahay, J. depended almost entirely upon the view that he held that Order XXI, rules 11 to 14, had been complied with. Now it is the contention of Dr. Mitter that whatever may be thought of the other points in the case the application of the 14th of July, 1925, was in accordance with law within the meaning of the case to which I have just referred and, therefore, if in accordance with law, can form a valid basis for the subsequent applications. Now, Order XXI, rule 11, makes provision for the particulars which are to be given in an application in execution: the particulars are (*a*) number of

(1) (1923) 4 Pat. L. T. 513.
(2) (1925) 7 Pat. L. T. 330.

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the suit, (*b*) names of the parties,(*c*) date of the decree, etc., etc. The second particular is 'names of the parties'. Now, it will be seen that this point does not assist the appellants here if the first point is decided against them. It comes back again, as I stated earlier in my judgment, to the question whether the proper parties have been made, in other words, whether the assignee and the 9-annas proprietor took out the application for execution being the first application. If that question is answered in the affirmative then, of course it is quite clear that Order XXI, rule 11, sub-clause (*2*) (*b*), has been complied with, namely, the names of parties have been given. But here the contention is that the real assignee, not being the person named in the deed of assignment, is not the party who ought to have taken out execution. It seems to me that that concludes the matter. The decree-holder *A* in taking out execution, which is stated to be barred by limitation, cannot rely upon an earlier application taken out by *B*, another person, and in no circumstance could it be said that the earlier application taken out by another person (which is substantially the case here) was an application in accordance with law; and as I have said and repeat the question, therefore, comes back to the old point—whether the assignee named in the deed or the real assignee, as he has been called in the argument, is the proper person who could take out execution. I have no doubt as I have said what should be decision on that point. It seems to me that it would be doing violence to Order XXI, rule 16, of the Code of Civil Procedure to hold otherwise, viz., that the benamidar the person named in the deed of assignment, must be the person to apply in execution. For those reasons it seems to me that the judgment of the learned Judge in the Court below was right and the appeal fails and must be dismissed with costs.

VARMA, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

1937.

October, 22, 25, 26.

Before Wort and Varma, JJ.

CHITRADHAR NARAIN DAS

v.

KHIDAR THAKUR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXII, rule 4—minor not properly represented by guardian ad litem, when can get a declaration that decree is not binding—Court, whether can set aside the whole decree and direct a fresh trial.*

The plaintiffs instituted a suit for a declaration that a mortgage decree on the basis of a mortgage bond executed by their father was not binding on them as they were not properly represented in the suit by the father whose interest was adverse to them. The courts below found that the plaintiffs had a good defence on the ground of family necessity and benefit and accordingly granted the declaration, set aside the whole decree and directed the re-hearing of the mortgage suit.

Held, that on the findings of fact that they had a good defence and that they were not properly represented in the suit the plaintiffs were entitled to the declaration that the decree was not binding on them, but the court had no jurisdiction to set aside the whole decree in the mortgage suit and order a re-hearing of the mortgage suit.

Musammat Bibi Walian v. *Banke Behari Persad Singh*(1), *Musammat Rashidunnisa* v. *Muhammad Ismail Khan*(2), *Sellappa Goundan v. Masa Naiken*(3), *Shaikh Abdul Karim* v. *Thakurdas Thakur*(4), *Hitendra Narayan Singh* v. *Sukhdeb Prasad Jha*(5), *Kali Charan Singh* v. *Hirdai Narain*(6) and *Hari Prasad Singh* v. *Sourendra Mohan Sinha*(7), reviewed.

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*Appeal from Appellate Decree no. 262 of 1937, from a decision of R. B. Beevor, Esq., I.C.S., District Judge of Muzaffarpur, dated the 9th of January, 1937, reversing a decision of Babu Dwarka Prasad, Additional Subordinate Judge of Muzaffarpur, dated the 23rd of December, 1935.

(1) (1903) I. L. R. 30 Cal. 1021; L. R. 30 Ind. App. 182.
(2) (1909) I. L. R. 31 All. 572; L. R. 36 Ind. App. 168.
(3) (1923) I. L. R. 47 Mad. 79.
(4) (1928) I. L. R. 55 Cal. 1241.
(5) (1929) I. L. R. 8 Pat. 558.
(6) (1934) 154 Ind. Cas. 948.
(7) (1923) 3 Pat. L. T. 709.

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Appeal by the plaintiffs.

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

A. B. Mukharji and *Mrs. Dharmshila Lall*, for the appellants.

Dr. Dwarka Nath Mitter and *K. Sahai*, for the respondents.

WORT, J.—This appeal and a cross-objection arise out of an action in which the plaintiffs who were minors claimed a declaration that a certain mortgage decree was not binding upon them. I propose to say as little as possible in this case as I have always failed to find any logical basis for the decisions which have been arrived at in this matter, always excepting certain decisions of the Judicial Committee of the Privy Council to which I shall refer in a moment. I can understand the position as in *Bibi Walian's* case(1) that although certain irregularities were present, that is to say, the strict letter of the law had not been complied with in the appointment of a guardian, yet there was in substance representation. But I find myself in the greatest possible difficulty as regards the decisions which have held that although the law has been complied with so far as the appointment is concerned, yet the question whether there has been a representation in fact can be ignored. It always has seemed to me that to lay down any such wide rule is to open a vista of litigation the end of which cannot be seen. However, it does appear to be clear on the authorities, including the decision of their Lordships of the Judicial Committee of the Privy Council in *Musammat Rashidunnisa* v. *Muhammad Ismail Khan*(2), that although the law has been complied with, it is open to the courts to go into the question whether there has been representation.

(1) (1903) I. L. R. 30 Cal. 1021; L. R. 30 Ind. App. 182.
(2) (1909) I. L. R. 31 All. 572; L. R. 36 Ind. App. 168.

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Shortly stated, the facts out of which this appeal and the cross-objection arise are these. The plaintiffs are two minors and their fathers entered into a mortgage transaction in November, 1921. Three months prior to that date, that is to say, sometime in August they entered into a transaction by which they purchased a certain property. For the purpose of raising the money, the consideration for the purchase, they entered into the mortgage transaction to which I have referred. In course of time an action was brought on the mortgage, and amongst the defendants were the two fathers and their respective minor sons. A decree was obtained and it is as regards that decree that the action out of which this appeal and the cross-objection arise was brought.

The learned Judge in the Court below has come to the conclusion, affirming the decision of the trial court, that, as the minors were not properly represented in the mortgage suit, and as the interests of the fathers who were appointed guardians of the minors in that suit were adverse to those of the minors, the decree was not binding upon them. Had the learned Judge in the Court below been content with allowing that declaration to the plaintiffs nothing more perhaps would have been heard of this matter. But for reasons which I must confess I do not understand the learned Judge has not only given the declaration to the plaintiffs which, by his findings, was an obvious conclusion, but has set aside the whole decree in the mortgage suit, and, without any jurisdiction, has ordered a rehearing of the mortgage suit. As I have already said, the learned District Judge had no jurisdiction whatever to make that order. The action against the fathers and the minors was properly constituted, there was no allegation of fraud, and without a case of fraud being proved the Judge had no jurisdiction to set aside the decree. It is quite another question to make the declaration that the decree was not binding on the minors as in substance

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they were not parties to the suit. I leave the appeal at this stage to deal with the cross-objection.

In the cross-objection Dr. Mitter representing the decree-holders in the mortgage suit contends that the learned Judge should have come to the conclusion that the decree was binding upon the minors, first, because they were properly represented and, in the alternative, that the consideration for the mortgage was an antecedent debt. With the latter question I propose to deal at once. I have stated the facts quite sufficiently to raise that question. It is contended by Dr. Mitter that the matter ought to be remanded for determination of this question, but on the plain facts as established in the case it seems to me to be impossible to come to the conclusion that this was an antecedent debt. As I have already stated, the mortgage was for the purpose of raising money for payment of the purchase price under the kabala in suit. There is no doubt that so far as time is concerned the transaction of course was antecedent to the mortgage transaction of November. But, as Lord Dunedin in the well-known case of *Brij Narain* v. *Mangla Prasad*(1) has pointed out, to constitute a debt an antecedent debt it must be antecedent both in point of fact as well as in time. Dr. Mitter argues that once he has shown that the debt was antecedent in point of time the onus was upon the other party to show that it was not antecedent in fact. I must confess I do not understand that argument which in my opinion is based upon a fallacy. In *Brij Narain's* case(1) Lord Dunedin was not stating that there were two limbs to the question whether the debt was antecedent or not but he was merely defining the word 'antecedent'; if the onus was upon the mortgagees, as it undoubtedly was in this case, to show that the debt was antecedent, they had not discharged that onus by showing that it was merely antecedent in

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.

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point of time: in other words, until it was shown that the debt was antecedent in time and fact the onus which was upon them was not discharged. In my judgment there can be no possible doubt in this case on that point.

The argument of Mr. Mukharji on behalf of the appellants, who are the respondents to the cross-objection, is that this question did not properly arise and it is therefore unnecessary to deal with it.

Now as regards the representation. The case of *Musammat Bibi Walian* v. *Banke Behari Pershad Singh*(1) to which I have already referred, is one of the leading decisions on the question of representation. But it is as well to point out at once that that was a case, as I have already stated in which there had been some informality as regards the appointment of the guardian and their Lordships of the Judicial Committee of the Privy Council pointed out that the interests of the minors were effectively represented by their mother with the sanction of the Court, and, unless there were any matter which would show that the minors were prejudiced, the mere fact that informality existed would not entitle the minor parties to have the decree or execution set aside. As regards the other case to which I have referred—*Musammat Rashidunnisa* v. *Muhammad Ismail Khan*(2) that was a case in which the facts were somewhat complicated, but the point decided arises by reason of two findings: one that the sister who claimed to be the guardian of one of the minor parties was not a proper person to be appointed and as regards the appointment of one Mauladad Khan, who was the father of some of the minor parties, it was pointed out that as the minor sons were benamidars of the father, the circumstances of the case disclosed the fact that the real position was that the guardian who was in substance the plaintiff in the proceedings

(1) (1903) I. L. R. 30 Cal. 1021; L. R. 30 Ind. App. 182.
(2) (1909) I. L. R. 31 All. 572; L. R. 36 Ind. App. 168.

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was acting as a guardian for the sons who were in the position of defendants and therefore their interests were adverse to that of the father. I refer to this case more particularly because the decision of the Madras High Court in *Sellappa Goundan* v. *Masa Naiken*(1) appears to be based upon this authority. Odgers, J., who delivered the principal judgment of the Court, made this statement (this was a case where the father was appointed a guardian of the minors in the mortgage action): "It was improper and in fact illegal to appoint the father guardian at all. It was manifestly to his interest to throw as much of the burden of the mortgage debt as he could on the minors' shares and to exonerate his own share proportionately. It is difficult to imagine a case where one defendant's interest could be more adverse to that of another than the present case." The learned Chief Justice of the Calcutta High Court, in dealing with a similar argument in the case of *Shaikh Abdul Karim* v. *Thakurdas Thakur*(2), made this statement:

"It is in this case not necessary to proceed upon this ground (i.e. the ground that the interest of the mother was adverse to those of the minor defendants) and I would desire in particular to guard myself against holding that in any case where a guardian-ad-litem is appointed by a Court the person afterwards by showing adverse interest can get a right to treat the decree as a nullity. I doubt extremely whether the case of *Rashidunnisa* v. *Muhammad Ismail Khan*(3) (to which I have already referred), which is relied upon for that proposition, really goes so far and I am not to be taken as subscribing to everything that is said in the case of *Sellappa Goundan* v. *Masa Naiken*(4)"—the case to which I have just referred. The real point which is at issue between the appellants and the respondents in this case is whether

(1) (1923) I. L. R. 47 Mad. 79.
(2) (1928) I. L. R. 55 Cal. 1241.
(3) (1909) I. L. R. 31 All. 572; L. R. 36 Ind. App. 168.
(4) (1929) I. L. R. 8 Pat. 558.

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in the case of an appointment having been made with apparent informality under the Civil Procedure Code, the question of the interest of the guardian being adverse to those of the minor parties can be raised. Now, I think as a general proposition the decision in *Rashidunnisa's* case(1), to which I have already referred, is a sufficient answer in the affirmative to this question, and further support can be given to that view by certain decisions of this Court, the first of which is the case of *Hitendra Narayan Singh* v. *Sukhdeb Prasad Jha*(2). I am not forgetting that in that case Mr. Justice Das (as he then was) states that the effect of what had taken place in that case was that no appointment had in fact been made; but he proceeds to say that "in order that a minor may be entitled to have a decree already passed against him vacated on the ground of gross negligence of the guardian ad litem, he must first satisfy the court that the defence was available to him which could properly be taken in the suit". I am proposing to make reference to one other case only—*Kali Charan Singh* v. *Hirdai Narain*(3). Fazl Ali, J. there states: "It is now well settled that gross negligence which may be interpreted as culpable neglect of the interest of a minor defendant on the part of his guardian ad litem will entitle the minor to the avoidance of proceedings undertaken against him". He then goes on to point out "that it is not every kind of negligence nor any kind of negligence which would render proceedings otherwise regular and proper liable to be opened up; it must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted". Without expressing any definite opinion of my own on that it seems to be established by these authorities that the question whether a guardian properly represents the interests of the minors by taking up such defences on behalf of the minors as were open to him

(1) (1909) I. L. R. 31 All. 572; L. R. 36 Ind. App. 168.
(2) (1929) I. L. R. 8 Pat. 558.
(3) (1934) 154 Ind. Cas. 948.

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is a matter that can be raised in a case of this kind, although there has been prima facie a regular appointment in the sense that the rules of the Code of Civil Procedure have been complied with. I am not losing sight of the provisions of Order XXXII, rule 4, in dealing with this matter. It is provided by clause (*1*) of rule 4

"that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or in the case of a guardian for the suit, a plaintiff."

Now, the learned Judge of the appellate court in this case has come to the conclusion that the Judge of the trial court was right in finding that owing to the interests of the fathers of the plaintiffs being adverse the plaintiffs were not properly represented in the mortgage suit. I purposely refrain from expressing any view that the father's interest was necessarily adverse because there are indications from the authorities of this Court that that at any rate cannot be stated as a universal proposition. But as the learned Judge has affirmed the decision of the trial court it would be necessary to see what the trial court has stated in this connection. The learned Judge of the trial court appears to have considered this matter in the first instance as a matter of law and relies upon the decision in *Hari Prasad Singh* v. *Sourendra Mohan Sinha*(1) for that proposition, but later he goes on to discuss the case relating to this matter and points out that the minor had a very good defence in that suit on the ground of family necessity and benefit and further points out that no such defence was taken by the father in that suit, and then proceeds to find that the minors were not properly represented in that these defences which were open to them were not raised. I must confess that it seems to me to be a case on the border-line, but there is no doubt that the learned Judge has come to the conclusion as a conclusion of fact and that being so it is binding upon us in

(1) (1922) 3 Pat. L. T. 709.

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second appeal. Had the learned Judge contented himself with the observation which was made in the first part of his judgment in this matter (and to which I have already referred) I should have no hesitation in coming to the conclusion that it could not possibly be supported and that the Judge in the Court below in confirming this decision would equally lack support. For the reason that the learned Judge has come definitely to the conclusion that the defences open to the minors were not put forward by their guardians, the fathers, it would appear that his decision that the decree was not binding upon the minor defendants is right. I have already pointed out in dealing with the appeal that the learned Judge had no jurisdiction to do other than grant the declaration in favour of the minor plaintiffs. To the extent that the learned Judge has ordered a rehearing of the mortgage suit after the minor plaintiffs are properly represented the decree must be set aside. The plaintiff-appellants, therefore, will be entitled to a declaration to the effect that the decree in the mortgage suit was not binding upon them nor is the sale binding on them, that is to say, their interests are in no way affected. To that extent and that extent only was the Judge entitled to make any decree in the action. That leaves the decree in the mortgage action as well as the sale unaffected so far as the interests of the fathers are concerned. Now it is a rather anomalous position; the appellants in their appeal and the respondents in their cross-objection both support this part of the judgment. In my opinion, therefore, there should be no costs either in the appeal or in the cross-objection.

VARMA, J.—I agree.

Order accordingly.

Before Wort and Varma, JJ.

1937.

October, 27.

RAMDHARI AHIR

v.

KHEDU AHIR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 1 *and Order XLIII, rule* 1—*Order rejecting memorandum of appeal as not properly drawn up, whether appealable.*

Where the Judge, being of opinion that the memorandum of appeal presented before him was argumentative and not in accordance with the provisions of Order XLI, rule 1, of the Code of Civil Procedure, called upon the appellant to remove the defect and on his failure to do so rejected the same, *held*, that the order was not appealable as it did not finally dispose of the rights of the parties. It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal is appealable.

Zamindar of Tuni v. *Bennayya*(1), *Ayyanna* v. *Nagabhooshanam*(2) and *Gulab Rai* v. *Mangli Lal*(3), referred to.

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

K. N. Lal, for the appellant.

Phulan Prasad Varma, for the respondents.

WORT, J.—In the first place I do not think we are entitled to place any interpretation on the order of the learned Judge in the Court below other than that which it will bear on the face of it. The order is—

"the memorandum of appeal is rejected."

This followed a previous order made about two weeks before, i.e., on the 16th of January, 1937, in which the learned Judge expressed the view that the memorandum of appeal was not in accordance with Order XLI,

*Appeal from Appellate Order no. 102 of 1937, from an order of S. K. Das, Esq., I.C.S., District Judge of Saran, dated the 1st of February, 1937.

(1) (1898) I. L. R. 22 Mad. 155.

(2) (1892) I. L. R. 16 Mad. 285

(3) (1884) I. L. R. 7 All. 42

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rule 1, of the Code of Civil Procedure and consequent order was made requesting the appellants to comply with Order XLI, rule 1. Then on the 1st of February the order came to be made against which this appeal is directed; the order is in these terms:

"No compliance. The memorandum of appeal is rejected."

On the first question whether an appeal lies to this Court two cases of the Madras High Court have been relied upon. The first is the case of *Zamindar of Tuni* v. *Bennayya*(1) and the other is an earlier decision in *Ayyanna* v. *Nagabhooshanam*(2). In the latter case there were some irregularities so far as the vakalatnamas of two Vakils were concerned, and on the appeal being rejected (for so it appears to be from the words of the judgment in the case), the objection was taken that no appeal lay and the case of *Gulab Rai* v. *Mangli Lal*(3) was relied on for rebutting that contention, the reason being that an order rejecting the plaint was treated under section 2 of the Code of Civil Procedure as a decree and the learned Judges were therefore of the opinion that the order rejecting an appeal must also be treated as a decree. If the two cases of the Madras High Court are supposed to support the universal proposition that the rejecting of a memorandum of appeal is appealable, I respectfully disagree. Order XLIII, rule 1, of the Code of Civil Procedure provides for appeals in certain circumstances; clauses (*t*) and (*u*) of that Order and rule-making provision for appeals in cases coming under Order XLI, rules 19, 21 and 23. Now, if the legislature in its wisdom had made provisions as regards those Orders and rules, why did it not make provision for appeals regarding Order XLI, rules 1 to 3? No such provision is made and therefore it is necessary to fall back upon section 2 of the Code. Again it might be asked if the legislature has provided for the rejection of a plaint and appeal

(1) (1898) I. L. R. 22 Mad. 155.
(2) (1892) I. L. R. 16 Mad. 285.
(3) (1884) I. L. R. 7 All. 42.

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arising therefrom why did it not provide for the rejection of the memorandum of appeal? It seems to me that the reason is obvious because unless the Court either summarily or otherwise adjudicates upon the merits (in the word 'merits' I would include the question of limitation), it cannot be said that the dispute between the parties has been finally disposed of.

In this case there is a rejection of the memorandum of appeal. We are not concerned, in the particular circumstances of the case, whether the appellants are out of time and they therefore are unable to file another memorandum of appeal, as the fact remains that the mere rejection of the notice of appeal for whatever reason does not preclude the appellants from filing a memorandum which complies with the rules of the Civil Procedure Code. For that reason I would hold that it is impossible to come to the conclusion that as a universal proposition an order rejecting a memorandum of appeal is appealable. I would add that only in those cases in which it finally disposes of the disputes between the parties would it be appealable.

Now, apart from that technical point, I think the case itself has no merits. The appellants could have complied with the order of the Judge. The Judge was of opinion that the Memorandum did not comply with Order XLI, rule 1, because it was argumentative—and we have read the notice of appeal and find it is so—and it seems to me in those circumstances that the appellants have no grievance. They could by the 1st of February, 1937, have complied with the order of the Judge in which event the trouble which they have brought upon themselves would not have arisen.

For both reasons in my judgment the appeal fails and it must be dismissed with costs.

VARMA, J.—I agree.

J. K. *Appeal dismissed.*

APPELLATE CIVIL.

1937.

October, 29.

Before Wort and Varma, JJ.

RAJA SHYAM SUNDAR SINGH

v.

DHIRENDRA NATH CHANDRA.*

Execution—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 11—*execution by appointment of receiver of certain properties—decree-holder, whether can take out other forms of execution—estoppel.*

Where by consent of parties a receiver was appointed of certain properties of the judgment-debtor and the decree-holder thereafter wanted to attach and sell other properties of the judgment-debtor, *held*, that there was no question of estoppel and that the decree-holder was entitled in law to take out any or all the forms of execution which the Code of Civil Procedure entitled him to pursue.

Maharajadhiraj Sir Rameshwar Singh Bahadur v. *Hitendra Singh*(1) and *Follows, In re*(2), explained.

Appeal by the judgment-debtor.

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

Janak Kishore and *Bindhyeshwari Prosad*, for the appellant.

Abani Bhusan Mukharji, for the respondents.

WORT, J.—This is an appeal from the decision of the Subordinate Judge of Dhanbad given on the 16th of September, 1936, in an objection taken by the judgment-debtor to an execution by the respondents. It would appear that the respondents who were the decree-holders, obtained their decree for something in excess of a lakh of rupees on the 29th of February,

*Appeal from Original Order no. 351 of 1936, from an order of Babu Ramesh Chandra Sen, Subordinate Judge of Dhanbad, dated the 16th of September, 1936.

(1) (1921) 6 Pat. L. J. 208.
(2) (1895) 2 Q. B. D. 521.

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1932. There were applications for execution and eventually at the instance of the judgment-debtor a receiver of his estate was appointed. The question of his discharge appears to have come before the Court, and in appeal before this Court on the 11th of January, 1935, a consent order was made. The consent order provided for the appointment of two receivers of the estate of the judgment-debtor excluding seven villages; the order was stated in these terms:

"The order of the Subordinate Judge, dated the 5th of December, 1933, is hereby set aside and Mr. Surendra Narain Roy and Mr. Prabodh Kumar Chandra, pleaders, are appointed joint receivers of the estate of the judgment-debtor excepting the properties mentioned in Order no. 66, dated the 22nd of January, 1934."

The properties mentioned in Order no. 66 are the seven villages to which I have referred. This execution taken out by the decree-holders is against those seven villages. The learned Judge in the Court below, as I have already indicated, has dismissed the objection of the judgment-debtor.

It is now contended by Mr. Janak Kishore that the decree-holders are estopped by their consent to the order of the 11th of January, 1935, part of which I have read. I must say I am unable to follow that argument unless it could be said that the consent order not only excluded the seven villages from that part of the estate which was to be taken possession of by the receivers, but also excluded them from any future execution. Mr. Janak Kishore frankly admits that the consent order of the 11th of January, 1935, cannot be construed in that way, that is to say, cannot be construed in a manner which would exclude the seven villages from execution. When once that admission is made, it seems to me that the matter is quite clear. There is no reason why the decree-holder should not take out any or all the forms of execution which the Code of Civil Procedure entitles

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him to pursue against various items of the judgment-debtor's property. In this case treating the appointment of receivers as a form of equitable execution there seems to be no reason why the decree-holders should not proceed against the properties, which were not the subject-matter of the order, dated the 11th of January, 1935. The case of *Maharajadhiraj Sir Rameshwar Singh Bahadur* v. *Hitendra Singh*(1) has been relied upon. That was a case, however, in which the application was for the discharge of the receiver to enable the decree-holder to proceed in execution, and the only point decided in that case was that, by consenting to that form of execution, that is to say, the appointment of the receiver, the decree-holder was bound. Reference was made during the course of the argument in that case to the decision in *In re Bond*(2). In that case a receiver had been appointed of the judgment-debtor's property and a bankruptcy notice had been served upon him. The contention on behalf of the judgment-debtor was that the appointment of the receiver acted as a stay of execution and, therefore, the issue of bankruptcy notice was bad. Reference was made both in the argument in that case and in the judgment to *In re Follows*(3). The contention was that as the writ of *fieri facias* operated as a stay of execution therefore likewise the appointment of a receiver also operated as a stay. Phillimore, J. (as he then was) pointed out that although the common law rule with regard to a writ of *fi.fa* operated as a stay, the property of the judgment-debtor was being seized and the judgment-debtor was placed in a position in which he would be unable to find the means to pay his debts. But the learned Judge there pointed out that the rule was confined to the writ of *fi. fa* and did not operate in the case of the appointment of the receiver. That indeed is a much stronger case than the one which we

(1) (1921) 6 Pat. L. J. 208.
(2) (1911) 2 K. B. D. 988.
(3) (1895) 2 Q. B. D. 521.

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have before us. We are not concerned in India with the common law writs of execution, but we are concerned with the appointment of a receiver which is spoken of as equitable execution. We are not called upon in this case to decide the perhaps somewhat difficult question whether the decree-holders could execute against these very properties with regard to which the receivers were appointed: we are only concerned with the question whether they could execute against those properties which are excluded from the operation of that consent order, and it seems to me that the obvious answer both in law and in fact is that they are so entitled.

For these reasons it seems to me that the decision of the learned Judge in the Court below dismissing the objection was right and this appeal therefore fails and must be dismissed with costs.

VARMA, J.—I agree. The appeal is directed against the order of the Subordinate Judge of Dhanbad who has disallowed the objection of the appellant. The present appeal has been pressed on the ground that the decree-holders should not be allowed to go against the consent order which was passed by this Court on the 11th of January, 1935. But a reference to the facts of the case will make it clear that the decree-holders are making no such attempt. By the consent order of this Court two receivers were appointed with regard to certain properties and by that very order seven villages were excluded from its operation. The decree-holders are at present trying to execute their decree against those seven villages. No question of estoppel arises and, therefore, the order of the learned Subordinate Judge is right and I agree that the appeal should be dismissed with costs.

J. K.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

1937.
November, 20.

Before James, J.

SINGHESHWAR PRASAD MAHTON

v.

MOWAR RAM BAHADUR SINGH.*

Review—appeal dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151 *and Order XLI, rule* 19, *applicability of—Court-fee payable, what should be—Court-fees Act,* 1870 (*Act VII of* 1870), *Schedule* 1, *Articles* 4 *and* 5.

An application for restoration of an appeal dismissed for non-payment of printing costs is to be treated as an application for review and must be stamped as such under Articles 4 and 5 of Schedule 1 of the Court-fees Act, 1870.

Anant Potdar v. *Mangal Potdar*(1) and *Fatimunnissa* v. *Deoki Pershad* (2), followed.

Haridasi Debi v. *Sajanimohan Batabyal*(3), dissented from.

Reference by the Taxing Officer under section 5 of the Court-Fees Act, 1870.

L. K. Chowdhury and *K. N. Verma*, for the petitioners.

The Government Pleader, for the Crown.

JAMES, J.—This is a reference by the Taxing Officer on the question of whether an application for restoration of an appeal dismissed for non-payment of printing costs should be treated as an application under Order XLI, rule 19, or as an application for review. In this High Court following the decision

*Miscellaneous Judicial Case no.....of 1937 and in the matter of an application in First Appeal no. 73 of 1936. Reference made by the Taxing Officer by his order no. 4, dated the 25th September 1937.

(1) (1925) I. L. R. 4 Pat. 704.
(2) (1896) I. L. R. 24 Cal. 350, F. B.
(3) (1932) I. L. R. 59 Cal. 1334.

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of the Full Bench in *Fatimunnissa* v. *Deoki Pershad*(1), such applications have been treated as applications for review. The learned Taxing Officer quoting the decision of this Court in *Anant Potdar* v. *Mangal Potdar*(2) has remarked that in this High Court there has been conflict of decisions. It is true that the learned Judges observed that in certain cases the view has been taken that the appeal could be restored by an application under Order XLI, rule 19, read with section 151, of the Code of Civil Procedure; but on examining the records of those cases, I find that there is actually no conflict of authority. In *Niro Kuer* v. *Govind Prasad Singh* (3) the application was stamped as an application for review. The Division Bench deciding it casually remarked that the Court had power to restore the appeal under Order XLI, rule 19, read with section 151, of the Code of Civil Procedure; but the appeal was not restored in that way, but on an application for review. In *Debi Lal Sahu* v. *Gosain Kauleswar Gir*(4) the Registrar as Taxing Officer considered that it could be stamped as an application under Order XLI, rule 19, not quite clearly perceiving the effect of the treatment of *Niro Kuer* v. *Govind Prasad Singh*(3) which he treated as authority for the view that an application for review of an order dismissing an appeal for non-payment of printing costs fell under Order XLI, rule 19. In *Musst. Roshan Bibi* v. *Aziz Fatma*(5) and *Hira Singh* v. *Sonalo*(6) the application was in each instance required by the Bench to be stamped as for a review. In *Musammat Roshan Bibi* v. *Aziz Fatma*(7) the application for restoration was granted, on the petitioner's paying the deficit court-fee, which had been required in *Musammat Roshan Bibi* v. *Aziz*

(1) (1896) I. L. R. 24 Cal. 350, F. B.
(2) (1925) I. L. R. 4 Pat. 704.
(3) (1924) Civ. Rev. 35 of 1923.
(4) (1924) Civ. Rev. 30 of 1924.
(5) (1924) M. J. C. 24 of 1923.
(6) (1924) M. J. C. 35 of 1924.
(7) (1924) Civ. Rev. 38 of 1923.

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SINGHESHWAR PRASAD MAHTON v. MOWAR RAM BAHADUR SINGH.

JAMES, J.

Fatma(1). In *Haridasi Debi* v. *Sajanimohan Batabyal*(2), a Division Bench of the Calcutta High Court has held that even though Order XLI, rule 19, may not apply in its terms to an application of this nature, that rule read with section 151 of the Code would enable such an application to be maintained; and Articles 4 and 5 of the Court-fees Act do not govern the application. This decision cannot be regarded as overruling the decision of the Full Bench of the Calcutta High Court in *Fatimunnissa* v. *Deoki Pershad*(3). The learned Judges, when they mention the decision of this High Court in *Anant Potdar* v. *Mangal Potdar*(4), say that since 1923 the view was taken in several cases in this Court that the appeal could be restored on an application under Order XLI, rule 19; but as I have remarked, none of the cases quoted in *Anant Potdar* v. *Mangal Potdar*(4) quite justify that observation. With due respect to the learned Judges, who decided *Haridasi Debi* v. *Sajani Mohan Batabyal*(2), I find it difficult to treat that decision as warranting my departure from the rule laid down in *Anant Potdar* v. *Mangal Potdar*(4). The learned Judges proceed on two grounds: first that there was a change in the definition of a decree in the Code of Civil Procedure of 1908, and, secondly, that the decision of the Judicial Committee in *Chhajju Ram* v. *Neki*(5), would tend to make it difficult to grant these applications if they are regarded as falling under Order XLVII, rule 1. The first point was considered in *Anant Potdar* v. *Mangal Potdar*(4). The second might justify amendment of Order XLVII, rule 1; but I doubt whether it should be regarded as a justification for saying that the Division Bench of this Court was wrong in its view.

(1) (1924) M. J. C. 24 of 1923.
(2) (1932) I. L. R. 59 Cal. 1334.
(3) (1896) I. L. R. 24 Cal. 350, F. B.
(4) (1925) I. L. R. 4 Pat. 704.
(5) (1922) I. L. R. 3 Lah. 127; L. R. 49 Ind. App. 144.

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I consider that until there is an authoritative decision of this Court, over ruling the decision in *Anant Potdar* v. *Mangal Potdar*(1), we must continue to follow our practice in accordance with the rule therein laid down, and require that these applications should be stamped under Articles 4 and 5 of Schedule 1 of the Court-fees Act.

This order will also govern the other reference (*Mowar Ram Bahadur Singh* v. *Kumar Kamakshya Narain Singh*).

S. A. K.

Order accordingly.

APPELLATE CIVIL.

Before Wort and Manohar Lall, JJ.

1937.

November, 19, 20.

MAHARAJADHIRAJA SIR KAMESHWAR SINGH

v.

MD. YASIN KHAN.*

Monopoly—contract to collect hides within a landlord's zamindari, if enforceable in law.

A contract by which the defendant got the exclusive right to collect hides of dead animals within the plaintiff's zamindari is of the nature of a monopoly and is unenforceable.

Rossi v. *Edinburgh Corporation*(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.

Sir Sultan Ahmed (with him *Murari Prasad*, *B. P. Sinha*, *R. Misra*, *K. P. Upadhya* and *S. P. Srivastava*), for the appellant.

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*Appeal from Original Decree no. 10 of 1934, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Purnea, dated the 31st of August, 1933.

(1) (1925) I. L. R. 4 Pat. 704.

(2) (1905) A. C. 21.

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MAHARAJA-DHIRAJA SIR KAMESHWAR SINGH v. MD. YASIN KHAN.

Mr. Yasin Yunus, for the respondent.

WORT, J.—This is an appeal from the judgment of the Subordinate Judge arising out of an action in which the plaintiff claimed arrears of what I shall describe as license fees due amounting to Rs. 8,806-4-0. The plaintiff is the appellant and the difficulty that I find in the case is to discover exactly what the plaintiff's case is with regard to the terms of the contract he is alleged to have made with the defendant. Broadly stated, it purports to be a license granted to the defendant allowing him to collect hides in one of the circles of the plaintiff's Raj. The learned Judge in the Court below has come to the conclusion on the facts against the plaintiff. He has also decided that the grant to the defendant was a monopoly and therefore unenforceable.

Sir Sultan Ahmed, appearing on behalf of the plaintiff, contends that what in fact was granted to the defendant was a right to go on to the parti land of the paintiff for a period of three years according to the terms of the grant and there to purchase from the Chamars hides of dead animals which the Chamars brought there for the purpose of sale. I propose to say as little as possible about this case and I think it quite clear that had a case of that kind been made out (always assuming of course that the findings of fact were in favour of the plaintiff) the sums which are sought to be recovered in this case would be recoverable. But in my judgment no such case as alleged by Sir Sultan Ahmed has been established by the plaintiff. For the years 1336 to 1338 Fs. two persons Samatullah and Muhammad Mustafa had been granted a license under a kabuliyat dated the 23rd of January, 1929, which is Exhibit H in the case. It is not evidence as regards the terms entered into by the plaintiff with the defendant but it has been put forward as some evidence of the actual terms, upon the footing of which the defendant is alleged to have been contracting. The license was granted by an auction which took place on the 25th

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of September, 1929, and continued until the 19th of November, 1929. From the bid-sheet it would appear that one of the bidders Samatullah was one of the licensees under the license of 1929. This is a fact of importance to the appellant and upon it the appellant relies. Ultimately according to the bid-sheet the license was knocked down to the defendant for the sum of Rs. 2,815. I have already observed that it is the contention of Sir Sultan Ahmed, realizing the difficulty he was in in the case, that it was a grant to the defendant to go on to the parti land of the plaintiff, but as I have already stated I see no indication from the evidence of that term excepting perhaps the evidence of one of the witnesses being Badri Chamar who in examination in chief makes this statement:

"Before that (i.e., before license was granted to the defendant) we sold hides to the defendant. For that purpose we used to bring the dead animals to the gairmajrua land of the plaintiff and skin them there."

In this connection, whilst I am referring to the evidence, I propose to refer to the evidence of Fateh Bahadur Singh, the principal witness for the plaintiff. In cross-examination he made this statement:

"By settlement with the defendant he was the only person recognised by the plaintiff as entitled to collect hides of all dead animals within the area comprised in Bhawanipur Circle. I can't say if that right includes the right to take the hides even against the will and consent of persons to whom the dead animals belonged nor do I know if any penalty was ever inflicted upon any person who was not lessee for collecting hides.....The plaintiff had no animals of his own in Bhawanipur Circle. On settlement of the Charsa Mahal we sent parwanas to the patwaris and Srimans of different places for giving information to all that the lessee named in the parwanas was to collect hides."

I find it necessary to refer in some detail to the evidence of the plaintiff because from that alone can we get the terms of the agreement. We must look at the substance of the agreement and in viewing the matter in that way, I have no hesitation in saying that the actual license granted by the plaintiff to the defendant was the exclusive right to collect hides in

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the particular area of the Raj. That statement in my judgment if correct would be an end of the plaintiff's case. It purports to grant a monopoly to the defendant. I am not wedded to the expression 'monopoly' because it is trite to say that the grant to the defendant was a grant to allow him to exercise a right which all His Majesty's subjects had a right to exercise if they were so minded—I am using the terms of the speech of Lord Halsbury in the case of *Rossi* v. *Edinburgh Corporation*(1). The matter can be tested in this way. Assuming that the defendant had entered into such a contract but ignored the terms of it and proceeded to purchase hides from the Chamars—a right which I have already held he is entitled to exercise—could the plaintiff have obtained an injunction against the defendant for exercising that right? Sir Sultan Ahmed admits that an action of that kind would fail, and it was for this reason that it was contended that the right which was granted was a right to go on to the parti land of the plaintiff. In my judgment there was nothing in the evidence which would entitle this Court to come to the conclusion that any such right was granted. The mere fact the defendant in the exercise of the license which was granted to him by the plaintiff might have found it necessary to go from time to time on to the parti land, in my opinion, makes no difference whatever. It is the substance of the matter which has to be looked to.

Now, there are a number of other considerations which in my opinion are fatal to this case. The license which was granted to Samatullah and Mustafa in 1929, was, as I have indicated, a joint license granted to two persons. The point was raised by my learned brother during the course of the argument as to whether the licensees under that license had

(1) (1905) A. C. 21, 24.

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surrendered their right. Sir Sultan Ahmed relied upon the clause in the license to this effect:

"Should we, at the end of a year, fail to pay rent in respect of the next year, the Maharajadhiraj Bahadur and his authorised agent shall, as per terms of this kabuliyat, be competent to make settlement with other mustajir without having any regard for (the non-expiry of) the term, etc."

Sir Sultan's contention, as I have said, is that the surrender was unnecessary. That may very well have been so; but the case clearly made out by the plaintiff in this matter is shown by the evidence of Fateh Bahadur Singh, the first witness on behalf of the plaintiff to this effect:

"When I took charge, the Charsa Mahal in suit was in possession of one Samatullah as a lessee of the plaintiff. Samatullah's settlement had not been sanctioned by the head office of the plaintiff and so Samatullah surrendered his right as lessee to me by filing a petition before me."

The only importance of that matter but it is of vital importance in this case is that the defendant pleaded that he refused to go on with the matter although he had been the highest bidder as he found that the prior licensees were still in possession. It is fatal to the plaintiff's case for this reason that the case which I have already pointed out was a case of surrender, and the evidence relied upon by the plaintiff would prove at the most surrender of one person alone which is insufficient and indeed supports the defendant's contention. The reason given for the surrender. viz., the inability to pay the rent, in my judgment, does not in any way affect the matter. The question whether this is license or lease is clear. It is a license, and indeed, had it been a lease, such a contention would have been fatal to the plaintiff's case because there was no document in this case nor was any registered. Quite apart from the decision of the learned Judge on questions of fact with regard to which he declined to believe the plaintiff's case, the case would have failed by reason of the fact that the plaintiff here had purported to

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grant for a consideration a right to the defendant which he had already and a right which without a license he was entitled to exercise. A contract of that kind in my judgment is unenforceable and for that reason alone I would hold that the decision of the learned Judge in the Court below is right.

The appeal fails and must be dismissed with costs.

WORT, J.

MANOHAR LALL, J.—I agree. I only wish to add that the evidence in the case justifies the finding of the learned Subordinate Judge that " under the settlement the lessee is entitled as the only person to collect hides from all manzas comprised within the Bhawanipur Circle and that the Chamars and owners of dead animals are bound to sell hides to the lessees and none else ". This finding, which has not been assailed before us, distinguishes the present case from the case of *K. L. Mackenzie* v. *Maharaja Sir Rameswar Singh Bahadur*(1). The terms of the lease in that case are not quoted in the judgment, but it appears from the judgment that the learned Judges who decided that case came to the conclusion that the *kabuliyat* in that case could not be construed as granting a monopoly in favour of the defendant of that case. In the present case the oral evidence, which has been accepted, makes it clear that there was an attempt by the plaintiff to create a monopoly in favour of the defendant. It follows that if the plaintiff had been successful in establishing that the defenant was let into possession on the basis of the contract which is the basis of the present action, the contract would have been unenforceable by reason of section 23 of the Indian Contract Act.

J. K.

Appeal dismissed.

(1) (1916) 1 Pat. L. J. 37.

SPECIAL BENCH.

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Before Courtney Terrell, C.J., James and Manohar Lall, JJ. *November, 11, 12. December, 2.*

KARUNA KANT PRASAD, PLEADER, *In re.**

Legal Practitioners Act, 1879 (*Act XVIII of* 1879), *sections* 13 *and* 14—*proceedings drawn up and evidence recorded by Judge-in-charge record room—pleader found not guilty of misconduct—District Judge's disagreement with finding—proceedings forwarded to High Court for action—proceedings, whether* ultra vires—*pleader entering record-room without permission of Judge-in-charge—conduct improper—Judge-in-charge, duties of.*

The Judge-in-charge of a record room drew up proceedings against a pleader, for entering the record room and making his signature on a vakalatnama without the permission of the Judge-in-charge, and called upon him to show cause why his conduct should not be reported to the High Court. The pleader showed cause and the Judge having recorded the evidence came to the conclusion that there was no ground for any action. The District Judge, however, disagreed with his finding and submitted the record to the High Court for appropriate action.

Held, (*i*) that the proceedings were *ultra vires* as the District Judge had no jurisdiction either to forward the proceedings which were never initiated by him, or to act on the evidence which was never recorded by him.

(*ii*) that the District Judge could have drawn up fresh proceedings against the pleader and then after giving notice to the pleader he should have recorded himself all evidence and after adjudicating thereon he could report the matter to the High Court.

(*iii*) that likewise it was open to the High Court on reference to draw up fresh proceedings against the pleader and then after giving notice to him and hearing his defence, if any, to dispose of the matter.

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*Civil Reference no. 3 of 1937, made by B. P. Jamuar, Esq., District Judge of Saran, in his letter no. 2272, dated the 25th May, 1937.

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It is highly improper for any pleader to force his way into the record room without the permission of the Judge-in-charge.

Observations on the duty of the Judge-in-charge to see that the orders of the District Judge forbidding any member of the public or pleader to enter into the record room are strictly obeyed.

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

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

Dr. D. N. Mitter, for the pleader.

The Advocate-General, for the Crown.

COURTNEY TERRELL, C.J., JAMES AND MANOHAR LALL, JJ.—This is a reference by the learned District Judge of Saran forwarding the record of proceedings drawn up under section 13, clauses (*b*) and (*f*) of the Legal Practitioners Act against Babu Karuna Kant Prasad, a pleader, (who will be referred to as "the pleader" hereafter) recommending that the pleader should be held guilty of professional misconduct and that proper orders may consequently be passed by this Court. The facts which led to the drawing up of these proceedings must be briefly stated.

Money suit no. 416/238 of 1935-36 (Ramlal Singh and another *versus* Guptar Prasad and others) was disposed of in the court of the first Munsif of Chapra in or about December, 1936 leaving a small sum of Rs. 4 on account of guardian's fee still unexpended. After the disposal of that suit the record of the case had been sent in the normal course to the record room. The pleader filed on the 25th of February, 1937, a petition signed by him for the withdrawal of this sum of Rs. 4. The petition was sent to the record-keeper for report. On the 26th of February, 1937, the pleader entered into the record room in order, it is

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alleged, to put his signature on the back of the vakalatnama which was filed in the original suit in 1935 by the plaintiffs in that suit. It is further alleged that the record keeper happened to be absent from his seat on the table where the record of this suit was lying at that time and the pleader was observed by the other clerks in that room engaged in making his signature on the vakalatnama secretly and without the permission of the Judge-in-charge of the record room. Ram Chandra Sahai, the clerk of the record room, brought the matter immediately to the notice of Mr. B. K. Sarkar, the Judge-in-charge, who took down his statement in writing. The statement is printed at page 10. The Judge-in-charge forwarded the statement which, he had recorded, to Mr. S. K. Das, the then District Judge of Saran, asking for instructions if any action should be taken in the matter against the pleader in the way of drawing up a proceeding against him. The learned District Judge passed the following order upon that report:

"Certainly. Please draw up a proceeding against the pleader under the Legal Practitioners Act [section 13, clauses (*b*) and (*f*)]. Put up the proceeding to me for approval.

Please also enquire how the pleader was allowed access into the record room. No payment should be made to the pleader without my authority."

Upon that the Judge-in-charge of the record room drew up proceedings on the 27th of February, 1937, under clauses (*b*) and (*f*) of the Legal Practitioners' Act and called upon the pleader to show cause in writing on or before the 18th March, 1937, why his conduct should not be reported to the Hon'ble High Court of Judicature at Patna for necessary orders. These proceedings were approved by the District Judge, Mr. S. K. Das, on the 1st of March, 1937. On the 18th of March the pleader filed his explanation before the Judge-in-charge who recorded the evidence of the pleader and his witnesses on the 17th of April, 1937, and the evidence on behalf

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of the opposite party on the 23rd of April, 1937. On the 24th of April, 1937, the Judge-in-charge submitted the report to the District Judge with his conclusion:

"After due consideration of all the facts and circumstances connected with this enquiry I am of opinion that the pleader is entitled to a benefit of doubt and the proceeding against him should be dropped.

Let the record be submitted to the District Judge for favour of disposal."

By that time Mr. S. K. Das had been transferred from Saran and was succeeded by Mr. Jamuar who disagreed with the findings and report of the Judge-in-charge and without himself drawing any fresh proceedings against the pleader has submitted the record to this Court with his report in which he has given reasons for his disagreement with the report of the learned Subordinate Judge who has made the enquiry.

The above narrative of facts makes it clear that the proceedings are irregular and no action can be taken by us on these proceedings. Section 14 of the Legal Practitioners Act empowers the Presiding Officer of a court subordinate to the High Court to draw up a charge of the alleged misconduct against a pleader and if he does so he is required to send to the pleader a copy of the charge and also a notice that on a day to be therein appointed such charge shall be taken into consideration. The Presiding Officer on any day to which the enquiry is adjourned shall receive and record all evidence properly produced in support of the charge or by the pleader and shall proceed to adjudicate on the charge. It will be noticed that the enquiry is to be conducted by the Presiding Officer who has drawn up the charge. Section 14 then goes on to provide that if the Presiding Officer finds the charge established and considers that the pleader should be suspended or dismissed he shall record his finding and the reasons therefor and shall report the same to the High Court. In the present case the Judge-in-charge, who drew up the proceedings, was not satisfied (as pointed out already)

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that there was any ground for suspension or dismissal of the pleader. He, therefore, did not report the matter to the High Court. The learned District Judge, Mr. Jamuar, on the other hand, disagreed with that finding and considered that the matter should be reported to the High Court for the suspension or the dismissal of the pleader. The learned District Judge was at liberty to draw up fresh proceedings against the pleader and then after giving notice to the pleader he should have recorded himself all evidence in support of the charge or to refute the charge and then after adjudicating thereon he could report to the High Court if in his view the conduct of the pleader deserved a punishment to be meted out by this Court. But the learned Judge had no jurisdiction to forward the proceedings which were never initiated by him nor could he act on the evidence which was never recorded by him. The result of these irregularities is that the reference must be discharged as being *ultra vires*. But it is open to this Court to draw up fresh proceedings here and then after giving notice to the pleader and hearing his defence, if any, to dispose of the matter. At one time we thought it desirable that this step should be taken but on further consideration we do not think it is expedient in the interest of justice that this enquiry should be prolonged as any further investigation will necessarily lead to much false evidence on one side or the other. We desire, however, to make a few observations for the guidance of the pleaders and of the subordinate courts and the clerks who are in charge of the record rooms.

The facts narrated above which were sought to be established before the Judge-in-charge were refuted by the pleader who gave evidence to the effect that his name was already in the vakalatnama on the plaint which was filed in May, 1935, and that he went to the record room in order to find out what report was being made upon the petition which he had filed for withdrawal of the unexpended guardian cost. His

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case further was that there was an altercation between the clerks in charge of the record room and himself because the clerks wanted the pleader to send for or bring his client; and that owing to this altercation a false charge was trumped up against him by all the clerks who were present in the record room in collusion with each other. *Prima facie* it would be difficult to believe that the clerks deliberately concocted a false case against the pleader in the very short time that elapsed between the alleged altercation and the report to the Judge-in-charge; but it is unnecessary to come to a conclusion on this point. The admitted facts of this case are that the pleader was found inside the record room in front of a table on which this particular record was lying at that time. Let it be assumed that the pleader had already signed the vakalatnama which bears his signature; still we do not see any justification for the pleader to have entered the record room without the permission of the Judge-in-charge. The pleaders should realise that this Court is making its best attempt to wipe out bribery and corruption from the offices of the subordinate courts and unless the Bar comes to the help of the Court it is impossible for the Court to succeed in doing so. We know that a good deal of temptation is put in the way of the clerks who are kept in charge of the record from day to day and the only effective way in which this can be checked is to see that the clerks are not brought into contact with the litigants or their agents. The pleaders should see that their conduct is entirely above suspicion and they should behave as officers of the court as they are considered to be. It is admitted that there is a standing order of the District Judge forbidding the public or the pleaders from entering into the record room and that a Judge is placed in special charge of the record room. It was the obvious duty of this pleader as well as of other pleaders to refrain from entering into the record room and to obey the standing order of the District Judge. If it was necessary for this

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pleader to enter into the record room he should have done so with the permission of the Judge-in-charge and if this had been done there would have been no occasion for the initiation of these proceedings.

The Judge-in-charge of the record room should see that the orders of the learned District Judge forbidding any member of the public or pleader to enter into the record room are strictly obeyed and that any infringement of this order is seriously brought home to the Sharistadar or the officer in charge of the record room. The Judge-in-charge can, by paying surprise visits from time to time at unexpected hours during the court time and after, easily find out for himself if there is any laxity in the particular record room. The Judge-in-charge will, by show of severity, be helping the public in rooting out the scandal that prevails on these matters in the muffasil courts.

The learned Advocate-General, in the course of hearing in this case, pointed out that some method should be found by which the pleaders should be allowed access to the records in order to find out reports which are made from time to time by the clerks in charge of the record room on the petitions of the litigants in matters which are more or less of an administrative character like the one under consideration in these proceedings. He pointed out that in such matters it is impossible for the pleaders to move the Judge in open court on account of the expenses involved which will be disproportionate to the amount of the relief claimed. Now, in our opinion, the proper procedure is for the pleaders to go to the Judge-in-charge who will send for the record and acquaint the pleader with the report made by the clerk in charge of the record. But until such time as the rules are not made it is highly improper for any pleader to force his way into the record room without the permission of the Judge-in-charge. With these remarks the reference is discharged.

Order accordingly.

S.A.K.

APPELLATE CIVIL.

1937.

December, 13, 14.

Before Agarwala and Rowland, JJ.

MAHANTH KESHO DAS

v.

HARI KISHUN DAS.*

Promissory note, suit based on—payee's name not mentioned in handnote—plaintiff, whether entitled to prove original loan aliunde—amendment of plaint after limitation, effect of.

A plaintiff is entitled to recover on the original loan when his claim on a handnote fails (either because the payee is not mentioned therein or because the handnote is not admissible in evidence) provided that a proper case has been made out in the plaint or the plaint has been amended to state the facts necessary to support the claim.

Suraj Lal v. *Anant Lal*(1), *Dhaneshwar Sahu* v. *Ramrup Gir*(2), *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(3), *Tasaduq Hussain* v. *Basawan Rai*(4), *Brijbhushan Pande* v. *Ramjanam Kuer*(5), *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*(6), *Pramatha Nath Sandal* v. *Dwarka Nath Dey*(7), *Ram Bahadur* v. *Dusuri Ram*(8) and *East Bengal Commercial Bank, Ltd.* v. *Surendra Narayan Saha*(9), followed.

Domoo Khan v. *Agha Arshad*(10), explained.

*Appeal from Appellate Decree no. 698 of 1935, from a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 24th June, 1935, confirming a decision of Maulavi Muhammad Yahia, Munsif of Sitamarhi, dated the 18th April, 1934.

(1) (1920) 1 Pat. L. T. 203.
(2) (1928) I. L. R. 7 Pat. 845.
(3) (1931) I. L. R. 11 Pat. 135.
(4) (1933) A. I. R. (Pat.) 159.
(5) (1931) 13 Pat. L. T. 506.
(6) (1878) I. L. R. 3 Cal. 314.
(7) (1896) I. L. R. 23 Cal. 851.
(8) (1912) 17 Cal. L. J. 399.
(9) (1935) 39 Cal. W. N. 1235.
(10) (1933) I. L. R. 12 Pat. 862, F. B.

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Farr v. *Price*(1), *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2), *Sheikh Akbar* v. *Sheikh Khan*(3), *Nazir Khan* v. *Ram Mohan*(4), *Ramasami Pillai* v. *Murugiah Pandayachi*(5) and *Maung Chit* v. *Roshan N. M. A. Kareem Oomer & Co.*(6), referred to.

The circumstance that an amendment of the plaint may have the effect of depriving the defendant of the benefit of the plea of limitation is one of the circumstances, and a most important one, which has to be considered by a Court before permitting an amendment of the plaint. It is only in exceptional cases that the court will allow the plaintiff to amend his plaint in such a way as to deprive the defendant of the plea of limitation, but when once the Court has exercised its discretion judicially, and the amendment has been allowed, the amendment dates back to the presentation of the plaint, and, if that date is within the period of limitation prescribed for the particular relief which the plaintiff seeks by the amendment, the suit must be held to be within time.

East Bengal Commercial Bank, Ltd. v. *Surendra Narayan*(7), followed.

Appeal by the defendant.

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

S. M. Mullick and *A. C. Roy*, for the appellant.

Harnarayan Prasad, for the respondents.

AGARWALA, J.—The respondents sued to recover Rs. 1,125 alleged to have been lent to defendant no. 1 on the 23rd of March, 1930 and Rs. 200 as interest on the loan. Defendant no. 2 was impleaded as surety for repayment of the advance. In the plaint the plaintiffs stated that on the 23rd March, 1930, defendant 1st party borrowed the sum of Rs. 1,125

(1) (1800) K. B. 1 East 55; 102 E. R. 22.
(2) (1914) A. C. 618.
(3) (1881) I. L. R. 7 Cal. 256.
(4) (1930) I. L. R. 53 All. 114, F. B.
(5) (1935) I. L. R. 59 Mad. 268, F. B.
(6) (1934) I. L. R. 12 Rang. 500, F. B.
(7) (1935) 39 Cal. W. N. 1235.

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and "in token of the acknowledgment of the sum executed a handnote dated the 23rd March, 1930, and promised to pay this sum on demand with interest at one per cent per mensem". The plaint, further, alleged that on the same date the defendant 2nd party agreed, by a letter dated the 23rd March, 1930, to repay the amount if defendant no. 1 failed to do so. The plaintiffs, accordingly, in their plaint prayed for a decree for Rs. 1,325 against defendants 1st party and 2nd party, "on the basis of the handnote and the letter" of suretyship. Defendant no. 1 did not deny that Rs. 1,125 was due from him. His defence was that this money was due not to the plaintiffs but to defendant no. 2 on bahi khata account. The first court disbelieved the defence and decreed the plaintiff's suit. An appeal by defendant no. 1 resulted in the suit being remanded to enable the plaintiffs to amend their plaint. The reason for this was that the document described as a handnote did not contain the name of the payee and the court, therefore, held that the plaintiffs were not entitled to succeed on the basis of the handnote, but that in the circumstances they were entitled to an opportunity to amend their plaint and to seek to recover from the defendants on the basis of the loan. The case accordingly went back to the trial court and the plaint was amended. The amendment consisted of a statement in the plaint "that the fact of the loan being advanced to the defendant was entered in the rokar bahi of the plaintiffs' shop which was kept in the regular course of business" and in the paragraph in which the date of the cause of action is mentioned, in addition to the original statement "that the cause of action arose on the date of the execution of the handnote" there was an addition "that the cause of action arose when the loan was taken from the plaintiffs". The court on remand again decreed the plaintiffs' suit. In appeal by defendant no. 1 to the District Judge the decree was attacked on four grounds. First, that the

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amendment of the plaint should not have been allowed, secondly, that as the claim to recover the original loan was barred by limitation at the date of the amendment the suit should have been dismissed on that ground, thirdly, that the plaintiffs' story of the loan was improbable, and lastly, that interest at the rate mentioned in the handnote should not have been granted. All these grounds failed to impress the learned District Judge who upheld the decision of the first court.

The first ground on which the decision of the courts below is attacked in second appeal is that the suit, after the amendment, was not maintainable. This is a ground which was not taken in the courts below and was not taken in the grounds of appeal to this Court. It is contended, however, that the question is really decided by a decision of the Full Bench of this Court in *Domoo Khan* v. *Agha Arshad*(1) which was a case referred to the Full Bench by Macpherson, J. and myself, the question being whether, when a suit on a handnote fails by reason of the handnote being inadmissible in evidence, the creditor is entitled to recover on the original debt. So far as this Court is concerned the first reported case in which that question was dealt with was *Suraj Lal* v. *Anant Lal*(2). In that case Mullick and Sultan Ahmad, JJ. held that where the plaintiffs alleged that there was an adjustment of accounts of loans taken by the defendants who in acknowledgment thereof executed the handnote in suit, which was found by the lower courts to be a forged one, the plaintiffs could maintain the suit on the basis of their account books even though the handnote in suit was forged. The next case in this Court was *Dhaneswar Sahu* v. *Ramrup Gir*(3) which was decided by Kulwant Sahay, J. and Macpherson, J. (one of the Judges by whom the first mentioned case was referred to the

(1) (1933) I. L. R. 12 Pat. 862, F. B.
(2) (1920) 1 Pat. L. T. 203.
(3) (1928) I. L. R. 7 Pat. 845.

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Full Bench). It was there held that there was an implied contract to repay money borrowed from another even though no express promise to repay is made either in writing or verbally and that this implied promise to repay arises apart from the instrument or promissory note evidencing the loan and is enforceable independently of the instrument or promissory note even where the lending of the money and the execution of the note are contemporaneous. This view of the law was reiterated by Jwala Prasad and Kulwant Sahay, JJ. in *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(1) in which the decision in *Dhaneshwar Sahu* v. *Ramrup Gir*(2) was followed. The last decision of this Court before the Full Bench case was *Tasaduq Hussain* v. *Basawan Rai*(3) decided by Mohamad Noor, J. There the plaintiff sued on the allegations that the defendant had borrowed Rs. 218 from him and had given him a handnote. There also the payee's name was not entered in the handnote. Mohamad Noor, J. held that the suit as framed could be tried and decided as a suit for recovery of the loan independently of the handnote and that the writing was admissible in evidence of the loan irrespective of whether it was or was not a promissory note within the meaning of the Negotiable Instruments Act. In *Brijmohan Pande* v. *Ramjanam Kuer*(4) Dhavle, J., sitting singly, held that where a suit on a handnote fails for some technical defect and the plaintiff asks for a decree on the loan itself no decree can be passed unless a specific case has been made in the plaint as originally filed, or the plaint has been amended, the reason given being that in such a case the onus shifts to the plaintiff. In that case the learned Judge sent the case back to the lower court to afford the plaintiff an opportunity to amend the plaint if he so desired to do. Except for the decision of the Full Bench, therefore, the views expressed

(1) (1931) I. L. R. 11 Pat. 135.
(2) (1938) I. L. R. 7 Pat. 845.
(3) (1933) A. I. R. (Pat.) 159.
(4) (1931) 13 Pat. L. T. 506.

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by this Court have been consistent that the plaintiff is entitled to recover on the original loan when his claim on the handnote fails either because the payee is not mentioned or because the handnote is not admissible in evidence, provided that a proper case has been made out in the plaint or the plaint has been amended to state the facts necessary to support the claim, and the only question, therefore, is whether the Full Bench has upset this line of decisions so that we should have to follow the decision of the Full Bench in preference to the other decisions on the point of the Court. Mr. Justice Wort, Acting Chief Justice, in the Full Bench case, referred to the finding of the trial court that the plaintiff had proved that there was an oral contract to repay the advance and his Lordship, therefore, held that the question of whether the decisions in *Dhaneshwar Sahu* v. *Ramrup Gir*(1) and *Abdul Muhammad Khan* v. *Mahananda Upadhyaya*(2) were correctly decided did not arise for consideration. Those decisions, therefore, were not reversed by the Full Bench. A number of decisions in other Courts relating to this much-debated question have been brought to our notice including the Full Bench decision in *Nazir Khan* v. *Ram Mohan*(3) and the Full Bench decision of the Madras High Court in *Ramasami Pillai* v. *Murugiah Padayachi*(4) the decision of the Chief Justice Sir Richard Garth in *Sheikh Akbar* v. *Sheikh Khan*(5) and other cases of similar nature to which I do not propose to refer in detail. An attempt to summarise the law was made by the Full Bench of the Rangoon High Court in *Maung Chit* v. *Roshan N. M. A Kareem Oomar & Co.*(6). The decisions of our own Court on this point are binding on us and I

(1) (1928) I. L. R. 7 Pat. 845.
(2) (1931) I. L. R. 11 Pat. 135.
(3) (1930) I. L. R. 53 All. 114, F. B.
(4) (1935) I. L. R. 59 Mad. 268, F. B.
(5) (1881) I. L. R. 7 Cal. 256.
(6) (1934) I. L. R. 12 Rang. 500, F. B.

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do not, therefore, propose to analyse those decisions. Furthermore, the plaintiffs did not raise the question of maintainability of the suit in the courts below after the amendment had been allowed and did not raise it in the grounds of appeal in this Court and the question of law propounded by the appellant, even if it be accepted, turns on a question of fact, viz. whether in this particular case there was an independent contract to pay or not. That was a question which was not raised in the pleadings of the defendant.

The second question raised by the learned Advocate for the appellant was that the suit as now framed is barred by limitation. The loan was on the 23rd March, 1930. The suit was instituted on the 17th September, 1931, the amendment was made on the 21st March, 1934. The circumstance that an amendment of the plaint may have the effect of depriving the defendant of the benefit of the plea of limitation is one of the circumstances, and a most important one, which has to be considered by a court before permitting an amendment of the plaint. It is only in exceptional cases that the court will allow the plaintiff to amend his plaint in such a way as to deprive the defendant of the plea of limitation, but when once the court has exercised its discretion judicially, and the amendment has been allowed, the amendment dates back to the presentation of the plaint, and if that date is within the period of limitation prescribed for the particular relief which the plaintiff seeks by his amendment, the suit must be held to be within time. This was also the view expressed by the Division Bench of the Calcutta High Court in *East Bengal Commercial Bank, Ltd.* v. *Surendra Narayan*(1) which was a case in which the claim on a promissory note failed as the note was under-stamped and the plaint was amended so as to introduce a claim on the loan, the amendment being made after the suit on the loan was barred.

(1) (1935) 39 Cal. W. N. 1235.

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In any case, in my view, the allegations in the plaint in this case were sufficient to entitle the plaintiffs to succeed on a suit on the loan distinct from the claim on the handnote. The plaintiffs distinctly set out in their plaint that the defendant had borrowed money from them on the 23rd March, 1930, and it was to recover that money that the suit was instituted. It is true that they did not alternatively make a claim that they were entitled to recover the money as well on the original loan as on the basis of the handnote but that, I think, is not fatal to the suit as all the facts necessary to support a claim on the loan were alleged and proved. In view of the observations regarding interest in *Dhaneshwar Sahu* v. *Ramrup Gir*(1) the plaintiffs-respondents did not press for interest at the rate mentioned in the handnote. They will recover interest at the rate of six per cent. from the date of the loan. The respondents will be entitled to the costs of this appeal.

ROWLAND, J.—I agree.

If I may say so, I feel no doubt as to the correctness of the decisions of this Court which have just been summarised. I think the law is correctly stated in those decisions and in *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*(2), *Pramatha Nath Sandal* v. *Dwarka Nath Day*(3), *Ram Bahadur* v. *Dusuri Ram*(4) and *East Bengal Commercial Bank, Ltd.* v. *Surendra Narayan*(5). These decisions, it seems to me, are in agreement with *Farr* v. *Price*(6) and the Privy Council decision in *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(7). The other view seems to be based on over emphasis on the word "then" in the pronouncement of Sir Richard Garth

(1) (1928) I. L. R. 7 Pat. 845.
(2) (1878) I. L. R. 3 Cal. 314.
(3) (1896) I. L. R. 23 Cal. 851.
(4) (1912) 17 Cal. L. J. 399.
(5) (1935) 39 Cal. W. N. 1235.
(6) (1800) K. B. 1 East 55; 102 E. R. 22.
(7) (1914) A. C. 618.

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in *Sheikh Akbar* v. *Sheikh Khan*(1) " when a cause of action for money is once complete in itself..... and the debtor then gives a bill or note to the creditor .....the creditor may sue for the original consideration ". The view has been expressed in some places that " then " does not include ' at that time ' which is the dictionary meaning of the word but means ' thereafter ' or ' subsequently ' and the Full Bench decision of the Allahabad High Court in *Nazir Khan* v. *Ram Mohan*(2) goes so far as to introduce an analogy with the requirement of antecedency in debts to make them binding on the junior members of a Hindu family. I can find nothing in the reasoning of that and the other decisions referred to displace the line of authority leading up to and contained in the decisions of this Court. In the Full Bench decision [*Domoo Khan* v. *Agha Arshad*(3)] we have referred to the original record and so far as we could ascertain the loan and the handnote appear to have been of the same date; and, as I understand the matter, to say that there is a cause of action independently of the bill or note need not imply that there are an antecedent and a subsequent transaction; it is enough that there was a good cause of action if the handnote had not been executed. Had it not been so, the case before the Full Bench should have been decided differently.

S. A. K.

Appeal dismissed.

Decree modified.

(1) (1881) I. L. R. 7 Cal. 256.

(2) (1930) I. L. R. 53 All. 114, F. B.

(3) (1933) I. L. R. 12 Pat. 862, F. B.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1938.

January, 6, 7.

GANESH PRASAD SAH

v.

SHEIKH JAWAD HUSSAIN.*

Limitation Act, 1908 (*Act IX of* 1908), *article* 115—*suit on implied contract, whether governed by article* 115—*suit by Municipality on oral contract, whether maintainable—Bihar and Orissa Municipal Act*, 1922 (*B. & O. Act VII of* 1922), *section* 64.

Where the Municipality sued a farmer of a market for the recovery of a certain sum of money which he had agreed to pay orally in consideration of his right to collect tolls, *held*, that in view of the provisions of section 64 of the Bihar and Orissa Municipal Act the Municipality was not entitled to sue, the contract being not under seal.

Ahmedabad Municipality v. *Sulemanji Ismalji*(1), followed.

Held, that treating the case as a suit for enforcing an obligation under an implied contract the suit was barred under article 115 of the Limitation Act.

Tricomdas Cooverji Bhoja v. *Gopinath Jiu Thakur*(2), *Ram Raghubir Lal* v. *United Refineries (Burma) Limited*(3) and *Chairman and Commissioners of the Chaibassa Municipality* v. *Gobind Sao* (4), referred to.

Appeal by the plaintiff.

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

A. P. Upadhaya (with him *Girindra Nath Mukharji* and *J. L. Brahmachari*), for the appellant.

*Appeal from Appellate Decree no. 472 of 1935, from a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 20th of May, 1935, reversing a decision of Babu Anjani Kumar Sahay, Subordinate Judge of Motihari, dated the 5th of April, 1934.

(1) (1903) I. L. R. 27 Bom. 618.
(2) (1916) I. L. R. 44 Cal. 759; L. R. 44 Ind. App. 65.
(3) (1933) I. L. R. 11 Rang. 186; L. R. 60 Ind. App. 183.
(4) (1937) I. L. R. 16 Pat. 302.

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Syed Abdul Aziz and *Janak Kishore*, for the respondent.

WORT, J.—The District Judge in this case has dismissed the plaintiff's action, the plaintiff being the representative of the Motihari municipality, for the sum of money to which the municipality claimed to be entitled as against the defendant in the following circumstances.

The defendant had taken what has been described by the Judges in the Courts below as a lease of a market for the years 1927 and 1928. It was proposed to grant a fresh lease for the purposes of which a resolution of the municipality was passed. It is stated in the evidence that the defendant was present on that occasion and agreed to pay a sum of Rs. 4,001 for a further period of one year. It is a fact, however, that no contract or document under seal in compliance with section 64 of the Bihar and Orissa Municipal Act was made by the municipality, and the defendant therefore went into possession of the market under the resolution to which I have referred. After a period of seven months he offered to surrender his rights which surrender was accepted. I use the expression "lease" as an expression used by the learned Judges in the Courts below, but in my judgment it is quite clear that even if the grant had been to the defendant under seal it would not have been a lease; at the most it could be said that he had a license with respect to the land on which the market was held, and the dues payable by the defendant to the municipality were the dues in respect of that license. Had it been the case of a lease, the question which arises in this appeal, that is to say, whether the action is barred by limitation—and that is the only question—would have to be determined by considering whether the dues owing by the defendant were in the nature of rent or were in the nature of damages for use and occupation.

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WORT, J.

Now, the learned Judge in the Court below, as I have stated, has dismissed the action as being barred by limitation, applying Article 115 of the Limitation Act to the case. It appears to me that the appellant is on the horns of a dilemma. If they are in a position of not being able to enforce their rights by reason of the fact that the seal was not attached to the contract or document which either was executed or was to be executed, and that without such seal he is not entitled to sue, then quite clearly the action would fail on that ground. That view of the matter has been taken by Sir Lawrence Jenkins in *The Ahmedabad Municipality* v. *Sulemanji Ismalji*(1).

The contention of the appellant here is that the obligation to pay was not an obligation arising under contract within the meaning of Article 115 of the Limitation Act. It is admitted, and it is clear that the right of the plaintiff against the defendant is not one arising out of tort. Section 73 of the Contract Act was referred to in the course of the argument advanced on behalf of the appellant. The third clause of that section provides this:

> "When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract."

Here for the reasons I have stated there was no contract binding within the meaning of the provisions of the Municipal Act, and the question therefore arises as to how does the obligation of the defendant in this action arise. Again the learned Advocate for the appellant is bound to admit that it is an implied obligation by the defendant to pay for the seven months during which he was in possession. That seems to me to come quite clearly within Article 115 of the Limitation Act which provides:

> "The compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for."

(1) (1903) I. L. R. 27 Bom. 618.

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Their Lordships of the Judicial Committee of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(1) have held that Article 116 applies to contracts registered and impliedly, if not expressly, have decided that the term "compensation" within the Article is used in the widest possible sense in India. Apart from the assistance of that authority, speaking for myself, I should have been inclined to hold that the obligation of the kind in question in this case was not an obligation to pay the compensation from the point of view of the common law, but a definite obligation to pay a sum certain under an implied contract. But it is too late in the day to take that view of the matter having regard to the case to which I have referred and also a later case —the case of *Ram Raghubir Lal* v. *United Refineries (Burma) Limited*(2) in which their Lordships of the Judicial Committee of the Privy Council have followed the earlier case to which I have also referred. Again there is the authority of this Court in *Chairman and Commissioners of the Chaibassa Municipality* v. *Gobind Sao*(3), in which my learned brother Fazl Ali has held that Article 115 of the Limitation Act applies to a case similar to the present with only one exception to which I shall refer presently and not Article 120. The difference between the case of *Chairman and Commissioners of the Chaibassa Municipality* v. *Gobind Sao*(3) and the present one is that it would appear that the contract was under seal. But as I have pointed out in the earlier part of my observation, the appellant municipality is on the horns of a dilemma. If the decision to which I have just referred does not apply by reason of the fact that the contract is not under seal then I should have imagined the only conclusion to be arrived at would be that the municipality was not entitled to sue at all. If on the other they are entitled

(1) (1916) I. L. R. 44 Cal. 759; L. R. 44 Ind. App. 65.
(2) (1933) I. L. R. 11 Rang. 186; L. R. 60 Ind. App. 183.
(3) (1937) I. L. R. 16 Pat. 302.

to sue, they are entitled to sue by reason of the implied obligation which is expressly provided by Article 115 of the Limitation Act.

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WORT, J.

In those circumstances it seems to me that the decision of the learned Judge in the Court below is correct and the appeal fails and must be dismissed with costs.

VARMA, J.—I agree.

J. K.

Appeal dismissed.

REVISIONAL CIVIL.

Before Fazl Ali and Rowland, JJ.

LALA MISTRY

v.

GANESH MISTRY.*

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November, 25.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 149 *and Order XXXIII, rules* 5 *and* 8—*application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—application finally disposed of —court, whether has power to allow plaintiff at a later date to pay court-fees—refusal to permit payment of court-fees, whether is a question of jurisdiction—section* 115.

An application for leave to sue as a pauper does not require two separate orders for its disposal, that is to say, an order refusing leave and a further order rejecting the plaint; but the order refusing leave finally disposes of the whole proceeding.

The power to permit an application to sue in *forma pauperis* to be converted into a plaint by payment of court-fees, which the Court undoubtedly has during the pendency of the application, can be exercised at the time of rejecting the application, that is to say, if in one single order the Court declines leave to sue as a pauper and also gives time for filing court-fees, this would be within the discretion allowed by

*Civil Revision no. 380 of 1937, from an order of Babu Shivapujan Rai, Munsif of Patna, dated the 16th April, 1937.

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section 149, Code of Civil Procedure, 1908, but once an order finally disposing of the application for leave has been passed, it is no longer open to the Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed

Chunna Mal v. *Bhagwant Kishore*(1) (judgment of Allsop, J.), *Sudhir Kumar Chaudhuri* v. *Jagannath Marwari*(2) and *Aubhoya Churn Dey Roy* v. *Bissesswari*(3), followed.

Jagadishwari Debi v. *Tinkari Bibi*(4), *Sundarathammal* v. *Paramaswami Asari*(5) and *Balaguru Naidu* v. *Muthurathnam Iyer*(6), not followed.

Skinner v. *Orde*(7), explained.

Bank of Bihar, Ltd. v. *Sri Thakur Ramchanderji Maharaj*(8), distinguished.

Per Fazl Ali, J.—The question whether the Court should or should not have allowed the plaintiff to pay the proper court-fee and to treat the suit as having been presented on the date the application to sue as a pauper was filed is not a question of jurisdiction, for the Court has undoubtedly that jurisdiction vested by express provisions in the Code, but is only a question of discretion and the judicial exercise of that discretion.

Quaere :—Whether, in those cases where the Court is asked to exercise its power under section 149 of the Code, the suit should be deemed to have been filed on the date when the application for leave to sue in *forma pauperis* is treated as a plaint or on the date when the application for leave was originally filed?

Application in revision by the plaintiff.

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

Bindeshwari Prasad, for the petitioner.

B. C. Sinha, for the opposite party.

(1) I. L. R. (1937) All. 22, F. B.
(2) (1935) A. I. R. (Pat.) 193.
(3) (1897) I. L. R. 24 Cal. 889.
(4) (1936) A. I. R. (Cal.) 28.
(5) (1933) A. I. R. (Mad.) 883.
(6) (1923) 76 Ind. Cas. 767.
(7) (1879) I. L. R. 2 All. 241, P. C.
(8) (1929) I. L. R. 9 Pat. 439.

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ROWLAND, J.—This is an application in revision against an order of the Munsif, First Court of Patna whereby after the rejection of an application by the petitioner to sue in forma pauperis he refused to treat the application as a plaint and to accept the court-fee stamps payable on it as a plaint and to treat the suit as having been instituted on the date on which the pauper application was presented. The case has something of a history. The petitioner's application to sue as a pauper was, to begin with, dismissed on the 20th April, 1936. Thereafter on the 18th May, 1936, the petitioner requested the leave of the court to file deficit court-fee which the Munsif refused on the 16th June, 1936. Thereafter the petitioner moved the High Court in revision and the previous order of the Munsif was set aside and the Munsif was ordered to make further enquiry and to dispose of the application to sue as a pauper in accordance with law. This order was passed on the 13th October, 1936, and the Munsif after some other proceedings passed an order on the 9th December, 1936, again refusing leave to sue as a pauper. The petitioner moved the High Court against this order, but his petition was rejected on the 10th March, 1937, without issuing notice to the opposite party. The petitioner's Advocate apparently understood that a direction would be given to receive the required court-fee treating the application as a plaint and thereafter proceeding as with an ordinary suit. Varma, J., however, in his order merely observed that the petitioner might move the Munsif. The petitioner did so on the 18th March. The Munsif called for the record and the officer before whom the case came directed the applicant to pay the court-fee by the 10th April, and the record to be put up on that date for orders. The court-fee of Rs. 112-8-0, was paid on the 10th April, but the Munsif on looking through the order-sheet felt himself unable to accept the court-fee at that stage at any rate without hearing both sides. After hearing both sides he passed on the 20th April, 1937, the order against

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which the petitioner has moved this Court, the substance of which is that the application is rejected. Among the grounds for this decision the Munsif said that a similar petition had been rejected by his predecessor on the 16th June, 1936, and that no new circumstance had been brought to his notice to justify him in reviewing that order. He observed incidentally that the order passed by the Hon'ble High Court appeared to have been passed in ignorance of that order. Besides this ground he was of opinion that the law was as stated in the Full Bench decision of the Allahabad High Court in *Chunna Mal* v. *Bhagwant Kishore*(1).

In revision it is pointed out that the Munsif should not have relied on the order of 16th June, 1936, because that order was passed as a sequel to the order of the 20th April, 1936, dismissing the application to sue as a pauper and the order of the 20th April having been set aside by the High Court on the 13th October, 1936, all the orders consequential to it must have fallen to the ground with it. This reasoning is quite correct and the Munsif erred in thinking that the order of the 16th June barred him from considering the case on the merits and the suggestion in his judgment that the order of this Court was passed in consequence of ignorance of the Munsif's order of 16th June, is entirely uncalled for.

The position has to be examined with reference to the order of refusal of leave to sue as a pauper which was passed by the Munsif on the 9th December, 1936, and was affirmed by this Court on the 10th March. With reference to the view of law expressed by the Munsif it is contended that the law so far as this Court is concerned is laid down by the decision of a Division Bench in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(2) and that the Munsif was not entitled to prefer the decisions of other

(1) I. L. R. (1937) All. 22, F. B.
(2) (1929) I. L. R. 9 Pat. 439.

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High Courts even by Full Benches to a decision of a Division Bench of this Court. That is a correct statement of the duty of subordinate courts but we shall have to see what was decided in the Patna decision relied on and examine the law for ourselves in so far as points arise which the previous decision of this Court does not cover.

Before coming to this, however, I should indicate the substantial point on which there is some conflict of authority in the several High Courts in India. One view is that the application to sue as a pauper is not a plaint; it can only be treated as a plaint if it succeeds and that when it fails there is nothing before the court on which to proceed. Therefore on this view a court has no jurisdiction after disposing of the application to make an order extending the time for filing the necessary court-fees for a plaint. The other view is that the application containing all the particulars which the law requires in a plaint as well as the prayer to be allowed to sue as a pauper is itself a plaint or a composite document including a plaint and the termination of the proceeding for leave to sue as a pauper does not, if adverse to the applicant, amount to a rejection of the plaint which continues to be before the court on the same footing as a document on which proper court-fees have not been paid. On this view the same position would arise as when a plaint is presented on deficit court-fee stamp and the court in such a case would be bound in duty to allow some time for making good the deficit before rejecting the plaint under Order VII, rule 11, of the Code. These are the two views and before I examine the authorities I had better refer to the relevant provisions of the Code of Civil Procedure.

Order IV, rule 1—

"Every suit shall be instituted by presenting a plaint to the court."

Then of course Orders VI and VII regulate the contents of a plaint and we have next to consider Order XXXIII, rule 1, which says that

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subject to the provisions of the Order any suit may be instituted by a pauper and under rule 2 every application for permission to sue as a pauper is required to contain particulars required in regard to the plaints in suit as well as a schedule of property belonging to the applicant. In certain circumstances the application is rejected under rule 5, otherwise notice is issued and the parties are heard. When under rule 8 the application is granted, it shall be numbered and registered and shall be deemed to be the plaint in the suit. There is nothing here to say that the application is deemed to be a plaint in any other case except that in which the application is granted. The other statutory provision regarding the institution of a suit is in section 3 of the Limitation Act where the explanation says that a suit is instituted in ordinary case when a plaint is presented to the proper officer and in the case of a pauper when his application for leave to sue as a pauper is made. But that is not exhaustive as appears from the Privy Council decision in *Skinner* v. *Orde*(1). Here the applicant during the pendency of his application for leave to sue as a pauper having acquired some property tendered the court-fee on the plaint and was permitted to convert the application into a plaint and was deemed to have instituted his suit on the date when his pauper application was presented. This is clear authority that at any time during the pendency of the application for leave to sue as a pauper the applicant, provided that his application is in good faith and not fraudulent, can be permitted to pay the court-fees and convert his application into a plaint. Now, the decisions relied on in support of the argument that this power is not exhaustive even when the application to sue as a pauper is rejected and that the court may even thereafter extend the time are to be found in a decision of a Division Bench of the Calcutta High Court in *Jagadishwari Debi* v. *Tinkari Bibi*(2) and two

(1) (1879) I. L. R. 2 All. 241, P. C.
(2) (1936) A. I. R. (Cal.) 28.

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decisions, each of a single Judge of the Madras High Court, namely, *Sundarathammal* v. *Paramaswami Asari*(1) decided by Walsh, J., and *Balaguru Naidu* v. *Muthurathnam Iyer*(2), decided by Krishnan, J. In the Calcutta case reliance is placed on the Privy Council decision in *Skinner* v. *Orde*(3) which is quoted as having pronounced that the document mentioned as an application for permission to sue as a pauper is a plaint, but I am unable to find any such words in the decision of their Lordships. What their Lordships said was that they could see nothing which would oblige their Lordships to say that this petition which contains all the requisites which the statute requires for a plaint should not, when the money has been paid for the fees, be considered as a plaint from the date when it was filed. I think that the Privy Council decision was intended to be regarded as a case of petition being converted into a plaint and to this extent the reasoning in *Jagadishwari Debi's* case(4) does not appear to me to be entirely satisfactory. Reliance is also placed in that decision on a case of this Court in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(5) but the facts of that case were that the order granting time to file the requisite court-fee and the order refusing leave to sue as a pauper were passed simultaneously and this decision therefore does not apply to the case of a dismissal of the application to sue as a pauper followed at a later date by an application to be permitted to resume the proceedings on payment of the necessary court-fee. In *Sundarathammal's* case(1) the opinion expressed by Walsh, J. was clearly an obiter dictum for he said that the matter did not really arise on the view which he took on the main question before him. He did, however, observe that "though the pauper application be dismissed the plaint is still pending until it is actually dismissed".

(1) (1933) A. I. R. (Mad.) 883.
(2) (1923) 76 Ind. Cas. 767.
(3) (1879) I. L. R. 2 All. 241, P. C.
(4) (1936) A. I. R. (Cal.) 28.
(5) (1929) I. L. R. 9 Pat. 439.

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In the other Madras case [*Balaguru Naidu* v. *Muthurathnam*(1)] the facts are not fully stated but Krishnan, J. said " it was not necessary that there should be a competent application to sue in forma pauperis on record before time can be given to pay court-fee on the plaint filed at the same time ". It had been held in an earlier Calcutta decision in *Aubhoya Churn Dey Roy* v. *Bissesswari*(2) that assuming that the petition is treated as a plaint and the required court-fee affixed to it the suit will then be deemed to have been instituted on the date on which the court-fee was affixed. It was observed that under the Civil Procedure Code the court was bound either to allow or reject the application. If it allowed the application, it was to be numbered and registered as a plaint in the suit. If it was rejected, then the applicant could not again apply to sue as a pauper in respect of the same right but was at liberty to institute a suit in the ordinary manner. It is provided in the Limitation Act that in the case of a pauper the suit is instituted when the application for leave to sue as a pauper is filed. That obviously applies only to a case in which the application is granted. It was held that the Subordinate Judge had no power, after the rejection of the application, to give time for the presentation of the plaint or treat the application as a plaint in the suit. In this case *Skinner* v. *Orde*(3) was distinguished on the ground that there had in that case been no order rejecting the application. In this Court the decision in *Bank of Bihar's* case(4) has not, as far as I know, been read as authorising the view that there is power to extend the time for filing the court fees even after the dismissal of an application for leave to sue as a pauper. Too much should not be made of the observation that the application may be regarded as a composite document. In *Sudhir Kumar Choudhuri*

(1) (1923) 76 Ind. Cas. 767.
(2) (1897) I. L. R. 24 Cal. 889.
(3) (1879) I. L. R. 2 All. 241, P. C.
(4) (1929) I. L. R. 9 Pat. 439.

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v. *Jagannath Marwari*(1), it was pointed out by Wort, J. that an application to sue in forma pauperis is not for all purposes a plaint. It was pointed out that in *Skinner* v. *Orde*(2) the application which was allowed to be treated as a plaint had not at the time which was material been rejected. In the Full Bench decision of Allahabad High Court in *Chunna Mal's* case(3) the majority of the Judges held that leaving aside the application rejected under rule 5 of Order XXXIII the application could not be considered and treated as a plaint and allowed to be regularised by permission to file the court-fee either at the time of the dismissal of the pauper application or thereafter. Allsop, J., however, was not prepared to go quite to this length. In his view the application did not require two separate orders for its disposal, that is to say, an order refusing leave to sue as a pauper and a further order rejecting the plaint, but the order refusing leave finally disposes of the whole proceeding. This in my opinion is the correct view. Allsop, J. went on to express the opinion that the power to permit the application to be converted into a plaint by payment of court-fees which the court undoubtedly has during the pendency of the application as held by the Judicial Committee could be exercised at the time of rejecting the application, that is to say, if in one single order the court declined leave to sue as a pauper and also gave time for filing of court-fees, this would be within the discretion allowed by section 149 but he agreed with the other Judges that once an order finally disposing of the application for leave to sue as a pauper had been passed it was no longer open to the court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed. I am inclined on a review of the Code and of the authorities to agree with the view expressed by Allsop, J. In my opinion it is not in conflict with the previous decision of this Court in *Bank of Bihar, Ltd.* v. *Sri*

(1) (1935) A. I. R. (Pat.) 193.
(2) (1879) I. L. R. 2 All. 241, P. C.
(3) I. L. R. (1937) All. 22, F. B.

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Thakur Ramchanderji Maharaj(1) and it appears to me to be also consonant with the view expressed by Wort, J. in *Sudhir Kumar Chaudhuri* v. *Jagannath Marwari*(2). On this view it is to be observed that the order of the Munsif dated the 9th December, 1936, was not coupled with any reservation of leave to the petitioner to file the court-fee within a stated time. It was, so far as the Munsif could make it, a final order, the effect of which would be to relegate the applicant to the position set forth in Order XXXIII, rule 15, leavng him the liberty to institute the suit in the ordinary manner. Any application made thereafter to the Munsif would necessarily be beyond the power of that officer to entertain.

There is nothing in the observation of Varma, J. made at the time of rejecting the petition of the applicant on the 10th March, 1937, to indicate that he had formed any opinion as to whether on the facts of the case an application before the lower court would prove maintainable or not. The order merely points out that the Munsif was the person to whom the application should be made. Indeed it is obvious that it would have been inappropriate in an order rejecting an application to embody an order modifying the decision moved against.

In the result it does not seem possible to interfere with the order of the Munsif which, though in parts unfortunately expressed, was the correct order. I would dismiss the application with costs. Hearing fee one gold mohur.

As the court-fee of Rs. 112-8-0 was deposited in response to a direction of the Munsif who subsequently declined to accept it, the petitioner may apply to the Munsif for a certificate entitling him to a refund.

FAZL ALI, J.—I am also of the opinion that this application should be dismissed with costs.

(1) (1929) I. L. R. 9 Pat. 439.
(2) (1935) A. I. R. (Pat.) 193.

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An application for leave to sue in forma pauperis is sometimes described as a composite document, because it contains as is provided by Order XXXIII, rule 2, of the Civil Procedure Code, all the particulars required in regard to a plaint in a suit together with a prayer that the applicant may be allowed to sue as a pauper. It has, however, been nowhere described as a plaint in the Code and strictly speaking it is not a plaint but a mere application. Rule 8 of Order XXXIII only provides that where the application is granted, *it shall be deemed to be the plaint in the suit* and therefore in such a case it will not be necessary for the applicant to file any fresh plaint. There is also nothing in the Code to prevent the court from treating the application as a plaint, if before it is rejected the applicant asks the court to treat it as such and either accepts from him then and there the proper court-fee for the suit upon the footing that it is a plaint or gives him time under section 149 of the Civil Procedure Code to pay the court-fee within a reasonable time. Where, however, the application has already been rejected, there is nothing before the court which may be treated as plaint and, therefore, it appears to me that the only remedy which the unsuccessful applicant has in such circumstances is to bring a fresh suit as contemplated in Order XXXIII, rule 15. It appears to me, therefore, that the view expressed by my learned brother is the only logical view which can be taken upon a consideration of the various provisions of Order XXXIII.

In a large number of cases, however, and particularly in those cases where the court is asked to exercise its power under section 149 of the Code of Civil Procedure there may arise for decision a further question as to whether the suit should be deemed to have been filed on the date when the application for leave to sue in forma pauperis is treated as a plaint or on the date when the application was originally filed.

It appears to me that a possible corollary of the view expressed above might be that the suit should be

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deemed to have been filed only on the date on which the Court decides to treat the application for leave to sue in forma pauperis as a plaint. Such a view, however, would seem to be opposed to the view which was expressed in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(1) in these words:

"Under section 149 of the Code of Civil Procedure the court may order the requisite stamp to be paid within a time fixed by it and after it has been done the application which may be regarded as an unstamped plaint will be considered to have been validly presented on proper stamped duty on the date when it was originally filed".

Therefore, as at present advised, I do not wish to lay down anything which might tend to bring our decision into conflict with the earlier decision of this Court especially as the view expressed therein is based on the decision of the Judicial Committee in *Skinner* v. *Orde*(2). The matter, however, need not be pursued because I find that the present case can be decided on a totally different ground.

It appears from the order-sheet that when the learned Munsif directed the petitioner to deposit the court-fee by the 10th April, 1937, he did not purport to act under section 149 nor did he commit himself to the view that the court-fee would necessarily be accepted. The order which was passed on that date clearly shows that the matter was to be finally dealt with by the Munsif on a subsequent date. On the next date the learned Munsif after looking into the circumstances of the case came to the conclusion that the court-fee could not be accepted and he finally passed an order to this effect after hearing the parties on the 26th April, 1937. Thus the Munsif has in effect refused to exercise his discretion under section 149 of the Code of Civil Procedure. As was pointed out in *Bank of*

(1) (1929) I. L. R. 9 Pat. 439.
(2) (1879) I. L. R. 2 All. 241, P. C.

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Bihar, Ltd. v. *Sri Thakur Ramchanderji Maharaj*(1) the question whether the court should or should not have allowed the plaintiff to pay the proper court-fee and to treat the suit as having been presented on the date the application to sue as a pauper was filed is not a question of jurisdiction, for the court has undoubtedly that jurisdiction vested by express provisions in the Code, but is only a question of discretion and the judicial exercise of that discretion. In this particular case I find that the Munsif refused to exercise the discretion in favour of a party who was guilty of concealing material facts and in these circumstances I have no hesitation in holding that the present application should not be entertained.

S. A. K.

Application dismissed.

APPELLATE CIVIL.

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

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v.

SURENDRA MOHAN LAHIRI.*

Arbitration—Code of Civil Procedure, 1908 (*Act V of* 1908) *Schedule II, paragraphs* 18 *and* 22—*agreement to refer dispute to arbitration—suit instituted in disregard of the agreement—no application for stay of suit under paragraph* 18 *—suit, whether maintainable—court, jurisdiction of, to pronounce judgment—Specific Relief Act,* 1877 (*Act I of* 1877), *section* 21.

If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of that contract, the court has been given discretion at the instance of the other party to stay the suit under paragraph

*Circuit Court, Cuttack. Appeal from Original Decree no. 1 of 1935, from a decision of Babu Surjyamani Das, Additional Subordinate Judge, Cuttack, dated the 30th September, 1934.

(1) (1929) I. L. R. 9 Pat. 439.

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18 of Schedule II to the Code of Civil Procedure, 1908. But of neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute.

Where, therefore, there was an agreement to refer a certain dispute to arbitrators and one of the parties to the agreement instituted a suit concerning the dispute in disregard of the agreement and the parties went to trial, the defendant taking no steps under paragraph 18 of the second Schedule for the stay of the suit, *held*, that the suit was maintainable.

Ram Prasad Surajmal v. *Mohan Lal Lachmi Narayan*(1), and *Appava Rowther* v. *Seeni Rowther*(2), followed.

Appeal by the defendants.

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

C. M. Acharyya, for the appellants.

B. K. Ray and *A. Dutta*, for the respondents.

KHAJA MOHAMAD NOOR, J.—This appeal arises out of a suit instituted by the plaintiffs-respondents against the Secretary of State and his officer (defendant no 2) for recovery of Rs. 7,916 odd as damages for breach of a contract for building an inspection-bungalow at Brahmagiri in the interior of the district of Puri.

The contract of the work was given to the plaintiffs on the 29th of September, 1928. They were required to finish it within eighteen months, time being of the essence of the contract. The plaintiffs finished the manufacture of bricks before March, 1929, but the construction of the building was not commenced till some time in January, 1930. There was a payment on account of Rs. 1,500 before March, 1929, which included Rs. 711 for the price of the bricks

(1) (1920) I. L. R. 47 Cal. 752.
(2) (1916) I. L. R. 41 Mad. 115.

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stacked at the site. In March, 1930, differences arose between the Executive Engineer (defendant no. 2) and the plaintiffs about the quality of the bricks to be used in the construction. It is not disputed that the plaintiffs had burnt about 300,000 bricks in the locality though the quantity actually required was only about 150,000. They had prepared more bricks to be on the safe side so that only good bricks might be used. On the 16th March, 1930, when the foundation wall had reached the plinth level, the defendant no. 2 visited the site and was of opinion that the bricks stacked and used till then in the construction were bad and underburnt. It is clear from his letter to the Superintending Engineer, dated the 28th March, 1930, (Exhibit Z-8) that the defects in the bricks were to some extent due to the nature of the local soil itself. He asked the contractors to use better bricks. Correspondence ensued between the plaintiffs and the Department and I shall refer to some of them later. On the 28th August, 1930, as directed by the Superintending Engineer, the plaintiffs produced six bricks before the Executive Engineer (defendant no. 2) as samples of good bricks and expressed their readiness to complete the work with bricks of the samples produced by them. The Executive Engineer approved four of the bricks, kept two of those four with him, gave the other two to the plaintiffs, and rejected the remaining two as not being according to the standard required. There is nothing on the record to show the quality of the two bricks rejected and why they were found below the standard. Be that as it may, the plaintiffs were ordered to sort out the bricks according to the samples approved. It is clear from the correspondence that the plaintiffs did not agree to this proposal and were only willing to complete the work if all the six samples of bricks were approved and not only with the class of bricks selected by the Executive Engineer. The plaintiffs' case, as their petitions show, was that the Executive Engineer selected only first class bricks and the

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contract did not provide that only first class bricks were to be used. The objections of the plaintiffs were rejected and they were repeatedly asked to sort out bricks according to the samples given to them. This they admittedly failed to do with the result that the contract was rescinded on the 13th December, 1930. Afterwards the amount of work which had been completed was measured and after giving credit for Rs 1,500 which had already been paid to the plaintiffs, the Department offered them Rs. 559 obviously forfeiting their security deposit of Rs. 650. The plaintiffs refused to accept the sum and instituted the present suit claiming the amount stated above, which includes the Rs. 650 the security deposit and their estimated profit in the work. The defendants pleaded that the suit was not maintainable and justified the cancellation of the contract.

The learned Subordinate Judge has passed a modified decree for a sum of Rs. 4,960. This includes Rs 1,957-8-0 the price of 135,000 bricks which the defendants were allowed to take away according to their own selection within six months from the date of the decree. It was provided that in case the defendants failed to exercise this option it would be open to the plaintiffs to select 135,000 bricks, leave them for the defendants, and to dispose of the remainder as they thought fit.

The defendants have preferred this appeal; and there is a cross-objection on behalf of the plaintiffs against the reduction of the amount claimed by them.

The first point raised on behalf of the appellants is about the maintainability of the suit on the basis of clause 30 of the agreement. This clause provided that in case of dispute between the parties the matter was to be referred to arbitrators, one to be selected by each party. It is contended that as the plaintiffs did not seek to have the dispute settled by arbitrators the suit was barred. In my opinion this objection is untenable. The position has been clearly stated by

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Mulla in his commentary on paragraph 18, Schedule II, of the Civil Procedure Code. The position as explained by him is this: By section 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void. To that section there was a proviso that if the parties agreed to refer their dispute to arbitration, the existence of the agreement would be a bar to seeking redress in the ordinary Courts, and that a party had a right to sue for specific performance of the agreement to refer the dispute to arbitration. Then came the Specific Relief Act of 1877 which by section 21 superseded the proviso to section 28 of the Indian Contract Act; and in those territories where the Specific Relief Act is in force, though a contract to refer disputes to arbitration barred suits in ordinary Courts, but the right to sue for specific performance of such a contract was taken away. The relevant provision of section 21 of the Specific Relief Act runs as follows:—

> "And, save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Then came the present Civil Procedure Code in the year 1908 in which a separate schedule (Schedule II) was added in connection with the settlement of matters by arbitration. Most of the procedures therein mentioned were taken from the old Civil Procedure Code but some were new. There are procedures for referring a matter pending before a Court for decision by arbitrators and for decree on the basis of the award given, for getting a matter settled out of Court and then having a decree on the basis of the award given and for applying to the Court for forcing the other party to refer a matter in dispute to arbitration if there is a contract between them to that effect. By paragraph 18 the Court has been given power to stay a suit brought by a party to an agreement to refer the dispute to an arbitration or by his representative if either party apply for the

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same at the earliest possible opportunity and in all cases where issues are settled before the settlement of issues, and if the party applying is ready and willing to do all that is necessary for the proper conduct of the arbitration. Thus there is a complete machinery for enforcing the agreement of parties to refer a matter in dispute between them to arbitration and consequently that portion of section 21 of the Specific Relief Act which barred suits when there was an agreement to refer dispute to arbitration was repealed by paragraph 22. The last 37 words of section 21 of the Specific Relief Act which now do not apply to any agreement to refer to arbitration or to any award to which Schedule II of the Civil Procedure Code applies are these :

> " but if any person who has made such a contract (that is, a contract to refer to arbitration) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

As has been pointed out by Mulla, these 37 words have been omitted in view of the provisions of paragraph 18 referred to above.

The policy of the Legislature seems to me to be this. Once a machinery by which the parties can have their dispute settled by arbitrators is provided, the choice to have the dispute so settled is to be left to them. If any party who has contracted to settle such dispute by arbitration backs out of it and institutes a suit in disregard of that contract the Court has been given discretion at the instance of the other party to have the suit stayed. But if neither party wishes to have recourse to arbitration the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute. I am fortified in this view by the fact that when the Arbitration Act of 1919 was passed, which in the first instance applied to Presidency towns only, these last 37 words of section 21 of the Specific Relief Act mentioned above were repealed in those places where the Act applied. When the Civil Procedure Code provided procedure

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for stay of the suit the bar to the institution of the suit was removed. Paragraph 18 of Schedule II of the Code is practically a copy of section 19 of the Arbitration Act of 1919. I am, therefore, clearly of opinion that the suit is maintainable. If the defendants wanted to bind the plaintiffs to their contract for having the matter settled by arbitration, it was open to them to apply to the court before the settlement of issues to stay the suit. This seems to be the view taken in *Ram Prasad Surajmal* v. *Mohan Lal Lachmi Narayan*(1) and *Appava Rowther* v. *Seeni Rowther*(2).

Coming to the merits of the case, the simple question involved is whether the contract was legally rescinded. The Public Works Department of Government relied upon clause 3 of the contract, which in turn refers to clause 14 thereof. Clause 14 provides among other things that if it appears to the Engineer in charge or to any of his subordinates that the contractor is proceeding with the works with materials of any inferior description or that any materials or article provided by him are unsound or of an inferior quality or otherwise not in accordance with the contract the contractor shall, on demand in writing from the Engineer notwithstanding the material having been inadvertently approved before, change the material. If he does not do so, he is liable to pay a penalty of Re. 1 per cent. on the estimated amount of work per day for a period not exceeding ten days. Clause 3 says that when the penalty imposed exceeds or becomes equal to the amount of security given by the contractor the Department has the option of rescinding the contract altogether. Now in this case it is said that as the contractor failed to sort out bricks according to the order of the Executive Engineer he rendered himself liable to a penalty of Rs 130 per day, the estimated cost of the work being Rs 13,000 and as ten times that amount would be

(1) (1920) I. L. R. 47 Cal. 752.
(2) (1916) I. L. R. 41 Mad. 115.

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Rs 1,300, i.e., much in excess of the security given by the plaintiffs they rendered themselves liable to be turned out. It was contended on behalf of the plaintiffs that out of the 300,000 bricks which they had admittedly prepared for the construction of the building sufficient bricks were available according to the standard prescribed in the contract and that the Department was not justified in asking them to select bricks according to the sample of only four bricks given to them. Their case was that very small quantity of bricks could come up to that standard as all the four bricks were first class, and therefore they were not able to finish the work. Their case is that the Department was not justified in insisting upon all the bricks being of first class which was against the terms of the contract. Now the contract provided for bricks of local make and clamp-burnt. The plaintiffs admitted that very large number of bricks were not of first class because the local clay was sandy. They refuted the charge of the bricks being underburnt. The learned Subordinate Judge on going into the evidence found as a fact that more coal was used by the plaintiffs than was ordinarily required and that the demand of the Department was beyond the contract, and we have no reason to differ from him.

Now the learned Advocate for the appellants contended that according to clause 25 of the contract the decision of the Superintending Engineer about the quality of the bricks was final; but unfortunately the Superintending Engineer never decided the matter as required by that clause. I have stated before that six bricks were produced before the Executive Engineer, four of them were selected by him and two were rejected, and the plaintiffs were asked to sort out the bricks according to the sample of those 4 bricks, 2 of which were kept in the office of the Engineer and the other 2 were given to the contractors. The two bricks which were rejected were given back to the contractor. There is not one word in the evidence of this case that the Superintending Engineer

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ever saw these two rejected bricks and decided that they were not according to the standard of bricks provided in the contract. When the contract made the Superintending Engineer the sole judge in case of a dispute between his subordinates and the contractor, it was the duty of the Superintending Engineer to decide it. In their protest the plaintiffs definitely stated that the Executive Engineer was wrong in insisting that the building should be completed with bricks which should be according to the sample of the four bricks selected by him, which were all first class and the contract did not provide for the use of first class bricks only.

The evidence of the Superintending Engineer, Mr. Bery (D. W. no. 3) is this:

> "It is possible to find out 1½ lacs of bricks according to the two bricks selected. The proportion of good bricks to bad ones will depend upon the moulding and the burning of the bricks by a contractor. In clamps 80—85 per cent. may be good bricks. In good clamps we may get 80—85 per cent. well burnt bricks, call them first class or second class.....These 80 or 85 per cent. can be divisible into two classes—first and second."

It is clear from this evidence that according to the witness both first and second class bricks were available in the clamps burnt by the plaintiffs and could be used according to the contract. As I have said, the plaintiff's grievance was that the Executive Engineer (defendant no. 2) insisted on having first class bricks only. Therefore it was obviously for the Superintending Engineer to decide whether the bricks which were rejected by the Executive Engineer were second class bricks within the standard of the contract or whether they were inferior bricks which could not come up to the required standard. The matter has not been decided and therefore the suit was not barred according to the contract, and it is open to the Civil Court to enter into the question whether the demand of the Executive Engineer was just or otherwise. The learned Subordinate Judge has gone into the matter very carefully and has examined every material fact

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and the correspondence and has come to the conclusion that the bricks which were available on the spot came up to the reasonable standard of the contract, and this finding is according to the evidence of the Superintending Engineer. Under these circumstances it cannot be said that the rescission of the contract was justified and the contractor was not justified in refusing to sort out the bricks according to the samples of the bricks which were given to them by the Executive Engineer. Therefore, in my opinion, the suit has been rightly decreed.

Though the contract has not been rescinded on the ground of delay on the part of the plaintiffs in the completion of the work, the defendants have referred to it. Here also I agree with the learned Subordinate Judge and hold that there was no delay. Though the contract was given in September, 1928, the defendants' officers did not lay out the foundation on the site till November, 1929. They themselves took fourteen months. Within four months of laying out of the foundation the work had to be stopped owing to the dispute about the quality of the bricks.

There is one matter which is likely to create some confusion and it is this: As I have said, the learned Subordinate Judge has allowed the plaintiffs Rs. 1,900 odd as the price of the bricks which would have been used in the construction of the building and he has given the defendants option to select 135,000 bricks from those which have been prepared by the plaintiffs and on the defendants failing to exercise this option within six months, the plaintiffs are authorised to leave 135,000 bricks and to dispose of the rest. An objection was raised on behalf of the appellants that the cost of sorting is to be met by the plaintiffs. In my opinion this objection is justified; but the parties could not come to terms as to what the cost of that sorting is likely to be. The learned Advocate for the plaintiffs-respondents has, however, agreed that the defendants may take away the entire stock of bricks

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which has been manufactured by the plaintiffs and are in the clamps. The question of sorting therefore does not arise.

I would, therefore, modify the decree of the learned Subordinate Judge to this extent that there will be no sorting of bricks and the entire bricks which were manufactured, i.e., all the bricks at the site or at the clamps will be taken away by the defendants. With this modification the appeal is dismissed with costs.

The cross-objection is not pressed and it is dismissed but without costs.

COURTNEY TERRELL, C.J.—I agree.

S. A. K.

Decree modified.

Cross-objection dismissed.

APPELLATE CIVIL.

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

NAJMUNNISSA BEGUM

v.

MAULAVI SIRAJUDDIN AHMAD KHAN.*

1937.

December, 21.

Muhammadan Law—dower—minor wife, whether competent to relinquish the whole or a part of her dower or to change its character—matter, whether governed by personal law—Majority Act, 1875 (*Act IX of* 1875), *section* 2.

Once a marriage has been performed and the dower is settled, a wife who (although a major according to the personal law of the lady) is a minor under the Majority Act, 1875, is not competent to relinquish the whole or part of her dower or to change its character.

* Circuit Court, Cuttack. Appeal from Original Decree no. 7 of 1934, from a decision of Babu Kshetra Mohan Kunar, Additional Subordinate Judge, Cuttack, dated the 27th February, 1934.

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NAJMUNISSA BEGUM v. MAULAVI SIRAJUDDIN AHMAD KHAN.

Abi Dhunimsa Bibi v. *Mahammad Fathi Uddin*(1) followed.

Qasim Husain Beg v. *Kaniz Sakina*(2) and *Mozharul Islam* v. *Abdul Gani Ala*(3), distinguished.

Appeal by the plaintiff.

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

G. P. Das and *H. P. Bhagat*, for the appellant.

A. S. Khan and *H. Mohapatra*, for the respondents.

KHAJA MOHAMAD NOOR, J.—The suit out of which this appeal has arisen was instituted by a Muhammadan lady, the appellant before us, for recovery from the defendants of Rs. 5,015 the amount of her prompt dower fixed at the time of her marriage with defendant no. 1 on the 8th of October, 1925. She also sued for recovery of certain properties belonging to her which were kept back from her by her husband and his father, the defendant no. 2. The defence was that though the dower was fixed at Rs. 5,000 and one gold mohur prompt, it was not an unconditional dower. The defendants alleged that the dower was fixed on the condition that the paternal and maternal relations of the lady would give her jewellery worth Rs. 2,000 and also to defendant no. 1 presents worth Rs. 1,000, but that the Marriage Registrar, who happened to be a maternal grandfather of the lady, did not enter these terms in the register on the pretext that there was no column for such entry and that those terms were independent contracts. They further alleged that as the lady's relation did not carry out the promise they had made at the time of the marriage, relations between them and the defendant no. 1 became somewhat estranged and consequently the plaintiff of her own free will executed

(1) (1917) I. L. R. 41 Mad. 1026.
(2) (1932) I. L. R. 54 All. 806.
(3) (1925) A. I. R. (Cal.) 322.

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an ekrarnama, dated the 19th July, 1926, whereby she surrendered Rs. 3,000 out of the Rs. 5,000 odd of the prompt dower fixed at the time of the marriage, and made it a deferred dower instead of a prompt one.

The learned Subordinate Judge has held that though there was some promise about giving jewellery to the lady and some presents to the defendant no. 1, non-fulfilment of those promises did not affect the amount of the dower fixed at the marriage; but he dismissed the suit for dower giving effect to the terms of the ekrarnama of 1926 relied upon by the defendants. He gave the plaintiff a decree for the value of some articles claimed by her.

Now the ekrarnama relied upon by the defendants was challenged on behalf of the plaintiff, among others, on the ground that at the time of its execution she was below 18 years of age and had not attained majority under the Indian Majority Act. In reply to this the defendants relied on section 2 of the Act and contended that for purposes of relinquishing a part of the dower the age of majority would be according to the personal law of the lady and not according to the Indian Majority Act. This contention of the defendants prevailed in the lower Court. The plaintiff has, therefore, preferred this appeal.

The learned Advocate for the respondents has not challenged the finding of the lower Court that the age of the plaintiff on the date of the ekrarnama was 17 years 2 months, and it must be taken that at the time she was a minor under the Indian Majority Act. The only question which remains to be decided is whether the ekrarnama of 1926, by which the plaintiff purported to relinquish her claim for dower, is valid, or, whether it is void.

Now section 2 of the Indian Majority Act while fixing the age of majority at 18 years in ordinary cases and at 21 years where a guardian of the person or property of the minor has been appointed, or his

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estate has been taken charge of by the Court of Wards, provides that

"nothing herein contained shall affect the capacity of any person to act in the following matters (namely),—marriage, dower, divorce and adoption".

The question is whether the relinquishment of a part of dower fixed at the time of the marriage, or, changing its character from prompt into deferred, falls within this exception. In my opinion it does not. The provisions of the section govern only the performance of marriage or effecting of divorce by persons who though not major according to the Act are so according to their personal law. But once a marriage has been performed and the dower has been settled, the dower becomes a property of the wife like her any other property. The dower is a debt payable to the wife and any transfer of this debt, or foregoing it altogether or a portion of it are not matters in any way connected with marriage and such acts must be governed by the ordinary law of the land. The Indian Majority Act in making this provision purports to leave intact the personal law of a community in the specified matters. We are not authorised to extend the operation of the section beyond what is specified therein. In other cases the territorial law enacted by the Legislature unless specially excepted must be applied.

The lower Court has relied upon two decisions. One of them is *Qasim Husain Beg* v. *Bibi Kaniz Sakina*(1). He appears to have missed an important passage in the judgment of Sulaiman, C.J. in that case. There the wife who was not a major under the Indian Majority Act obtained a divorce in the *khula* form and in consideration of it she surrendered her dower to the husband. The question arose whether she could do so. The learned Chief Justice observed as follows:—

"The agreement to pay a certain amount of dower is a part of the contract of marriage, and there

(1) (1932) I. L. R. 54 All. 806.

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is no reason to suppose that although a person, who is a minor under the Majority Act, but a major under the Muhammadan law, is capable of entering into a contract of marriage, he is incapable of fixing the amount of the dower. We think that on the same ground an individual who is a major under the personal law is capable of relinquishing the dower as consideration for obtaining *khula*. *Khula* is a form of divorce recognized by the Muhammadan law and comes within the exception."

It is obvious that the reason why the learned Judges held the surrender of dower in that case to be valid, was that the surrender of the dower was a consideration for obtaining the divorce, and divorce is specifically excepted by the Act. In this particular case the surrender is not in consideration of any divorce but is a gratuitous surrender, which is in no way different from the surrender or giving away of a right in any other property.

The other case relied upon by the learned Subordinate Judge has also no application to the case before us. That was *Mozharul Islam* v. *Abdul Gani Ala*(1). There the question was whether a minor according to the Majority Act but not so under his personal law, could fix the amount of dower at the time of his marriage. It was held that he could. It is obvious that marriage being excepted by the Act, it could not be performed under the Muhammadan Law without there being a promise of dower and, therefore, as a necessary element to the performance of the marriage he could fix the amount of the dower.

On the other hand, there is a clear decision of the Madras High Court in *Abi Dhunimsa Bibi* v. *Mahammad Fathi Uddin*(2). The facts of that case are almost on all fours with the present case, and it was held there that a wife who was a minor under the

(1) (1925) A. I. R. (Cal.) 322.
(2) (1917) I. L. R. 41 Mad. 1026.

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Indian Majority Act could not relinquish her dower. The learned Judges relied upon a passage from Abdur Rahim's Principles of Muhammadan Law (page 241 of the book) that minors cannot perform even benevolent acts to their detriment.

Therefore, in my opinion, the ekrarnama of 1926 is not binding upon the plaintiff and cannot operate either to reduce the amount of the dower or change its character. On this finding it is not necessary to go into the question whether the ekrarnama was obtained under coercion or that the lady was not a willing executant of it.

The appeal succeeds and I would allow it. There will be a decree for dower claimed by the plaintiffs with costs throughout against defendant no. 1 only. The decree of the learned Subordinate Judge in respect of the properties against both the defendants will stand. The costs in respect of them will be paid by the defendants according to the value of the properties as decreed by the lower Court.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

1938.

January, 3.

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

GODFREY

v.

MUSAMMAT PARBATI PALUNI.*

Contract Act, 1872 (*Act IX of* 1872), *section* 23—*contract to support a woman who had been a mistress, whether is void as being immoral—past service rendered by promisee, even if immoral, whether constitutes good consideration for a contract to compensate.*

*Circuit Court, Cuttack. Appeal from Appellate Decree no. 78 of 1934, from a decision of Babu Kshetra Mohan Kumar, Additional Subordinate Judge of Cuttack, dated the 17th April, 1934, confirming a decision of Maulavi Mirza Ahmed Beg, Munsif, 2nd Court, Puri, dated the 10th November, 1933.

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An agreement to support a woman who had been a mistress is not void as being immoral or opposed to public policy.

The consideration in the case of a contract to enter into the relationship of protector and mistress (which is doubtless void as being immoral) should not be confused with the consideration and object in the case of a contract to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with the protector; such past consideration under the Indian law is a perfectly good consideration for a contract to compensate.

Dhiraj Kuer v. *Bikramajit Singh*(1), *Husseinali Casam Mahomad* v. *Dinbai*(2), *Sabava Yellappa* v. *Yamanappa Sabu (judgment of Barlee, J.)*(3), *Mahtabunnissa* v. *Rifaqatullah*(4) and *Man Kuar* v. *Jasodha Kuer*(5), followed.

Appeal by the defendant.

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

B. K. Ray, for the appellant.

Suba Rao and *A. S. Khan*, for the respondent.

COURTNEY TERRELL, C.J.—The appellant Mr. L. E. Godfrey, an Excise Inspector of Sambalpur Sadr, is described by his learned Advocate as "a European gentleman of standing". He seeks to escape liability from a contract entered into with the respondent in the following circumstances. The respondent and the appellant were originally inhabitants of Bhadrak town and many years ago they came into contact and an attachment sprang up between them and the respondent who is an Indian woman of humble position became the mistress of the

(1) (1881) I. L. R. 3 All. 787.
(2) (1924) A. I. R. (Bom.) 135.
(3) (1933) A. I. R. (Bom.) 209.
(4) (1924) 85 Ind. Cas. 459.
(5) (1877) I. L. R. 1 All. 478.

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COURTNEY TERRELL, C. J.

appellant. After some years of association he entered into an agreement with the respondent to pay her ten rupees a month for her maintenance so long as she remained outcasted and unmarried. Notwithstanding the humble position in life of the respondent, she had most certainly by association with the appellant sacrificed such amenities as might be hers by association with him. There was nothing in the agreement with reference to future association and the contract was merely in respect of the past association and ten rupees a month was to be paid to the woman so long as she deprived herself of such advantages attaching to membership of her community or so long as she should remain unmarried. It is a fact that for some considerable time after the making of the contract the respondent and the appellant continued to be in association; but the agreement of which I had spoken had no reference to such continued relationship; it had reference merely to past relationship and to the future for the period that she should remain outcasted and remained unmarried. The time came when the appellant wished to marry another woman of his own status in life. He then refused to pay to the respondent the ten rupees a month which he had agreed to pay and discarded her altogether. When sued by her in respect of the arrears of the agreed ten rupees a month maintenance, he set up the defence, surprising as it may seem if we attribute to him the status claimed for him by his learned Advocate, that the agreement to pay compensation was void as being against public policy; and he has attempted to argue, firstly, that there should have been a finding to the effect that the real object of the agreement was to promote the continued relationship with himself and that it was void because it was in effect an agreement for the continuance of their relationship. The fact that their relationship did continue after the agreement has no effect whatever on the validity of the agreement already made. If the law were otherwise, it would be possible for a man who had made an agreement for maintenance

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of a past mistress to destroy the effect of that agreement the next day by resuming cohabitation with her for a week; the argument was however not seriously pressed and has no merit whatever.

But it was further argued that an agreement to maintain a mistress after the relationship has passed is an agreement which is void as being of an immoral character. That argument has often been attempted and so far as I can examine the authorities, it has never been successful. The argument is based upon the confusion between an agreement to become a mistress which is doubtless void as being immoral and an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with the plaintiff.

A brief reference may be made to some of the cases which have come before the Courts. One of the earliest cases was in the year 1881 before Mr. Justice Straight and Mr. Justice Oldfield [*Dhiraj Kuer* v. *Bikramjit Singh*(1)]. The judgment in that case is extremely brief and the reasoning was that the past cohabitation was not in the nature of a consideration at all and as the learned Judges said "Such a consideration, if consideration it can properly be called, which seems to us more than doubtful, would not be immoral, so as to render the contract de facto void"; and that the contract was really of a kind to compensate the woman for past services voluntarily rendered. The next is the case of *Husseinali Vasam Mahomed* v. *Dinbai*(2) decided by Chief Justice Macleod. The facts in that case were particularly involved; but the following passage from the judgment of Chief Justice Macleod may be cited. At page 137 the learned Chief Justice said: "It cannot be said that the object of an agreement to provide for the future maintenance

(1) (1881) I. L. R. 3 All. 787.
(2) (1924) A. I. R. (Bom.) 135.

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of a mistress after the connection has ceased is unlawful "; and the learned Judge refers to the decision in *Dhiraj Kuer* v. *Bikramjit Singh*(1) to which I have just made reference. In the case of *Subava Yellappa* v. *Yamanappa Sabu*(2) which was decided by Mr. Justice Patkar and Mr. Justice Barlee there are observations in the judgment of Mr. Justice Patkar which would seem to indicate that he was of opinion that a contract to support a woman who had been a mistress was of the nature of an immoral contract. That view was dissented from by Mr. Justice Barlee who sat with him. The two learned Judges arrived at the same conclusion with regard to the order which was to be made in that particular case; but the reasoning of Mr. Justice Barlee, with which I respectfully agree, indicates that he agrees with the earlier decisions that a contract of the kind which I have mentioned is not void.

The matter becomes to my mind clear when one realises the distinction between the two classes of contract. Section 23 of the Indian Contract Act states that " the consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy ". Now the contract to enter into the relationship of protector and mistress is undoubtedly regarded by the court as immoral and unenforceable and void; but in the case of a contract to compensate a woman for what she has lost and so long as that loss shall continue cannot be regarded as immoral and that is the consideration and the object of the agreement to compensate. The tendency is to confuse the consideration in the case of a contract to enter into the relationship with the consideration and object in the case of the agreement to compensate. The case before us is not a contract to enter into the relationship of protector and mistress; the object is to compensate the person for that which she has suffered and is suffering and I am unable to find any dictum or

(1) (1881) I. L. R. 3 All. 787.
(2) (1933) A. I. R. (Bom.) 209.

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judgment to the effect that such a contract is unlawful. It seems to me unnecessary to go into the cases decided under the English Law. Past consideration under the Indian law is good consideration and the fact that a woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury, to my mind forms a perfectly good consideration for the contract to compensate her. We have had to consider the case from a strictly legal point of view. In my opinion the appellate decision of the Subordinate Judge is quite correct. There is no merit whatever in the appeal, and I would dismiss it with costs.

JAMES, J.—I entirely agree. If I may say so, I would accept as correct the view of the law expressed by Mr. Justice Sulaiman in *Mahtab-un-nissa* v. *Rifaqat-ullah*(1). Therein he points out that there is a clear distinction between a mere contract to pay an allowance in future in order that an illicit connection should be continued and a contract in favour of a woman with whom cohabitation has already taken place. This has been the view held by the Allahabad High Court from the time when the Indian Contract Act was introduced. Before the introduction of the Act a contract of the kind with which we have here to deal was a perfectly valid contract enforceable by the Courts in India—[*Man Kuer* v. *Jasodha Kuer*(2)]. In the Indian Contract Act when the term consideration was defined by sub-section (*d*) of section 2 of the Act, it was stated in the clearest possible terms that when, at the desire of the promisor, the promisee had done something, such act was consideration for a contract, thereby apparently affirming the state of law as described in *Man Kuer* v. *Jasodha Kuer*(2). It appears to have been assumed in some cases that although the Indian Contract Act thus stated that past consideration should be good consideration, it was intended not to affirm the law as it stood in India,

(1) (1924) 85 Ind. Cas. 459.
(2) (1877) I. L. R. 1 All. 478.

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but to introduce a new rule from English law, and to introduce by implication the limitations placed upon it by the English decisions. A contract of this kind, not under seal, could not be enforced in England, not for the reason that it is immoral or against public policy, but because it is required there that the past consideration should be such as would have entitled the promisee at the time of performing the past act to sue the promisor for compensation—[*Beaumont* v. *Reeve*(1)]; and this rule has been applied more or less in all instances in which past consideration has been recognised as sustaining a contract, so that it has been said there that an executed consideration will sustain only such a promise as the law will imply. But there is nothing in the Indian Contract Act which implies that these decisions of the English courts are to be applied in limitation of the definition given in section 2(*d*) of the Act. We are not strictly concerned here with the question of whether long before the parties entered into this contract the plaintiff could have supported a contract which promised her an annuity in consideration of future cohabitation. The only question is of whether the contract promising an annuity in compensation for inconvenience suffered through past services rendered to the promisor at his request is immoral or opposed to public policy. It appears to me to be clear that there is nothing in the present contract which can be so described, whatever might have been said of a contract entered into with a view to future cohabitation. All that was over and done at the time when the present contract was made: and the defendant merely undertook to compensate the plaintiff for the injuries sustained on his account; loss of caste and loss of eligibility for marriage. I agree that this contract cannot be regarded as void on account of its being immoral or opposed to public policy, and that this appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

(1) (1846) 8 Q. B. 483.

APPELLATE CIVIL.

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

1938.
January, 5.

BHAGI MALIK

v.

SATYABADI OTA.*

Service tenure—chaukidari land, whether liable to be resumed by zamindar—land assigned for public purposes—zamindar accustomed to demand private services—such services no longer rendered by chaukidar—land, whether liable to be resumed on this ground.

A zamindar is not ordinarily entitled to resume chaukidari lands, because chaukidars have public duties to perform, and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes.

Raja Ranjit Singh v. *Kali Dasi Debi*(1) and *Radha Pershad Singh* v. *Budhu Dashad*(2), followed.

Even if a zamindar has been accustomed to demand certain private services from the chaukidar, he would not be entitled to resume the chaukidari land merely because those private services are no longer rendered, so long as the holder of the land is the chaukidar of the village.

Appeal by the defendant.

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

B. K. Ray and *B. Mahapatra*, for the appellant.

C. M. Acharya and *B. K. Das*, for the respondents.

JAMES, J.—This appeal arises out of a suit for ejectment of a village chaukidar from the chaukidari

* Circuit Court, Cuttack. Appeal from Appellate Decree no. 30 of 1935, from a decision of Babu Surjamoni Das, Additional Subordinate Judge of Cuttack, dated the 29th January, 1935, reversing a decision of Maulavi Mirza Ahmed Beg, Munsif, 2nd Court, Puri, dated the 25th May, 1934.

(1) (1917) I. L. R. 44 Pat. 841; L. R. 44 Ind. App. 117.

(2) (1895) I. L. R. 22 Cal. 938.

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jagir. The land was recorded at the provincial settlement as chaukidari jagir in possession of the defendant's father and at the recent revisional settlement as chaukidari jagir of the defendant with a note that this jagir had been given in niskar for village chaukidari work by the sub-proprietors. The Munsif dismissed the suit on the ground that the sub-proprietors had no right to resume the jagir of the chaukidar who held an office of a public nature; but his decision was reversed on appeal by the Subordinate Judge who held that since the record-of-rights stated that the jagir had been granted by the sub-proprietors, they were entitled to resume it. It was alleged in the plaint that the jagir was liable to resumption, because the chaukidar failed to perform certain services to the zamindar in consideration of which the jagir had been granted; but according to the record-of-rights the jagir is a chaukidari jagir granted for chaukidari work.

It is argued on behalf of the appellant chaukidar that his office being of a public nature, the land is not liable to resumption at the instance of the zamindar; and further that this jagir being in the nature of a grant of land burdened with service, cannot be resumed so long as the holder is willing to render services due on account of the jagir. Rai Bahadur C. M. Acharya on behalf of the respondents raises a new point for the first time in second appeal that the defendant himself is no longer the chaukidar but that his son has been doing the work of the village chaukidar for the last seven years. This point was not raised at any earlier stage of the proceedings, and if the son is doing the work of the chaukidar, that would on the face of it appear to justify the retention of the jagir by the family of which the nominal holder is the father or the son. The nature of these chaukidari jagirs was discussed by the Privy Council in *Raja Ranjit Singh* v. *Kali Dasi Debi*(1) wherein Lord

(1) (1917) I. L. R. 44 Cal. 841; L. R. 44 Ind. App. 117.

Parker pointed out that the zamindar was not ordinarily entitled to resume chaukidari land, because chaukidars had public duties to perform, and the lands which are held on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. And in *Radha Pershad Singh* v. *Budhu Dashad*(1) it was pointed out by the Calcutta High Court that a jagir could not be resumed by the zamindar when it had been granted for services of a public nature. "The distinction between a grant for services of a public nature and one for services, private or personal, to the grantor, is well understood. In the former case the zamindar is not entitled to resume, while in the latter case he may do so; when the services are not required or when the grantee refuses to perform the services. A distinction also exists between the grant of an estate burdened with a certain service, and that of an office, the performance of whose duties is remunerated by the use of certain lands. In the former case it would seem that the zamindar is not ordinarily entitled to resume, even if the service is not required, if the grantee is willing and able to perform the services, while in the other case he may do so when the office is terminated". In the present case the jagir appears to have been granted to the village chaukidar in his capacity of chaukidar for services which are in their nature essentially public services and not private to the zamindar. Even if the zamindar had been accustomed to demand certain private services from the chaukidar, he would not be entitled to resume the chaukidari land merely because those private services were no longer rendered so long as the holder of the land was the chaukidar of the village. It may be true that because the chaukidar now receives pay from the chaukidari fund, the jagir has become liable to resumption; but that resumption can only be made in accordance with the provisions

(1) (1895) I. L. R. 22 Cal. 938.

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of Part 2 of Act VI of 1870 and a suit for resumption of the chaukidari land on the ground that the chaukidar receives his remuneration in another way would not be cognizable in the civil courts. It is not necessary for us to say whether this jagir is actually liable to resumption under Act VI of 1870 though on the face of it it appears to be so; but it was not liable to resumption on the grounds set out in the plaint and the decree of the learned Subordinate Judge cannot be maintained.

I would allow this appeal and set aside the decree of the Subordinate Judge, restoring the decree of the Munsif. The appellant is entitled to his costs throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

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

1938.

January, 6.

RADHAMOHAN THAKUR

v.

BIPIN BEHARI MITRA.*

Sale—title to vended property, when passes—intention of parties, how is to be proved—terms unambiguous—external evidence, whether admissible—recital as to passing of consideration, whether differs from strictly contractual part—Evidence Act, 1872 (*Act I of* 1872), *section* 92.

In a contract of sale the strictly contractual part, as for instance, the arrangement between the parties as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose, as

* Circuit Court, Cuttack. Appeal from Appellate Decree no. 62 of 1935, from a decision of Babu B. K. Sarkar, Additional Subordinate Judge of Cuttack, dated the 24th July 1935, reversing a decision of Babu B. N. Ray, Munsif, 1st Court, Cuttack, dated the 31st July, 1934.

mentioned in section 92 of the Evidence Act, 1872, of contradicting, varying, adding to, or substracting from its terms; in this respect it differs from the recital of fact, that is to say, the passing of consideration, which is not a matter of contract but a matter of fact. In the latter case, there is nothing in section 92 which prevents a person from adducing evidence for the purpose of showing that the recital was untrue.

If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties.

Rasikananda Mallik v. *Gangadhar Panda*(1), followed.

Maheswar Mahanty v. *Dayanidhi Mahanty*(2), explained.

Appeal by the plaintiffs.

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

S. N. Sen Gupta and *L. K. Das Gupta*, for the appellants.

S. C. Bose (with him *A. S. Khan* and *N. N. Mitra*), for the respondents.

JAMES, J.—On the 24th of August, 1931, Janaki Nath Banarji sold to Babu Bipin Behari Mitra four annas share of a zamindari for the sum of twelve hundred rupees. The sale deed was duly registered. Bipin Behari Mitra paid to Janaki Nath Banarji's agent the sum of Rs. 70 in cash with a written promise to pay the balance of Rs. 1,130 which represented the amount of a mortgage debt secured on this property due to the plaintiffs of this suit. After the deed had been executed Bipin Behari entered into possession of the property; and the guardian of the two minors among the mortgagees, Srimati Nomamoyee Dasi, issued notice upon him to pay the mortgage debt.

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.
(2) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

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The mortgage debt was not paid, and subsequently on the 11th of January, 1932, the mortgagees approached the vendor and obtained from him a sale deed purporting to convey this property to them. The mortgagees then instituted a suit against Bipin Behari praying for a declaration that they were the lawful owners of the property with the false allegation that they were in possession and praying for confirmation of possession. The plaintiffs alleged that at the time of the conveyance to Bipin Behari it had been agreed that title should not pass until the full consideration was paid and that as Bipin Behari had not paid the full consideration, no title to the property had passed by the conveyance of the 24th of August, 1931. The Munsif decreed the plaintiffs' suit; but his decision was reversed on appeal by the Subordinate Judge. The Subordinate Judge has found that the consideration of the sale deed consisted of Rs. 70 to be paid in cash and Rs. 1,130 for payment of which a written promise was given and that title and possession passed to Bipin Behari immediately on the registration of the sale deed. The plaintiffs (the subsequent purchasers) have come in second appeal from that decision.

It is argued on behalf of the appellants that on the terms of the sale deed as it stands it should be inferred that the passing of title is to be postponed until the full consideration is paid and that no evidence beyond that of the deed itself should be admitted to prove what the contract between the parties actually was. It is suggested that the terms of the sale deed are precisely the same as those of the deed in *Rasikananda Mallik's* case(1) which has been quoted by the learned Subordinate Judge; but in that case the deed specified that the transfer of ownership was to take place after the payment of the consideration. The learned Subordinate Judge has relied upon the decision in *Maheswar Mahanty* v.

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.

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Dayanidhi Mahanty(1) wherein it was held that title did pass although the whole consideration had not been paid. There is actually no conflict between the two decisions and the facts of the present case are very similar to those of *Maheswar Mahanty's* case(1). Here we have consideration consisting in part of payment made in cash and in part in a written promise to pay with the recital that the vendee is to acquire title and possession from the day of the execution of the sale deed and with the further recital in the present case that the purchaser is to be entitled to institute suits against tenants of the share conveyed from whom arrears of rent may be due. Ordinarily the title to property transferred by sale passes on the registration of the sale deed although it may sometimes happen that the parties agree that title shall not pass until the consideration is completely paid. The learned Advocate for the appellants has in the present case been unable to demonstrate from anything in the sale deed itself an intention that the passing of title should be postponed to full payment of the mortgage debt: and apart from the conveyance itself, the subsequent conduct of the parties indicates that the intention was that title should pass on the registration of the document.

No error of law has been pointed out in the decision of the learned Subordinate Judge and I would dismiss this appeal with costs.

COURTNEY TERRELL, C. J.—I agree. I would only add a few words because of the way in which the learned Subordinate Judge has, I think, somewhat mistaken the correct view of the law of construction of contracts and the effect of section 92 of the Evidence Act, notwithstanding that he has arrived in the end at what is, I agree, the correct conclusion. This question of whether in giving effect to a sale deed the property is to pass on the execution and registration of the deed or whether it is to pass upon the full

(1) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

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payment of the consideration money arises somewhat frequently and has given rise to various cases in this particular Court and I venture to think that the correct principle should be stated. The learned Subordinate Judge was under the impression that there was a conflict of view between the case of *Rasikananda Mallik* v. *Gangadhar Panda*(1) in which I delivered the judgment and the subsequent case of *Maheswar Mahanty* v. *Dayanidhi Mahanty*(2). There is no conflict of any sort. In a contract of this character there is contained a recital of the receipt of the purchase money. There are also terms which provide for the passing of the property. This strictly contractual part, that is to say, the arrangement between the parties as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose, as mentioned in section 92, " of contradicting, varying, adding to, or substracting from its terms ". The question when the property is to pass is a matter of contract. In that respect it differs from the recital of fact, that is to say, the passing of the consideration which is not a matter of contract but a matter of fact. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was; but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties. As a rule contracts are so drawn that the property passes on the completion of the contract by registration; and if one of the parties wishes to show that the contract has not that effect, he must do one of two things: either he must show that the contract on its correct wording is in accordance with the terms which he suggests or he must show that the contract is ambiguous in its terms capable

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.
(2) (1930) 1 Cutt. L. T. 12; S. A. 110 of 1928.

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of either meaning and it is for him to show by external evidence that the intention of the parties was that the property should pass not on the execution and registration of the document but on the happening of some other event. In such cases evidence is admissbile to show that one of the parties retained possession of the kobala in confirmation of evidence that the intention of the parties was that the property should not pass until the happening of some subsequent event; that is to say, the party tendering such evidence first of all contends that such is the meaning of the contract and then he produces the evidence of the retaining of the kobala not with a view to contradicting, varying, adding to or substracting from the terms of the contract, but by way of confirmatory evidence that that was in fact the intention of the parties. In that sense the evidence of the retention of the kobala does not infringe the conditions of section 92. In the first case which I have mentioned and in which I was a party, the contract itself was construed and its contents were held to be free from ambiguity. In those circumstances the contract having been construed as one that the property should not pass until the whole consideration was paid and being unambiguous, external evidence was excluded. In the subsequent case decided by Mr. Justice Fazl Ali sitting singly the contract was construed as providing that the property should pass immediately and without waiting for the payment of the whole consideration. The decision to which I was a party was mentioned by the learned Judge and then he quotes the following passage: "It is now settled law that section 92 of the Evidence Act will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited but was agreed to be paid in a different manner." Now the learned Subordinate Judge has taken that to be a disagreement with the first decision. First of all he

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mentioned *Rasikananda's* case(1) as being a case in which the terms are to be gathered from the sale deed itself and from nothing else and then he thinks that Mr. Justice Fazl Ali has expressed a contrary view. He says:

> "It has there been held that it is now settled law that section 92 of the Evidence Act will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed that the consideration specified in the deed was not in fact paid as therein recited *but was agreed to be paid in a different manner.*"

This is precisely what Mr. Justice Fazl Ali did not decide. The decision with which I respectfully agree says that section 92 will not prevent a party from disputing the *recitals* in the deed. Thus if the vendor should decide, not having received his purchase money, to sue for the purchase money, he will not be overcome by the fact that the document stated that the whole of the consideration money was paid as preventing him from raising a point in a suit for recovery of purchase money that had not been paid. It is certainly true, as Mr. Justice Fazl Ali has said, that there is nothing in section 92 which prevents a person from adducing evidence for the purpose of showing that the recitals were untrue. Statements of facts are different from the nature of the contract between the parties which must be determined from a reading of the document itself. If the document is ambiguous in character, then certainly reference can be made to evidence for the purpose of ascertaining what the intention of the parties was. If on the other hand the contract is unambiguous in its terms, then you cannot introduce evidence for the purpose of showing that the contract means something other than what it expresses in unambiguous terms. Here the learned Judge has held first of all that the contract in express terms states that the passing of the property is to take place immediately. He finds in the evidence, that is to say, conduct of the parties after the document was

(1) (1929) 1 Cutt. L. T. 1; S. A. 62 of 1927.

executed, evidence of fact not in contradiction of the document but confirming the view that that was what the parties originally intended. This is not in conflict with section 92. He held that the contract expressly provided for the passing of the property at once. If the other party should however feel inclined to sue for his purchase money, then mere recital in the document will not prevent him from showing what the true facts are.

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In these circumstances I agree that the appeal fails on the construction of the document and the conclusion arrived at by the learned Judge is, I think, a correct one. I agree therefore that the appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

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

RAJA RAMCHANDRA DEB

v.

FAKIR PAIKARA.*

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Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 31 *and* 250—"*maximum fee*", *meaning of —amount of mutation fee payable under section* 31, *how is to be determined.*

When the court has to find what is the proper amount of mutation fee which can be recovered under section 250(*e*) of the Orissa Tenancy Act, 1913, a customary amount proved by evidence to be such as would be sufficient to prove a long established and binding custom of the estate, would be the

* Circuit Court, Cuttack. Appeals from Appellate Decrees nos. 79 to 83 of 1935, from a decision of Sadhu Charan Mahanty, Esq., District Judge of Cuttack, dated the 19th June, 1935, modifying a decision of Babu M. N. Guna, Deputy Collector of Khurda, dated the 5th June, 1934.

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amount properly payable under section 31(*1*) of the Act, provided that it did not exceed 25 per cent. of the purchase money. But if the evidence falls short of that and it is proved that the landlord and tenants had been in the habit for some years before 1913 of making and obtaining mutation of names on payment of a certain recognised proportion of the purchase money, that amount which was regarded as reasonable by the parties in 1913 should properly be regarded as reasonable after the passing of the Act.

Uchhab Jena v. *Upendra Naik*(1), referred to.

The words "maximum fee" indicate that it is not necessary in every case that the fee shall be 25 per cent. as the proper fee, but in no case should the court allow more than 25 per cent.

Appeals by the plaintiff.

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

B. K. Ray, for the appellant.

B. N. Das (with him *G. G. Das* and *B. K. Das*), for the respondents.

COURTNEY TERRELL, C.J.—We have here to deal with a batch of five second appeals from the appellate decision of the District Judge allowing them in part from the decision of the Deputy Collector. The main question with which we are concerned is the construction of the first sub-section of section 31 of the Orissa Tenancy Act. The suits were brought by the plaintiff to recover registration fees under section 250(*e*) of the Act. It would appear that in the various second appeals the transfers effected in favour of the defendants by the predecessors in the holdings took place some years ago; and in the year 1931 it seems to have occurred to the plaintiff to effect registration of these transfers and having effected the registration of the transfers and thereby giving his consent to them, he contends that he is entitled to a registration fee

(1) (1926) I. L. R. 6 Pat. 350.

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of 25 per cent. upon the consideration money. There were two substantial defences to the suits; one was that in the particular estate in question the holdings were transferable without any consent, so that section 31 had no application at all and that the landlord was not entitled to charge any registration fee. The Judge has found as a fact, and rightly found, that this is not a permanently-settled estate and section 31 has application to the registration fee which is chargeable; and in the argument before us on appeal the contention on the part of the defendants that section 31 is not applicable has virtually been abandoned and wisely abandoned. The right of the landlord accordingly to levy the registration fee being established under section 31, the most important question which arises for our decision is the rate at which the fee is chargeable. The trial court held that the claim by the plaintiff to charge 25 per cent. of the consideration money as the registration fee was justified and decreed the suits on that ground. Now the wording of the first sub-section to section 31 must be considered. It runs as follows:

> "When any occupancy-holding or portion of a holding is transferred by private sale, the transferee or his successor in interest shall within two years from the date of the commencement of this Act or within one year from the date of the transfer, whichever is later, apply to the landlord to whom the rent of the holding or portion is payable for registration of the transfer. The maximum fee payable on such registration shall be a sum equal to 25 per centum of the consideration money or to six times the annual rent of the holding or portion thereof, whichever is greater."

The contention of the plaintiff is that the meaning of the phrase in the concluding sentence of the sub-section is that the landlord at his will and pleasure may in such circumstances charge a registration fee the amount of which may be fixed by himself provided in all cases that he may not charge more than 25 per cent. In other words, he wishes to read the last sentence as though the words 'maximum fee' were excluded and the sentence read 'the fee payable on such

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registration shall be a sum equal to 25 per cent.' It is clear that if the landlord is free to fix a fee at his own pleasure subject to the maximum, he will in the ordinary course of human nature invariably fix the maximum. There is no reason why he should do otherwise. The words 'maximum fee' on the other hand to my mind indicate that it is not necessary in every case that the fee shall be 25 per cent. as the proper fee, but in no case should the court allow more than 25 per cent. In those circumstances the question arises as to how the fee is to be fixed subject to the said maximum. Now the Judge has in my opinion taken the correct view of the matter. He has enquired as a matter of fact as to the fee which the plaintiff in this particular estate and at or about the period when these transfers were made was able to exact as the price of his consent for the transfers. During the hearing of the appeals as is demonstrated by the order-sheet and by the judgment the learned Judge offered the parties an opportunity of adducing evidence on this question of fact and both parties refused to adduce further evidence and the matter was expressly left to be decided by the Judge on the materials that were before him and evidence for his construction there were the various settlement reports and he has examined those settlement reports which are good and valid evidence in the matter of fact with regard to this estate and has found as a fact that for the period in question the fee which he was able to collect and which the tenants were willing to pay as the price of his consent to the mutation was two per cent. on the consideration money. He has examined the evidence carefully, taking note of the fact that on occasions it has been possible for the landlord in some cases to realize as much as 25 per cent.; but he gives very good reasons for saying that these were exceptional cases and were by no means recognised by the tenants or as a rule collectable from the tenants. In my opinion we are bound by that finding of fact and in such circumstances having come to that conclusion of

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fact that customary and successful exaction of the fee did not exceed the maximum fixed by the Act, he gave judgment for the plaintiff for the amount at that rate. To my mind his construction of the sub-section is correct.

We have been requested on behalf of the plaintiff to remand the case for further evidence to be taken on this issue of fact and the argument in support of the request was that everybody had hitherto believed that the meaning of the sub-section was that the landlord was entitled to claim anything up to 25 per cent. and that the case was entered into without a true realization of the importance of the question of fact and the history and usage of the estate and had they so realised it, the plaintiff would have been prepared to adduce evidence. It is impossible for the plaintiff after his conduct before the appellate court to make this excuse. First of all his mistake as to the meaning of the sub-section does not give any basis for a special procedure to be followed; and, secondly, the learned Judge in fact gave them every opportunity of adducing further evidence.

The decision of the learned Judge was in my opinion correct and I would dismiss these appeals with costs. The cross-objections are not pressed and they will be dismissed without costs.

JAMES, J.—I agree. When these appeals came before the learned District Judge there was not complete absence of evidence regarding the amount which had been charged as mutation fee in the *ekrajat* mahal at the time of introduction of the Orissa Tenancy Act, because the defendants' witness Uchhab Sahu had said that the estate had been accustomed to exact a fee of eight annas for each transaction by sale; but the learned District Judge regarding this evidence as scanty invited the parties to adduce further evidence if they desired to do so, whereupon each party stated that he would not adduce any

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evidence beyond what was found in authentic official reports. On the evidence before him after he had heard the appeal, the learned District Judge accordingly found that up to 1913 the *ekrajat* mahal had been realizing two per cent. of the purchase money as mutation fee from purchasers of occupancy holdings. In 1913 the Orissa Tenancy Act was introduced, which led the landlord to attempt to increase his customary mutation fee, though at first he only attempted to exact $6\frac{1}{4}$ per cent.; but even this additional amount was more than the raiyats were prepared to pay. The learned District Judge has found that it has not been proved that any custom has been established of exacting more than two per cent. of the purchase money; and on this finding he holds that two per cent. would be a reasonable fee to allow under section 31.

Section 31 provides that the landlord must recognise the transfer of an occupancy right on payment of the registration fee by the raiyat, and that the maximum fee payable on such registration shall be a sum equal to twenty-five per cent. of the consideration money or to six times the annual rent of the holding. It is argued on behalf of the appellant that this amount which is prescribed as the maximum in section 31 should be regarded as the normal fee as practically speaking the minimum fee also, because no mention is made of any dispute regarding the amount of fee payable in the Explanation given to sub-section (*3*) specifying the matters which the Collector has to consider for finding whether the landlord is entitled to refuse his consent to a transfer. In my opinion no such conclusion can be drawn from this fact. The proper conclusion to be drawn is this that if the raiyat tenders $12\frac{1}{2}$ per cent. and the landlord claims 25 per cent., the fact that the raiyat disputed the landlord's right to 25 per cent. as mutation fee is not to be treated as justification for refusal to recognise the acquisition of the occupancy right by the purchaser.

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The question of whether mutation fee is payable in the Khurda estate and the *ekrajat* mahal has come before this Court on several occasions and the effect of some decisions appear to have been misunderstood; but it has in no case been held that the landlord is entitled as a matter of right to demand 25 per cent. of the purchase money as his mutation fee. In 1917 in *Mritunjoy Praharaj* v. *Sree Jagannath Jew*(1) it was held that the purchaser was obliged to apply to the landlord and to deposit the registration fee. The District Judge had held that the tenant was liable to pay a fee equivalent to 25 per cent. but the question of what might be the amount of the fee payable was not considered in second appeal, where the only question was of whether the tenant was obliged to register his transfer and to pay a fee.

In 1918 in *Balmukund Kanungoe* v. *Sree Birabar Bhararbar Roy*(2) the purchaser of a holding in the *ekrajat* mahal successfully resisted a suit instituted by the landlord for his ejectment by putting forward the defence that he had the right by custom to acquire the holding by purchase without the consent of the landlord. The decision in second appeal was based entirely on the proof of custom existing in the *ekrajat* mahal, and no reference was made to the effect of section 31 of the Orissa Tenancy Act.

In 1920 in *Balmukund Kanangoe* v. *Mritunjoy Paharaj*(3) the landlord succeeded in a suit for recovery of mutation fee. The defence was taken that in the *ekrajat* mahal there was an unrestricted right of transfer, so that no mutation fee was payable; but it was held that under section 31 of the Orissa Tenancy Act the purchaser was obliged to pay a mutation fee whether before the passing of the Act

(1) (1917) 3 Pat. L. J. 351.
(2) (1918) S. A. 39 of 1917 (unreported).
(3) (1920) 5 Pat. L. J. 357.

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there had been a right of transfer or not. The question of what should be the amount of fee payable was not considered by the High Court. The respondent in that second appeal attempted to obtain leave to appeal to His Majesty in Council; but his application was refused.

In 1926 in *Uchhab Jena* v. *Upendra Naik*(1) it was held that a purchaser of an occupancy holding must apply for registration and deposit the mutation fee; but it was pointed out by Mr. Justice Macpherson that the provision for registration fee in section 31 of the Orissa Tenancy Act merely laid down a statutory maximum and there is nothing in the judgment which suggests that this maximum is to be the amount of fee which is recoverable as a matter of course. The learned Judge pointed out that before 1913 a registration fee was payable by custom when and if the landlord registered the transfer; and the provision in support of it in section 31(*1*) of the Orissa Tenancy Act only lays down a statutory maximum for that registration fee; that is to say, where before 1913 the landlords had by custom been obtaining a certain proportion of the purchase money as registration fee, that sum was definitely recognised and legalised by section 31 subject to this limitation that where they might have been demanding and obtaining more than 25 per cent. there the registration fee was for the future reduced to that amount. In the present case the learned District Judge has found that the amount of registration fee which was customarily demanded and paid in this mahal at the time of the passing of the Orissa Tenancy Act amounted to two per cent. of the purchase money.

It is argued on behalf of the appellant that the evidence on the record—the report of the Settlement Officer and reports of Assistant Settlement Officers—is not sufficient to warrant a finding that this was the

(1) (1926) I. L. R. 6 Pat. 350.

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customary rate; but if this evidence were to be discarded, we shall have to fall back upon the evidence of Uchhab Sahu and allow to the appellant a mutation fee even smaller than has been allowed by the District Judge. When the court has to find what is the proper amount of mutation fee which can be recovered under section 250(*e*) of the Orissa Tenancy Act, if a customary amount was proved by evidence such as would be sufficient to prove a long established and binding custom of the estate, that amount would be the amount properly payable under section 31, provided that it did not exceed 25 per cent. of the purchase money. But if the evidence falls short of that, and it is proved that the landlord and tenants had been in the habit for some years before 1913 of making and obtaining mutation of names on payment of a certain recognised proportion of the purchase money, that amount which was regarded as reasonable by the parties in 1913 should properly be regarded as reasonable after the passing of the Orissa Tenancy Act. It is not possible, therefore, to interfere with the findings or order of the learned District Judge and these appeals must be dismissed with costs.

Appeals dismissed.

S. A. K.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

THAKUR RAI

v.

ISSARDYAL PARSHAD.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 26(*N*), *whether retrospective—transferee of a non-transferable occupancy holding, whether affected by sale in execution of a rent decree to which he was not a party.*

*Appeal from Appellate Decree no. 38 of 1936, from a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Shahabad, dated the 30th of April, 1935, confirming a decision of Babu Hargobind Prasad Sinha, Munsif of Arrah, dated the 5th of July, 1934.

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Held, that section 26(N) of the Bihar Tenancy Act was retrospective and therefore the interest of a transferee of a non-transferable holding was not affected by the sale in execution of a decree for rent against the recorded tenants only.

Muhammad Shafait v. *Nithali Ram*(1), followed.

Mukerjee v. *Ramratan Kuer*(2), explained.

Appeal by the plaintiff.

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

Sambhu Barmeshwar Prasad, for the appellant.

D. N. Varma, for the respondents.

WORT, J.—This appeal raises a question as to the meaning of the decision of their Lordships of the Privy Council in *Mukerjee* v. *Ramratan Kuer*(2) where their Lordships' opinion expressed by Sir George Rankin was in these words: "The object of this section (referring to section 26-*N* of the Bihar Tenancy Act) 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". The appeal here arises by reason of the plaintiff's action against his landlord for a declaration as to his right to possession and as regards a decree obtained by the landlord in execution case no. 330 of 1932, in pursuance of which the landlord claims to have purchased the holding, the subject-matter of this suit.

The facts are that in 1913 there was a transfer of a part of holding to the plaintiff which according to the plaintiff's case was recognized by the landlord, and it is on the footing of that recognition and also on the footing that the decree out of which the execution case arose was not a rent decree but a money

(1) (1937) 18 Pat. L. T. 345.
(2) 1935) I. L. R. 15 Pat. 268; L. R. 63 Ind. App. 47.

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decree, inasmuch as the landlord had not joined in that action all the recorded tenants, that the case was argued.

Both these questions appear to have been decided by the courts below against the plaintiff, but the contention in this Court is that section 26(*N*) of the Bihar Tenancy Act applies, and on that footing he is entitled to the declaration which he claims. The first contention advanced on behalf of the plaintiff is that the Judge is wrong in law in placing the onus upon him (the appellant) for showing that all the recorded tenants were made parties to the action of 1931. But the learned Judge in the court below has dealt with the evidence, and has come to the conclusion on the evidence largely of the defendants, that the recorded tenants were joined. That point therefore fails.

We are only concerned with section 26(*N*) of the Bihar Tenancy Act. It is a contention of the respondents that the section is only retrospective to the extent of its relating to titles which have not been disturbed. The argument is that the action of 1931 having been brought against all the recorded tenants, as the Judge in the court below has found, he (the landlord) obtained a rent decree the result of which was that the plaintiff's title was brought to an end. The matter can be disposed of by a simple question which I think must be answered only in one way: the question is, what would have been the position had the plaintiff here established, quite apart from section 26(*N*) of the Bihar Tenancy Act, that he had been recognized by the landlord in 1913. The learned Advocate appearing on behalf of the respondents frankly admits that if the plaintiff had established his recognition, he would have been bound to succeed in the action because the decision of the Judge on the other question would have been different, namely, that the action was an action not against all the tenants but only against some, and further that the mere fact

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that he had established his title would have disposed of any question of the action of 1931 having brought the title of the plaintiff to an end. Another way of approaching the matter would be this. It is clear that no person other than the persons who are party to the suit could be affected by any decree. The plaintiff therefore could not be affected by the decree of 1931; but the mere fact that he was not affected by the decree of 1931 would not entitle him to succeed in this suit unless he could otherwise prove a title. Now that leads to the irresistible conclusion, in my opinion, on the decision of their Lordships of the Privy Council that the plaintiff had title by reason of operation of section 26(*N*). The words relied upon by the respondents are " 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 ", and it is the contention of the respondents that the plaintiff has been ejected and therefore the decision of their Lordships of the Privy Council will have the limited effect which the words of Sir George Rankin indicate. But the answer to that is that the plaintiff has not been affected, he was not a party to the action, and if he can show that he has a title as well as that he was not affected by the decree of 1931, it would appear that his right of action is clearly established. In my judgment for these reasons the decision of the learned Judge in the court below is wrong and must be set aside.

Before allowing the appeal I should make a reference to the decision in this Court in *Muhammad Shafait* v. *Nithali Ram*(1) where this very question came up before me sitting alone and it was referred to a Divisional Bench for determination. Mohammad Noor, J., in the case in which the facts were not dissimilar from those in the present case, stated " In this particular case the defendant landlord did not enter into possession of the holding in his capacity

(1) (1937) 18 Pat. L. T. 345.

as landlord having treated it as an abandoned holding", and then goes on to state in effect that unless the plaintiff's title has been extinguished, the plaintiff bringing an action for possession, as in this case, would have the advantage of the retrospective nature of section 26(*N*).

In my judgment the appeal succeeds, the decisions of the learned Judges in the Courts below are set aside and the plaintiff will be entitled to a decree in the form of relief claimed with costs throughout.

VARMA, J.—In answer to the argument advanced by Mr. Sambhu Barmeshwar Prasad appearing on behalf of the plaintiff-appellant, based upon section 26(*N*) of the Bihar Tenancy Act, Mr. Dhanendra Nath Varma appearing on behalf of the respondents urged as follows:—

Section 26(*N*) does not apply because the rights of the plaintiff had been extinguished before the section came into force.

I may mention here in short some of the important facts to clarify the position taken up by Mr. Varma. The transfer in favour of the plaintiff was in the year 1913 of a part of the holding. The landlord filed a suit in the year 1931 against the tenants who according to the findings were in existence at the time and purchased the holding on the 17th of June, 1932. The present plaintiff filed his suit on the 21st of December, 1933.

Now, Mr. D. N. Varma says that, as according to the findings he obtained a rent decree, therefore the rights of the plaintiff were extinguished and therefore section 26(*N*) of the Bihar Tenancy Act did not apply. But it has to be noted that during the pendency of the suit the plaintiff applied to be made a party but he was not allowed to be made a party; and, if this is the only incident by which Mr. Varma thinks that the rights of the plaintiff have been

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extinguished, I am afraid it would not help him in the least because the right of a person who is not a party to a suit cannot be said to be extinguished in a suit between other parties. I would therefore decree this appeal with costs.

Appeal allowed.

J. K.

APPELLATE CIVIL.

1938.

January, 26.

Before Wort and Varma, JJ.

KESHWAR SAO.

v.

GUNI SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, articles* 83 *and* 116—*suit for damages for loss occasioned by non-payment of consideration to third party as stipulated—limitation—proper article applicable—cause of action, when accrues—contract of indemnity—Contract Act*, 1872 (*Act IX of* 1872), *section* 124—*rule of common law.*

The plaintiffs executed an ijara deed in favour of the defendants, for a certain sum, who undertook to pay off previous mortgages in favour of third parties. The defendants did not pay and the mortgagees put the mortgaged properties to sale.

Held, that the plaintiffs had failed to make out a case of a contract of indemnity either express or implied within the meaning of section 124 or any other section of the Contract Act and that the ordinary rule of common law applied, and the plaintiffs were entitled to damages for breach of contract, and not any resulting or collateral damages occasioned thereby.

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*Appeal from Appellate Decree no. 267 of 1936, from a decision of Rai Bahadur Shiba Priya Chatterjee, Additional District Judge of Patna, dated the 5th December, 1935, modifying a decision of Babu Brajendra Prasad, Subordinate Judge of Patna, dated the 20th February, 1935.

Consequently limitation ran from the time when the contract was broken and not from the time at which any damage was sustained by the plaintiff.

Held also that article 83 of the Limitation Act which relates to contracts of indemnity did not apply and the case was governed by article 116.

Appeal by the defendants.

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

Dr. Sir Sultan Ahmed (with him *Rai G. S. Prasad* and *Rai Paras Nath*), for the appellants.

Janak Kishore and *Girjanand Prasad*, for respondents nos. 1 to 3.

Mahabir Prasad and *K. N. Lal*, for respondents nos. 4 to 6.

WORT, J.—This is an appeal by the defendants second party in an action in which plaintiffs claimed to recover a sum of Rs. 2,200 by way of damages against either the defendants first party or the defendants second party. That was the alternative claim. The claim was made in these circumstances: Plaintiffs' father had executed certain mortgages between the years 1912-1917, three in number, in favour of certain parties, only one of whom need be mentioned, namely, the defendants first party in this action. They were the mortgagees, in the first of these three transactions. Later, in January, 1918, plaintiffs executed an ijara deed in favour of the defendants second party for a sum of Rs. 800 under which the defendants had undertaken to pay off two of the mortgages to which I have referred. It was not necessary to pay off the first mortgage. The position as regards that mortgage would be understood if I repeat what I have already stated that the first mortgage of 1912 was in favour of the defendants first party. Now in the plaint the plaintiffs claimed that the transaction of the 9th of January, 1918, was

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a farzi transaction being in the name of defendants second party but in fact being the transaction of defendants first party. The trial court came to the conclusion that the real ijaradar in the transaction of 1918 was defendants first party. No appeal was preferred by the plaintiffs against that decision. But there was a dispute in the court of appeal between the defendants first party and the defendants second party, and in spite of the fact that, as I have already stated, there had been no appeal by the plaintiffs, the judge in the court below came to the conclusion that the real persons behind the transaction of 1918 were the defendants second party. Now, in those circumstances, there having been a decree against defendants second party, they have appealed to this Court.

The first argument advanced on their behalf by Sir Sultan Ahmed is that in the circumstances of the case the Judge was not in a position, nor was he entitled, to make a decree in favour of the plaintiffs against the defendants second party. The reason stated is this: that throughout the plaint the case set out by the plaintiffs was a case against defendants first party. The essence of his claim can be stated in the words used in paragraph 4—

"The plaintiffs executed an ijara deed dated, the 9th of January, 1918, for Rs. 800 in favour of defendants first party and got it registered; and the defendants first party got it executed advisedly in the farzi name of their friend and creature Keshwar Sao, defendant no. 4 second party.....".

But in the relief portion it is stated

"If in the opinion of the court defendants first party be not proved to be the real ijaradar.....a decree for the amount due to your petitioners may be awarded against defendants second party."

It is not perhaps an ideal plaint, but it seems to me that so far as the plaintiffs are concerned, the argument that no court is entitled to give a relief to the plaintiffs against defendants second party is in my judgment unsustainable. As regards the other question depending upon the fact that the plaintiffs did not appeal, it seems to me that the powers of the

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court were governed by Order XLI, rule 33, the provisions of which are sufficiently wide to enable the Judge in the court below to exercise the jurisdiction which he has exercised in giving judgment in favour of the plaintiffs against defendants second party.

The substantial question in this appeal is the question whether the action is barred by limitation. The Article which applies is undoubtedly Article 116 which gives the period of limitation running from a date on which limitation would begin to run against a suit brought on a similar contract not registered. Ordinarily that would mean that the matter is governed by the third column of Article 115 which deals with a contract, express or implied, not in writing registered, period of limitation to be from the date on which the contract is broken. But the contention in this case is that the period dates from the date upon which the plaintiffs suffered damage; in other words, that we have to read Article 116 with Article 83 which provides the period of limitation with regard to a contract of indemnity and the time in that case runs from the date when the plaintiffs are actually damnified which, in this case, according to the argument of Mr. Janak Kishore, was at the time the property was sold in execution of the decree in the action which was brought by reason of the default of the defendants to pay off the mortgages of 1916 and 1917. This is a contract, as I have already stated, to pay off those mortgages. There is no suggestion that there is any express provision in the ijara deed of 1918 to indemnify the plaintiffs, nor can it be stated, in my opinion, that there is any implied agreement here to indemnify the plaintiffs. Section 124 of the Contract Act defines a contract of indemnity as one by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. This is not a claim to enforce a contract but an action for breach of contract. Now, there are two branches to

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this question and two branches to the argument. The first is that apart from the point whether this was a contract of indemnity or not the plaintiffs were bound to wait until they had suffered damage and that therefore the period of limitation dated only from the date upon which the properties were sold in execution of the mortgage decree. There is no specific provision in the Contract Act with regard to that matter and therefore, in my opinion, the ordinary rule of common law would prevail which can be stated in the terms of Chitty on Contracts in these words: "The gist of an action for the violation of a contract is the breach of such contract, and not any resulting or collateral damage which may be occasioned thereby; and, consequently, the Limitation Act runs in such cases from the time when the contract is broken, and not from the time at which any damage arising therefrom is sustained by the plaintiff." There has been in the decisions of Indian High Courts with regard to this matter repeated reference to the case of *Battley* v. *Faulkner*(1) which decision is to the same effect as the words which I have read from Chitty on Contracts. The real difficulty about this matter arises by reason of two decisions of this Court, one *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Misser*(2) and the other in the case of *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(3). In the former case the question to be determined was whether (the circumstances being similar) time began to run from the date of the contract under which the payment was to be made or whether at some later date. It is true that the learned Judges there deciding the case came to the conclusion that the time ran from the time when the execution sale took place. But whether the time ran from the date when the action was brought under which or by reason of which the plaintiff had suffered damage or whether at the

(1) (1820) 8 B. & Ald. 288.
(2) (1929) I. L. R. 8 Pat. 860.
(3) (1930) I. L. R. 10 Pat. 451.

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later date, either point of time was within the period of limitation. Therefore the case can be no authority for the point which we have to decide in this case. In a word the effect of that decision is nothing more than the question whether limitation ran from the date of the contract or whether it ran from the later date, and the decision, as I have already stated, was against the earlier date. As regards the decision in *Musammat Rajbansi Kuer's* case(1) on a casual perusal of that case it would appear to be in support of Mr. Janak Kishore's argument. But on a closer analysis of the facts it could be seen that the action there was not an action for compensation for breach of contract in the sense that expression has been used in the case before us, but an action for the return of a sum of money which was left in deposit with a purchaser for a purpose similar to the purpose for which the contract was entered into in the case before us. That is the explanation why throughout the case no mention is made of either of the Articles which we have to consider in this case. In my judgment it is not an authority for the proposition that time does not run until the property is sold in execution of the mortgage decree or, to put it in the words of Mr. Janak Kishore, until the plaintiffs are damnified. If the question is to be determined on the footing that this is a contract of indemnity, in my judgment the same result obtains and the matter can be disposed of by putting this question: Had the plaintiffs brought their action when they were joined as party to the mortgage action, could it have been said that the action was premature? It is true that at this stage it might be difficult to assess the damages. But the fact that a difficulty arose in the assessment of damages would not stand in the way of the plaintiffs nor be an obstacle to their bringing an action claiming indemnity against the defendants. I do not think that in this decision we can go beyond the facts of the present case that when they were joined as parties

(1) (1930) I. L. R. 10 Pat, 451.

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in the action there was a breach of contract or in the alternative they were damnified, and, therefore, limitation ran from that date. That being the position, it seems to me quite clear that the action is barred by limitation as not being within the period of six years under Article 116 of the Limitation Act—whether read with Article 115 or Article 83, as I have already stated, is immaterial.

Reference is made in the judgment of the court below to a decision of the learned Judges of the Calcutta High Court in *Daswant Singh* v. *Syed Shah Ramjan*(1). This decision seems, in his opinion, to have given him assistance in arriving at the conclusion to which he came in the case. But the decision of Mookerjee and Holmwood, JJ. is simply to the effect that Article 116 of Schedule II of the Limitation Act applies to a suit for compensation and the suit is in time if it is commenced within six years from the date when the contract is broken. In this connection I would also like to make an observation with regard to the case to which I have already referred, namely, the decision of Sir Jwala Prasad in *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(2) in which the learned Judge appears to rely upon the decision of the Allahabad High Court in *Ram Ratan Lal* v. *Abdul Wahid Khan*(3) in which the learned Judges there say—" The cause of action in such a case does not arise until demand is made and ignored, or when person to whom the money is to be paid sues the person with whom the contract had been made and consequent loss and damage occurred."

The appeal, in my opinion, succeeds and the plaintiffs' action must be dismissed with costs throughout.

VARMA, J.—I agree.

Appeal allowed.

J. K.

(1) (1907) 6 Cal. L. J. 398.
(2) (1930) I. L. R. 10 Pat. 451.
(3) (1927) I. L. R. 49 All. 603.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1938.

January, 27.

SRINIVAS MULL

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 80—*notice, requisites of—cause of action, statement of.*

Where a notice purporting to be under section 80 of the Code of Civil Procedure, among other matters, stated as follows :—

"That the Deputy Magistrate purporting to act for the District Magistrate of Monghyr has served a notice upon my client, dated the 27th of July, 1933, making a demand of Rs. 2,500-12-6 as an apportioned amount payable by him for upkeep of the additional police force there.

.....

"That my client asserts that the assessment of costs against him is illegal and *ultra vires* and, secondly, the sum assessed is too high,"

and objection was taken that the notice was not proper as all the details had not been given, *held* that the notice did sufficiently comply with the requirements of the section.

To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as damages for breach of contract and damages for negligence.

Appeal by the plaintiffs.

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

Phulan Prasad Varma, for the appellants.

Government Pleader, for the respondent.

WORT, J.—This appeal arises out of an action in which the plaintiffs claimed from the Secretary of State a sum of Rs. 2,500 which they contended had

*Appeal from Appellate Decree no. 242 of 1936, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Monghyr, dated the 30th of January, 1936, confirming a decision of Maulavi Shamsuddin, Munsif of Monghyr, dated the 14th of August, 1935.

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been illegally assessed upon them, the Government purporting to act under section 15 of the Police Act, 1861, as amended by the Act of 1922. The action was dismissed *in limine* as it was held by the courts below that section 80 of the Code of Civil Procedure had not been sufficiently complied with. The contention in support of that decision by the learned Government Pleader is that by the notice purporting to be under section 80 the plaintiffs had not sufficiently stated their cause of action.

The case made out in the plaint, it appears, is shortly this, that the Deputy Magistrate purporting to act for the District Magistrate under sub-section (4) of section 15 had made the apportionment and issued the notice, whereas the section demanded an apportionment and notice by the Magistrate of the district. Now, by the notice which the plaintiffs gave under section 80 they stated as follows in paragraph 5:

> "That the Deputy Magistrate purporting to act for the District Magistrate of Monghyr has served a notice upon my client, dated the 27th of July, 1933, making a demand of Rs. 2,500-12-0 as an apportioned amount payable by him for upkeep of the additional police force there."

The learned Government Pleader relying on a number of well-known decisions on the question of 'what is a cause of action' has contended that what was necessary in the notice was a statement of the facts which went to make up the plaintiffs' cause of action. The decision most often quoted with regard to what is meant by the expression 'cause of action' is in *Cooke* v. *Gill*(1) where Bovill, C. J. and two other Judges were considering the question whether a certain cause of action arose within the jurisdiction of the Lord Mayor's Court of the City of London, and in the course of the judgment by Brett, J. this statement was made: "Cause of action has been held from the earliest time to mean every fact which is

(1) (1873) 8 C. P. 107.

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material to be proved to entitle the plaintiff to succeed ". A similar statement of the law was made in the case of *Read* v. *Brown*(1) by Lord Esher, M. R. where the same question came up for decision—in what place the cause of action arose. There are a number of decisions in India following the decisions to which I have just referred. But it must be remembered that what was being discussed there was not the expression " stating the cause of action ", but what was the cause of action. To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as, damages for breach of contract and damages for negligence. But even supposing that the contention of the learned Government Pleader on this point is to be supported, it will be difficult, in my judgment, to hold that in this case the plaintiffs have not sufficiently stated their cause of action. There are a number of paragraphs in their notice under section 80 which must under the circumstances be held to be irrelevant. But paragraph 5 thereof read together with a later paragraph (paragraph 11) to the effect

> " that my client asserts that the assessment of costs against him is illegal and *ultra vires* and secondly the sum assessed is too high,"

must be held in my opinion to comply with the provisions of section 80 of the Code of Civil Procedure. Whether the plaintiffs make out, in the action when it is tried, what they have asserted in their notice under section 80 and in their plaint is entirely another matter. But although paragraph 5 of the notice may be worded loosely, I think it is impossible to contend that there is not a sufficient indication there, that what is complained of is that the Deputy Magistrate was purporting to act under section 15 of the Police Act for the District Magistrate, and that act by the Deputy Magistrate was illegal and *ultra vires*, and therefore the plaintiffs were entitled to recover under the notice the money paid by them

(1) (1888) 22 Q. B. D. 128.

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WORT, J.

I purposely omit to give any expression of view as to the merits of the plaintiffs' case; but on the question whether section 80 had been complied with in the service of notice by the plaintiffs to the Secretary of State, I unhesitatingly come to the conclusion that there had been sufficient compliance.

For those reasons I would hold that the judgments of the courts below must be set aside and the case remanded to be heard and determined according to law on its merits. Costs will abide the hearing in the court below.

VARMA, J.—I agree. This second appeal arises out of suit no. 233 of 1934 before the Second Munsif of Monghyr. He dismissed this suit and his order was confirmed by the lower appellate court on the ground that notice under section 80 of the Code of Civil Procedure was not served on the Secretary of State. A notice was served but the courts below have held that it does not comply with the requirements of section 80 of the Code because all the details mentioned in the plaint have not been given in the notice. Section 80 of the Code of Civil Procedure makes the service of notice by the plaintiff on the Secretary of State imperative and the section also mentions as to what the notice should contain. The section says that the notice should be served stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims.

The question is, whether the notice that was served by the plaintiffs in this case satisfies the requirements of section 80 of the Code of Civil Procedure. We have looked into the notice and have come across two paragraphs in it which answer the question. Paragraph 5 states:

"That the Deputy Magistrate purporting to act for the District Magistrate of Monghyr has served a notice upon my client, dated

27th July, 1933 making a demand of Rs. 2,500-12-0 as an apportioned amount payable by him for upkeep of the additional police force there."

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Then after a few intervening paragraphs referring to the plaintiffs' position in life and the nature of business that he was carrying on, we come to paragraph 11 which runs as follows:

"That my client asserts that the assessment of costs against him is illegal and *ultra vires* and secondly the sum assessed is too high".

Now, a notice, as I have already mentioned, under section 80 of the Code of Civil Procedure requires, amongst other things, the statement of the cause of action. The question is whether the notice out of which I have quoted paragraphs 5 and 11 has made a statement of the cause of action or not? "Cause of action" has been defined in various decisions and the definition that seems to have been generally accepted is that "A cause of action means every act which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court". Now, I am of opinion on the various decisions mentioned by my learned brother and the accepted definition of "cause of action" that there is no doubt that the cause of action was indicated in the notice that was served by the plaintiffs.

As that is the only point on which the case has been disposed of I agree that this appeal should be allowed and the case remanded for decision on its merits.

J.K.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Manohar Lal and Chatterji, JJ.

1938.

January, 21, 28.

SRIMATI HEMANGINI DEVI

v.

ANIL KRISHNA BANERJEE.*

Annuity-payable under a Will—limitation—Limitation Act, 1908 (Act IX of 1908), section 10 and Schedule 1, Article 123—annuitant dying in interval between the times of payment—representative entitled to apportioned amount—terminus a quo.

A suit to recover the arrears of annuity under the provisions of a Will against an executrix is governed by Article 123 of the Limitation Act, 1908. Section 10 of the Act has no application.

Nistarini Dassi v. *Nundo Lal Bose*(1), *Benode Behari Bose* v. *Nistarini Dassi*(2), *S. K. Venkatasubramania Ayyar* v. *Sivagurunatha Chettiar*(3), *Saroda Pershad Chattopadhya* v. *Brojonath Bhattacharjee*(4), *Hurro Coomaree Dossee* v. *Tarini Charan Bysack*(5), *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*(6) and *Chhatra Kumari Devi* v. *Prince Sri Mohan Bikram Shah*(7), discussed.

Where an annuitant dies in the interval between the times of payment, his representative would be entitled to recover an apportioned amount within twelve years of the date when the annuity was payable to the deceased annuitant.

Appeal by the defendant.

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

Mahabir Prasad (with him *Chaudhuri Mathura Prasad* and *B. C. Sinha*), for the appellant.

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*Appeal from Original Decree no. 47 of 1935, from a decision of Babu Nand Kishore Chaudhuri, Subordinate Judge at Patna, dated the 26th November, 1934.

(1) (1902) I. L. R. 30 Cal. 369.
(2) (1905) I. L. R. 33 Cal. 180, P. C.
(3) (1938) A. I. R. (Mad.) 60.
(4) (1880) I. L. R. 5 Cal. 910.
(5) (1882) I. L. R. 8 Cal. 766.
(6) (1921) L. R. 49 Ind. App. 37.
(7) (1931) 35 Cal. W. N. 953, P. C.

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SRIMATI HEMANGINI DEVI v. ANIL KRISHNA BANERJEE.

S. N. Bose and *S. S. Rakshit*, for the respondents.

MANOHAR LALL AND CHATTERJI, JJ.—This is an appeal by the defendant against the judgment and decree of the learned Subordinate Judge of Patna, dated the 26th November, 1934, by which he decreed the plaintiff's suit which was instituted to recover certain arrears of annuity under the provisions of a Will executed by one Kedarnath Banerji on the 3rd of March, 1914, by which the plaintiff's father was given an annuity of Rs. 300 per annum descendible in the male line generation after generation.

The case of the plaintiff is that on the death of the testator on the 25th of July, 1914, the probate of his Will was granted on the 6th February, 1915, to one Haridas Banerji who was another annuitant and executor named in the Will, that the father of the plaintiff received only one instalment of his annuity in or about the year 1916 but subsequently the annuity was altogether stopped. The appellant Hemangini Devi disputed the genuineness of this Will and applied for the revocation of the probate thereof but the matter was ultimately decided by the High Court in this manner that the lady was added as a co-executrix on the 16th of March, 1920. The plaintiff's father died on the 3rd of May, 1921, and the annuity having been in arrears for a considerable period the plaintiff has instituted this suit for realisation of the annuity from 24th of July, 1915, up to the 24th of July, 1933, the date of the action; there is also a claim for interest on the arrears at 6 per cent. the total claim being fixed at Rs. 5,004. The substantial defence to the action was that the Will did not create any charge for the payment of annuity to the plaintiff or to his father and that the defendant acquired a complete Hindu widow's estate on the death of the husband and any restriction or limitation over the enjoyment of that right was invalid in law. It was denied that any annuity was ever paid to the father of the plaintiff but on the other hand it was asserted that Annada Charan Banerji waived, disclaimed and

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MANOHAR LALL AND CHATTERJI, JJ.

relinquished all benefits arising out of the Will and the plaintiff himself acquiesced in the same. Limitation was also pleaded as a bar to the claim of the plaintiff. The learned Subordinate Judge has held that Annada Babu never gave up his right to the legacy under the Will of Kedarnath Banerji and the plaintiff's right is not barred by the principles of waiver, estoppel or acquiescence. He also held that Annada Babu received his legacy in 1916 and overruled the defence of limitation holding that the suit was governed by the provisions of Article 123 of the Limitation Act and in the result granted a decree to the plaintiffs for such of the sums which were recoverable within 12 years of the date of the action; that is to say, he gave a decree for 12 years' annuity making a total of Rs. 3,600 together with interest at 6 per cent. thereon and corresponding costs. He did not allow any future interest in this case and directed that the decretal amount should be realised from the income of the properties described in schedule II of the plaint. Hence the appeal by the defendant before us.

It is argued by Mr. Mahabir Prasad that upon a true construction of the Will it should be held that the appellant was declared by the Will to be the full owner of the property during her life-time and that the annuities which were mentioned in the Will were dependable upon the sweet will and the pleasure of the lady. He also argued that the right to realise any arrears of annuity was barred by reason of Article 123 of the Limitation Act and not merely the right to receive the arrears beyond 12 years from the date of the action. Upon a careful consideration of the terms of the Will it is clear that the annuity is payable under the express terms of the Will. Paragraph 6 makes the position quite explicit in these words

"That it is incumbent and obligatory upon my wife, Srimati Hemangini Debi.....to carry out the stipulations contained in this Will. Nobody shall have the right to resile from and evade the performance of the stipulations of this Will."

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We also do not agree with the argument of the appellant that the claim is barred by limitation. The express words of Article 123 of the Limitation Act apply to this case and the plaintiff has a right to the payment of those arrears of annuity which were not paid within 12 years of the date of action. Mr. S. N. Bose for the respondent on the other hand argued that by the provisions of section 10 of the Limitation Act no claim for any arrears can ever be barred against the executor because the executor must be held to be an express trustee for the purpose of carrying out the provisions of the Will and that it was not open to the appellant who admittedly was an executrix in possession of the estate to urge that any claim for any arrears was barred. He relied upon the cases of *Nistarini Dassi* v. *Nundo Lal Bose*(1), *Benode Behari Bose* v. *Nistarini Dassi*(2) and *S. K. Venkatasubramania Ayyar* v. *S. Sivagurunatha Chettiar*(3). Reliance is placed upon the decision in *Nistarini Dassi* v. *Nundo Lal Bose*(1) which dealt with the question of limitation under section 10 in these words: "The property was vested in the executors in trust for a specific purpose, that purpose being to pay the legacies, the allowances and the debts. and to pay the residue of the income of the one-third share of the testator's estate to the plaintiff for life. There can be no doubt that the estate did vest in the executors, and it is difficult to say that the purpose for which it was so vested is not specific. Then it is said that the object of this suit is not for the purpose of following in the hands of the executors such property. We think it is: it is clear that the purpose of the suit was to follow the property, which came to the hands of the two executors, to make them account for it and to hand over to the plaintiff as the result of that account what may be found due to her. The case of *Saroda Pershad Chattopadhya* v. *Brojonath*

(1) (1902) I. L. R. 30 Cal. 369.
(2) (1905) I. L. R. 33 Cal. 180, P. C.
(3) (1938) A. I. R (Mad.) 60.

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Bhuttacharjee(1) cited for the appellant is for the foregoing reason distinguishable from cases like the present as has been pointed out by Mr. Justice Wilson in *Hurro Coomaree Dossee* v. *Tarini Charan Bysack*(2). But even if this were not so, so far as it is a suit which is based on the fraud of the defendant Nundo Lal, and virtually the whole suit is based upon that ground, the defendant's objection is met by article 95 of the Second Schedule of the Limitation Act". In our opinion this case is no authority for the proposition as contended for by Mr. Bose. It will be noticed that the suit was instituted by the plaintiff, a childless Hindu widow against the executors of her late husband's Will in which she sought to have certain documents, viz., a deed of trust, an award and a decree, declared fraudulent and void as against her, to have the Will of her husband construed, for an account on the basis of wilful default, for the appointment of a receiver and other consequential relief. The present suit is of an entirely different character. In our opinion the true rule is laid down in the case of *Saroda Pershad Chattopadhya* v. *Brojonath Bhuttacharjee*(1) where the learned Judges held: "To claim the benefit of section 10 a suit against a trustee must be for the purpose of following the trust property in his hands. If the object of the suit is not to recover any property in specie, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years (the period fixed by the Act of 1877) from the time when the plaintiff had first a right to demand it". In other words, section 10 of the Limitation Act has no application to cases of the character which are the subject of consideration by us.

(1) (1880) I. L. R. 5 Cal. 910.
(2) (1882) I. L. R. 8 Cal. 766.

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The next case relied upon is the case of *Benode Behari Bose* v. *Nistarini Dossi*(1) which is a decision of their Lordships of the Judicial Committee affirming the decision of the Calcutta High Court but the question of limitation was neither argued before nor decided by the Privy Council.

In the case of *S. K. Venkatasubramania Ayyar* v. *S. Sivagurunatha Chettiar*(2) the suit was instituted on behalf of the trustees to recover the properties which belonged to the trust but which were in the unlawful possession of the various defendants under alienations made by one Suri Ayyar and in deciding the question of limitation Mr. Justice Stone (with whom Mr. Justice Ramesam agreed) distinctly held that upon the facts of that case "the executors were in all but name trustees. This is really enough to dispose of the matter, for it brings in Article 134. But assuming that I am wrong as to this.....I accordingly reject the conclusion arrived at in (V) and conclude that the alienation was void ab initio, the possession was adverse in 1898 and the suit is barred". In our opinion this case again does not bear out the contention of the appellant. On the other hand it seems to recognise that executors as such are not express trustees. In truth the matter is no longer open to discussion after the decision of the Judicial Committee in the case of *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*(3) where Lord Buckmaster in delivering the judgment stated: "A specific purpose within the meaning of section 10 must be a purpose that is either actually or specifically defined in the terms of the Will or settlement, or a purpose which, from the specified terms can be certainly affirmed. The statement that was made on the

(1) (1905) I. L. R. 33 Cal. 180, P. C.

(2) (1938) A. I. R. (Mad.) 60.

(3) (1921) L. R. 49 Ind. App. 37.

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authority of *Balwant Rao* v. *Puran Mal*(1) that the purpose of following the property in the hands of the trustees referred to at the end of the section must be the purpose of restoring it to the trust which is specified in the earlier part of the section, provides a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section ".

In the case of *Chhatra Kumari Devi* v. *Prince Sri Mohan Bikram Shah*(2) Sir George Lowndes when delivering the judgment of the Privy Council pointed out that " Indian law does not recognize legal and equitable estates.....By that law, therefore, there can be but one " owner ", and where the property is vested in a trustee, the " owner " must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882..... It is clear that such a trust as is relied upon in the present case would not fall within section 10 of the Limitation Act, as it would be impossible to hold that the properties which vested in the appellant under the terms of the Wills which have been proved were so vested for the specific purpose of making them over to the respondent: *see* per Lord Buckmaster in *Khaw Sim Tek* v. *Chuah Hooi*(3)". We, therefore, overrule the contention of Mr. Bose and hold that the provision of section 10 of Limitation Act has no application to the facts of the present case. The suit, therefore, is rightly governed by the provisions of Article 123 of the Limitation Act. The plaintiff has sued for the recovery of the annuities which belonged to him in his own right on the death of his father on the 3rd of May, 1921, and for the arrears of annuities which were due to his father up to the date of his death. The annuities in this case were payable to the father on the 24th of July each year

(1) (1883) I. L. R. 6 All. 1, P. C.
(2) (1931) 35 Cal. W. N. 953, P. C.
(3) (1921) L. R. 49 Ind. App. 37, 43.

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starting from the 24th of July, 1915, which was the anniversary of the death of the testator. The plaintiff's right to receive the annuities accrued to him on the 4th of May, 1921, in his own right and the first annuity would be payable to him on the 4th of May, 1922, and therefore this claim is well within the period of limitation applicable to such a case. Regarding the annuities which remained unpaid to Annada Babu on the date of his death the plaintiff would be entitled to recover only such annuities as were not paid within 12 years of the date of the action. Now the only annuity which was payable to Annada Babu within this period would be the annuity which was running in 1921 and which was payable to him on the 24th of July, 1921. We usefully call attention here to the express provision of section 340(*2*) of the Succession Act which provides that

"If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative."

Therefore the annuity payable to Annada Babu must be apportioned up to the 3rd of May, 1921, and this portion should be paid to the plaintiff as the representative of Annada Babu. The due date of payment of this portion would be the 24th July, 1921. The result is that no part of the claim of the plaintiff as decreed is barred by limitation.

It was next argued that the learned Subordinate Judge should not have allowed interest at the rate of 6 per cent. because the plaintiff himself waited for all these years before he came to court. But this is no ground for refusing interest as the plaintiff has a statutory right to recover interest at the rate of 6 per cent. under section 353 of the Indian Succession Act if his claim is within time. No mistake has been pointed out in calculation on this basis. The respondent in dealing with the question of interest in the cross-objection pointed out that the subordinate court did not give any reason whatever for disallowing pendente lite and future interest and submitted that

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the same should have been allowed to him. It is true that no reasons are assigned in the judgment but the learned Subordinate Judge has expressly stated that "I allow no future interest in this case."

The question of interest pendente lite and future interest is entirely in the discretion of the court, and although the court has not given any reasons whatsoever in the judgment, the circumstances in this case do not justify our interference with the discretion of the learned Subordinate Judge. It appears that it is difficult to make full realisations from this estate, and the learned Subordinate Judge himself has directed the money to be realised from the income of the properties which are in the possession of the lady. We, therefore, do not think that we would be justified in interfering with the discretion of the learned Subordinate Judge when we are going to direct that a receiver should be immediately placed in possession of the estate to pay over the various legacies as well as the arrears due to the plaintiff. The result is that the appeal and the cross-objection must both be dismissed without costs.

Appeal and cross-objection dismissed.

J. K.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

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January, 28.

BANSI SINGH

v.

CHAKRADHAR PRASHAD.*

Landlord and Tenant—lease for homestead or residential purposes granted before the passing of the Transfer of Property Act, 1882 (*Act IV of* 1882), *whether is transferable—estoppel.*

* Appeal from Appellate Decree no 774 of 1935, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Patna, dated the 27th of July, 1935, reversing a decision of Babu Kamini Kumar Banerji, Munsif of Bihar, dated the 27th of November, 1933.

A lease of land taken for homestead or residential purposes granted before the Transfer of Property Act, 1882, was passed and which is not governed by the Bihar Tenancy Act is not transferable without the consent of the landlord. The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidents of the tenancy.

If there had been a representation by the landlord which led the tenant to believe that he had a permanent tenancy and he erected the building there might be an estoppel.

Banee Madhub Banerjee v. *Joy Kishen Mookerjee*(1). *Doorga Pershad Misser* v. *Brindabun Sookul*(2), *Ambica Prasad Singh* v. *Baldeo Lal*(3), *Madhusudhan Sen* v. *Kamini Kanta Sen*(4), *Hari Nath Karmakar* v. *Raj Chandra Karmakar*(5), *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(6), *Safar Ali Mia* v. *Abdul Rasid Khan*(7) and *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(8), reviewed.

Appeal by the defendants.

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

Dr. D. N. Mitter and *G. P. Singh*, for the appellants.

S. M. Mullick and *Hareshwar Prasad Sinha*, for the respondents.

WORT, J.—This appeal is by the defendants arising out of an action in which the plaintiffs claimed possession of certain property which the defendants contended they had purchased under a sale deed of the 15th of May, 1925.

It is unnecessary to state the details of the case considered by the learned Judges in the courts below, because only two points come up for consideration

(1) (1869) 12 W. R. 495.
(2) (1871) 15 W. R. 274.
(3) (1916) 1 Pat. L. J. 253.
(4) (1905) I. L. R. 32 Cal. 1023.
(5) (1897) 2 Cal. W. N. 122.
(6) (1931) 36 Cal. W. N. 149.
(7) (1924) 39 Cal. L. J. 585.
(8) (1926) I. L. R. 54 Cal. 333.

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before us. One I propose to deal with at once for the purpose of disposing of it, and that is whether the learned Judge was in error in not calling for a further commissioner's report having not accepted the evidence of the commissioner nor the report that he made.

Apparently the question upon which the commissioner was asked to report was whether there had been an encroachment on the defendants' land. This was not for the purpose of deciding any question of trespass but for assisting the court in coming to the conclusion whether or not the defence, that consent to transfer the land had been given by the landlords, was true. Shortly the case of the defendants was that such consent had been given and that subsequent to the consent there had been an exchange of land, and the land which the defendants exchanged with the plaintiffs had been built upon by the plaintiffs. This piece of land as far as my memory goes is 6 dhurs in area. That statement in the report of the commissioner as to whether buildings of the plaintiffs were actually upon the land in dispute was not evidence of any agreement on the part of the landlords to the transfer but was mere evidence of the fact whether the buildings stood thereon or not. Had the commissioner's report been directed against any particular point which had been advanced by the parties, even so the report and the evidence of the commissioner himself were nothing more than evidence in the case which the learned Judge in the court below was entitled to accept or reject as he would. Both parties apparently had given evidence on this matter and the fact that the learned Judge did not accept the commissioner's report, in my judgment, does not support the appellants' contention that the judgment of the Judge in the court below is erroneous in point of law and that another commissioner should have been appointed to report with regard to the matter.

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The other question was whether the tenancy was permanent and whether it was transferable. The Judge in the court below has held that it was neither permanent, nor was it transferable, nor was the consent of the landlords given. That being the state of facts as found by the Judge in the court below, Dr. Mitter on behalf of the appellants seeks to contend in this Court that a tenancy not governed by the Bihar Tenancy Act and coming into existence before the Transfer of Property Act (not being governed by that Act also) was transferable without the consent of the landlord. Shortly stated, I should have come to the conclusion, considering the authorities on this matter, that that point could not at this time of day be questioned.

All those who contend otherwise rely in the first place on the statement of Sir Barnes Peacock in *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee*(1). There the learned Chief Justice made this observation :

" Independently of this, speaking for myself, I should say that if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another."

It must be observed that the lower court from which the appeal was preferred had come to the conclusion that the defendant there had proved a local custom to transfer. It is quite obvious, therefore, that the observation of Sir Barnes Peacock, important as it might have been, was not necessary for the purpose of the decision of the case.

The next case to which reference was made was the decision in *Doorga Pershad Misser* v. *Brindabun Sookul*(2) in which it was decided that " Where a proprietor grants permission to a party to build upon

(1) (1896) 12 W. R. 495.
(2) (1871) 15 W. R. 274.

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and occupy a portion of his land, without any reservation of rights to oust him at will or limitation of the grant to him individually, the permission must be construed in the ordinary way; and if the occupation continues for a very long period, the occupant cannot be turned out at a moment's notice or denied the power of transferring his right, though he may be sued for rent". There the learned Judges referred to the case of *Banee Madhub Banerjee*(1) with these words: "A case has been cited by the appellant to be found in XII Weekly Reporter, page 496, in which the late Chief Justice Sir Barnes Peacock has expressed an opinion which seems to us to bear directly upon this case."

Coming from those decisions to the decisions of this Court, in *Ambica Prasad Singh* v. *Baldeo Lal*(2) Mullick and Kingsford, JJ. decided that with regard to tenancies of homestead lands created before the Transfer of Property Act the onus of proof was upon the tenants if they wished to show that they had a right to transfer and relied upon *Madhusudhan Sen* v. *Kamini Kanta Sen*(3), a decision of Sir Francis Maclean.

Taking the other decisions in order of time I come to the case to which I have just made reference and upon which Mullick, J. relied, the facts being these. The Subordinate Judge in the case who heard the appeal from the decision of the Munsif had held that the tenancy in question was neither permanent nor transferable and remanded the case to be heard by the Munsif on its merits. The Munsif gave a decree in favour of the plaintiff. Meanwhile there was an appeal from the remand order to the High Court, and the only question with which the learned Judges in that Court were principally concerned was whether in the circumstances of the case an appeal lay to the High Court from the interlocutory order. But Sir

(1) (1869) 12 W. R. 495.
(2) (1916) 1 Pat. L. J. 253.
(3) (1905) I. L. R. 32 Cal. 1023.

Francis Maclean proceeds to observe that the case had also been heard on the merits. He pointed out that the only question which was open to the appellant in second appeal was the question of the transferability of the tenancy and, as the question of permanency was a question of fact, it could not be disturbed by the High Court. The only observation that could be considered in any way in point with regard to the question before us in this case is the statement of the learned Judge to this effect: "That the incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands before the passing of the Transfer of Property Act was held in *Hari Nath Karmakar* v. *Raj Chandra Karmakar*(1)" and the learned Judge goes on to observe that they had taken that view in certain other cases which the learned Judge there mentioned. He then refers to the observation of Sir Barnes Peacock to which I have already made reference, and makes this observation: "The tenure in that case was one for building purposes and according to the custom of the district, which was proved by evidence, it was assignable as well as heritable. It has not been proved in this case that any such custom exists. There are no doubt certain observations of Chief Justice Peacock in that case, which give support to the appellant's contention. They were, however, unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal".

The contention of Dr. Mitter, as I understand it, is that this right of transferability exists in cases in which the land is let for residential purposes in contradistinction to land let for homestead purposes. This matter was considered in a decision of the Calcutta High Court in *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(2) where again reference

(1) (1897) 2 Cal. W. N. 122.

(2) (1931) 36 Cal. W. N. 149.

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is made to the observation of Sir Barnes Peacock, and the learned Judge, delivering the judgment of the Court, made a reference to the observation of Maclean, C. J. to the effect "They were however unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal", and then, later on in the judgment makes this observation: "Mr. Roy attempts to maintain that 'lease for homestead' means homestead of an agricultural tenant which would be non-transferable but the lease for purposes of residence would be transferable in view of the observation of Sir Barnes Peacock. In my judgment there is no authority for making a distinction between a lease for homestead and a lease for residential purposes. In fact the cases cited above and similar cases were all dealing with leases of ordinary homestead for residential purposes. A lease for homestead may be a lease for residential purposes of such a nature that the parties intended that *pucca* buildings might be built upon the land at some expense by the tenant and it is reasonable to deduce from this fact a contract which though not put into writing but was impliedly understood that the lessee would have a heritable and transferable right in the land."

It is pointed out in a number of other decisions the question whether the tenancy allowed to be built upon may be in the nature of an estoppel but those decisions cannot in my judgment have any reference to the question whether a lease or tenancy being of a permanent character is also transferable. In the case of *Safar Ali Mia* v. *Abdul Rasid Khan*(1) Walmsley and Mukerji, JJ. had again to consider this question. The effect of their decision was that a permanent tenancy created before the passing of the Transfer of Property Act for the purpose of habitation cannot be transferred when pucca buildings have not been erected on the land leased. The learned Judge quoted with approval the decision in *Ambika Prasad Singh*

(1) (1924) 39 Cal. L. J. 585.

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v. *Baldeo Lal*(1) in these words: "With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of judicial decision has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable, and that the only exception to the above rule is when there has been an erection of pucca buildings or a standing by on the part of the landlord while the tenant spends a large sum of money upon the land". The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidence of the tenancy. At most it could be said that if there had been a representation by the landlord which led the tenant to believe that he had a permanent tenancy and therefore erected buildings, there might be an estoppel although their Lordships of the Judicial Committee of the Privy Council negatived this argument in *Ariff's* case(2) (which dealt with the Transfer of Property Act).

One of the latest decisions which deals generally with the matter is the case of *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(3). There the case was of a permanent lease of homestead land and the learned Judge decided that a tenancy of homestead land created before the passing of the Transfer of Property Act was not transferable by law. There was further reference in this case to the statement of Sir Barnes Peacock, and the learned Judges made this observation "In our opinion, these observations of Peacock, C.J. are opposed to the settled view of this Court, and cannot now be regarded as correctly stating the law." It seems to me to be clear that under the general law one of the incidents of a tenancy whether permanent or otherwise in India prior to the Transfer of Property Act or the Bengal Tenancy Act is non-transferability; and, as Mullick, J. pointed

(1) (1916) 1 Pat. L. J. 253.
(2) (1931) L. R. 58 Ind. App. 91.
(3) (1926) I. L. R. 54 Cal. 333.

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out in *Ambica Prasad Singh's* case(1); if the tenant contends that the tenancy carries with it the incidents of transferability, the onus is upon him to show it.

For these reasons, in my judgment, the decision of the Judge in the Court below is right, the appeal fails and it must be dismissed with costs.

VARMA, J.—I agree. Dr. Mitter cited several authorities before us in order to establish that the tenancy with which we have to deal was transferable. He relied upon the decision in *Banee Madhub Banerjee* v. *Joy Kishen Mookerjee*(2), chiefly upon the observation made by Sir Barnes Peacock towards the end of his judgment. I may mention that this observation was relied upon in the subsequent case of *Doorga Pershad Misser* v. *Brindabun Sookul*(3) but the decision in *Banee Madhub Banerjee*(2) ultimately turned upon the question of custom of transferability of such tenures in the locality from which the case came. But soon after doubts were expressed about his observation of Sir Barnes Peacock in *Madhusudhan Sen* v. *Kamini Kanta Sen*(4) where it was declared that this observation was a mere obiter. Dr. Mitter has drawn our attention to a certain passage in *Sulin Mohan Banerjee* v. *Rajkrishna Ghose*(5). That is a passage in the judgment of Mookerjee, A.C.J., who after giving a number of cases of the Calcutta High Court, said: "The only recognized exception of this rule is that stated in the case of *Bani Madhab Banerjee* v. *Joy Krishna Mookerjee*(2). In that case, Sir Barnes Peacock, C.J. observed that if one man grants a tenure to another for the purpose of living upon the land, the tenure, in the absence of evidence to the contrary, is assignable. The same view was subsequently taken in the case of *Durgaprasad Misser*

(1) (1916) 1 Pat. L. J. 253.
(2) (1869) 12 W. R. 495.
(3) (1871) 15 W. R. 274.
(4) (1905) I. L. R. 32 Cal. 1023.
(5) (1920) 33 Cal. L. J. 193.

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v. *Brindaban Sookul*(1). In the case before us, the tenancy had not been created for the purpose of residence. Consequently, we must hold that the tenancy was not transferable ". From this Dr. Mitter wanted us to conclude that the observation made in *Banee Madhab's* case(2) was followed in *Sulin Mohan's* case(3). But apart from the other decisions of the Calcutta High Court, reading the passage itself, it is clear to me that Mukherjee, A.C.J. held that they were dealing with a tenancy that was not transferable. All that the decision mentions is that there is a list of cases deciding the question in one way and these two cases decide in another way; but the facts of the case in which their Lordships were delivering judgment were different from the facts mentioned in *Sulin Mohan's* case(3), and I am strengthened in this view of mine by a decision in the case of *Sarada Kanta Sen Gupta* v. *Nabin Chandra Sen Gupta*(4) where Page, J. said: " And we are of opinion that the Acting Chief Justice in *Sulin Mohan's* case(3) when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above ". The most recent case of the Calcutta High Court is that of *Kamala Mayee Dasi* v. *Nibaran Chandra Pramanik*(5). In that case most of the authorities cited before us have been referred to, and the distinction which Dr. Mitter has been trying to draw for the purpose of the present case has been shown to be a distinction without a difference. The passage has been referred to by my learned brother but as this point appealed to me for some time I was at some pains to find out if the distinction pointed out by Dr. Mitter really existed, that is to say, the distinction between a homestead lease and a lease for residential purposes. The interpretation Dr. Mitter

(1) (1871) 15 W. R. 274.
(2) (1869) 12 W. R. 495.
(3) (1920) 33 Cal. L. J. 193.
(4) (1926) I. L. R. 54 Cal. 333.
(5) (1931) 36 Cal. W. N. 149.

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was trying to put upon the expression "homestead lease" is that it may be something different from a lease for residential purposes. This was not accepted by Suhrawardy, J. in *Kamala Mayee Dasi's* case(1). He says: "In my judgment there is no authority for making a distinction between a lease for homestead and a lease for residential purposes. In fact the cases cited above and similar cases were all dealing with leases of ordinary homestead for residential purposes", and then he also says that the observation made in the case of *Banee Madhub Banerjee*(2) "was against the current of decisions" in the Calcutta High Court and therefore he did not like to rely upon it. So far as the Patna decision is concerned it is a clear authority for the proposition upon which the lower appellate court has relied: I mean the case of *Ambica Prasad Singh* v. *Baldeo Lal*(3).

On the question of acquiescence, the finding is that it has not been proved. The only remark made by Dr. Mitter is that if the Court below was not satisfied with the evidence of the commissioner he ought to have appointed another commissioner to inspect the locality and submit a report. But the commissioner's report according to the Code itself is nothing more than a piece of evidence and the Court was perfectly entitled to rely on that evidence. The finding, therefore, on the question of acquiescence is a finding of fact.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

J. K.

(1) (1931) 36 Cal. W. N. 149.
(2) (1869) 12 W. R. 495.
(3) (1916) 1 Pat. L. J. 253.

APPELLATE CRIMINAL.

Before Dhavle and Chatterjee, JJ.

1938.

February, 7, 8, 9.

KING-EMPEROR

v.

MUSAMMAT JAGIA.*

Evidence Act, 1872 (*Act* 1 *of* 1872), *section* 26—*confession to Police Officer—village chaukidar, whether is a Police Officer—confession made during the temporary absence of village chaukidar, if admissible.*

The village chaukidar having arrested the accused, tied her in a peg and leaving her in the custody of another person left for the police-station. This man untied the accused and she made the confession to him.

Held, that the village chaukidar appointed under the Village Administration Act of 1872 is a police officer within the meaning of section 26 of the Evidence Act, 1872.

Queen-Empress v. *Salemuddin Sheik*(1), *Queen-Empress* v. *Indra Chandra Pal*(2) and *Radha Kishun Marwari* v. *King-Emperor*(3), reviewed.

Held also that the temporary absence of the chaukidar leaving the accused in the custody of another person did not terminate his custody.

Empress v. *Lester*(4), *Emperor* v. *Sheo Ram*(5) and *King-Emperor* v. *Rambadan Koeri*(6), followed.

The policy of the Legislature appears to be that any statement in the nature of a confession made by an accused while under the custody and control of a police officer should be excluded from evidence. This is no doubt a wholesome policy and this policy would be defeated if it were that the

* Death Reference Case no. 58 of 1937 and Criminal Appeal no. 339 of 1937, from a decision of R. B. Beevor, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 20th December, 1937.

(1) (1899) I. L. R. 26 Cal. 569.
(2) (1898) 2 Cal. W. N. 637.
(3) (1932) I. L. R. 12 Pat. 46, F. B.
(4) (1895) I. L. R. 20 Bom. 165.
(5) (1928) A. I. R. (Lah.) 282.
(6) (1935) Death Reference 45 of 1935 (Unreported).

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section is not to apply when the arrest by the police officer has been illegal. Whether the arrest is legal or illegal the mischief which section 26 is intended to avert remains all the same.

Per DHAVLE, J.—Little, if any, importance would be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends.

Nazir Jharudar v. *Emperor*(1), 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 Chatterji, J.

Syed Ali Khan, for the appellant.

Assistant Government Advocate, for the Crown.

CHATTERJI, J.—This is a reference under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death passed upon Musammat Jagia of village Parori, police-station Sitamarhi, under section 302 of the Indian Penal Code. She has also filed an appeal, which has been heard along with the reference.

The accused was charged with having murdered a boy named Cholhwa Chokra, aged about four years, on the 3rd October, 1937, by drowning him in the Lakhandai river which flows on the north of the village Parori. The deceased boy's father Khublal (p. w. 1) and the accused Musammat Jagia's husband Lakhan are separated cousins living, however, in the same compound. About eleven or twelve days before the occurrence Musammat Jagia was accused by Khublal of having stolen Rs. 3 from his machan. This led to a quarrel between the two families. The matter was referred to a panchayeti. The panches decided that Lakhan would place Rs. 3 in their presence and Khublal would, if his story of theft was true, take a special oath and pick up the money. This

(1) (1905) 9 Cal. W. N. 474.

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was done and Khublal took the money. Upon this Musammat Jagia felt very much offended and she, according to her own case, abused not only Khublal but the panches also and, according to the prosecution, abused Khublal only. On the morning of the day of occurrence the deceased boy after taking food went out of the house and it was supposed by his parents that he went out for playing with other boys as usual. Khublal, the father, who appears to be a day-labourer, went to the fields for work and returned home at about 10 in the morning and took his bath and food. Then the parents noticed that the boy had not still returned. Khublal then went to search for him and was told by Musammat Rupiya (p. w. 2) whose house is at a distance of about 260 paces to the north of his house that she had seen the accused taking the boy towards the gachi which is further north of her (Musammat Rupiya's) house. Khublal then came back and questioned the accused about the boy. She replied that she had turned the boy back from the gachi. Khublal again went out in search of the boy. He met Sant Mahto (p. w. 4) who told him that while he was sitting in his guava gachi which is to the north of the gachi previously mentioned he heard the screams of a boy from the river which is to the farther north and shortly afterwards he saw the accused coming back from the direction of the river by the side of his guava gachi. Khublal then went towards the river and proceeded along its bank. About the evening he met Janak Mahto (p. w. 7) who told him that in the morning he had noticed the body of a boy floating in the river. Khublal could not find any trace of his boy and returned home. He went to the chaukidar who was then absent. The chaukidar subsequently came to his house and after hearing everything from him arrested the accused. He requested the chaukidar to accompany him to the thana. When the chaukidar left for the thana he tied the accused to a cattle-peg in the house of one Dhanraj and left her in charge of Babulal (p. w. 10). Khublal and the chaukidar reached the thana that night at a very late

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hour and the first information was lodged by Khublal on the following morning. During the night when the accused was in charge of Babulal it appears that he untied her hands and then she is said to have confessed her guilt in the following words: "*Ham mar deli thik. Hamara jan bache so upaya karo*". This statement is said to have been made to Babulal when nobody else was present. The Sub-Inspector came to the village next morning and started investigation. He took the accused to the place from where she said she had sent back the boy. The Sub-Inspector also went to the river bank and found some foot-prints on the way at different places which appeared to indicate that towards the direction of the river an adult and an infant had gone whereas at the time of return from the river there was only an adult. At a certain place on the bank of the river he marked only two foot-prints, one of an adult and another of an infant. I should mention here that the evidence shows that that morning, before the Sub-Inspector came to the village, there was rain. The river was also in flood. The same day, i.e. the 4th October, 1937, in the afternoon the dead body of the boy was recovered from the river at a place 3½ or 4 miles down stream from the supposed place of occurrence. The body was sent for post-mortem examination, but the doctor found no definite signs of drowning and could give no definite opinion regarding the cause of death. On the 6th October, 1937, the Sub-Inspector submitted a *namokamal* charge-sheet under section 302, Indian Penal Code. On the 7th October, 1937, the accused was committed by the Subdivisional Magistrate to the court of session. Some of the foot-prints which the Sub-Inspector had noticed were preserved, where possible, and those were sent to the foot-print expert (p. w. 11) for examination. This expert submitted his report after the commitment order had been passed and therefore his evidence was not before the committing Magistrate. He, however, gave evidence before the Sessions Court which went to support the prosecution story.

The learned Sessions Judge disagreeing with the assessors has found the accused guilty of murder. The evidence on which the prosecution rests may be divided under two heads (*1*) the extra-judicial confession said to have been made by the accused to Babulal and (*2*) the circumstantial evidence. The circumstantial evidence consists of the following facts :—

(*1*) On the morning of the day of occurrence Rupiya (p. w. 2) and Musammat Phulbatia (p. w. 3) whose houses are at a distance of about 260 paces to the north of the house of the accused saw her taking the boy to the gachi on the north of their houses.

(*2*) Sant Mahto (p. w. 4) while sitting in his guava gachi at a short distance from the river heard the screams of a boy from the river and shortly afterwards he saw the accused coming back hurriedly from the direction of the river.

(*3*) Foot-prints were noticed at two different places on the way to the river which would indicate that an adult and an infant had gone towards the river but an adult came back alone from the river.

I shall first deal with the confession. It rests entirely on the uncorroborated testimony of Babulal (p. w. 10). It appears that the exact words which were said by the accused to him were told by him for the first time before the Sessions Court. The accused denied having made the confession. In dealing with an extra-judicial confession, particularly when it is not anywhere recorded, the Court must be very careful and should not act upon it unless it is proved by evidence of the most reliable character. Babulal in his statement before the Committing Magistrate said—

"I opened one of the hands out of the knot and asked her to speak the truth. She admitted that she had drowned the boy and asked me for advice as to how she would escape from this crime and be saved".

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In the Sessions Court he says

"I released both the accused's arms from the rope during the night. I did not state before the Magistrate that I released one of her hands from the knot".

Further he states—

"I did not state before the Sub-Inspector that at first the accused denied about the child, but when confronted with Rupiya admitted".

We have looked into the police diary and found that he did make such a statement before the Sub-Inspector and the Sub-Inspector also says the same thing in his evidence. It is thus evident that the witness Khublal changes his statement from time to time on material points, obviously with some purpose. He cannot therefore be regarded as a reliable witness. Relying on the sole testimony of such a witness I cannot hold that the confession has been proved. The confession therefore goes out.

There are also some legal objections to the admissibility of the confession. It was contended on behalf of the appellant that the alleged confession having been made while the accused was in the custody of the chaukidar could not be admissible under section 26 of the Evidence Act. Now, two questions arise: first, is the chaukidar a police officer within the meaning of section 26 of the Evidence Act; secondly, whether when the confession was made, the accused could be said to be in the custody of the chaukidar, because, as I have already said, the confession is said to have been made not in the presence of the chaukidar, but after he had left for the thana and while she was in charge of Babulal. On the question whether the chaukidar is a police officer within the meaning of section 26 of the Evidence Act, it was contended by the learned Assistant Government Advocate appearing on behalf of the Crown that nobody can be said to be a police officer unless he is enrolled as a member of the police force, as provided for in the Police Act (Act V of 1861). This contention was sought to be supported by the observations of Agarwala, J. in the

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Full Bench decision of this Court in *Radha Kissen Marwari* v. *King-Emperor*(1). But turning to section 21 of that Act, which provides that—

> "Nothing in this Act shall affect any hereditary or other village-police-officer, unless such officer shall be enrolled as a police officer under this Act. When so enrolled, such officer shall be bound by the provisions of the last preceding section. No hereditary or other village-police-officer shall be enrolled without his consent and the consent of those who have the right of nomination",

it appears that there is a class of village-police-officers though they may not be enrolled as police-officers under Act V of 1861. Then if we turn to section 27 of the Village Administration Act (Bihar and Orissa Act III of 1922)—an Act which largely replaces the Village Chaukidari Act of 1870—we find that that section which specifies the powers and duties of a chaukidar appears in Part III which is under the heading "Village Police". This puts the matter beyond any doubt. It is obvious that a chaukidar is regarded as a member of the village police and therefore he is a village-police-officer. It cannot be disputed that a village-police-officer is a police officer and in my opinion certainly he is so within the meaning of section 26 of the Evidence Act. Here I should make it clear that a chaukidar may not be a police officer within the meaning of the Code of Criminal Procedure which lays down the powers to be exercised by a police officer for the purposes of that Code. In support of my view that a village chaukidar is a police officer within the meaning of section 26 of the Evidence Act, reference may be made to *Queen-Empress* v. *Salemuddin Sheikh*(2) and *Queen-Empress* v. *Indra Chandra Pal*(3). In the Full Bench decision of this Court [*Radha Kishun Marwari* v. *King-Emperor*(1)] the question arose whether an Excise Sub-Inspector is a police officer within the meaning of section 25 of the Evidence Act, but incidentally in the course of the

(1) (1932) I. L. R. 12 Pat. 46, F. B.
(2) (1889) I. L. R. 26 Cal. 569.
(3) (1898) 2 Cal. W. N. 637.

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judgments in that case certain observations were made relating to a chaukidar. Fazl Ali, J., however, expressed a different view from Agarwala, J. Anyhow the question whether a village chaukidar is a police officer did not arise in that case and any observations on the point made by a single Judge cannot be of any binding authority.

Then comes the question whether the accused could be said to be in the custody of the chaukidar when she is said to have made the confession. The point taken was that the chaukidar had already made over the accused to Babulal and while she was under the control not of the chaukidar but of Babulal, a private individual, she could not be said to be in the custody of the chaukidar. Reading the evidence of the chaukidar and also of Babulal, it appears that the former had made over charge of the accused to the latter during the temporary absence of the former. It cannot, therefore, be said that the chaukidar, although he was not physically in possession of the person of the accused, had not the custody. It seems to me that when once an accused is arrested by a police officer and is in his custody, the mere fact that for some purpose or other he happens to be temporarily absent and during his temporary absence leaves the accused in charge of a private individual does not terminate his custody—the accused shall be deemed to be still in police custody. I am supported in this view by *Empress* v. *Lester*(1) and *Emperor* v. *Sheo Ram*(2). There is also an unreported decision of this Court in *King-Emperor* v. *Rambadan Koeri*(3) decided by James and Saunders, JJ. in which it has been held that during the temporary absence of a police officer who arrested an accused and who during his absence made over the accused to somebody else, the accused would not cease to be in the custody of that police officer.

(1) (1895) I. L. R. 20 Bom. 165.
(2) (1928) A. I. R. (Lah.) 282.
(3) (1935) Death Ref. 45 of 1935 (Unreported).

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It was argued by the learned Assistant Government Advocate that in this particular case the chaukidar had no authority to arrest the accused and the arrest was illegal because it was not a case where he had seen the accused actually committing the crime or any of the other conditions under which he could exercise his power of arrest as laid down in section 27 of the Village Administration Act (III of 1922) existed. The arrest being illegal, the chaukidar's custody also was illegal, and therefore his illegal custody came to an end as soon as he handed over the accused to Babulal. But reading section 26 of the Evidence Act it seems to me that these considerations are quite immaterial. The policy of the Legislature appears to be that any statement in the nature of a confession made by an accused while under the custody and control of a police officer should be excluded from evidence. This is no doubt a wholesome policy and this policy would be defeated if we were to hold that the section is not to apply when the arrest by the police officer has been illegal. Whether the arrest is legal or illegal the mischief which section 26 is intended to avert remains all the same. In my opinion, therefore, the alleged confession is inadmissible under section 26 of the Evidence Act.

Now coming to the circumstantial evidence, the first point which deserves notice is that Musammat Phulbatia (p. w. 3) says that when she saw the boy going with the accused in the morning he was running. Neither this witness nor Musammat Rupiya (p. w. 2) says that the accused was then catching hold of the boy. This does not show that it was the accused who was really taking the boy. It may be that the boy was going of his own accord for playing as he used to do. The accused also happened to go at the same time with a basket to collect fuel from the orchard as would appear from the first information. Therefore the evidence is lacking to show that it was the accused who was taking the boy. The next circumstance is that Sant Mahto (p. w. 4) says that in the morning

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while he was in his gachhi he heard the screams of a boy towards the river and soon afterwards saw the accused coming back hurriedly from the direction of the river. On this point I find that there has been some improvement made by the witness in his evidence, because in the first information it is simply stated that

> "he had heard the crying of a boy twice and that he had also seen Lakhan's wife *coming back* from the direction of the river".

If the accused had come hurriedly her movement would naturally be suspicious and if that was really a fact, the witness would not have omitted to mention it to Khublal when the latter in an anxious mood enquired of him about his missing son, and the latter in his turn must have mentioned the fact in the first information. Then as regards the place where the Sub-Inspector found one foot-print of an adult and another foot-print of an infant on the edge of the river just touching the water, those foot-prints have not been preserved and it is very difficult to connect those foot-prints with those of the accused and the deceased boy. It had rained in the morning that day and the river was also in flood. In my opinion there is practically no evidence to show that the accused had taken the boy to the river at the place where the Sub-Inspector noticed those two foot-prints. As regards the foot-prints which appeared at two different places to the east of the gachhi of Sant Mahto (p. w. 4) one set indicating that a child and an adult had gone towards the river and the other indicating that an adult only came back from the direction of the river, they would, at best, show, if they were really connected with the accused and the boy, that the accused might have gone towards the river with the boy and the accused came back alone. But there is nothing to show that the accused accompanied the boy right up to the river bank. On the whole the circumstances taken together may at best create some suspicion against the accused but to my mind they fall far short of affording conclusive proof that she drowned the boy. It is quite possible that the boy went of his own accord to the

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river and was accidentally drowned without being noticed by the accused at the time of drowning and even if she actually saw him drowning she might not like to make any attempt herself to save him and would naturally come away without raising any cry lest she might be put to trouble by the boy's parents with whom she was on bitter terms of enmity. The learned Sessions Judge seems to think that the conduct of the accused is conclusive on the point. I do not agree with him. He assumes that the accused actually took the boy to the river bank at the spot where the Sub-Inspector noticed only two foot-prints, one of an adult and another of an infant. But where is the legal evidence to justify that assumption? In order to convict an accused of murder we must be satisfied that the circumstantial evidence is of such a nature that it would be inconsistent with his innocence. In this case the circumstantial evidence is by no means of that character. I am therefore not prepared to hold that the charge has been proved against the accused.

I should like to add a few words regarding the evidence of the foot-print expert. The learned Sessions Judge himself does not place much reliance upon it. It should be borne in mind that the Sub-Inspector went to the locality nearly 24 hours after the alleged occurrence, that in the morning there was rain before he arrived there and that the foot-prints were seen on ploughed field. I have read the evidence of the expert and also compared the foot-prints; and, speaking for myself, I feel the greatest hesitation in accepting the expert's opinion. If we compare the two prints of the left foot not only do they differ in size but they also differ in regard to the position of the toes. I have therefore left out of consideration the evidence of the expert while dealing with the circumstantial evidence.

In the result I would discharge the reference, set aside the conviction and sentence and acquit the accused.

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DHAVLE, J.—I agree.

Particular care is necessary in dealing with cases of circumstantial evidence bolstered up by extra-judicial confessions. In the present case the first important circumstance found against the accused is that she was seen taking the boy Chulhwa towards the river. If this rests on the evidence of Rupiya and Phulwatia (p. ws. 2 and 3), it must be observed that Phulwatia, who speaks of the boy being taken by the accused, admits in cross-examination that the boy was running when she saw him, and that Rupiya merely speaks of the boy going with the accused. We have it from the first information that the boy went out of the house to play in the tola after taking food, and it is by no means certain on the evidence of Rupiya and Phulwatia that the accused was actually *taking* the boy northwards when she was seen by these witnesses. Even according to the first information, when the villagers enquired from the accused, she replied that Chulhwa had gone with her when she was going to collect fuel in the orchard, but she made him return from the orchard. The next sentence in the first information, I observe, is that the orchard lies on the bank of the river Lakhandai towards the north of the village, which suggests that she may have had a perfectly innocent business as far as the bank of the river. As regards the return of the accused from the riverside, as my learned brother has pointed out, though Sant Mahto in his evidence speaks of seeing the accused hurrying from the north-east from the direction of the river, the story in the first information is merely that Sant had seen the accused coming back from the direction of the river. Differences on such points as whether the boy was taken by the accused or was merely going with her and whether the accused was hurrying from the north-east or merely coming back from the direction of the river (which ran along the north of the village) are not immaterial in a case where the correct inference to be drawn depends on minute details such as would not

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matter very much in a case of direct evidence. The learned Sessions Judge has laid a great deal of stress on the alleged original denial of the accused that she had taken the boy that morning; but this original denial is not to be found either in the first information or in the evidence given by Khublal Koeri in his examination-in-chief. It is curious that it was only in answer to a question in cross-examination that Khublal said that it was correct that when he first questioned the accused she denied all knowledge, but when others questioned her, she said that she had sent the boy back from the gachhi. Even this statement made by the complainant Khublal in cross-examination does not, moreover, seem to be altogether supported by the evidence. Khakhan Mahto, who is mentioned in the first information as among the people who were present when the accused was questioned, speaks of having been told by Khublal that the accused had denied taking away his son; but that is not Khublal's story at all. Khakhan also says that when he questioned the accused,

> "at first she denied but then said she had taken the boy but had sent him back from the gachhi."

The omission of this denial from the first information and the conflict of evidence on the point makes it impossible to attach any sensible weight to it. As to Babulal, the discrepancies in his evidence do not appear to be properly explicable on the theory of a confession. We have ascertained, as my learned brother has stated, that he did mention to the Sub-Inspector—notwithstanding his denial in cross-examination—that "at first the accused denied about the child, but when confronted with Rupiya admitted." It is true that Babulal is not specifically named in the first information or in the other evidence as present on the occasion, but his denial in cross-examination of the statement he did make to the Sub-Inspector can only be due to a desire, I think, to minimise his connection with the case as far as possible. He spoke in the commitment proceedings of releasing one of the

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hands of the accused and asking her to speak the truth, whereupon she admitted that she had drowned the boy and

"asked me for advice as to how she would escape from the crime and be saved."

In his examination-in-chief in the Court of Sessions he does not say anything about asking her "to speak the truth", but says that she made the confession when she was untied, and in his cross-examination he claims to have released both her arms from the rope on that occasion, denying that he had stated before the Magistrate that he had released only one of her hands from the knot. I cannot help regarding the contradictions or variations made by the witness in the Court of Sessions as made with a purpose. They must make the witness unreliable; and in any case, as Maclean, C. J. observed in *Nazir Jharudar* v. *Emperor*(1) little, if any, importance should be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends. Little importance was apparently attached by the police and the Magistrate to the confession spoken to by Babulal, for they did not even take the trouble to note the exact words of the confession as given by Babulal. No witness is said to have been present when the accused confessed to Babulal, who, moreover, claims to have informed Khakhan of it (and apparently Khakhan alone) at a time which conflicts with Khakhan's story before the Magistrate. But a far greater objection to the confession arises on sections 24 and 26 of the Evidence Act. The learned Sessions Judge says about section 24 that he can find nothing in Babulal's evidence to show that any inducement, threat or promise was offered to the accused. But the strong indications afforded by the circumstances must not be left out of account: the accused had been tied by both hands to a cattle peg and was feeling pain and wanted to sleep; she therefore asked her custodian to release her; he then released one of her hands and asked her to speak the truth; and this

(1) (1905) 9 Cal. W. N. 474.

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was followed by the confession. Though it is not shown that Babulal expressly offered any inducement, threat or promise, the accused must in the circumstances have plainly been afraid of being tied up by both hands again before she confessed. It is true that this will not by itself be within the letter of section 24 of the Evidence Act, as even a promise to strike off a prisoner's hand-cuffs, having no reference to the charge against him, has been held not to affect the admissibility of a confession obtained thereby. But even so, the confession could not be regarded as voluntary and could convey but little weight. Then there is section 26 of the Evidence Act which provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. The learned Sessions Judge doubts if the section can apply if, as he thinks, the arrest of the accused by the chaukidar and her custody were illegal; but the section cannot be read as confined to the legal custody of a police officer, for it would be surprising if confessions in legal police custody were excluded while confessions in police custody which could not be justified were outside that bar. The learned Sessions Judge did not apparently doubt that a chaukidar is a police officer. It is true that in *Radha Kishun Marwari* v. *King-Emperor*(1) Agarwala, J., held that no person is a police officer unless he is enrolled in, or appointed a member of, the police force or is declared by statute to be a member of that force. This, however, does not seem to have been the view of the majority of the Full Bench that decided the case; and Fazl Ali, J. observed that the term police officer has not been defined anywhere, but that there can be no doubt that section 1 of the Police Act is not exhaustive and that the term is wide enough to include not only the persons enrolled under the Police Act but some others. Agarwala, J. referred to the decision in *Queen-Empress* v. *Salemuddin Sheikh*(2)

(1) (1932) I. L. R. 12 Pat. 46, F. B.
(2) (1899) I. L. R. 26 Cal. 569.

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in which it was held that a confession made to a chaukidar is excluded by section 25 (which excludes confessions made to police officers), and observed that in that decision no reference was made to the earlier decision in *Queen-Empress* v. *Bepin Behari Day*(1) that section 25 does not exclude a confession made to a chaukidar. But there is another decision, *Empress* v. *Indra Chandra Pal*(2), to which my learned brother has referred in which O'Kinealy and Henderson, JJ. expressed their dissent from the view taken in *Bepin Behari's* case(1) and referred to Act I of 1882 amending the Chaukidari Act, and Regulation XX of 1817 in support of the view that a chaukidar is a police officer. The Village Administration Act (B. & O. Act III of 1922) which applies to the area with which we are concerned and largely replaces the Chaukidari Act of 1870 deals in Part III with "Village Police", and it is in this part that we find section 27 laying down the powers and duties of dafadars and chaukidars. This is the latest indication that we have been able to find of the light in which the Legislature regards the village chaukidar. A chaukidar's powers as a village police officer are, of course, to be found in the Chaukidari Act or the Village Administration Act, and not in the general provisions of the Code of Criminal Procedure; but sections 25 and 26 of the Evidence Act speak of a police officer without reference to any particular Act, nor is there anything in the decision of the Full Bench in *Radha Kishun's* case(3) which compels us to hold that a chaukidar is not a police officer for the purpose of these sections of the Evidence Act, the point decided in that case being that an Excise Officer is not a police officer within the meaning of section 25 of the Evidence Act, even though under the Dangerous Drugs Act he had power to arrest, search and investigate. The learned Sessions Judge is right in holding that the woman's

(1) (1897) 2 Cal. W. N. 71.

(2) (1898) 2 Cal. W. N. 637.

(3) (1932) I. L. R. 12 Pat. 46, F. B.

arrest by the chaukidar was illegal; so was her custody by him. But, as I have already pointed out, the illegality does not affect the operation of section 26. Nor can it be rightly said that the chaukidar's custody was at an end when the accused was made over to Babulal. His custody could only terminate in one of two ways, viz., either by his releasing her or by his handing her over to the regular police or a Magistrate. It was not terminated when he made the woman over to Babulal, for there cannot be any doubt that on his return he expected Babulal to restore the custody of the woman to him. There is also authority as my learned brother has shown, for the view that police custody does not cease to be so merely on account of the temporary absence of the police officer. The confession should therefore have been excluded, and could in any case carry but little weight, as I have already shown. The other circumstances relied upon by the learned Sessions Judge, as already shown, appear to have been overrated at point after point and to fall short of excluding a reasonable possibility that the boy was accidentally drowned, if indeed he did go with the accused to the river. She might quite easily have been afraid to speak after the accident, and it is impossible to say with confidence that she would have called out or tried to get help in all the possible circumstances of an accident. Her failure would in my opinion be far too slender a foundation for a conviction in what little is known of the circumstances.

J. K.

Reference discharged.

Appeal allowed.

APPELLATE CIVIL.

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February, 15, 16, 17.

Before Agarwala and Varma, JJ.

CHHOTEY LAL CHAUDHURY

v.

RAI BAHADUR DALIP NARAIN SINGH.*

Hindu Law—mortgage of joint family property—legal necessity—Karta, power of, to embark on a new business for the benefit of family—test.

A mortgage of joint family property to finance a venture embarked on by the manager of a joint family for the benefit of the family (and not for his own benefit only) is binding on the members of the family, whether they in fact profited by the venture or not, provided it was of such a nature as a prudent manager would undertake and funds were in fact required to finance it.

Shaikh Jan Mohammad v. *Bikoo Mahto*(1), *Sheotahal Singh* v. *Arjun Das*(2), *Biswanath Singh* v. *The Kayastha Trading and Banking Corporation, Limited*(3), *Jai Sahu* v. *Hadibandhu Behera*(4), *Lalji Singh* v. *Muchkund Singh*(5), *Jagat Narain* v. *Mathura Das*(6), *and Ram Nath* v. *Chiranji Lal*(7), followed.

Inspector Singh v. *Kharak Singh*(8), not followed.

Ganesh Prasad Singh v. *Sheogobind Sahu*(9), distinguished.

Benares Bank, Limited, v. *Hari Narain*(10), explained.

Hunooman Pershad Panday v. *Musammat Babooee Munraj Koonweree*(11), referred to.

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*Appeal from Appellate Decree no. 764 of 1936, from a decision of H. Whittaker, Esq., I.C.S., District Judge of Monghyr, dated the 28th May, 1936, upholding a decision of Babu Tekanath Jha, Munsif at Monghyr, dated the 20th December, 1935.

(1) (1928) I. L. R. 7 Pat. 798.
(2) (1920) 1 Pat. L. T. 136.
(3) (1928) I. L. R. 8 Pat. 450.
(4) (1934) A. I. R. (Pat.) 462.
(5) (1934) A. I. R. (Pat.) 699.
(6) (1928) I. L. R. 50 All. 969, F. B.
(7) (1934) I. L. R. 57 All. 605, F. B.
(8) (1928) I. L. R. 50 All. 776.
(9) (1937) I. L. R. 16 Pat. 719.
(10) (1932) I. L. R. 54 All. 564, P. C.
(11) (1856) 6 Moo. I. A. 393.

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Appeal by the defendants.

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

B. C. De and *Sudhir Chander Ghosh* (for *N. C. Ghosh*), for the appellants.

S. M. Nayamatullah and *K. N. Lall*, for the respondents.

AGARWALA, J.—This second appeal raises the question as to the liability of the members of a joint Hindu family on a mortgage executed by some of the senior members of the family for the purpose of financing a venture initiated by the karta. The facts were as follows: A thikka was executed in favour of Rasiklal, defendant no. 1, and his cousin Ajodhya, the father of defendant no. 6. These two individuals were the senior members of a joint Hindu family. No salami was paid for the thikka which was for a term of nine years at a rental of Rs. 700 per annum. As security for payment of the rent a mortgage in favour of the lessor was executed by Rasiklal and Ajodhya and the latter's brother, Babulal, defendant no. 2 (father of defendant no. 7). They having defaulted in the payment of the thikka rent, the lessor instituted a suit on his mortgage which resulted in a decree for Rs. 2,981. The executants of the mortgage and their sons were all impleaded in the mortgage suit. In execution of the mortgage decree the mortgaged property was purchased by the plaintiffs. The mortgaged property consisted of two plots of land constituting the ancestral property of the family. These two plots were nos. 164 and 166. Formal delivery of possession was given to the auction-purchaser but when he attempted to take actual possession he was obstructed by Chhoteylal, the brother of Ajodhya and Babulal, two of the mortgagors. This resulted in a proceeding under section 145 of the Code of Criminal Procedure which was decided against the auction-purchaser with the result that he instituted the present suit for possession. The suit has been decreed by both the courts below.

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In appeal by the defendants it is contended on the authority of the decision of the Privy Council in *Benares Bank, Ltd.*, v. *Hari Narain*(1) that Rasiklal and Ajodhya had no authority to take the thikka lease and that the members of the family, other than the executants of the mortgage, are not bound by the bond which was executed to secure the rent of the thikka. The particular passage in the judgment of their Lordships of the Privy Council on which reliance is placed is as follows: "The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chapter I of the Mitakshara. The judgment of the Board in *Hunooman Pershad Panday* v. *Musammat Babooee Munraj Koonweree*(2), relied on by the bank, was founded apparently on those verses. A new business, their Lordhsips think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father." The particular item which their Lordships were dealing with in citing that passage was an item of nearly Rs. 4,000 which had been borrowed for the purpose of financing a contracting business. It does not appear from the report of the case what the ordinary business, if any, of the family was. This passage is, however, cited by the learned Advocate for the appellants for the proposition that the karta of the joint family is in no circumstances authorised to commence any business or embark on any venture which may possibly imperil the shares of the other members of the family in the ancestral property or to incur liabilities to finance such a business or venture. Prior to the decision of the Privy Council in the case cited above, there had been a divergence of views in the High Courts in India as to the powers of the karta of the family in this regard. One view was that the karta was never authorised to embark on a new business or venture in such a manner as to incur liabilities on the other

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1856) 6 Moo. I. A. 393.

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members of the family. The other view was that the manager had such authority but that the members of the family would not be bound unless it were shown that the venture was of such a nature as might reasonably be expected to be for the benefit of the family. In this Court, in *Shaikh Jan Mohammad* v. *Bikoo Mahto*(1), Ross, J. observed, " I quite agree that the manager of a joint family has no authority whatever to effect or dispose of any portion of joint family property in order to enable him to embark on speculative transactions, but I cannot say that the mortgagee must in each case satisfy the court that the transaction was bound to benefit the joint family. There is a certain element of risk in every business transaction and if we are to hold that when the business has succeeded and the entire family has benefited by it, we ought not to uphold the mortgage transaction entered into by the manager to enable him to embark on such business, unless the mortgagee satisfies us that the business was bound to succeed and that benefit was bound to accrue to the family, we would necessarily handicap the managers of joint Hindu families and place a limitation on their powers, which would have the effect of stopping all business transactions in every Mitakshara family ". In that case the purchase of the equity of redemption in a share in a property which was in the possession of the family was held to justify a mortgage of joint family property. In *Sheotahal Singh* v. *Arjun Das*(2) Das and Adami, JJ. held that a mortgage bond executed to pay the premium for a lease taken for the benefit of the family was binding upon all the members. In *Biswanath Singh* v. *The Kayastha Trading and Banking Corporation, Ltd.*(3), Ross, J. observed that in cases of the present description it is necessary to examine the evidence as to the nature of the business for which the debt was incurred for the purpose of ascertaining whether the act was the act of a prudent manager or

(1) (1928) I. L. R. 7 Pat. 798.
(2) (1920) 1 Pat. L. T. 136.
(3) (1928) I. L. R. 8 Pat. 450.

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not. In that case a mortgage of joint family property of petty zamindars to raise funds to finance a speculative contracting business was held not to be binding on the members of the family. An analysis of the cases decided in this Court shows that a mortgage of joint family property to finance a venture embarked on by the manager of a joint family for the benefit of the family (and not for his own benefit only) is binding on the members of the family. whether they in fact profited by the venture or not, provided it was of such a nature as a prudent manager would undertake and funds were in fact required to finance it. It is contended that since the decision of the Privy Council in the *Benares Bank* case(1) this view is no longer supportable. That question has been agitated in the Allahabad High Court on various occasions since the decision in the *Benares Bank* case(1). In *Inspector Singh* v. *Kharak Singh*(2) Mukerji, J., in delivering the judgment of the Bench, held that it was not competent to the manager of a joint Hindu family comprising minor members to raise money on the security of the family property in order to start a new business, even if such business may reasonably be supposed likely to be a profitable one. That view was based on an interpretation of the decision of the Privy Council in *Hunooman Pershad's* case(3). In the opinion of Mukerji, J. the phrase "benefit of the estate" which occurs in the judgment of the Privy Council in *Hunooman Pershad's* case(3) contemplates a benefit "of a defensive nature" calculated to protect the estate from possible danger or destruction and no benefit that could arise by any other means falls within the phrase as used in that case. This view was challenged in *Jagat Narain* v. *Mathura Das*(4) which was decided by a Full Bench in which it was held that "In order to sustain an alienation of joint

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1928) I. L. R. 50 All. 76.
(3) (1856) 6 Moo. I. A. 393.
(4) (1928) I. L. R. 50 All. 969, F. B.

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family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time ". Their Lordships who constituted the Full Bench expressly repudiated Mukerji, J.'s interpretation of the phrase " benefit of the estate " which occurs in *Hunooman Pershad's* case(1) and held that those words " are not limited to those transactions which are of a defensive nature ". The matter again came before a Full Bench of the Allahabad High Court in *Ram Nath* v. *Chiranji Lal*(2). In considering the effect of the decision of the Privy Council in the *Benares Bank* case(3) their Lordships held that while it is settled law that money borrowed for the purposes of an ancestral family business is per se a valid justification for alienation of family property without further inquiry on the part of the creditor, yet in the case of a business which is not ancestral but newly started by the manager or father, the mere fact that money was required for such a business is not in itself sufficient to justify an alienation of the family property. In such a case two separate questions arise: (*i*) was the business one which a prudent manager would start and (*ii*) was the mortgage for legal necessity or for the benefit of the estate. If the business, though not ancestral, had become joint family business and was not the separate business of particular members, then there may be circumstances under which money required may either be for legal necessity or for the benefit of the family and the family estate. At page 619 the learned Chief Justice stated, " It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family is something more than the mere question whether the money borrowed was required for the purposes of a new

(1) (1856) 6 Moo. I. A. 393.
(2) (1934) I. L. R. 57 All. 605, F. B.
(3) (1932) I. L. R. 54 All. 564, P. C.

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business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family, or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported, but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family". Thom, J., another member of the Full Bench, referring to the decision in the *Benares Bank* case(1), said that that case "never intended to lay down the general proposition that a loan taken by the manager of a joint Hindu family for the purpose of starting a new business could never be binding upon the minor members of the family. There is ample authority, not only in the original texts but in the decisions of the Privy Council and of this court for the proposition that where the starting of a new business is a prudent step taken by the manager of the family for the benefit of the family, a loan taken for this purpose or for the carrying on of the new business is a valid loan and is binding on the minor members of the family". The *Benares Bank* case(1) was considered in this Court recently by Wort and Varma, JJ. in *Ganesh Prasad Singh* v. *Sheonobind Sahu*(2). In that case the karta of the family had taken a farming lease of a ferry and had executed a mortgage to raise money for that purpose. In a suit on the mortgage it was contended that the manager had no authority to start the ferry business or to bind the members of the family by the mortgage. Wort, J. in delivering the judgment of the Court said, "Had it been a question of the adult members only, I think I should have come to the conclusion that the

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1937) I. L. R. 16 Pat. 719.

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plaintiff would be entitled to a decree for sale as regards the whole of the consideration. But the difficulty arises by reason of the 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 ". In the result Wort, J. concluded that the borrowing of money in that case could not in law be held to be for justifying legal necessity *qua* the joint family estate. The important distinction between that case and the present one is that there is no indication either in the judgment or in the report of that case that the ferry-farming had anything to do with the avocations of the members of the family. In the present case the family of the defendants are cultivators and in addition to this some of the members earn their living as zamindari servants, that is to say, tahsildars and patwaris, so that they are people well qualified to judge the prudence of a transaction such as that with which we are concerned in the present appeal, the transaction itself being one closely related to the ordinary avocations of the members of the family, the only difference being that whereas ordinarily they cultivated the land, in this particular instance they were going to add to their cultivated lands lands from which the profit would be derived from rents paid by the tenants. The case decided by Wort and Varma, JJ. is also distinguishable from the present case in another respect. In that case, objection to the liability of the members of the family, including the minor, was raised in the mortgage suit itself where it was open to all the parties to state what objections they had to the transaction entered into by the karta. In the present case, although all the members of the family, except Chhoteylal, were impleaded in the suit on the mortgage and had an opportunity of showing that they were not bound by the mortgage they did not do so and are parties to the decree which has been passed. Since,

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however, Chhoteylal was not impleaded in the mortgage suit it was open to him to show that the thikka in the present case was not a prudent venture and that the mortgage was not binding on the members of the family. Now, instead of concentrating his attack on these points, what Chhoteylal endeavoured to prove at the trial was that he himself was the karta of the family. In this he signally failed and the finding of the courts on this point is not challenged in second appeal.

With regard to the other question, namely, whether the venture was a prudent one or whether it was for the benefit of the family, the courts have found that although the evidence is meagre it was one for the benefit of the family. The known facts about it are that it was a venture which had the express approval of three out of the four adult members of the family, namely, the three members who executed the mortgage bond, that it was a venture the prudence of which the adult members of the family were well able to judge owing to their connection with zamindari matters, that no member of the family, except Chhoteylal, has challenged the transaction on the ground of its being imprudent or not for the benefit of the family, and that there is nothing on the record of this case to indicate that the terms of the thikka were such as not to justify a reasonable prospect of its turning out to be a profitable undertaking. Two recent decisions in this Court are relevant to the point in issue in the present case. In *Jai Sahu* v. *Hadibandhu Behera*(1) Dhavle, J. held that the power of the manager of a joint Hindu family to enter into transactions for the support of the family is to be judged (when in exercise of such power the family property is charged or alienated by the manager) by the consideration whether that transaction was one into which a prudent owner would enter. In that case the manager of a Teli family executed a

(1) (1934) A. I. R. (Pat.) 462.

mortgage bond to provide funds for starting a grocery shop to supplement the income of the family which was not in a flourishing condition. It was held that a grocer's shop was neither a luxury nor a speculative transaction and that the mortgage was binding on all the members of the family. The *Benares Bank* case(1) was referred to. The second case, *Lalji Singh* v. *Muchkund Singh*(2) is a decision of a Division Bench. The facts in that case were that a mortgage had been executed to raise money partly for the payment of a previous debt and partly for the purchase of 4½ bighas of land situated about a mile and half from the residence of the mortgagor's family. The suit on the mortgage was contested on the ground that there was no legal necessity for the loan. In delivering the judgment of the High Court, Mohamad Noor, J. observed, " What was required to be done by the mortgagees was a reasonable and honest enquiry that the purchase was being made for the benefit of the family. I have said that the usual livelihood of the family was cultivation. Augmenting the means of livelihood unless speculating or risky, must be taken to be beneficial to the family ". In my view the decision of the courts below is right and is not open to challenge now.

Another question raised by the learned Advocate for the appellants arises in this way. One of the mortgaged plots, namely, plot no. 166, has since been sold in execution of a decree for arrears of rent. It was purchased by the superior landlord and settled with the present plaintiffs. It was contended that the decree in execution of which plot no. 166 was purchased was not a rent decree but a money decree. That question does not require decision having regard to the view we take with regard to the first question.

In my opinion, this appeal must be dismissed with costs.

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VERMA, J.—I agree.

Mr. De on behalf of the appellants has framed his argument chiefly on the decision in *Benares Bank, Limited* v. *Hari Narain*(1) and also on a decision of this Court in *Ganesh Prasad Singh* v. *Sheogobind Sahu*(2) to which I was a party. His argument that the business was a new one and therefore the other members of the family, besides the executants of the mortgage bond, were not bound by the transaction would have been effective if the facts of the present case were in any way similar to the facts which were dealt with in *Benares Bank, Limited* v. *Hari Narain*(1) or in *Ganesh Prasad Singh* v. *Sheogobind Sahu*(2). Except the word 'thika' which occurs in *Benares Bank* case(1) as well as in the present case there is not much similarity between the former case and the present one. In the *Benares Bank* case(1) the word 'thika' mentioned meant the business of a contractor, but in this case 'thika' is something like a lease of immovable property taken by the present defendants. The Hindu Law recognizes a difference between ancestral business and a new business. The distinction was pointed out in the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(3) referred to in the *Benares Bank case*(1). In *Ganesh Prasad Singh* v. *Sheogobind Sahu*(2) the mortgage debt was created partly for legal necessity of the family and partly for payment of rent of a ferry taken in lease, and the question involved was whether the mortgage was binding on the minor member of the family. The lower appellate Court had come to certain findings on which it was of opinion that the business for which the mortgage was executed was not ancestral and, therefore, on the decision of the Judicial Committee in *Sanyasi Charan Mandal*(3), this Court held that the money borrowed for paying rent could not possibly

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1937) I. L. R. 16 Pat. 719.
(3) (1922) L. R. 49 Ind. App. 108.

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in law be held to be for justifying legal necessity *qua* the joint family estate. In the present case the position is that the adult members of a family, including the karta belong to the agricultural class and their occupation is said to be that of cultivators. The question is that if they executed a mortgage bond, as a security for the lease, in order to extend the amount of land in their possession whether it can be called, first, a business and, secondly, a new business. In my opinion, taking into consideration the class of people from which these defendants come it cannot be said that the taking of the thika was the starting of a new business and this view of mine is strengthened by the way in which the case was contested in the lower courts. I do not find any mention of this line of argument in the judgment either of the appellate court or of the trial court. The line of contest adopted by the defendants especially the present appellant no. 1, Chhoteylal, was that Rasiklal was not the karta of the family but it was he, Chhoteylal, who was the karta of the family and therefore the mortgage bond was not executed by a person who had the authority to bind the other members of the family. The written statement filed by the defendants in the case has been well summarised by the trial court where, apart from the other formal defences taken up the chief defence taken up by defendant no. 3, Chhoteylal, was that Rasiklal was never the karta of the family but that it was he who was the karta of the family all along, it was also contested that the security bond was not for the benefit of the joint family. They never contested the suit on the basis that the bond was for the purposes of starting a new business. The decision of this Court in *Lalji Singh* v. *Muchkund Singh*(1) is very much in point, where Noor, J. observed as follows: "Taking into consideration the fact that the family was of cultivators, that they purchased a small piece of land in the

(1) (1934) A. I. R. (Pat.) 699.

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neighbourhood of their home, and that the purchase was made both by the father and the son, the purchase must be held for the benefit of the family ".

I am, therefore, of opinion that on the findings of the courts below appellants' appeal must fail and that the argument based on the decisions in *Benares Bank, Limited* v. *Hari Narain*(1) and *Ganesh Prasad Singh* v. *Sheogobind Sahu*(2) is not at all helpful to them in this case.

S.A.K. *Appeal dismissed.*

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January, 6, 7, 10, 11, 18.

APPELLATE CIVIL.

Before Manohar Lall and Chatterji, JJ.

JOGENDRA NARAIN SINGH

v.

RADHA PRASAD SINGH.*

Ghatwali Tenure—Kunjora ghatwali—hereditary and perpetual—Birbhum Ghatwali Regulation, 1814 (*Beng. Reg. XXIX of* 1814), *section* 5—*Sonthal Parganas Rural Police Regulation,* 1910 (*Beng. Reg. IV of* 1910), *sections* 6, 7 *and* 8—*customary* muchalka *executed by ghatwal—Government, right of, to dismiss a ghatwal for default in payment of chaukidari dues—customary right of ruling power to dismiss for breach of the terms of* muchalka—*dismissal of ghatwal for non-payment of chaukidari dues, whether involves forfeiture of the tenure—heir, right of, to be appointed as a ghatwal—question of fitness ordinarily rests with the executive authorities—Civil Court, when can interfere with the decision of executive authorities.*

Plaintiff first party was the holder of the Kunjora ghatwali governed by the Birbhum Ghatwali Regulation XXIX of 1814. This ghatwali, which was permanent and

*Appeal from Original Decree no. 39 of 1935, from a decision of C. E. Walze, Esq., Subordinate Judge of Deoghar, dated the 10th September, 1934.

(1) (1932) I. L. R. 54 All. 564, P. C.
(2) (1937) I. L. R. 16 Pat. 719.

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descendible from generation to generation, was subject to the payment of fixed and established rent to the Zamindar and the performance of certain duties for the maintenance of the public peace and for supporting the police. The plaintiff first party succeeded to the ghatwali in 1904 on executing a *muchalka* (agreement) in the customary and ancient form which, inter alia, provided as follows:—

"Further I shall continue to comply with the order, which will be issued by Government from time to time without any objection; and I shall make no delay in complying with the laws and orders that will be passed on me. The ghatwali mahal is settled with me on the said jama on these aforesaid terms. If I violate the terms I shall be dismissed from the ghatwali and shall pay a fine of Rs. 1,000."

By Regulation IV of 1910 the mode of performing a part of the duties of the ghatwal in supporting the police was altered in the manner prescribed by sections 6, 7 and 8 of the Regulation, that is to say, the Government itself determined the pay of the choukidars employed in each village in this ghatwali and fixed the amount required for their salaries and equipments and the ghatwal was made liable to pay the amount so determined. The plaintiff first party was, however, dismissed by Government on account of his persistent default in carrying out the statutory obligation to pay the choukidari dues. The claim of his son (plaintiff second party) to succeed his father was rejected by the Executive authorities, and defendant first party was appointed to succeed as ghatwal. The plaintiffs brought the present action for a declaration that the dismissal of the plaintiff first party was ultra vires and, in the alternative, for a declaration that the plaintiff second party was of right entitled to be appointed ghatwal in place of his father.

Held, (*i*) that when the Government has by a statute commuted a part of the duty of the ghatwal into a money demand, the amount and the mode of realisation whereof are specifically fixed by statute, the only remedy which the Government has is to realise these dues in the manner provided in section 8(2) of Regulation IV of 1910 and the non-payment of these dues by the ghatwal cannot give it any right to dismiss him from his office;

(*ii*) that the provisions of section 5 of Regulation XXIX of 1814, entitling the Government to dismiss a ghatwal for non-payment of arrears of rent, are not incorporated in the later Regulation of 1910 by necessary implication;

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(*iii*) that the ruling power, however, always has a customary right, as a necessary incident of a ghatwali tenure, to dismiss a ghatwal for misconduct or for non-payment of his dues which are, as a matter of ancient and customary form, enumerated in the *muchalka*, and that the failure of the ghatwal to obey the statutory duty of paying up the chaukidari dues amounted to a clear violation of the terms of the *muchalka* entitling the Government to dismiss the ghatwal.

Rajah Nilmoni Singh v. *Bakranath Singh*(1), *Satya Narayan Singh* v. *Satya Niranjan Chakravarti*(2) and *Ashutosh Deo* v. *Bansidhar Shroff*(3), followed.

Per Manohar Lall, J. (Chatterjee, J. *contra*) :—A hereditary ghatwali tenure cannot be taken away from a family merely because the incumbent at any time misconducts himself or proves unfit to discharge his duties so long as there is some other member of the family fit for the post. In each case it must be decided whether the misconduct of an incumbent involves the forfeiture in the person of that incumbent only or in the persons of the entire family by applying the doctrine of anticipatory repudiation. An instance of this kind would be where the ghatwal says, as if on behalf of the entire family, that they are not the ghatwals at all and refuses to perform the services which are the necessary incidents of the tenure.

But where the ghatwali is hereditary and perpetual the son (or other heir) has a recognised right to be appointed a ghatwal in place of his father, provided only that he is fit to discharge his duties and meet his obligations.

Satya Narayan Singh v. *Satya Niranjan Chakravarti*(2) and *Joykishen Mookerjee* v. *The Collector of Burdwan*(4), referred to.

The decision of fitness for the post of a ghatwal ordinarily rests with the Executive authorities subject to this important reservation that if the Executive has simply made a pretence of dealing with the question of the fitness of the ghatwal who claims to be recognised as the next ghatwal and declares him unfit in an arbitrary manner or in a manner

(1) (1882) I. L. R. 9 Cal. 187; L. R. 9 Ind. App. 104.
(2) (1923) I. L. R. 3 Pat. 183, P. C.
(3) (1928) I. L. R. 7 Pat. 744, P. C.
(4) (1864) 10 Moo. I. A. 16, 44.

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which the law would not recognise, then the Civil Courts are free to interfere. But where it is impossible to say that the Executive did not reasonably consider the hereditary claims of an heir to be appointed as a ghatwal or that the exercise of discretion by the Executive was arbitrary or pretended, the Civil Court cannot interfere.

Lall Dharee Roy v. *Brojo Lall Singh*(1), followed.

Debee Narain Singh Ghatwal v. *Sree Kishen Sein*(2), *Secretary of State* v. *Poran Singh*(3), *Debakar Singh* v. *Radhagobindo Singh*(4), *Hemendra Nath Roy* v. *Upendra Narain Roy*(5), *Jogendra Nath Singh* v. *Kalicharan Roy*(6) and *H. Mathewson* v. *The Secretary of State for India in Council*(7), distinguished.

Per Chatterji, J.—When a ghatwal is dismissed from his office by the Government for a breach of the conditions on which he holds the tenure, though impressed with hereditary character, his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider fit.

Ashutosh Deo v. *Bansidhar Shroff*(8), followed.

Satya Narayan Singh v. *Satya Niranjan Chakravarti*(9), distinguished.

Ordinarily the Government should consider and respect the hereditary claim of the next heir of the dismissed ghatwal, but he cannot force such claim upon the Government.

The court, in any case, cannot do anything beyond giving a declaration as to the right of a claimant to be appointed a ghatwal, but such a declaration should not be granted as it would be infructuous, if the executive authorities, for reasons of their own, ultimately choose not to act upon that declaration.

(1) (1868) 10 W. R. 401.
(2) (1864) 1 W. R. 321.
(3) (1878) I. L. R. 5 Cal. 740.
(4) (1914) 24 Ind. Cas. 527.
(5) (1915) 22 Cal. L. J. 419.
(6) (1905) 9 Cal. W. N. 663.
(7) (1924) I. L. R. 3 Pat. 673.
(8) (1928) I. L. R. 7 Pat. 744, P. C.
(9) (1923) I. L. R. 3 Pat. 183, P. C.

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Appeal by the plaintiffs.

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

Sir Sultan Ahmed (with him *S. N. Bose*, *D. C. Varma*, *R. J. Bahadur*, *Ishwari Nandan Prasad*, *Sambhu Barmeshwar Prasad* and *D. L. Nandkeolyar*), for the appellants.

P. R. Das (with him *Sushil Madhab Mullick*, *S. S. Bose*, *L. M. Ghosh*, *Ranjit Sinha* and *K. P. Sukul*), for respondent no. 1.

Advocate-General and *Government Pleader*, for respondent no. 2.

MANOHAR LALL, J.—This is an appeal by the plaintiffs against the judgment and decree of the learned Subordinate Judge of Deoghar, dated the 10th September, 1934, by which he dismissed the plaintiffs' suit which they had instituted for a declaration that Kunjora was a Ghatwali tenure entitled to be held generation after generation in perpetuity subject to the payment of fixed and established rent and subject also to the performance of certain duties and for a further declaration that the dismissal of the first plaintiff from the office of the Ghatwal was ultra vires and in the alternative for a declaration that the plaintiff second party as his son was entitled to and eligible for the appointment for the office of Ghatwal in his place and that the appointment of the defendant 1st party was illegal and without jurisdiction. The plaintiffs also claimed that either the first plaintiff or the second plaintiff may be placed in possession of the Ghatwali of Kunjora by evicting the defendant first party; there was also a claim for mesne profits. The Secretary of State for India in Council was impleaded as a second party but no relief was sought against him beyond the fact that the plaintiffs wanted the decision in the presence of the Secretary of State. The learned Subordinate Judge has dismissed the suit of the plaintiffs. Hence the appeal before us.

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The facts necessary for the determination of the matters which are in controversy in this case are no longer in dispute (the only dispute is as to the legal rights of the parties and as to the inference to be drawn from certain documents) and may be shortly stated.

The Kunjora Ghatwali in dispute (which will be hereinafter referred to as "the Ghatwali") bears tauzi no. 1/36 Tappa Sarath Deoghar and is admittedly a Ghatwali tenure governed by Birbhum Ghatwali Regulation XXIX of 1814. It is also admitted that this Ghatwali is descendible from generation to generation but nevertheless subject to payment of fixed and established rent to the Zamindar of Birbhum through the Deputy Commissioner of the Santal Parganas and also subject to the performance of certain duties for the maintenance of the public peace and for supporting the police. It is also common ground that the plaintiff first party succeeded to this Ghatwali in the year 1904 on executing a Muchalka in the customary and ancient form which is to be found at page 15 of the Paper Book and bears date 7th of September, 1904. Since then he has been in possession of the Ghatwali which is 14 square miles in area, and from which he has been dispossessed by reason of an order of dismissal by the Commissioner of the Santal Parganas, dated the 15th of March, 1930, with effect from the 1st April following. The circumstances which led to the passing of this order of dismissal are admittedly these. By Regulation IV of 1910 the mode of performing a part of the duties of the Ghatwal in supporting the police was altered in the manner prescribed under sections 6, 7 and 8, that is to say, the Government itself determined the pay of the choukidars employed in each village in this Ghatwali and fixed the amount required for their salaries and equipments and the Ghatwal became liable to pay the amount so determined by the Deputy Commissioner under section 7. By the rules framed by the local Government under the provisions of

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section 25 of this Regulation the Ghatwal was required on the date fixed by the Subdivisional Officer for payment of the dues of these choukidars to "bring or send to the thana the sums due to the choukidars", in order that these dues shall be paid to the choukidars by Gazetted Officers or Police Officers. The first appellant paid the amount so determined for the payment of the choukidars regularly up to 1923 but in 1924 he defaulted and the amount in arrears was sought to be realised from him by a distress warrant issued under section 8(*2*) of the Regulation of 1910. In the following year he again defaulted and a distress warrant had again to be issued but a very small sum of Rs. 3 was realised and no further movable property was available to be seized in execution. The Government, thereupon, gave warning to this Ghatwal that he was continually defaulting in paying the dues of the choukidars in the manner prescribed and also that he was frustrating the realisation of the arrears by concealing his movable properties. The only explanation which the plaintiff no. 1 gave on the 10th of August, 1925, by a written petition was that he was unable to borrow the money to pay to the choukidars. Accordingly the Deputy Commissioner on the 29th of August, 1925, recommended that the Ghatwal should be dismissed from his Ghatwali and the office should pass to a person next entitled to hold it. These facts are clearly stated in Ex. O at pages 20 and 21. The matter of the dismissal of this Ghatwal was thereafter allowed to remain unsettled for sometime. It appears that the Government gave him sufficient time as *locus pœnitentiae* but the appellant no. 1 instead of taking any lesson from the warnings began to default even in payment of the arrears of road cess which were due from him with the result that a number of certificates were issued under the Public Demands Recovery Act for the realisation of arrears of cess amounting to such small sums as Rs. 46-4-6 in September, 1928 (*see* page 24), for

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realising Rs. 77-5-6 in December, 1928 (*see* page 26), and for realising another small sum of Rs. 46-4-6 on the same date in December, 1928 (*see* page 28). A perusal of the various orders in these certificate cases shows that the proceedings for realisation were unduly and deliberately protracted due to the attitude taken up by the Ghatwal and even warrants of arrest had to be issued against him. The payments were ultimately made on the 20th of of February, 1930. In the meantime Government issued a more serious warning to the Ghatwal on the 13th of August, 1929, and called upon him to show cause why he should not be dismissed from the office of the Ghatwal on account of "being a habitual defaulter in the payment of Government dues and for continued wilful breach of the terms of Muchalka" (page 31). On the 15th of March, 1930, Mr. (now His Excellency Sir Maurice) Hallett, Commissioner of Bhagalpur, in a very carefully considered order came to the conclusion that

"the Ghatwal has habitually defaulted in payment of the choukidari tax which he is bound to pay under section 8 of Regulation X of 1910 as well as under the terms of his Muchalka by which he is bound to carry out certain police duties in his estate. Failure to pay choukidars for months on end must react on the efficiency of that force and prevent police work being carried out in an efficient manner. For a breach of the term of his Muchalka he is liable to dismissal and a fine of Rs. 1,000. He has defaulted in payment of choukidars continually since at least 1924. He has been given ample warning both in this court and in that of the Deputy Commissioner but has paid no heed to that warning. For his failure to pay choukidars alone the Ghatwal is liable to dismissal and it is unnecessary for me to deal with the question of the other dues. I accordingly direct that Babu Jogendra Narain Singh Ghatwal of Kunjora be dismissed from the office of Ghatwal with effect from 1st April, 1930."

The Ghatwal sent a memorial to the local Government but the Governor-in-Council by a resolution, to be found at page 38, bearing date 15th August, 1930, rejected the memorial regretting that it was necessary for the Government to dismiss the Ghatwal of Kunjora from his Ghatwali and added

"But the persistent failure of the Ghatwal in spite of warnings to meet the obligations, upon the observance of which the Ghatwali tenure

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is founded, left Government no option in the matter. In the circumstances His Excellency in Council is not prepared to review the matter."

It is clear from the above narrative of facts that the appellant no. 1 was dismissed from the Ghatwali on account of his persistent default in carrying out statutory obligations to be found in sections 7 and 8 read with rule 2 at page 130 of the Manual framed under section 25 of the Regulation of 1910. The question which is very seriously argued before us is whether the Government have a right to dismiss a Ghatwal for failure to pay the choukidars' dues. It was argued by Sir Sultan Ahmad, appearing for the appellant, that when the Government has by a statute commuted a part of the duty of the Ghatwal into a money demand, the amount and the mode of realisation whereof are specifically fixed by statute, the only remedy which the Government have is to realise these dues in the manner provided in section 8(2) and that non-payment of these dues by the Ghatwal cannot give Government any right to dismiss him from his office. Mr. P. R. Das on behalf of the respondent argued, on the other hand, that Government have full right to dismiss the Ghatwal for non-payment of arrears of rent by the express provisions of section 5 of Regulation XXIX of 1814 and that the concluding portion of section 8, sub-section 2, of the Regulation of 1910, namely,

"the Deputy Commissioner shall recover the same by the process prescribed for the recovery of arrears of Government revenue"

must mean that the provisions of section 5 of the Regulation of 1814 are incorporated in the later Regulation by necessary implication and therefore the Ghatwal was liable to be dismissed for non-payment of choukidari dues also. He argued in the next place that even if we do not accept this contention as sound the Ghatwal is liable to be dismissed on the express terms of the Muchalka which he executed in 1904 and he sought to jusify the order of dismissal by bringing in the default in the present case within the words

"Further I shall continue to comply with the orders which will be issued by Government from time to time without any objection; and

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I shall make no delay in complying with the laws and orders that will be passed on me."

The learned Advocate-General appearing for the Secretary of State supported this argument and also asserted that the Ghatwal has not obeyed the earlier terms in the Muchalka that

"Further without the permission of Sarkar (Government) I shall not dismiss my servants who are engaged for performing the police duties."

The learned Advocate-General suggested that the servants referred to in the last quotation are the choukidars. In my opinion this contention of the learned Advocate-General is not sound. The servants referred to in this last quotation are the servants who are engaged by the Ghatwal himself and not those choukidars who by the express terms of rule 2 (to be found at page 137 of the Santhal Parganas Manual) are to be appointed, dismissed and suspended by the Subdivisional Officer himself. (This rule is made specifically applicable to the Ghatwali in question. *See* the concluding portion of rule 3 at page 140.) I do not agree with the contention of Mr. P. R. Das that section 5 of the Regulation of 1814 is by necessary implication incorporated in section 8(*2*) of the Regulation of 1910 for the simple reason that if that was the intention of the Legislature they could easily have said so. In truth the matter is not open to any doubt if the provisions of the Public Demands Recovery Act, namely, Bihar and Orissa Act IV of 1914, are considered. Section 3, sub-clause 6, defines "public demand" as an arrear of money mentioned or referred to in Schedule I and section 3, Schedule I, at page 24, mentions

"Any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or land-revenue, or by the process authorized for the recovery of arrears of revenue or of the public revenue or of Government revenue."

The words underlined by me are the very words used in section 8(*2*) of the Regulation of 1910. (The earlier Public Demands Recovery Acts which were

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repealed by section 2 of the Act of 1914 were similar in terms on this matter). The learned Advocate-General even went to the length of contending that all the processes which were issued from time to time for the realisation of the choukidari dues from the Ghatwal by distress warrants were all illegal but this is an erroneous contention. In my opinion, the Ghatwal was not liable to be proceeded against under the provisions of section 5 of the Regulation of 1814 for non-payment of choukidari dues. If this is so Government have no right to dismiss the Ghatwal acting under the provisions of secton 5(*2*) in cases where he is in arrears for the payment of the choukidari dues. The power to dismiss a Ghatwal then for non-payment of choukidari dues must be found, if at all, elsewhere and the critical question is whether such power is given to and remains in the Government for all time as a customary right evidenced by the Muchalka which this very Ghatwal executed in 1904. A perusal and study of the luminous judgments of their Lordships of the Privy Council in the celebrated cases of *Rajah Nilmoni Singh* v. *Bakranath Singh*(1), *Satya Narayan Singh* v. *Satya Niranjan Chakravarti*(2) and *Ashutosh Deo* v. *Bansidhar Shroff*(3) confirm me in the view that the ruling power always has a customary right, as a necessary incident of a Ghatwali tenure, to dismiss a Ghatwal for misconduct or for non-payment of his dues which are as a matter of ancient and customary form enumerated in the Muchalka. The terms of the Muchalka are very clear and unambiguous and, in my opinion, the failure of the Ghatwal to obey the statutory duty of bringing in the money on the appointed day for payment to the choukidars amounted to a clear violation of the terms of the Muchalka inasmuch as " he failed to comply with the orders issued by the Government from time to time and he made a delay in complying with the laws and

(1) (1882) I. L. R. 9 Cal. 187; L. R. 9 Ind. App. 1004.
(2) (1923) I. L. R. 3 Pat. 183, P. C.
(3) (1928) I. L. R. 7 Pat. 744, P. C.

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orders that were passed upon him ", in fact he never paid the arrears in full, if at all, since 1924. The Regulation of 1910 is a regulation which by the defining clause in section 3 applies to the Ghatwali of Tappa Sarath in Deoghar. The Government gave repeated warnings to the Ghatwal but he persistently refused to pay the arrears and, in my opinion, Government were fully justified within the terms of the Muchalka to dismiss the appellant no. 1 from his office with effect from the 1st of April, 1930. and I am unable to give any relief to the first appellant.

It will now be convenient to state the facts which led to the rejection of the claim of the second appellant to be appointed as a Ghatwal of the Ghatwali in place of his father, who, I have just held, was rightly dismissed by the Executive authorities. On the 31st of May, 1930, 16 candidates applied to be appointed as a Ghatwal of Kunjora in place of the dismissed Ghatwal, the first of these applicants was Raj Kumar Singh, the second appellant before us. The Deputy Commissioner submitted his remarks as to the qualifications and claims of each candidate to the higher authorities while forwarding their applications. Regarding this appellant he wrote as follows " If it be possible to appoint him in place of his father he may be selected " (Ex. MM at page 35). On the 1st of August, 1930, the Commissioner of Bhagalpur informed the Deputy Commissioner that he did not think " that the appointment of Babu Raj Kumar Singh, son of the dismissed ghatwal is desirable " and proceeded to give his views why he selected the defendant-respondent and appointed him as the Ghatwal of Kunjora (Ex. P page 37). It will be noticed that no reason whatsoever was given as to why this appellant was considered undesirable. If the matter stood here it would be difficult to support the case of the defendant-respondent but the appellant applied to the Commissioner for a review of his order, dated the 1st of August, 1930, and the Commissioner disposed of this review application by

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another order on the 19th September, 1930 (Ex. H page 39), by which he refused to review his former order. In this order the Commissioner gives the following reasons

"The former Ghatwal was dismissed for consistent refusal to pay the choukidari tax. The petitioner is the son of the former Ghatwal who claims 'that the dismissal of a Ghatwal for neglect of duties is tantamount to his civil death and the next heir succeeds him, and consequently on the dismissal of his father by the order of this court, the appellant has become entitled to the Ghatwali in question and he has the sole right of appointment as a Ghatwal to the said estate'. The son was not appointed as the appointment of the son would seem to have been merely equivalent to reinstatement of the father with the tenure free from encumbrances. As the former Ghatwal had in the past shown that he was of extravagant habits and had encumbered the tenure with debts so that he was unable to pay his taxes, it did not seem desirable to appoint the son. I do not agree with the view of the law expressed by the petitioner that on the dismissal of the father the son has a right to appointment."

The appellant, thereafter, presented a memorial to the local Government but the same was rejected on the 2nd of April, 1931, by a resolution printed at page 42 which does not give any reasons. In the meantime the present suit had been lodged on the 30th of March, 1931.

The facts stated above are admitted and the questions which fall to be decided are (*1*) whether the Government were justified in refusing to appoint the appellant as the Ghatwal for the reasons stated by them in the order of the Commissioner, dated the 19th September, 1930, when the Ghatwali was admittedly hereditary and perpetual and (*2*) whether this Court can interfere with the order of the Executive and place the appellant in possession of the Ghatwali.

In the numerous cases cited at the Bar, which we have carefully considered, I do not find any case which directly deals with the question before us. In all the cases the question arose on the death of the former Ghatwal but there is no case in which the identical question, namely, the right of the son to be

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appointed as a Ghatwal in place of his father who was dismissed for misconduct has been directly considered. In the record of this case some correspondence is to be found which indicate the views of the Government regarding the question at issue before us. Exhibit 3, at page 9, deals with the question "whether the Ghatwali tenure is heritable so long as there is a member of the family of the original grantee competent to perform the functions of Ghatwal. This question in its broadest aspect was set at rest by the Full Bench ruling of the High Court in the case of *Kuldip Narain* v. *Mohadeo Singh*(1) in which it was laid down that a grant, although originally for life only, must be regarded as heritable if long usage and transmission from ancestor to heir for several generations without objection could be proved. Regulation XXIX of 1814 recognises the hereditary nature of the Ghatwali tenures of Beerbhoom and the Privy Council in the case of *Raja Lilanand Singh Bahadur* v. *Government of Bengal*(2) extended the privilege to the Bishunpur Ghatwali Jaghirs; this being so, it seems to the Lieutenant-Governor to be very hard indeed to deny recognition, in the case of the petitioner, to the hereditary nature of the Lakhanpore Ghatwali tenure. It has been in the same family from a period anterior to the British rule, and it lapsed only because of the physical incapacity of Kartic Roy, its last holder, and husband of the petitioner.

"3. Mr. Barlow in his decision quoted in your paragraph 9, stated that the family have been tried and found wanting. This is a vague and inappropriate reason to give for breaking the succession. If Kartic Roy or any of his predecessors had been found wanting, the individual ought to have been removed but to put a ban on the whole family is not equitable with regard to your statement that Banwari, the nephew of Kartic Roy being the son of a thief is incapacitated for the office of Ghatwal, I am to say that

(1) (1866) B. L. R. Sup. Vol. 559, F. B.
(2) (1855) 6 Moo. I. A. 101.

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in such a matter as this, the sins of the father should not, in the Lieutenant-Governor's opinion, be visited on the son.

"4. Under these circumstances, the Lieutenant-Governor desires that you will recognise the hereditary nature of the Lakhanpore Ghatwali tenure, and appoint Banwari to the post of Ghatwal if he be found fit for it. The hereditary nature of the tenure being accepted, the petitioner cannot be ousted from her right to provide for the discharge of the duties of the post and till Banwari has been tried and found wanting or until the widow is unable to provide for the due discharge of the duties of the post the succession cannot be broken". This is a quotation from the letter conveying the opinion of the Lieutenant-Governor to the Commissioner of the Bhagalpur Division and bears date the 3rd of October, 1882. This view was again accepted on the 27th of May, 1883, in Ex. 5, page 12, which recognises the principle that "the family cannot forfeit their hereditary title and lands for ever because the man who was in charge of the Ghat at the time of a certain dacoity took place failed to give information about it". On the 22nd of June, 1920, the same view was followed in the order of the Commissioner of Bhagalpur (Ex. 2 page 18) in these words—"According to those orders, a hereditary Ghatwali tenure cannot be taken away from a family because the incumbent at any time misconducts himself or proves unfit to discharge his duties, so long as there is some other member of the family fit for the post and in the case of a minor so long as some suitable arrangement can be made for the performance of the necessary duties until the minor comes of age".

In my opinion this is the correct view of the law and of the incidents attached to and regulating this Ghatwali. I do not agree with the contention put forward by Mr. P. R. Das that as soon as the Ghatwal is dismissed for misconduct the result is that the whole

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tenure is forfeited and therefore Government have a right to appoint any one whom they like. This argument rests upon a misunderstanding of the position of the Ghatwal and in treating his case as the case of a mere Jaghirdar who has "a jaghir assigned for the support and remuneration" and such a jaghir "may be no more than wages in kind, arising from the use of a plot of land customarily in the occupation of the ghatwal for the time being, and in such a case personal service by the employee and personal selection and appointment by the employer may well be in every case essential incidents of the relationship. Incompetence and misconduct on the part of the employee may be causes for removal of the ghatwal and resumption of his holding" *per* Lord Sumner in the case of *Satya Narayan Singh* v. *Satya Niranjan Chakravarti*(1). But this is not the case here. The area of land in this case which belongs to the Ghatwali is, as already stated, 14 square miles, the profits derived by the Ghatwal from the Ghatwali are large, therefore the case of this Ghatwali falls within the second class of cases mentioned by Lord Sumner at page 200 in these words: "On the other hand, there are great estates, whose proprietors are found holding them or parts of them upon the terms of providing that ghatwali services, shall be forthcoming, either regularly or when required; services which it is impossible for the proprietor himself to render in his own person, and which become possible to him and to those to whom he renders them simply by virtue of his possession of the lands thus granted. In such cases the ghatwali tenure, even if not originally granted as heritable, easily becomes so, and is commonly found on the death of an incumbent of the office to descend to some member of his family, if not necessarily to the senior member.....A *recognised right* to be appointed ghatwal, then takes the place of a formal appointment; a recognised right in the superior to dismiss the ghatwal, if he is no longer able and willing

(1) (1923) I. L. R. 3 Pat. 183, 199, P. C.

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to render the service required by his tenure, and to appoint another person to the office and the tenure of the lands, then readily suffices to maintain in perpetuity the incidents of the tenure". In other words, the lands of this Ghatwali are appropriated to the maintenance of the Ghatwal who performed and was able to perform the duties as a Ghatwal [*See* the case of *Joykishen Mookerjee* v. *The Collector of East Burdwan*(1)]. If the argument of Mr. P. R. Das was correct the hereditary nature of the Ghatwali would disappear the moment the Ghatwal was in default in performing certain services which were required of him and it would be most inequitable and illogical and against the customary right, which has prevailed in this Ghatwali tenure, to visit the sins of the father upon the whole family and to eject the whole family for no fault of theirs. In the present case the son is willing to perform the services; he offers to carry out the duties of the Ghatwal and pay up the arrears of his father, the deceased Ghatwal, and unless it is found that he will not be able to or is unfit to discharge the duties of the Ghatwal his recognised rights to be appointed as Ghatwal remains intact. In *Satya Narayan Singh* v. *Satya Niranjan Chakravarti*(2) Lord Sumner anticipates to some extent the question that has arisen here and has observed in this manner: "Since the tenure is a service tenure, the lands are liable to forfeiture if the obligation of service is expressly repudiated, while the rights of the ruling power are similarly sufficiently safeguarded by holding that the succession of an heir incapable of rendering even the vicarious service involved in the provision of this armed force, might be treated as being in itself a ground of forfeiture in the person of that successor, if not in the persons of the entire family, for it is what might be called an anticipatory repudiation". That is to say, in each case it must be decided whether the misconduct of an incumbent

(1) (1864) 10 Moo. I. A. 16, 44.
(2) (1923) I. L. R. 3 Pat. 183, 206, P. C.

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involves the forfeiture in the person of that incumbent only or in the persons of the entire family by applying the doctrine of anticipatory repudiation. An instance of this kind would be where the Ghatwal says, as if on behalf of the entire family, that they are not the Ghatwals at all and refuses to perform the services which are the necessary incidents of the tenure. In such a case there is an express repudiation by the entire family and the ruling power would be justified in taking away the tenure from the entire family. Again the ruling power may think that the incumbent who is being removed has left no heir who is capable of rendering even the vicarious services involved as a part of the obligations of the holder of the tenure. The ruling power in such a case again would be justified in holding that these circumstances are themselves a ground for forfeiture in the persons of the entire family. Applying these principles to the present case it is clear to my mind that the appellant has a recognised right to be appointed a Ghatwal in the place of his father, the Ghatwali being admittedly hereditary and perpetual provided only he is fit to discharge his duties and meet his obligations.

The question, then, is whether this appellant is a person who is found incapable of performing these duties or otherwise unfit to be appointed a Ghatwal. The decision of fitness for the post of a Ghatwal must ordinarily rest with the Executive authorities subject to this important reservation that if the Executive has simply made a pretence of dealing with the question of the fitness of the Ghatwal who claims to be recognised as the next Ghatwal and declares him unfit in an arbitrary manner or in a manner which the law would not recognise then the Civil Courts are free to interfere. As an instance of this attention may be drawn to the case of *Lall Dharee Roy* v. *Brojo Lall Singh*(1) where the Calcutta High Court pointed out that the Courts will interfere where the heir is not

(1) (1868) 10 W. R. 401.

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being appointed a Ghatwal on the ground that he was not sufficiently dutiful and respectful to his own father in his lifetime. Jackson, J, observed " I think that in coming to this decision and so withholding from the plaintiff the inheritance to which he was entitled, the Commissioner did an act beyond the scope of his authority, and which the plaintiff was quite competent to question by a suit in the Civil Court. It is clear that the plaintiff was actually entitled to succeed, and consequently the suit was properly entertained and correctly decided ". Mitter, J., agreeing, added " A ghatwallee tenure in Beerbhoom is not resumable at the mere good-will and pleasure of the executive authorities ". In other words, the Civil Courts will not accept fanciful, arbitrary or pretended exercise of discretion by the Executive in refusing to appoint a Ghatwal.

Now what are the facts in this case? The Commissioner, as already pointed out, has given reasons for holding that in his view the appointment of the appellant is not desirable because the appointment of the son would be merely the reinstatement of his father and as the father has shown that he was of extravagant habits and had encumbered the tenure with debts so that he was unable to pay his taxes, it was not desirable to appoint the son. We were informed that some of the encumbrances were created by the old Ghatwal in favour of his wife. The reasons are not quite satisfactory and it is easily open to another officer or tribunal to take another view but I cannot say that it is not reasonably possible to take the view which the Commissioner has taken and with which the local Government have agreed on further consideration. Similar reasons were accepted as good grounds for the dismissal of a Ghatwal in *Debakar Singh* v. *Radhagobindo Singh*(1). In these circumstances with great reluctance, it appears to me that it is impossible for me to say that the Executive authorities did not reasonably consider the hereditary

(1) (1914) 24 Ind. Cas. 527.

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claims of this heir to be appointed as a Ghatwal on the removal of his father—the claim was considered on its merits and rejected—it is also impossible for me to say that the exercise of discretion by the Executive in this case was arbitrary or fanciful or pretended.

I shall now briefly deal with the cases relied upon by Mr. P. R. Das in support of his contention that the Civil Courts have no jurisdiction to reinstate a dismissed Ghatwal or to force a Ghatwal on the Executive authorities. The first case cited by him is the case *Debee Narain Singh Ghatwal* v. *Sree Kishen Sein*(1). In this case the only question as stated in the judgment is " whether the Civil Courts can interfere to reinstate a Ghatwal, who has been dismissed by the police authorities, in the lands which he formerly held as Ghatwal ". It was found as a fact that the plaintiff was dismissed by the authorities " for not performing the police service, the performance of which was one of the conditions on which he held the lands ". It is to be noticed that the plaintiff contended that, although the police authorities were competent to dismiss him from the office of the Ghatwal, they could not by that dismissal affect his right to continue to possess the Ghatwali lands and, as was pointed out in the next sentence, " It is admitted that he is liable to immediate dismissal by the police authorities if he fails to perform his service in a proper manner ". In my opinion this case is no authority for the proposition contended for by Mr. P. R. Das, the plaintiff had admitted that he was liable to dismissal but nevertheless wanted to assert his right of remaining in possession of the Ghatwali lands. In other words, he wanted to sever the office from the lands.

The next case relied upon is the case of *Secretary of State* v. *Poran Singh*(2). In this case the courts of fact appear to have found that the Ghatwal was guilty

(1) (1864) 1 W. R. 321.
(2) (1878) I. L. R. 5 Cal. 740.

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of misconduct and came to the conclusion: "We entertain no doubt that the plaintiff has no right to be reinstated in the Ghatwali land unless the Executive authorities will condone his conduct and restore him to his situation". The plaintiff was a sirdar Ghatwal in the district of Bankura and was dismissed for misconduct. As to the nature of this particular Ghatwali Mr. Justice Jackson says "The plaintiff has no title deed whatever, or any documentary evidence of any description to show that he has any title independent of service as Ghatwal to hold the lands in suit; and the very name "Ghatwali" indicates that the tenure is held by virtue of the office of Ghatwal.....There has been no attempt to show that at any time has the Ghatwali land been held by one person by right of inheritance, and the office of Ghatwal by a different person by appointment or otherwise". In my opinion this case does not support or even decide the proposition contended for by Mr. P. R. Das.

The next case relied upon is the case of *Debakar Singh* v. *Radhagobindo Singh*(1). In this case the Court found that the facts were that the plaintiff was dismissed by reason of his making default in payment of the quit-rent that was due from him to the Sudder Ghatwal and the Court observed that "If in the opinion of the police authorities, it is essential that money should not remain due from the Ghatwals to the Sudder Ghatwal or that, in the interests of the public, Ghatwals should remain free from debt and perform their duties with less likelihood of taking gratification from other parties, it is obviously a matter for the executive authorities to consider". It appears, therefore, that this case is merely an authority for the proposition that where the Executive authorities find that the Ghatwal had been guilty of misconduct they have jurisdiction to dismiss him and the observation upon which reliance is placed that the Court cannot reinstate any body as a Ghatwal because the Court

(1) (1914) 24 Ind. Cas. 527.

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cannot force upon the Executive authority a person to discharge the duties must be read in connection with the next line that follows which says that he is such a person who "in the opinion of the Executive authorities is not suited or is not fit to perform those duties. In my opinion the Court cannot reinstate a person in the land who has been *properly dismissed* from the office". I respectfully agree with this observation and, as I said before, the question in every case would be whether the person has been properly dismissed from the office on the ground that he is neither suited nor fit to perform those duties.

Attention was next drawn to the case of *Hemendra Nath Roy* v. *Upendra Narain Roy*(1). The learned Judges of the Calcutta High Court granted a declaration to the plaintiff defining the position of the plaintiff on the death of the previous Ghatwal. That was a suit brought by one Upendra to establish his claims to lands in a certain Ghatwali in the district of Bankura held as Digwari Chakran right against one Hemendra (the man appointed by the Government), the Secretary of State and the Zamindar. The learned Chief Justice in his judgment states as follows: "Whether we have here to deal with an office remunerated by the possession of land or land burdened with the service of an office is practically immaterial.....But such materials as there are on the record in my opinion supported the conclusion that we have here an office remunerated by the possession of land" and definitely came to the conclusion that the Digwari position was that of the office remunerated by the enjoyment of land. Upon these facts the attitude of the Government in that case was entirely free from difficulty because the Commissioner who passed the order had refused to appoint the plaintiff to the office and was guided not only by the conduct or fitness of office of Upendra but proceeded on his view of the rival legal claims of the

(1) (1915) 22 Cal. L. J. 419.

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various applicants and when the plaintiff being dissatisfied with the decision of the Commissioner went to the Board of Revenue they referred him to the Civil Courts. Mr. Justice Mookerjee, who gave a concurring judgment, also examined the situation elaborately and came to a similar conclusion that "we have here, not a grant of lands burdened with a certain service, but the grant of an office, the performance of whose duties is remunerated by the use of lands. The land and the office went together; but the office was the primary concern, the occupation of the land was subsidiary thereto. I think the inference is also legitimate that we have here a case, not of property held by a man to himself as holder of an office and his successors in that office. The office itself was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto. The theory that the office was hereditary in character is inconsistent with incontrovertible facts disclosed in the evidence.....The view that the Digwar was liable to be removed for failure to discharge his duties satisfactorily and that on his removal the Executive Government was free to appoint a qualified stranger as successor, is borne out by the documentary and oral evidence on the record" and came to the conclusion that the position was that "the disputed lands appertain to the office of Digwar of Ghat Bharra, that the office itself is not hereditary as a matter of right, that the holder of the office is liable to be removed for failure to discharge his duties to the satisfaction of the Executive Government, that on the removal of a Digwar his successor acquires a valid title to the office only if appointed thereto by the Executive Government.....". Mr. Justice Mookerjee pointed out at page 449 that in that case "the Commissioner refused to approve the appointment of the plaintiff as Digwar, not because the Commissioner considered him unsuitable

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for the office, but because the Commissioner took an erroneous view of the relative rights of the plaintiff and his opponent, the determination of the Commissioner was in essence based upon an erroneous adjudication of a question of title". In my opinion this case is no authority for the proposition contended for by Mr. P. R. Das but it rather supports only this proposition that the Civil Courts have no jurisdiction to reinstate a Ghatwal who has been properly dismissed by the Executive authority as unfit for the discharge of those duties. Apart from this the finding of fact which I have quoted already shows that the case before the Calcutta High Court was not a case of hereditary and perpetual Ghatwali to which entirely different considerations would apply.

Another case cited by Mr. P. R. Das was the case of *Jogendra Nath Singh* v. *Kali Charan Roy*(1) but that case far from supporting his contention appears to lay down a contrary proposition. In that case the Court found that the particular tenure was not merely heritable but was also permanent and that a tenure of this description could not be determined or resumed by the zamindar or the Government on the ground that the services were no longer required or had been dispensed with and it was further held that in the case of a tenure of this description where during the life-time of the Ghatwal his son who was appointed as Deputy was dismissed, the dismissal of the son does not mean the dismissal of the father and that after the death of the father the son was entitled to succeed although during the life-time of the father he had been dismissed while acting as a Deputy to the father.

All these cases which I have just been considering were referred to in a Division Bench ruling of this Court reported in the case of *H. Mathewson* v. *The Secretary of State for India in Council*(2). In considering the claim of Mr. Mathewson that he was

(1) (1905) 9 Cal. W. N. 663.
(2) (1924) I. L. R. 3 Pat. 673, 771.

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improperly dismissed Mr. Justice Jwala Prasad observed : " We are not competent to enter into that question as was held in *Debakar Singh* v. *Radhagobinda Singh*(1), *Devi Narain Singh Ghatwal* v. *Sri Krishan Singh*(2) *and Hemendra Nath Roy* v. *Upendra Narain Roy*(3)". I have already dealt with the very authorities which are the basis of that observation by Mr. Justice Jwala Prasad and have shown that these authorities do not support the proposition contended for by Mr. P. R. Das. The facts which were established in the case of *H. Mathewson* v. *The Secretary of State for India in Council*(4) showed that Mr. Mathewson was rightly dismissed for misconduct in the discharge of his duties as the Ghatwal, he having purchased the Ghatwali on the very terms that he would himself perform the duties and that he would not be evicted from the Ghatwali so long as he performed these duties to the satisfaction of the Government and would lose the Ghatwali on dismissal. But later on towards the end of page 771 Mr. Justice Jwala Prasad proceeds to observe that the question of the impropriety of the dismissal of the Ghatwal can be considered with a view to see if he had been wrongfully deprived of the lands in question, for the recovery of which he had brought this action and added that " if he has been dismissed for misconduct or neglect of duty, he has forfeited the lands in question and cannot get any relief " and proceeded to point out that Mr. Mathewson was dismissed " on account of his continued absence from the country and not having returned to his duties when required to do so by the Deputy Commissioner ". In my opinion, this case also is no authority for the proposition contended for by Mr. P. R. Das. Upon a review of the authorities cited I hold that the Civil Courts have power to interfere in certain circumstances indicated by me above.

(1) (1914) 24 Ind. Cas. 527.
(2) (1864) 1 W. R. 321.
(3) (1915) 22 Cal. L. J. 419.
(4) (1924) I. L. R. 3 Pat. 673, 771.

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It was also argued by Mr. P. R. Das that the present suit is not maintainable inasmuch as the defendant has got his name recorded in the recent settlement proceedings as the Ghatwal of Kunjora and he relied upon Ex. LL at page 45 which shows that on the 7th of March, 1931, the record-of-rights was prepared showing, in the khewat of this village, Kunjora, that the defendant had been appointed as the Ghatwal. It was, however, pointed out to Mr. Das, by us, that there was nothing in the evidence on the record to show that this document was other than a mere draft record-of-rights because it did not give the date on which it was finally published. Mr. P. R. Das could not give any satisfactory answer. It seems to me that it must be held that the record-of-rights could not have been finally published because the defendant himself stated in paragraph 24 of the written statement that the settlement operations in this Ghatwali Estate were still going on. The suit was instituted before the Settlement Officer of Dumka, Santal Parganas, on the 30th of March, 1931, that is to say, within 23 days of the draft preparation of this khewat, and this is well within six months which is the time provided by section 24 of Regulation III of 1872 which applies to Santal Parganas and by which any person interested is allowed to bring forward in the Settlement Courts any objection he may desire to make to any part of such record-of-rights within a period of six months from the date of such publication and the objection so made is to be inquired into and disposed of by a decision in writing under the hand of the officer presiding in that Court. In this view of the matter the argument of Mr. P. R. Das that under the provision of section 25 of this Regulation the record-of-rights must be deemed to be conclusive must be rejected. It was next argued that under the provision of section 25A the present suit is barred because the plaintiffs are neither zamindars nor proprietors and the present suit cannot be treated as a suit "where only the rights of zamindars and other proprietors as between themselves are concerned".

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This identical question has been decided by a Bench of this Court in the case of *Rani Sonabati Kumari* v. *Raja Kirtyanand Singh*(1) where it was held that a person in the position of the present plaintiffs would be entitled to be called proprietors if not zamindars. Indeed column 5 of the very khewat, exhibit LL at page 45, enters the name of this defendant as a proprietor. I, therefore, overrule this contention of Mr. P. R. Das also.

I have given my most anxious consideration to this case and I have, as indicated above, reluctantly arrived at the conclusion that the claim of the plaintiff no. 2 must also be dismissed. It would have been more satisfactory if the Government had given a trial to the second plaintiff and then removed him from office in case he was found unfit or unable to perform the duties of his office.

I would affirm the decree of the Subordinate Judge but under the circumstances direct that each party should bear his own costs of this appeal.

CHATTERJI, J.—I agree that the appeal should be dismissed but I desire to give in brief my own reasons so far as the second appellant is concerned. His case is that the tenure being hereditary and permanent, he was by right entitled to be appointed ghatwal on the dismissal of his father, the first appellant. Admittedly the tenure in question is a Birbhum Ghatwali tenure governed by the provisions of Bengal Regulation XXIX of 1814. Section 1 of that Regulation shows that the ghatwals are entitled to hold their lands, generation after generation, in perpetuity, subject nevertheless to the payment of a fixed and established rent to the Zamindar of Birbhum and to the performance of certain duties for the maintenance of the public peace and support of the police. In other words, the ghatwal has a right to hold the tenure hereditarily and in perpetuity subject to two conditions, namely (*1*) the payment of the fixed rent and

(1) (1934) I. L. R. 14 Pat. 70, 195.

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(2) the performance of certain duties for maintenance of the public peace and support of the police. By section 3 the rents are made payable to the Collector, the arrangement being that the Collector after deducting the Government revenue on that part of the estate which comprises the ghatwali lands is to pay the balance to the zamindar (vide section 4). Section 5 prescribes the penalty for non-payment of the rent. The section runs as follows:

"Should any of the ghatwals at any time fail to discharge their stipulated rents, it shall be competent for the Governor-General in Council to cause the ghatwali tenure of such defaulter to be sold by public sale in satisfaction of the arrears due from him, in like manner, and under the same rules, as lands held immediately by Government, or to make over the tenure of such defaulter to any person whom the Governor-General in Council may approve, on the condition of making good the arrear due; or

to transfer it by grants assessed with the same revenue, or with an increased or reduced assessment, as to the Government may appear meet; or

to dispose of it in such other form and manner as shall be judged by the Governor-General in Council proper.

Should any increase of revenue be obtained from the operation of any arrangements of the nature above described, such increase shall be paid in conformity to the tenor of the preceding article to the Zamindar of Birbhum, his heirs and successors."

It gives in clear terms the Government full power to forfeit the tenure of the defaulting ghatwal and to make it over to any person whom it may approve or otherwise to dispose of it in such manner as it may think proper. It is thus evident that notwithstanding the hereditary character of the ghatwali tenure the Government in case of breach of the condition to pay rent is at liberty to forfeit the tenure and to take it away from the family of the defaulting ghatwal. It must be as a matter of policy of the State based on grounds of expediency touching the administration of police duties by the ghatwals that this right of the Government was recognised by legislative enactment.

Let us next consider the position of the ghatwal with regard to the non-performance of the duties for the maintenance of the public peace and support of the

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police. There is no provision in the Regulation as to what those duties exactly are or as to what would happen in case of breach of the duties. These matters are obviously left to be determined according to established usages. It appears that according to the established usages every ghatwal on his appointment has to execute a muchilka (agreement) in favour of the Government binding himself to perform the duties specified therein and undertaking the liability to be dismissed from the ghatwali in case he violates the terms of the agreement. In the present case it is admitted in the plaint that the first plaintiff did execute such customary muchilka when he became a ghatwal. This muchilka is exhibit B and is dated the 7th September, 1904. It will be enough for the present purpose to quote the following passage from this document:

> "Further I shall continue to comply with the orders, which will be issued by Government from time to time without any objection; and I shall make no delay in complying with the laws and orders that will be settled with me on the said jama on these aforesaid terms. If I violate the terms I shall be dismissed from the ghatwali and shall pay a fine of Rs. 1,000."

For the reasons given by my learned brother the plaintiff no. 1 was guilty of breach of the terms of the muchilka and he was rightly dismissed for the breach. The question now is whether on his dismissal his son as his next heir could as a matter of right claim the ghatwali and whether the Government was bound to recognise him as ghatwal. To me it seems that when for a breach of the conditions on which he holds the tenure the ghatwal is dismissed from his office by the Government his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider fit. I am supported in this view by the observation of Viscount Sumner in *Ashutosh Deo* v. *Bansidhar Shroff*(1) in which their Lordships of the Judicial Committee had to deal with a similar ghatwali tenure governed by the same Regulation XXIX of 1814, the precise question for

(1) (1928) I. L. R. 7 Pat. 744, P. C.

investigation there being whether the Santal Parganas Rural Police Regulation IV of 1910 had the effect of affecting the inalienability of such tenures. Viscount Sumner at page 749 observes:

"If the effect is that contended for, the tenure would pass to a purchaser by the sale alone, and would in future involve no further obligation on the holder, if so much, than payment of such police salaries as might attach to it. The Government would lose its power of forfeiting the tenure on failure of the holder to perform the conditions and of making a new grant to some more worthy ghatwal."

Once a tenure is forfeited the right of the Government to re-settle it with any new ghatwal whom it may consider fit comes in. Ordinarily the Government should, and the documentary evidence in this case shows it does, consider and respect the hereditary claim of the next heir of the dismissed ghatwal but he cannot force such claim upon the Government. The argument by analogy that the forfeiture amounts to civil death of the dismissed ghatwal does not appear to me to be sound. Take the case of an ordinary tenure, permanent and hereditary, which is held on conditions the breach whereof involves a forfeiture of the tenure. Can it be said that when there is such breach on the part of the holder of the tenure for the time being, the forfeiture has the effect of letting in the next heir to succeed? I think not. This principle of law, in my opinion, is equally applicable or perhaps with greater force in the case of a service-tenure, though impressed with hereditary character. The claim of the second appellant is based on the provisions of Regulation XXIX of 1814 (vide paragraph 14 of the plaint). Section 1 of that Regulation, as already stated, lays down that the tenure is hereditary and permanent subject to certain conditions. If those conditions are violated, and as a result the tenure is forfeited, it is liable under certain circumstances to lose its hereditary character. I have already shown that in case of the breach of the condition to pay rent

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the Government has, under the provisions of section 5, the right to terminate the hereditary character of the tenure if necessary. If such is the result of a breach of the condition to pay rent, I do not understand why in the case of a breach of the other condition to perform the duties relating to the maintenance of the public peace and support of the police a different result would follow. Of course in construing an old Regulation mixed up with customs and usages the reasoning employed for arriving at a certain result may not be always logical, but in considering the particular question before us we should bear in mind that the ghatwali is a service tenure of a peculiar nature and the Government has to see to the efficient discharge of the police duties appertaining to the office of the ghatwal. No custom or usage has been pleaded, much less established, by which the second appellant can claim to enforce his right of succession to the ghatwali which has been forfeited in consequence of the dismissal of his father from the office. The case of ordinary succession is quite different because in that case on the death of a ghatwal his next heir by right of inheritance comes in unless he is found unfit for the office. I therefore consider that the second appellant cannot claim as a matter of right to be appointed ghatwal in the place of his father. I should mention here that the evidence in this case shows that even on the death of a ghatwal his next successor has to be appointed as ghatwal by the Commissioner. The muchilka (exhibit B) itself shows that the first appellant was appointed by the order of the Commissioner. That order was not on the record and to be quite sure of it we sent for it. From it we find that the appointment of the first appellant was sanctioned by the Commissioner of the Bhagalpur Division and the Santhal Parganas on the 25th July, 1904. I may also refer to Mr. O'Malley's District Gazetteer of the Santhal Parganas at page 220 where the following passages occur :—

"The power of appointing and dismissing a ghatwal is vested in the Commissioner of the

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Bhagalpur Division. Ordinarily the next heir of a deceased ghatwal is appointed to succeed him, provided he is fit to perform the duties attendant on the office."

The position that the ghatwal has to be appointed, the appointing authority being obviously the Government, is recognised in the plaint itself. Paragraph 14 of the plaint states that

"the plaintiff 2nd party was by right entitled to be *appointed* ghatwal of Kunjora in place of plaintiff 1st party."

Again in paragraph 19 clause 4 the plaintiffs pray for a declaration that

"the plaintiff 2nd party as his descendant was in law entitled to and *eligible for the appointment of ghatwal* in his place."

This disposes of the argument advanced by Sir Sultan Ahmad on behalf of the appellant to the effect that no appointment to the office of ghatwal is necessary and the next heir automatically comes in to fill up the vacancy. This argument was based on the following passage in the judgment of their Lordships of the Judicial Committee in *Satya Narayan Singh* v. *Satya Niranjan Chakravarti*(1); "Neither by the terms of the grant nor by the general law applying to such ghatwali tenures is an actual appointment of the next heir to be ghatwal in the room of his predecessor requisite." In that case the tenure under consideration was of a different kind not governed by the Regulation XXIX of 1814 and the facts also were quite different.

The case of the second appellant, however, may be disposed of on another ground and on that ground alone. It is conceded that the question of his fitness for the office of ghatwal is to be decided by the Government. In this case the Commissioner did consider the question of his fitness and found him undesirable, and the matter was carried to the Governor in Council. It cannot be said that the executive authorities did not at all consider his claim or that they acted arbitrarily.

(1) (1923) I. L. R. 3 Pat. 183, 208, P. C.

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The civil court is not therefore competent to question the propriety of their decision. Accordingly the second appellant is not entitled to any relief.

There is another difficulty in his way. Even assuming that we could hold that he should have been appointed to the office of ghatwal and that the appointment of the first respondent was bad, we cannot do anything beyond giving a mere declaration to that effect. We cannot force the executive authorities to remove the one and appoint the other instead. A mere declaration, therefore, would be infructuous if the executive authorities, for reasons of their own, ultimately choose not to act upon that declaration. Such declaration the Court should not grant. As regards possession of the tenure, it cannot be given apart from the office because the one goes with the other.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

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February, 18.

Before Agarwala and Varma, JJ.

JOALA PRASAD SINGH

v.

MUSAMMAT CHANDERJOT KUER.*

Hindu Law—partition—expression of intention to separate —matter of proof—filing of plaint, whether mere evidence of intention.

Under the Hindu Law the expression of an intention to separate effects severance of the joint status, but the expression of the intention has to be proved in a Court of justice by evidence.

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* Appeal from Appellate Decree no. 802 of 1936, from a decision of Mr. Ananta Nath Banarji, Subordinate Judge at Muzaffarpur, dated the 13th August, 1936, affirming a decision of B. Atal Bihari Sharan, Munsif of Muzaffarpur, dated the 27th November, 1935.

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The evidence may consist of a notice, as in *Girja Bai's* case(1), or of the filing of a plaint claiming partition as in *Kawal Nain's* case(2), or it may take some other form; but it is no more than evidence of the intention to separate.

Where the final Court of fact is not prepared, in the circumstances of the case, to look upon the filing of a plaint by a co-parcener as a clear indication of his intention to separate, the High Court cannot interfere with this finding of fact in second appeal.

Girja Bai v. *Sadashiv Dhundiraj*(1), *Kawal Nain* v. *Budh Singh*(2), *Appovier* v. *Rama Subba Aiyan*(3), *Syed Kasam* v. *Jorawar Singh*(4), *Kedar Nath* v. *Ratan Singh*(5) and *Palani Ammal* v. *Muthuvenkatacharia Moniagar*(6), explained.

Appeal by the plaintiffs.

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

S. M. Mullick (with him *A. N. Lal* and *Ramnandan Prasad*), for the appellants.

Mahabir Prasad and *G. P. Sahi*, for the respondents.

AGARWALA, J.—During the pendency of a partition suit instituted on the 27th of February, 1931, by Gobind Saran, the deceased husband of defendant no. 1, against his elder brother, defendant no. 2, and the latter's son, defendant no. 3, Gobind incurred debts to obtain funds for the litigation and to pay for medical attendance necessitated by an accident which occurred to him. For these debts and for a further advance of Rs. 289 he executed, on the 5th of June, 1931, a handnote for a thousand rupees bearing

(1) (1916) I. L. R. 43 Cal. 1031, P. C.
(2) (1917) I. L. R. 39 All. 406, P. C.
(3) (1866) 11 Moo. I. A. 75.

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interest at two per cent. per mensem. The partition suit was dismissed for default on the 21st November, 1931. Gobind Saran died on the 15th January, 1934. Defendant no. 2 thereon obtained registration of his own name in place of defendant no. 1 in the Land Registration Department in respect of the property for which Gobind had been registered, alleging that Gobind had died in a state of jointness with himself and his son, defendant no. 3. On the 22nd May, 1934, plaintiffs instituted the present suit on the handnote to recover a sum of Rs. 1,710-10-0, alleging that Gobind was separate from defendants 2 and 3 and that his widow, defendant no. 1, was his heir.

The first court dismissed the suit holding that Gobind was joint with defendants 2 and 3. In appeal to the Subordinate Judge of Muzaffarpur, the plaintiffs contended that the institution of the suit for partition effected a disruption of the joint family. The appellate court held that, in the circumstances of the case, the institution of the partition suit did not evidence an unequivocal intention on Gobind's part to separate from his brother and nephew. The suit was accordingly dismissed. The circumstances referred to by the appellate court were that at the time of the institution of the suit Gobind was under the influence of profligate persons who were bent on his ruination and in effect that the institution of the suit for partition was their act rather than the act of Gobind himself.

In second appeal it is contended by the plaintiffs-appellant that the court was going beyond its jurisdiction in considering the motive which led Gobind to institute the partition suit and that the decisions of the Privy Council are conclusive on the question that the institution of a suit for partition is sufficient to effect the separation in status of the plaintiff from the other members of the joint family. The decisions referred to are *Appovier* v. *Rama Subba*

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Aiyan(1), *Girja Bai* v. *Sadashiv Dhundiraj*(2), *Kawal Nain* v. *Budh Singh*(3) and *Syed Kasam* v. *Jorawar Singh*(4). In the case of *Kawal Nain*(3) the plaintiff's suit for partition was dismissed by the trial court on the ground that the plaintiff had instituted it under a misapprehension. Their Lordships of the Privy Council pointed out that the ground for dismissal was not sustainable in law, but they held that the plaintiff, by assertion of his right to separate, effected a separation of his status, whether a judgment followed on the plaint or not. In *Girja Bai's* case(2) their Lordships observed that the conduct of the plaintiff in indicating, by a notice in a registered letter, his intention to separate himself and enjoy his share in severalty, coupled with a suit for partition, was as unequivocal and clearly expressed an intention as could be made, and that it amounted to a separation with all its legal consequences. In that case their Lordships also observed, "Once the decision of separation has been unequivocally expressed and clearly intimated to his co-sharers, the plaintiff's right to obtain and possess the share, to which he admittedly has a title is unimpeachable; and neither the co-sharers can question it nor can the court examine the plaintiff's conscience to find out whether his reasons for separation were well-founded or sufficient". In an earlier decision, however, namely, in *Kedar Nath* v. *Ratan Singh*(5) it was held by the Judicial Committee of the Privy Council in a case in which a member of the joint Hindu family had filed a plaint claiming partition and then had withdrawn the plaint that severance of joint status was not effected. That decision was cited by the Board in the more recent case of *Palani Ammal* v. *Muthuvenkatacharia Moniagar*(6) where it was held that

(1) (1866) 11 Moo. Ind. App. 75.
(2) (1916) I. L. R. 43 Cal. 1031, P. C.
(3) (1917) I. L. R. 39 All. 496, P. C.
(4) (1922) I. L. R. 50 Cal. 84; L. R. 49 Ind. App. 358.
(5) (1910) I. L. R. 32 All. 415.
(6) (1924) I. L. R. 48 Mad. 254; L. R. 52 Ind. App. 83.

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mere filing of a plaint is not evidence of separation although it affords evidence that an intention to separate had been entertained.

The argument of the appellants in this case arises, it seems to me, from a tendency to view pronouncements of their Lordships of the Judicial Committee as enactments of the legislature. The Courts in India are bound by the decisions of the Privy Council on questions of law and no court in this country would ever entertain an argument that a view of the law expressed by the Privy Council should not be strictly followed. It has to be remembered, however, that whereas the Judicial Committee of the Privy Council are not bound by findings of fact and are not confined to considering questions of law, this Court, in dealing with second appeals under section 100 of the Code of Civil Procedure, is confined strictly to questions of law and is bound to accept the lower court's findings of fact. The finding of the facts has been entrusted to the subordinate courts and this Court in second appeal has no power to interfere with those findings. Their Lordships of the Privy Council themselves have on various occasions pointed out this limitation on the power of the High Courts in second appeals. In one of their recent pronouncements, namely, *Secretary of State for India in Council* v. *Rameswaram Devasthanam*(1) they stated that under section 100 of the Code of Civil Procedure the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate court, however erroneous, unless they are vitiated by some error of law. Now the law which we are administering in the present appeal is the Hindu law and it is not disputed that according to the Hindu Law the expression of an intention to separate effects severance of the joint status; but that expression of intention has to be proved in a court of justice by evidence. The evidence may consist of a notice, as in *Girja Bai's* case(2), or of the filing of a

(1) (1934) 16 Pat. L. T. 7, P. C.
(2) (1916) I. L. R. 43 Cal. 1031, P. C.

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plaint claiming partition, as in *Kawal Nain's* case(1), or it may take some other form; but it is no more than evidence of the intention to separate. All that their Lordships of the Judicial Committee have said with regard to this question is that the filing of a plaint may be considered as unambiguous evidence of an intention to separate. Their Lordships, in dealing with the question of fact whether there has been a separation or not, may be prepared (as in some cases they have been) to regard the filing of a suit for partition as such conclusive proof of the intention to separate that it is not necessary to consider other circumstances. It is impossible to conceive that their Lordships intended anything more than that. The argument of the learned Advocate for the appellants really amounts to this: although the Hindu law requires an unequivocal expression of an intention to separate in order to effect a severance in joint status, the Privy Council have amended the law by stating that separation may be effected by filing a suit for partition. This would be legislating and not a mere explanation of what the law is. The intention which the Hindu law requires may in appropriate cases be evidenced by the filing of a plaint from which it may be held that there was an intention to separate. The decision in *Kedar Nath* v. *Ratan Singh*(2) supports that view and, as I have already indicated, that case has been followed in the more recent case of *Palani Ammal* v. *Muthuvenkatacharia Moniagar*(3).

The question raised in this second appeal, therefore, is concluded by the finding of fact of the lower appellate court. It is clear that the lower appellate court, in the circumstances of the case, was not prepared to look upon the filing of the plaint by Gobind Saran as a clear indication of his intention to separate from his brother and nephew. It may be that if we were dealing with this case as a court of

(1) (1917) I. L. R. 39 All. 496, P. C.
(2) (1910) I. L. R. 32 All. 415, P. C.
(3) (1924) I. L. R. 48 Mad. 254; L. R. 52 Ind. App. 83.

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fact we might have taken a different view of that evidence; but as our powers in second appeal do not enable us to disregard the finding of fact of the appellate court, we must accept it.

The result is that this second appeal fails and must be dismissed with costs.

Appeal dismissed.

VARMA, J.—I agree.

S. A. K.

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February, 2, 3, 22.

APPELLATE CIVIL.

Before Agarwala and Varma, JJ.

BRAJA BEHARI DASS

v.

RAM NARAYAN RAI.*

Cess Act, 1880 (*Beng. Act IX of* 1880), *sections* 35 *and* 93—*valuation by the revenue authorities, whether can be questioned by the Civil Court—tenant, whether can plead that he is an occupancy raiyat and not a tenure-holder—liability for cess imposed on income not subject to cess—Civil Court, jurisdiction of, to grant relief.*

Section 93 of the Cess Act debars a Civil Court from questioning the valuation made by the revenue authorities under the Cess Act, 1880.

A plea by the defendant that he is an occupancy raiyat and not a tenure-holder and that the valuation is wrong is not entertainable by the Civil Court.

The Civil Court has jurisdiction to grant relief where the Cess Department has acted ultra vires and imposed liability for cess on income which is not subject to cess.

* Appeals from Appellate Decrees nos. 803, 804 and 805 of 1935, from a decision of P. C. Chaudhuri, Esq., I.C.S., District Judge of Purnea, dated the 23rd August, 1935, affirming a decision of Mr. Shiva Pujan Rai, Munsif of Purnea, dated the 28th July, 1934.

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Kesho Prasad Singh v. *Ram Swarup Ahir*(1), *Secretary of State for India in Council* v. *Ramasray Singh*(2) and *Shaikh Abdul Hasan* v. *Shaikh Taj Ali*(3), referred to.

Appeal by the plaintiff.

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

S. M. Mullick and *Phulan Prasad Varma*, for the appellant.

Dr. D. N. Mitter and *D. C. Varma*, for the respondents.

AGARWALA, J.—The plaintiff-appellant instituted three suits for recovery of arrears of rent and cess. The defendants, who were recorded in the record-of-rights as tenure-holders, at the cess valuation were called upon to file returns as tenure-holders and did so. They were accordingly assessed as tenure-holders on Rs. 565-5-0 with respect to khewat no. 2, Rs. 122-8-0 with respect to khewat no. 3 and Rs. 28 with respect to khewat no. 4. As tenure-holders the amount of cess for which the defendants are liable in respect of these three khewats is at the rate of one anna in the rupee. This was the amount claimed in the plaints. The defendants, however, pleaded that they were in fact occupancy raiyats within the definition of that term given in the Cess Act, inasmuch as the rent of their holding was less than Rs. 100. Both the courts below have held that the defendants are occupancy raiyats within the meaning of the Cess Act and that accordingly the amount of cess recoverable from them is not at the rate of one anna in the rupee on the annual value of their holdings but at the rate of half an anna in the rupee on the amount of rent which they pay.

In appeal the plaintiff-appellant relies on the decision of Ross, J. in *Kesho Prasad Singh* v. *Ram*

(1) (1926) A. I. R. (Pat.) 175.
(2) (1933) I. L. R. 12 Pat. 701.
(3) (1926) I. L. R. 6 Pat. 13.

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Swarup Ahir(1). In that case the annual rent of the holding of the defendants, according to the cess valuation, was Rs. 95-4-0, and the rent payable by them was Rs. 31-0-6. The plaintiff claimed to recover from the defendants cess at the rate of 1 anna in the rupee on the annual value of the holding. The defendants pleaded that since their rent was less than Rs. 100 they were, for the purposes of the Cess Act, occupancy raiyats, and liable only to pay half an anna in the rupee on the rent payable by them. The defence was accepted in the lower courts. In appeal it was contended for the plaintiff that the valuation made by the Cess Department was final for the purposes of the Act and that section 93 debarred that valuation being questioned in the civil courts, and that consequently the defendants were debarred from pleading that they were occupancy raiyats and not tenure-holders. This contention was upheld by the learned Judge who dealt with the case in this Court. He observed, " It is obvious that a great injustice would be done to the plaintiff (landlord) if the defendants' contention were to prevail. The plaintiff has been made liable for cess on a valuation of which one of the items is the annual valuation of the defendants' tenure. If it were now held that the defendants were not tenure-holders then the liability for this cess will fall on the plaintiff alone through no fault of his but because the defendants had failed to contest the entry. In my opinion, it was for the Revenue authorities to decide whether the defendants were tenure-holders or cultivating raiyats for the purposes of the Cess Act ". This decision is sought to be distinguished by the learned Advocate for the respondents on the ground that in that case the plaintiff had produced the cess valuation roll showing that the defendants had been assessed to cess as tenure-holders. In the present case the copy of the cess valuation roll which section 35 of the Act requires to be exhibited in the Collectorate is on the record, although it was not marked as an

(1) (1926) A. I. R. (Pat.) 175.

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exhibit at the trial. In the judgment of the lower appellate court, however, the annual valuation of each of the holdings is stated without any indication of the source from which the figures were derived. As we considered it necessary for the purpose of determining this appeal that the valuation roll should be taken in evidence we have admitted the document which is on the record and which has now been marked as Exhibit 1 in this Court. The decision of Ross, J. is, therefore, not distinguishable from the facts of the present case.

It was next contended that that decision has in effect been overruled by a decision of the Division Bench in *Secretary of State for India in Council* v. *Ramasray Singh*(1). That was a case in which the plaintiffs, who were cultivating raiyats, allowed dealers of cattle to hold a *hat* upon their land for which a fee was charged to the cattle-dealers. They were called upon under section 24 of the Cess Act to make a return for the purposes of cess valuation and they were assessed on the income which they derived from the fees paid by the cattle-dealers. Their objection to the assessment having been disallowed by the Board of Revenue and the authorities subordinate to it, they instituted a suit for a declaration that they were not liable to assessment on the fees derived from the cattle-dealers. Neither the decision of Ross, J. nor section 93 of the Cess Act was referred to and the reason, I think, is quite obvious. There can be no doubt that the civil court has jurisdiction to grant relief in a case where the Cess Department has acted ultra vires and imposed liability for cess on income which is not subject to cess. Section 93 is no bar to such a suit, that is to say, while the section does not bar a suit to establish that the amount on which the defendants have been assessed, is not subject to the Cess Act at all, it does bar a suit in which the contention is not that the Cess Department acted

(1) (1933) I. L. R. 12 Pat. 701.

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ultra vires but merely that its decision is wrong. The Division Bench decision, therefore, in my opinion, does not affect the decision of Ross, J., nor has it any bearing on the present appeal.

It was next contended that Ross, J.'s decision has been overruled by implication by another Division Bench in *Shaikh Abdul Hasan* v. *Shaikh Taj Ali*(1). The facts of that case were that a tenure of 300 bighas was held by a number of co-tenants on an annual rent of Rs. 560. The tenure was divided up between the co-sharers, each group of co-sharers agreeing that they were liable for the payment of their share of the rent only. By this agreement the defendants in the suit were liable for less than Rs. 100 of the rent. The plaintiff-landlord claimed to recover cess from them at the rate of one anna in the rupee. The defendant's contention was that as cultivating raiyats they were liable only for half an anna on the amount of rent that they paid. In this case also neither the decision of Ross, J. nor section 93 of the Cess Act was referred to in the judgment of the High Court, nor does the report of the case indicate that the cess valuation roll was in evidence. Adami, J., in delivering the judgment of the Court, observed, "In deciding whether the defendants are liable to pay as tenure-holders or not, we have to consider the definitions given in the Cess Act and find out who is liable, and if a person cultivates the land himself and pays rent not exceeding Rs. 100, he is a cultivating raiyat whatever may be the character of his holding under the Bengal Tenancy Act. The defendants in this case pay a rent under Rs. 100 and, if they cultivate the land themselves, they will be liable only to pay cess at the rate of half an anna per rupee". The case was remanded to the court below to determine whether the defendants did in fact cultivate the lands themselves. In the present case, in the returns filed by the defendants, they show themselves as tenure-holders

(1) (1926) I. L. R. 6 Pat. 18.

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and the actual valuation of their holdings was ascertained at the figures already mentioned. These circumstances clearly prove that the defendants were not cultivating the land themselves. This fact distinguishes the present case from the last mentioned case. I am in entire agreement with the reasoning of Ross, J. To hold otherwise would result in gross injustice. The result would be that the landlord would actually be liable for a greater amount of cess than he receives from the defendants as rent and cess combined. This was clearly not the intention of the legislature and there is nothing in the Act which coerces us to accept this interpretation of its provisions.

I would, therefore, allow these appeals and set aside the decision of the court below and decree the suits with costs throughout.

VARMA, J.—These three second appeals arise out of three rent suits instituted by the 16-anna landlord for recovery of rents and cesses in respect of three tenures, khewats nos. 2, 3 and 4 of mauza Mateli Khemchand, on account of the years 1337 to 1340 Fasli. The defendants pleaded payment, and as to the cess claimed they urged that they were occupancy raiyats and as such were not liable to pay more than half-anna per rupee on the jama. They further pleaded that they were never required to file any cess-return. The trial court held against the defendants on the plea of payment; but as to the rate of cess payable by them, it came to the finding that for purposes of the Cess Act they were cultivating raiyats and, therefore, the plaintiff was not entitled to realize more than half-anna in a rupee on the jama. The trial court found that the defendants had actually filed cess-returns; but the learned Munsif was of the opinion that that fact would not operate to oust the jurisdiction of the Civil Court to grant relief to the defendants in respect of the cess claimed by the plaintiff. The view of the learned Munsif must obviously be in answer to some argument advanced before him that under section 93

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of the Cess Act (Bengal Act IX of 1880) every valuation made by the Collector shall be open to revision by the Commissioner or Board of Revenue and not otherwise. The lower appellate Court upheld the decision of the learned Munsif in its entirety. The suits were thus decreed for the rents but the amount of cess claimed by the plaintiff was reduced to half-anna per rupee on the jama. Hence these appeals by the plaintiff.

Mr. Sushil Madhab Mullick, appearing on behalf of the plaintiff-landlord, urges that the Courts below fell into an error of law in treating the defendants as cultivating raiyats, having found that they lodged returns as tenure-holders. It has therefore to be examined how the courts below came to hold that the defendants are cultivating raiyats within the meaning of the Act. Exhibits 1 to 1(*b*) are certified copies of the returns filed by the defendants in the year 1925 in respect of khewat nos. 2, 3 and 4; and Exhibit I (marked in this Court) is a copy of valuation roll prepared in the same year under section 35 of the Act. It appears from Exhibit I, the valuation roll, that these khewats were classed as sub-tenures and the valuation in respect of them was made as follows:

Khewat.	Annual value.	Amount of revenue or chaukidari chakran assessment payable on which deduction is to be made under section 41 of the Act.
	Rs. a. p.	Rs. a. p.
2.	565 5 0	27 5 9
3.	122 8 0	3 6 6
4.	28 0 0	4 0 0

The suits were filed on the 8th of September, 1933, and the plaintiff admittedly claimed cess at the rate of one anna in the rupee.

The learned Advocate for the appellant, relying on the decision of this Court in *Abdul Hasan* v. *Taj*

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VERMA, J.

Ali(1) and on several other decisions, has argued that in dealing with cases for purposes of the Cess Act one has to look at the matter according to the definitions of the various natures of interests as given in the Act itself and not according to the definitions given of them in the Bengal Tenancy Act, and refers to the definitions of the terms "cultivating raiyat", "tenure", "estate" and "holder of an estate or tenure" in section 4 of the Cess Act. According to the Act "cultivating raiyat" is a person cultivating land and paying rent therefor not exceeding one hundred rupees per annum; "estate" includes all lands entered in the Collector's registers, or lands (other than the interest of a cultivating raiyat) the revenue or rent of which may be directly payable to the Collector, or land acquired by or under the authority of Government for sale, grant, lease or clearance of waste lands; "tenure" includes every interest in land whether rent paying or not save and except an estate and the interest of a cultivating raiyat; and "holder of an estate or tenure" means all or any of the holders thereof, and where two or more persons are jointly holders thereof, they shall be jointly and severally liable under the Act. Now, in order to appreciate the evidentiary value of the valuation roll (Exhibit I) we may look into the scheme of the Cess Act, as laid down in the various sections. Under section 5 of the Act all immovable property shall be liable to payment of cess except as otherwise provided in sections 2 and 8; and under section 12 the Board of Revenue may order a valuation or a revaluation to be made of such properties in any district or part of a district after the expiration of the term of five years from the beginning of the year in which the cess was last levied. Section 14 provides that when such a valuation is to be made a proclamation is to be issued requiring every holder of an estate or tenure liable to pay an annual amount of revenue or an annual amount of rent exceeding one hundred rupees

(1) (1926) I. L. R. 6 Pat. 13.

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to submit a return, and notices are served on such persons as provided in section 16 to lodge returns before the Collector. Under section 24 of the Act even a cultivating raiyat may, in the discretion of the Collector, be served with a notice to make a return and is thereupon bound to comply with it and may be made liable to payment of cess; and under the Note to the section a raiyat, when he sublets a part of his holding, however small, is to be treated as tenure-holder for cess purposes. Then the valuation rolls are prepared, as provided in section 34, of each estate within a district and of the tenures therein comprised from the returns lodged and the same are then published in the manner prescribed in section 35. It is through all this procedure that we get the valuation roll, Exhibit I, in these appeals. Then section 36 lays down that every valuation and revaluation so made shall remain in force for a term of five years from the date to be fixed by the Board of Revenue under section 12, and thereafter, until another revaluation and assessment in substitution therefor shall have been made and completed. The modes of payment of local cess by holders of an estate or a tenure, or by a cultivating raiyat, are provided in section 41. Finally, under section 93 every valuation thus made is open to revision by the Commissioner or the Board of Revenue, *and not otherwise*; but under section 107 of the Act nothing done in accordance with the Act shall be deemed to affect the rights of any person in respect of any immovable property or any interest therein except as otherwise expressly provided.

That being so, the valuation roll (Exhibit I) published under section 35 of the Cess Act has a binding effect on matters falling within the jurisdiction of the Civil Courts. Apparently the attention of the Courts below was not drawn to the provisions of section 93 of the Act.

We are referred to the decision of this Court in *Secretary of State for India in Council* v. *Ramasray*

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Singh(1). In that case the assessment was made upon an income derived from dealers of cattle, and it was held that in those circumstances the plaintiff, who collected certain fee from the dealers, could not be construed to have the status of a tenure-holder in respect of the land on which the cattle fair was held. The learned Judges held "It is only the income derived by the holder of the estate or of the tenure upon which cess is to be assessed and in so far as the cultivating raiyat is concerned it is only upon the rent payable by him that cess is to be assessed. Under the circumstances it is clear that the plaintiffs cannot be assessed to cesses in respect of any profit which they make out of the holding". In determining the question whether the plaintiff in that case could have the status of a tenure-holder, their Lordships relied upon the Full Bench decision of the Calcutta High Court in *Secretary of State for India* v. *Karuna Kanta Chowdhry*(2).

In the case of *Abdul Hasan* v. *Taj Ali*(3) the tenure was held by a number of co-sharer tenure-holders, who subsequently agreed with the landlord that each of them would pay his jama according to the amount of land held by him in the tenure, and the amount of jama paid by each of them was not more than Rs. 100. Upon these facts it was held by this Court that the holders of the interest were cultivating raiyats and not tenure-holders as held by the lower appellate court. But it does not appear that in that case their Lordships' attention was drawn to section 93 of the Act.

In the other case, relied upon on behalf of the defendants-respondents, i.e., the case of *Sarat Chandra Deb* v. *Dharani Mohan Roy*(4) the contention was that the defendants who cultivated the 29 holdings were cultivating raiyats, as in respect of none of the individual holdings they paid a rent exceeding

(1) (1933) I. L. R. 12 Pat. 701.
(2) (1907) I. L. R. 35 Cal. 82.
(3) (1926) I. L. R. 6 Pat. 13.
(4) (1928) I. L. R. 55 Cal. 1305.

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Rs. 100, although the total jama paid by them was more than Rs. 100. Their Lordships of the Calcutta High Court took the view that in those circumstances the defendants were to be regarded as tenure-holders for purposes of the Cess Act. In that case also it does not appear that attention was drawn to section 93 of the Act.

In our opinion, these appeals are conclusively determined by the decision of Ross, J. in *Kesho Prasad Singh* v. *Ram Swarup Ahir*(1). His Lordship held that according to section 107 what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of persons, and that section 107 did not purport to modify the conclusive effect given by section 93 to the cess valuation. The valuation roll is prepared under section 35 of the Act, and under section 93 only the revenue authorities will have the jurisdiction to revise it. The defendants in these appeals are, therefore, bound by the entries in the valuation roll (Exhibit I).

In this view of the matter I entirely agree that these appeals must be allowed with costs throughout.

Appeals allowed.

J. K.

APPELLATE CIVIL.

Before Agarwala and Varma, JJ.

1938.

February, 14, 15, 25.

JAMUNA SONAR

v.

ATMA RAM OJHA.*

Limitation Act, 1908 (*Act IX of* 1908), *Article* 11—*suit against an order rejecting an objection under section* 24 *of the Public Demands Recovery Act*, 1914 (*B. & O. Act IV of* 1914), *whether governed by article* 11 *of the Limitation Act.*

*Appeal from Appellate Decree no. 380 of 1936, from a decision of Rai Sahib Bhuvaneshwar Prasad Pande, Subordinate Judge of Shahabad, dated the 26th November, 1935, affirming a decision of Maulavi Kabiruddin Ahmad, Munsif, Buxar, dated the 11th December, 1934.

(1) (1926) A. I. R. (Pat.) 175.

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L filed a certificate against *D* and got a notice under section 7 of the Public Demands Recovery Act, 1914, issued against him. *P* in execution of a money decree applied for the attachment and sale of certain properties belonging to *D* and other members of his family and *L* filed an objection, the Munsif directed the sale of the properties sought to be sold subject to the charge under the certificate. *P* purchased the properties and thereafter filed an objection in the certificate court that the certificate-debtor had no interest left in the property, but the objection was overruled. *P* subsequently applied for delivery of possession, but on the objection of *L* who had in the meantime purchased the property and got possession, was unsuccessful. *P* filed the present suit.

Held, that the suit having been instituted more than one year after the order rejecting the objection under section 24 of the Public Demands Recovery Act, 1914, was barred under section 25 of the Public Demands Recovery Act read with article 11 of the Limitation Act.

Atarmoyi Dasi v. *Ramananda Sen Chowdhury*(1), *Muthiah Chetti* v. *Palaniappa*(2) and *Subedar Singh* v. *Ramprit Pande*(3), referred to.

Appeal by the plaintiff.

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

Mahabir Prasad and *P. P. Varma*, for the applellant.

D. N. Varma and *T. Nath*, for the respondents.

VARMA, J.—This second appeal arises out of a suit which was dismissed by the Courts below on the ground that it was barred by limitation under Article 11 of the Indian Limitation Act.

In the courts below the suit was mainly contested by defendant no. 1, liquidator of the Friends' Co-operative Society at Dumraon. This defendant filed a certificate against defendant no. 4 and had it served

(1) (1922) I. L. R. 50 Cal. 311.
(2) (1928) I. L. R. 51 Mad. 349; L. R. 55 Ind. App. 256.
(3) (1929) 11 Pat. L. T. 28.

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on him on the 30th of June, 1930, under section 7 of the Bihar and Orissa Public Demands Recovery Act, 1914. Defendants second-party obtained a money-decree against defendant no. 4 and other defendants (defendants third party) who form a joint Mitakshara family. In execution of this money decree, defendant no. 1 filed an objection laying claim to the property sought to be attached and sold, on the strength of the certificate under which notice was served under section 7 of the Act on the 30th of June, 1930, and it was ordered that the sale in execution of the money decree would be held subject to the charge under the certificate. Execution of the money decree was levied on the 8th of December, 1930, the sale proclamation was issued on the 18th of February, 1931, and the plaintiff purchased the property on the 8th of April, 1931. After this purchase the plaintiff filed an objection on the 25th of May, 1931, in the certificate proceeding that the certificate-debtor (defendant no. 4) had no interest left in him in the property attached, but the objection was rejected and the property specified in schedule 2 was sold to defendant no. 1 on the 4th of June, 1931, and delivery of possession was given of it on the 13th of September, 1931. The sale held under the money decree on the 8th of April, 1931, was confirmed, in respect of 3 out of the 4 houses involved, on the 5th of August, 1931, and a sale certificate was granted to the plaintiff on the 2nd of July, 1932, and delivery of possession was given to the plaintiff on the 24th of January, 1933. Resistance was offered to the plaintiff in taking possession of the property, and on the 7th of March, 1933, he filed a petition under Order XXI, rule 97, of the Code of Civil Procedure. The objection was allowed and the plaintiff was directed to take out a fresh dakhaldehani in respect of 15/16th share of the houses and to be in possession of it jointly with defendant no. 1; but this order of the Munsif was ultimately set aside by the High Court on the 9th of October, 1933. The plaintiff-purchaser under the money decree thus instituted the present suit for declaration of his title to and

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confirmation of possession over the entire property purchased by him at the execution sale on the 8th of April, 1931, and prayed that, if it were held that the defendant no. 1 had any interest in the property, he might be put in possession jointly with the defendant no. 1.

The Court below has dismissed the suit of the appellant on the ground that it was barred by limitation not having been filed within one year from the 4th of June 1931, on which date his objection before the Certificate Officer was rejected, as contemplated by section 25 of the Public Demands Recovery Act and Article 11 of the Indian Limitation Act.

Mr. Mahabir Prasad, appearing on behalf of the appellant, urges that on the 8th of April, 1931, defendant no. 1 had no interest in the property involved and therefore his application to the Certificae Officer resulting in the order of the 4th of June, 1931, was misconceived, as section 22 of the Act requires that the claimant or objector to a certificate proceeding must adduce evidence to show that, where immovable property is concerned, at the date of the service of the notice under section 7 he had some interest in, or was possessed of, the property attached. He has referred to the decision in *Atarmoyi Dasi* v. *Ramananda Sen Chowdhury*(1) where a person in possession filed an application under Order XXI, rule 100, of the Code of Civil Procedure for recovery of possession of the property from one who had obtained symbolical possession of that property after purchase in execution of decree, and the application was dismissed on the ground that his possession had not been disturbed. It was held that the application was one not within the purview of Order XXI, rule 100, and that it was only when possession is actually disturbed that time begins to run against the person dispossessed, and failure to bring a suit for establishment of title and recovery of possession within a year of the order

(1) (1922) I. L. R. 50 Cal. 311.

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passed on the application under Order XXI, rule 100, as contemplated by Article 11A of the Limitation Act, did not bar the suit by limitation. I am afraid this case does not help Mr. Mahabir Prasad, because, in my opinion, what this decision lays down is that when there is no disturbance of possession, an application under Order XXI, rule 100, would not lie. Mr. Mahabir Prasad then refers to the decision in *Muthiah Chetti* v. *Palaniappa*(1). There a mortgagee filed a suit after the period of limitation prescribed by Article 11. He had applied under Order XXI, rule 58, in the belief that there was an order of attachment. He filed the suit under Order XXI, rule 63, beyond the period of limitation. Their Lordships referred to Article 11 of the Limitation Act, and said that without attachment there could not be an application under Order XXI, rule 58, and that as there was no attachment, the petition could not be considered to be a petition under Order XXI, rule 58. But here we have got a sale proclamation issued by the Certificate Officer and it was on an application against that sale proclamation that the order of the 4th of June, 1931, was passed. The sale proclamation of the Certificate Officer was issued on the 20th of March, 1931, and the objection was filed on the 25th of May, 1931, and the order of the 4th of June, 1931, was passed against the plaintiff. That order must be held to be an order under section 24 of the Public Demands Recovery Act, and covered by Article 11 of the Limitation Act.

Mr. D. N. Varma, appearing on behalf of the respondent, has drawn our attention to the case of *Subedar Singh* v. *Ramprit Pande*(2) where even when a petition under Order XXI, rule 58, was dismissed on the ground that the petition was not maintainable under section 170 of the Bengal Tenancy Act, it was held that that was an order under Order XXI, rule 58, for the purpose of a suit under Order XXI, rule

(1) (1928) I. L. R. 51 Mad. 349; L. R. 55 Ind. App. 256.
(2) (1929) 11 Pat. L. T. 28.

63, and was governed by Article 11 of the Limitation Act.

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I would, therefore, hold that the order dated the 4th of June, 1931, was an order under section 24 of the Public Demands Recovery Act, and the suit is barred by limitation as held by the Courts below, I would, therefore, dismiss the appeal but under the circumstances of the case without costs.

AGARWALA, J.—I agree.

Appeal dismissed.

J. K.

FULL BENCH.

Before Courtney Terrell, C.J., Fazl Ali, Khaja Mohamad Noor, James and Manohar Lall, JJ.

JEONANDAN SINGH

v.

JANKI SINGH.*

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March, 3.
April, 1.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 56, 65 *and* 148—*plaint not specifying all the plots—landlord, when entitled to a decree for money on tenant's admission—no ejectment by landlord—tenant, whether entitled to suspension of rent—failure to grant acquittance under section* 56, *whether deprives the landlord of damages or interest—tenant forced to defend—costs, by whom payable—decision as to area and rental in a rent suit, when operates as res judicata.*

A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of section 65 of the Act; but a decree which has the effect of enforcing a charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of section 148 of the Act. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a

*Letters Patent Appeal no. 28 of 1937, from a decision of the Hon'ble Mr. Justice Madan, dated the 30th July, 1937.

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decree may be made enforcing this liability when a decree cannot be made enforcing the charge under section 65 of the Act.

If the finding be that the tenant has been ejected by the landlord from a portion of his holding, the tenant would be entitled to suspension of rent until the whole of his holding be restored to him; but when the finding is that the tenant is in possession of the area which he claims and that there has been no ejectment by the landlord, the landlord ought not to be deprived of the whole of the rent which the tenant by his defence has admitted to be payable.

Where the plaintiffs instituted a suit for bhaoli rent in respect of two khatas and the defendants pleaded that their holding consisted of other lands as well and that they held the same on a total cash rental of Rs. 42-14-4 and the court held that the suit was for a part of the holding which was held on a cash rental and dismissed it altogether,

Held, (*i*) that the question of area and rental was directly and substantially in issue between the parties in the former suit and actually formed the basis of the decision in that suit and was therefore res judicata.

(*ii*) that the landlord was entitled to a money decree on the admission of the tenant-defendant, but as he did not give acquittance in the manner prescribed by section 56 of the Bihar Tenancy Act he was not entitled to damages or interest; and as the tenant was forced to raise the issue of what was the correct area of his holding he was entitled to costs.

Appeal, by the defendant, under clause 10 of the Letters Patent against the decision* of Madan, J.

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

The case was in the first instance heard by Courtney Terrell, C.J. and Fazl Ali, J., who referred it to a larger Bench.

On this reference—

D. N. Varma, for the appellant: The tenant pays rent subject to the landlord recognising the tenancy of the defendant as it is.

*(1937) 18 Pat. L. T. 715.

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If the landlord refuses to recognise the precise tenancy, the tenant is under no obligation to pay the rent. The claim for rent is qua some land; if the landlord does not correctly state the land in the plaint, he cannot have a decree; he cannot claim rent for a land which is not the tenant's land or does not correctly represent his land.

It is not the case of an accidental omission of certain plots. The plaintiff does not wish to recognise my tenancy in regard to the entire holding. The plaintiff is not therefore entitled to any decree—*Indu Bhusan Basu* v. *Jatindra Nath Roy*(1).

[NOOR, J.—That was a case where the land in respect of which the tenant had been sued was not in his possession and did not represent the holding for which he was liable; that is quite different from a case of omission of certain plots in the plaint.]

The suit should be dismissed because the plaintiff has deliberately refused to comply with the provisions of law and to amend his plaint.

[Reference was made to *Maharaja Kesho Prasad Singh* v. *Ramdhar Rai*(2), followed in *Hakim Muhammad Raza* v. *Shaikh Zamiruddin*(3).]

[FAZL ALI, J.—If the plaintiff is to be penalised for not correctly stating the area in the plaint, then in every case where it is found that the area or the jama given by the plaintiff as well as by the defendant is not correct, the suit must fail.]

Not necessarily. If there is a *bona fide* omission or mistake that can be rectified, or where the plots found by the court to constitute the holding are already mentioned in the plaint, the suit will not fail.

(1) (1927) 32 Cal. W. N. 244.
(2) (1930) 11 Pat. L. T. 617.
(3) (1932) I. L. R. 11 Pat. 624.

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[MANOHAR LALL, J.—Rules of procedure have got nothing to do with the rights of the parties; giving the particulars of a holding is only a rule of procedure. Look to the observations of Terrell, C.J. in *Hakim Muhammad Raza* v. *Shaikh Zamiruddin*(1), at page 626.]

The learned Chief Justice has pointed out the necessity of an amendment of the plaint in similar circumstances. I now come to the case of *Rambeas Tewari* v. *Akhauri Raj Mohan Sahay*(2). That was a case of bhaoli rent. The plaintiff was entitled to leave out certain plots which had yielded no produce and there was nothing in law which could prevent the landlord from getting a decree in respect of such plots only as had yielded produce. I rely on the decision of Wort, J. in *Ram Chander Mahto* v. *Ram Gulam Mahto*(3).

Gendhari Prasad Singh, for the respondents:—The judgment in the previous rent suit does not operate as res judicata. The finding that the former suit was in respect of a part of the holding was not necessary for the decision of the suit.

[CHIEF JUSTICE.—But the matter was in issue all the same and the court did record a decision thereon.]

My next point is that the suit cannot fail as I have laid a claim to the *entire* rent. Arrear of rent is a debt and is recoverable independently of the provisions of the Tenancy Act. The observations in *Rambeas Tewari* v. *Akhauri Raj Mohan Sahay*(2) which was a case of bhaoli rent, apply with equal force to a suit in respect of nakdi holdings. But this view was not accepted by Agarwala, J. in *Dwarka Prasad Singh* v. *Babu Lal Singh*(4) wherein he has differed

(1) (1932) I. L. R. 11 Pat. 624.
(2) (1931) 13 Pat. L. T. 392.
(3) (1938) S. A. 996 of 1935 (unreported).
(4) (1937) 18 Pat. L. T. 1021.

from the view of Madan, J. expressed in the decision* under appeal. The learned Judge, I respectfully submit, has not understood the ratio decidendi of *Rambeas Tewari* v. *Akhauri Raj Mohan Sahay*(1); he was in no way bound by it. In *Kesho Prasad Singh* v. *Mathura Kuer*(2) the claim was not in respect of the entire area, *nor for the entire jama.* The question of apportionment necessarily arose in that case and the court in these circumstances refused to grant a decree. I rely on *Maharaja Kesho Prasad Singh* v. *Ramdhar Rai*(3).

[NOOR, J.—That was a case of an accidental omission which is not the case here.]

But all the same the plaintiff had failed to give a correct description of the holding.

[CHIEF JUSTICE.—There is but one liability on the part of the tenant, namely, to pay rent to the landlord who is bound to give not only a discharge for the entire rent but an acknowledgment that it is in respect of the whole of a well-defined holding.]

I submit not. The landlord is bound to give a correct description of the holding in those cases only where he desires to recover a decree for rent with all the advantages available to him under the Bihar Tenancy Act.

[FAZL ALI, J.—Suppose there is a *bona fide* dispute as to area between the landlord and the tenant and the landlord is not prepared to admit the claim of the tenant, would he still be deprived of the rent which the defendant himself admits to be the rent of the holding?]

No. That is my point.

*(1937) 18 Pat. L. T. 715.
(1) (1931) 13 Pat. L. T. 392.
(2) (1922) A. I. R. (Pat.) 608.
(3) (1930) 11 Pat. L. T. 617.

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[CHIEF JUSTICE.—Could the plaintiff frame a suit in this way—"I am claiming so much rent for 6 bighas only"? Will not the court be justified in striking off the plaint as disclosing no cause of action?]

I submit not.

[MANOHAR LALL, J.—Suppose the claim had been for 6 bighas and the defendant had said it was 8 bighas and the court had found the area to be 7 bighas only, would the suit even then be dismissed?]

No; that is exactly my contention.

D. N. Varma, in reply.

Cur. adv. vult.

S. A. K.

COURTNEY TERRELL, C.J., FAZL ALI, KHAJA MOHAMAD NOOR, JAMES AND MANOHAR LALL, JJ.—This appeal under clause 10 of the Letters Patent arises out of a suit which was instituted under section 148-A of the Bihar Tenancy Act for recovery of rent for the fasli years 1337 to 1340 in respect of a holding which originally was contained in khatians no. 222 and 921 of the record-of-rights. The defendant-tenants claimed that their holding included a further area of 1½ acres which they said had been settled with them at a total rental of Rs. 42-14¼ as. In 1923 the landlords instituted a suit claiming produce rent for the area contained in khatians nos. 222 and 921 which was resisted by the defendants on the ground that they held nine bighas of land at a rental of Rs. 42-14¼ annas, that is to say, that their holding at this rent included also 1½ acres out of plot no. 3751 which had been settled with them and that the whole had now been consolidated into one holding. The finding in that case was that the tenants occupied a holding of nine bighas at a cash rental of Rs. 42-14¼ annas and the suit for arrears of produce rent was dismissed. An appeal to the District Judge was

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dismissed on the 28th of April, 1925. In the present suit the Munsif found that the defendant-tenants had proved as a fact that their area and rental were as they described, apart from the question of whether the matter was made res judicata by the decision in the earlier suit. As the defendants admitted that the money which the plaintiffs claimed was due on account of rent, the Munsif gave a decree which was to have the effect of a mere money decree, allowing to the plaintiffs no damages or costs. On appeal the District Judge of Patna, relying on the decision in *Kesho Prasad Singh* v. *Mathura Kuer*(1), dismissed the plaintiff's suit. On second appeal to the High Court a Judge of this Court has restored the decree of the Munsif.

The learned Advocate for the appellant-tenants, relying on the decision in *Kesho Prasad Singh* v. *Mathura Kuer*(1), argues that in the circumstances the whole claim of the landlords should have been dismissed. He suggests that in the later decision in *Rambeas Tewari* v. *Akhauri Raj Mohan Sahay*(2) the rule which was laid down in *Kesho Prasad Singh* v. *Mathura Kuer*(1) ought to have been applied, because that decision had not at any time been overruled by the decision of a larger Bench. The learned Advocate points out that this was the view recently taken by Mr. Justice Wort in *Ram Chander Mahto* v. *Ram Gulam Mahto*(3); but it would appear on the face of it that the facts of that case did not in any way resemble the facts of the present case. It is necessary to speak with some reserve regarding the decision in *Ram Chander Mahto* v. *Ram Gulam Mahto*(3), because we understand that that decision is under appeal; but in that case it appears from the facts found that the plaintiffs had instituted a separate suit for one-third of an undivided holding, reserving the right to institute a separate suit for the remaining two-thirds.

(1) (1922) A. I. R. (Pat.) 608.
(2) (1931) 13 Pat. L. T. 392.
(3) (1938) S. A. 996 of 1935 (unreported).

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In the present suit we are bound by the findings of fact of the trial court which were affirmed on appeal. The learned Advocate for the plaintiff-respondents suggests that the decision in the former suit ought not to have been held to operate as res judicata; but the matter was directly and substantially in issue between the parties in the former suit and actually formed the basis of the decision in that suit, so that no argument can be based on the ground that the matter was not res judicata before the institution of the present suit. Apart from that question, the learned Munsif found on the evidence before him that the plaintiffs' holding was a holding of nine bighas. The provisions of section 148(*b*) of the Bihar Tenancy Act require that the plaint shall contain a statement of the situation, designation, extent and boundaries of the land held by the tenant. Under section 56 of the Act the tenant who makes a payment is entitled to a receipt giving the particulars contained in schedule 2 of the Act; and it may certainly be said that a tenant cannot properly be expected to confess judgment or to satisfy the claim for rent contained in the plaint unless the plaint should be in such a form that on his satisfaction of the claim for rent he would obtain acquittance of the nature described in section 56; that is to say, that the plaint must correctly specify the area held by the tenant. The tenant is therefore entitled and obliged, when faced with a plaint which describes incorrectly the area of his holding, to raise the issue of what is the correct area, and when that question is brought into issue and decided in the tenant's favour, it is clear that the tenant is entitled to costs on account of this contest which has been forced upon him. Further, as the learned Munsif has pointed out in the present case, the fact that the landlords have been manifestly unwilling to give acquittance in the manner prescribed by section 56 of the Act may be held to disentitle the landlord to any claim for damages or interest on account of the rent withheld.

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The question remains of whether the landlord is entitled to any decree on account of the money which the tenant admits to be due to him. If the finding should be that the tenant has been ejected by the landlord from a portion of his holding, the tenant would be entitled to suspension of rent until the whole of his holding should be restored to him; but where the finding is that the tenant is in possession of the area which he claims and that there has been no ejectment by the landlord, ought the landlord to be deprived of the whole of the rent which the tenant by his defence has admitted to be payable? In our judgment he should not. A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of section 65 of the Bihar Tenancy Act; but a decree which has the effect of enforcing this charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of section 148 of the Act. But the suit does not necessarily fail because a decree cannot be made enforcing the charge in such a manner as to entitle the purchaser at a sale in execution to annul all incumbrances. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be made enforcing the charge under section 65 of the Act. A money decree of this kind may properly be given in such a case as this, where owing to the existence of a dispute regarding the real area of the tenancy the landlord has in the description given in the plaint omitted to mention certain plots which formed part of the tenant's holding. The landlord must in such a case pay to the tenant the costs of the contest which he has forced upon him, and since it appears that he has not been willing to give acquittance in the manner required by law, he may be allowed no damages or interest on his claim; but for the rest we would prefer on the whole to accept as correct those decisions which

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permit the landlord to obtain a money decree for the actual arrears of rent which are found to be due to him.

The result is that the decision of the Judge of this Court restoring the decree of the Munsif is confirmed, but with this modification that the defendants will be entitled to their costs in the trial court. We make no order for costs in this Court.

J. K.

Appeal dismissed.

Decree slightly modified.

APPELLATE CIVIL.

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December, 7, 13, 14, 15, 16, 17, 20. January, 19.

Before Wort and Manohar Lall, JJ.

JAGDAMBA PRASAD LALLA

v.

ANADI NATH ROY.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 53*A*, *whether retrospective—section, whether applies to agreements made prior to April,* 1930—*Transfer of Property (Amendment) Act,* 1929 (*Act XX of* 1929), *sections* 16 *and* 63—*minor, whether bound to institute a suit for avoiding a transaction—declaration of intention to repudiate, whether sufficient—Guardians and Wards Act,* 1890 (*Act VIII of* 1890)—*legislature, duty of, to make drastic changes in the Act for proper and effective control of guardians.*

Section 53A of the Transfer of Property Act, 1882 (introduced by Act XX of 1929), is not retrospective in operation, and does not, therefore, apply to an agreement made prior to the 1st of April, 1930, the date of the coming into force of the amending Act.

* Appeal from Original Decree no. 182 of 1935, from a decision of Babu Harihar Prasad, Subordintue Judge at Dhanbad, dated the 26th of June, 1935.

Unless there is something in the language, context or object of an Act showing a contrary intention, the duty and practice of Courts of Justice is to presume that the legislature enacts prospectively and not retrospectively.

Sk. Mahammed Hushen v. *Jamini Nath Bhattacharjee*(1), dissented from.

Wakefield v. *Kumar Rani Sayeeda Khatun*(2), distinguished.

Young v. *Adams*(3), *Colonial Sugar Refining Company* v. *Irving*(4), *Reid* v. *Reid*(5), *Midland Ry. Co.* v. *Pye*(6), *The Queen* v. *Guardians of Ipswich Union*(7), *Smith* v. *Henry Callander*(8), *James Gardner* v. *Lucas*(9), *Kerr* v. *The Marquis of Ailsa*(10), *Pir Bakhsh* v. *Mahomed Tahar*(11) and *Ramkrishna Jha* v. *Jainandan Jha*(12), referred to.

Per MANOHAR LALL, J.—It is not necessary that a minor should institute a suit on coming of age to avoid a transaction entered into by the guardian on his behalf, or that some other guardian or next friend of the minor should institute a suit for that purpose. The minor can repudiate the transaction in a variety of ways, for instance, by dealing with or transferring the very property which has been dealt with by the guardian on his behalf and which transaction he does not choose to ratify.

Hem Chandra Sarkar v. *Lalit Mohan Kar*(13), *The Eastern Mortgage and Agency Company* v. *Rebati Kumar Ray*(14), *Abdul Rahman* v. *Sukhdayal Singh*(15) and *V. Muthukumara Chetty* v. *Anthony Udayar*(16), followed.

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(1) (1937) 42 Cal. W. N. 38.
(2) (1936) I. L. R. 15 Pat. 786.
(3) (1898) A. C. 469.
(4) (1905)) A. C. 369.
(5) (1886) 31 Ch. Div. 402.
(6) (1861) 10 C. B. (N. S.) 179.
(7) (1877) 2 Q. B. D. 269.
(8) (1901) A. C. 297.
(9) (1878) 3 A. C. 582.
(10) 1 Macq. 736.
(11) (1934) I. L. R. 58 Bom. 650; L. R. 61 Ind. App. 388.
(12) (1935) I. L. R. 14 Pat. 672, F. B.
(13) (1912) 16 Cal. W. N. 715.
(14) (1906) 3 Cal. L. J. 260.
(15) (1905) I. L. R. 28 All. 80.
(16) (1914) I. L. R. 38 Mad. 867.

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In a case where section 53A of the Transfer of Property Act, 1882, is sought to be invoked in defence of a lessee who has entered in possession upon the footing of an unregistered contract for lease, the lessee cannot be allowed to resist the action where the contract for lease is of a date anterior to the 1st of April, 1930.

Observations on the duty of the legislature to intervene and make some drastic changes in the Guardians and Wards Act, 1890, so that proper supervision and control may be exercised over the guardians in the real and effective interest of the minor.

Appeal by the defendants.

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

Sir Sultan Ahmed (with him *S. N. Bose*, *D. L. Nandkeolyar*, *N. N. Roy* and *R. J. Bahadur*), for the appellants.

P. R. Das (with him *J. C. Sinha* and *N. C. Ghosh*), for the respondents.

WORT, J.—This is an appeal by defendants nos. 5 and 6 and arises out of an action on a mortgage, dated the 20th of January, 1922, the consideration for which was Rs. 1,30,000. No question arises as between the mortgagor and the mortgagee, the only matter in dispute being the interest of the two appellants who are said to be entitled to the sub-soil rights of two of the villages, which are the subject-matter of the bond, free of the encumbrance.

The plaintiff sued as the assignee of the mortgage from defendant no. 17 who is the mortgagee, and who was a minor but had attained his majority at the time of the assignment to the plaintiff, which was dated the 23rd of December, 1932. Defendant no. 1 is the mortgagor. Defendant no. 17 granted the mortgage in suit acting through his mother, who was his guardian appointed by the District Judge of Burdwan by an order, dated the 23rd of February,

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WORT, J.

1920, about two years before the mortgage. Defendants nos. 5 and 6 were the appellants and were joined in the suit as they claimed the interest which I have already stated.

It is important to notice the facts relating to the mortgagee as a great deal of the argument depends upon his position with regard to the mortgage bond and another transaction to which I shall in a moment refer. One Gadadhar was the grandfather of defendant no. 17, Dharanidhar Rai. Gadadhar was married twice. By his first wife he had two sons, Jugal and Pramatha. Pramatha is the father of defendant no. 17, the mortgagee. By his second wife he had three sons, who for convenience will be referred to as the step-brothers and from whom at all material times Jugal and Pramatha were separated. The case of both the appellants is that their interest in the subsoil of the two villages is not affected by the mortgage. The interest of defendant no. 5 arises as follows.

On the 21st of Magh, 1330 (i.e. the year 1923), the mortgagor executed a *jot bemeadi ijara patta* of mauza Mahuda in favour of defendant no. 5. One Raghupati Chattarji of Purulia on the 8th of August, 1926, transferred to defendant no. 5 the right, title and interest of defendant no. 1 in mauza Mahuda excepting what had already been settled with defendant no. 5 under the ijara patta, and which had been purchased by him in a court-sale on the 16th of June, 1925, in execution of a decree obtained against defendant no. 1. Again on the 3rd of September, 1927, one Shiba Prasad Chattarji also conveyed to defendant no. 5 the right, title and interest of defendant no. 1 in the same village subject to the rights of Raghupati Chattarji's purchase which I have mentioned and which he (Shiva Prasad Chattarji) had purchased in a court-sale on the 16th of July, 1923, in execution of a decree against defendant no. 1. It is the transaction of the 12th of August, 1927, upon which in this case the rights of defendant no. 5 depend. On that date defendant no. 5 claims that

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the mortgagee defendant no. 17, acting through his guardian, granted him a deed of release of the sub-soil rights of village Mahuda. By this deed it is claimed that the sub-soil rights in this village were excluded from the operation of the mortgage. Although not recited in the deed it is stated in evidence that the consideration for this deed of release was a sum of Rs. 5,000 and the position of defendant no. 5, if this transaction is established, is that having obtained by the transactions, to which I have referred, the equity of redemption of the sub-soil rights in a portion of the village, he redeemed the mortgage to the extent of the sub-soil rights of village Mahuda by obtaining the deed of release in question.

Defendant no. 6 claims to have a lease of the sub-soil rights from defendant no. 1, the mortgagor of village Telmocho under a contract of the 26th of August, 1923. Telmocho was about 805 acres in area. On the 21st of June, 1922, defendant no. 1 granted a lease of 500 bighas of the sub-soil rights to defendant no. 3. On the 18th of December, 1925, defendant no. 3 granted a sub-lease of 50 bighas to defendant no. 6. On the 12th of August, 1927, there was a further lease by defendant no. 3 to defendant no. 6 of 25 bighas. On the 31st of August, 1927, defendant no. 3 transferred to defendant no. 6 a right to receive royalty with regard to 100 bighas of the 500 bighas; in this 100 bighas was included the 50 bighas granted under the sub-lease of the 18th of December, 1925. Under these various transactions defendant no. 6 was in possession of 125 bighas of the sub-soil. Then on the 26th of August, 1923, came the transaction to which I have referred—a contract by defendant no. 1 to transfer to defendant no. 6 sub-soil rights in respect of 450 bighas of village Telmocho. It is the contention of defendant no. 6 in this appeal that under the nineteenth clause of the mortgage the sub-soil rights in village Telmocho were reserved to the mortgagor restricting the mortgagor to make the grant which is in question.

As regards the case of defendant no. 5 the deed of release was executed by the guardian without the necessary consent of the District Judge under the Guardians and Wards Act. This fact is not disputed and therefore it became necessary for this defendant to contend that whereas the mortgage and the release purported to be the transaction of the minor, they were in fact the benami transactions of Jugal and Pramatha, respectively uncle and father of defendant no. 1—a fact of which he became aware (so he states) in 1930. If this case has been established the consent of the Judge for the transaction was unnecessary. Alternatively the case was that if the transaction was in fact, what it appeared to be, that of the minor, it was entered into by the guardian and was for the benefit of the minor's estate and therefore binding.

The Judge in the Court below has held that the mortgage was not a benami transaction; that the minor was in possession of separate estate and was in a position to advance the loan secured by the mortgage; that the deed of release was a fictitious transaction for which there was no consideration; and that the mother, as guardian, was unaware of the nature of the deed of release as it had not been explained to her. As regards defendant no. 6, the learned Judge has held that such interest as defendant no. 6 possessed in village Telmocho was subject to the mortgage.

In order to show that the deed of release was a transaction of the father and uncle and not that of the minor with regard to his separate estate, it has been the endeavour of defendant no. 5 to establish the fact that the minor had no separate property and that the money, the consideration for the mortgage, was in fact advanced by Jugal and Pramatha. Quite apart from other considerations the appellants are in some difficulty with regard to this as the evidence is clear that, of the Rs. 1,30,000 Rs. 93,000 odd was paid by the minor and the balance paid by Pramatha, the

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evidence of the advance by Pramatha of this limited amount being quite inconsistent with the appellants' case.

I propose to mention a point here for the purpose of disposing of it at once. It was the contention of the appellants that the school of Law governing this family was the Mitakshara and not the Dayabhaga, contrary to the decision of the Subordinate Judge in this regard. This question had no direct bearing on the point at issue, but the appellants appear to think that their case was in some way strengthened if they could establish this point. It has been rightly pointed out by the Judge in the Court below that if the family were governed by the Mitakshara School, there was nothing inconsistent with holding that the minor had separate property. The facts relied upon by the appellants in support of their contention are, first, that the family were Chhatris, as the High Court found in a judgment in a case to which certain members of the family were parties—*Nagendra Nath Roy* v. *Jugal Kishore Roy*(1); secondly, that the family had been settled in Bengal for about five or six generations; and, thirdly, the statements purporting to have been made in certain petitions by the mother of the minor that the family was governed by the Mitakshara. As regards the family's settlement in Bengal, the most that was said by the witness was that they had been there for five or six generations but their original home was unknown. It is argued that the fact that they had migrated to Bengal raises the presumption in law that they were governed by the School of Law from that part of the country from which they came. The Judge discredits the statement of the mother as he appears to be of the opinion that the statement was in all probability placed in the petition by the lawyer acting on behalf of the minor and that he was not bound by that statement. Whether this assumption by the Judge in the Court below was correct may be

(1) (1925) 43 Cal. L. J. 83.

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open to doubt, but in the state of the evidence it is impossible to hold that the family are governed by the Mitakshara School. Had the evidence as regards their migration to Bengal been clear, the presumption upon which the appellants rely would certainly have been stronger. But the mere fact that the family history can be traced back in Bengal for five or six generations does not necessarily raise the presumption that they migrated to Bengal. Ordinarily speaking, a Hindu family in Bengal would be governed by the Dayabhaga School and it seems to me to have been necessary for the party who contended otherwise to have called witnesses best able to establish the fact upon which they relied: I am referring to Jugal and Pramatha, neither of whom was called in this case.

The appellant no. 5 relies upon the weakness of the evidence of the mother as to the nucleus of the minor's property to establish his contention that the money was the money of Jugal and Pramatha or the money of the joint family of which the minor was a member. In this connection reliance is placed upon the decision in *Gopeekrist Gossain* v. *Gungapersaud Gosain*(1). He contends on the authority of this case that, as the transaction was in the name of the son, the presumption is that it was the transaction of the joint family. But that begs the very question which we have to consider—whose money was it that was advanced to the mortgagor? In the case relied upon there was no serious dispute that the money was that of a person other than the minor. The evidence which is attacked in this case is that of Musammat Sarupini Debi, the mother, who, in her evidence in chief taken on commission, said that Rs. 1,30,000 was advanced by her son the minor; the nucleus of her son's separate estate was obtained at the Ekusa ceremony of her son when presents were given by a number of guests amounting approximately to Rs. 5,000. It is quite evident from her deposition

(1) (1854) 6 Moo. I. A. 53.

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that she was somewhat vague as to the exact amount; but, as will be seen on reference to the other evidence in the case, to which I shall refer later, it is impossible to conclude that this boy had no separate estate inspite of the somewhat vague evidence of the mother. The minor, acting through his mother, purchased in execution of a decree Sitanala colliery for a sum of Rs. 3,315; this was in an execution case of 1918. This property was a mining lease in the name of Pramatha Nath Roy who had taken it from the Raja of Pachet in 1908. A decree for royalties was obtained in a suit of 1913. About the time of the purchase a dispute was going on between the step-brothers and Pramatha as to their rights in this property and it is suggested that this purchase was for the purpose of depriving the step-brothers of their rights. This transaction was not carried through by the mother but by another guardian, the mother being appointed at a later date, i.e. on the 23rd of February, 1920. It is not a very strong piece of evidence but the necessity for the appointment of a guardian is some indication that the minor had separate estate. On the 23rd of March, 1920, an application was made by Musammat Sarupini Debi to sell this property which had been purchased for Rs. 3,315. It is almost unbelievable, but the fact is that an offer had been obtained for the purchase of this colliery for Rs. 3,50,000. As the step-brothers had been claiming rights to this property, the purchasers, in addition to the purchase price already mentioned, paid a sum of Rs. 1,25,000 to the step-brothers and obtained a sale deed from them.

The facts as to the price paid and the offer of purchase are stated in the order of the learned Judge made on the date which I have given. On the 31st of the same month permission was granted to sell the property, as prayed for, and the guardian was ordered to file an account of the transaction within thirty days. It will be seen therefore that by this one transaction a estate of upwards of Rs. 3,00,000 was obtained. The order requesting Musammat Sarupini

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Debi to file an account was complied with on the 13th of December, 1920. There she set out items showing a disbursement of part of the Rs. 3,50,000 obtained from the sale of the Sitanala colliery. A large number of properties had been purchased and other expenses incurred which left a balance of Rs. 93,834-11-0. Of this balance Rs. 93,000 was advanced on the mortgage in suit and a further Rs. 37,000 was obtained from Jugal. There is no doubt, as I have already stated with regard to this evidence; and the statement that Jugal advanced Rs. 37,000 of the total consideration of Rs. 1,30,000 is clearly inconsistent with the case now set up by the appellants that it was from Jugal or Pramatha or both of them, acting on behalf of the family, that the whole of Rs. 1,30,000 was obtained.

That is the position with regard to the mortgage and the manner in which the money was obtained. If the transaction was a transaction with respect to the minor's separate estate, then it would necessarily follow that, if the release were a genuine transaction, it was also a transaction of the minor and not, as the appellants allege, the transaction of the joint family.

It is with regard to this deed of release that we are mainly concerned in the appeal of appellant no. 5. The deed of release, dated the 25th of June 1926, is by Jugal as am-mukhtar of Musammat Sarupini Debi, the guardian of the minor. There is no dispute as regards the fact of the lady's signature but there is a controversy as to whether the lady executed the deed understanding the transaction.

[His Lordship then discussed the evidence as regards execution and passing of consideration.]

Having regard to the view the learned Judge takes of the evidence of the witnesses before him and the fact (which in my judgment is most important in this case) that no consideration is named in the deed of release itself, it seems impossible to come to any

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other conclusion than that at which the learned Judge has arrived, and that is that Rs. 5,000 was never paid, and even if it must be held that the sum was paid, there is no evidence that it was ever received by the minor. In this connection it is important to note that in the petition of the lady, as guardian of the minor, to the District Judge for authority for the release, although the prospect of litigation is stated to be the ground for releasing Mahuda, no mention is made of the alleged consideration of Rs. 5,000. The petition is dated the 17th of January, 1927, six months after the date on which the deed of release was executed. In the affidavit in support of the petition, but which was made nearly three months later, the amount of Rs. 5,000 does appear. This the Judge has characterized as an after-thought.

It is true that the case of the appellants is that it was not the minor's transaction, but the circumstances upon which the learned Judge has relied are of the greatest possible importance. It appears that defendant no. 5 did not know that this was a transaction of the joint family until the year 1930, and the fact to which I refer is that defendant no. 5 thought (as indeed all persons connected with the transaction at the time thought) that it was necessary to obtain the sanction of the District Judge. For that purpose reliance is placed upon certain correspondence with a Mukhtar named Muhammad Yasin. Pramatha Nath Roy, Pleader, wrote to him on the 27th of June, 1926, instructing him to obtain the sanction of the Judge to the deed of release. Muhammad Yasin replied on the 28th to the effect that the application was refused and we know that, for whatever reason, the application was not persisted in and no sanction of the Judge was obtained.

Now, it is not disputed in this case that, if it can be shown that the transaction of the mortgage was that of the minor through his guardian, it would be necessary to have obtained the deed of release in

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question from the minor, assuming for the moment that it was not a fictitious transaction. * * * * * * * * *

On the face of it the mortgage transaction was that of the minor and in the state of the evidence I am of the opinion that the appellant has not shown that the apparent transaction is not the real one. More particularly with regard to the transaction with which we are primarily concerned, the circumstances point to the fact that the guardian was in ignorance of its existence and certainly its nature. Nor does the case made by the appellant (defendant no. 5) clearly show the transaction to be a genuine one. The existence of the receipt for the Rs. 5,000 which is in fact relied on by the appellant, does not establish such a payment, much less a payment to the minor. The existence of the receipt in the circumstances was so unnecessary as to give rise to the doubts which existed in the mind of the Judge in the Court below. Having regard to the view I take of the mortgage, I come unhesitatingly to the conclusion that the release if obtained should have been obtained from the minor and that has not been established in the case, first, because it has been established that the guardian was unaware of the transaction, and, secondly, there are the gravest doubts whether the Rs. 5,000 was ever paid, nor can it be said that the transaction, if not entirely unreal, was for the benefit of the minor's estate with regard to which there was no evidence.

The questions of law which have been argued strictly do not arise having regard to my decision as to the circumstances under which the deed of release was executed. On the footing that the transaction was a transaction of the minor, it was contended by the appellant (defendant no. 5) that the deed of release was not a transfer by sale, gift, exchange or otherwise within the meaning of section 29 of the Guardians and Wards Act and, therefore, it was unnecessary to obtain the sanction of the District

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Judge. Section 30 provides that a transfer of property in contravention of sections 28 and 29 is voidable at the instance of any person affected thereby. As the release was not a transfer within the meaning of section 29 it was further argued that the plaintiff, although affected by the deed of release, was not entitled under section 30 to have it set aside. The respondents contend, on the other hand, that the transaction was a transaction under sections 28 and 29; that it was voidable under section 30 by reason of consent not having been obtained from the District Judge; and that in any event if the plaintiff cannot avoid the transaction, it is avoided sufficiently by reason of the defence set up by the mortgagee in which he repudiates the document. Reliance was placed for this view on the decision of Sir Lawrence Jenkins in *Hem Chandra Sarkar* v. *Lalit Mohan Kar*(1) in which the learned Judges relied upon *The Eastern Mortgage and Agency Co.* v. *Rebati Kumar Ray*(2). In my opinion the words used in section 29 of the Guardians and Wards Act are sufficient to cover the transaction in question. In effect whatever might be the description given of the deed, it was a transfer of the equity of redemption to defendant no. 5 who had obtained certain leases of the underground rights in the village.

As regards limitation, in my judgment Article 44 of the Limitation Act would apply. It has been held by the Judge in the Court below and not disputed that the minor attained his majority on the 25th of October, 1931, and, whether the assignee (the plaintiff) as being the person affected by the transaction was entitled in his suit to have it set aside, or that such a right was limited to the minor himself, it must be held that the minor has avoided it by his defence in this action. The persons interested in having the transaction set aside are well within time as the action was within three years of the date of the minor's

(1) (1912) 16 Cal. W. N. 715.
(2) (1906) 3 Cal. L. J. 260.

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majority. In support of this argument reliance was placed upon *Fakirappa Limanna* v. *Lumanna Bin Mahadu*(1).

As regards defendant no. 6, he is in possession of an unregistered agreement of lease, dated the 26th of August, 1923. In the first place he relies upon clause 19 of the mortgage which provides:

"That I have not as yet settled the underground coal of the mauza called Ramnagar otherwise called Telmocho, which I have within my zamindary and included in my mortgaged property. I shall have the full right and power to settle the underground coal of the said mauza. I shall be competent to sell the same according to my sweet will. I shall remain bound to pay up the amount due to you with the amount of salami I shall get by making settlement of the underground coal land of the said mauza; otherwise it will be the cause of action for a suit."

He relies upon this for the contention that the sub-soil rights of Telmocho were excluded from the mortgage. In this case the clause which I have read confers on the mortgagor the power of management including the granting of leases, and if the agreement which defendant no. 6 sets up is a binding agreement, the mortgagee or any other person entitled to the possession of the estate will be entitled to possession subject to the lease granted to defendant no. 6. The only question in the appeal is whether defendant no. 6 has got a valid lease.

It is not disputed that the document in its present form is invalid as a lease. Sir Sultan Ahmed on behalf of the appellant relies upon section 53A of the Transfer of Property Act, an Amendment of the principal Act by the Transfer of Property Act in 1929, for the contention that he can resist the plaintiff's claim as he is in a position to demand specific performance of the agreement. The whole question depends upon whether the appellant (defendant no. 6) can take advantage of section 53A. That depends upon whether section 53A can apply to a case in which the agreement was made prior to April, 1930, the

(1) (1919) I. L. R. 44 Bom. 742.

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date of the coming into force of the Transfer of Property Act, 1929. The main argument is based on section 63 of Act XX of 1929 which provides that nothing in certain sections there named "shall be deemed in any way to affect" certain matters set out in sub-clauses (*a*), (*b*) and (*c*). Sub-clause (*d*) of section 63 of the same Act provides inter alia:

> "nothing in any other provision of the Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date."

This is the substance of the section. It is agreed that there is nothing in the section which prohibits the retrospective operation of section 53A, as section 53A is not mentioned in section 63 of Act XX of 1929, nor does it come within that part of the last sub-clause which I have read. The argument is, an argument which has been accepted in some cases, that as certain provisions of the Act are stated specifically not to be retrospective and as the prohibition in the last sub-clause (*d*) of section 63 refers merely to a thing already done before the 1st of April, 1930, and a proceeding in Court on that date, it necessarily follows that the other sections relating to matters other than those to which I have referred are retrospective. This argument, as I have stated, has been accepted in a number of cases.

In the case of *Sk. Mahammad Hushen* v. *Jamini Nath Bhattacharji*(1) the learned Judge delivering the judgment of the Court stated that if the test laid down by Lord Watson in the Privy Council case of *Young* v. *Adams*(2) had applied, then it would have been clear that the section was not retrospective; but the learned Judge proceeds to add that Lord Watson's test is not the only test, but that the retrospective nature of the section may result from necessary inference, and reference was made to *Colonial Sugar Refining Company* v. *Irving*(3). The fact that

(1) (1937) 42 Cal. W. N. 38.
(2) (1898) A. C. 469.
(3) (1905) A. C. 369.

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section 63 of the Transfer or Property Act provides that certain sections shall not have retrospective effect does not give rise to the necessary implication that the other sections have such an effect. In *Wakefield* v. *Kumar Rani Sayeeda Khatun*(1) the learned Chief Justice and James, J. (James, J. delivering the principal judgment of the Court) have expressed their views with regard to the matter, holding that the section applied to the agreement of the 4th of August, 1923, not otherwise enforceable. James, J., in expressing that view, but dealing with none of the cases nor the argument in detail, stated that in the form which the appeal had ultimately taken the question, strictly speaking, did not arise. Again the learned Chief Justice following stated: "Although by reason of the course which the case has taken the question of the retrospective nature of section 53A of the Transfer of Property Act is no longer of importance in this particular case, I think it necessary by reason of the general importance to explain the reason for my concurrence with the view expressed". Had the matter been otherwise and the point arisen in the case, it would have been necessary to refer the case to a Full Bench of this Court, having regard to the view that my learned brother and I take on this point. Having regard to the statement of the learned Chief Justice and James, J., I do not feel bound by their view of the law.

The question is put beyond doubt by section 3 of the Act of 1929, to which I shall in a moment refer. But before dealing with that I would like to reiterate, by reference to authorities, the principle which is applied in dealing with a question of this kind. In *Reid* v. *Reid*(2) Bowen, L.J., made this observation: "We are dealing, it is true, with an Act which is in some sense and to some extent retrospective, and with a section that is to some degree retrospective.

(1) (1936) I. L. R. 15 Pat. 786.
(2) (1886) 31 Ch. Div. 402.

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The section applies to and affects marriages contracted before the commencement of the Act..... Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris forman imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act, which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant". In *Young* v. *Adams*(1) a case to which I have made a passing reference—the Judicial Committee of the Privy Council in considering this matter were dealing with the words of a section which were to this effect: "Nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the public service". The position was this that during the period between the original engagement and the dismissal of the person in question the Act of 1884 was passed. He was dismissed five months before the Act of 1895 the relevant words in which I have quoted above. The argument was that crown could take advantage of the Act of 1895 as being retrospective. In dealing with the point Lord Watson said that the

(1) (1898) A. C. 469.

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rule laid down by Erle, C.J., in *Midland Ry. Co.* v. *Pye*(1) ought to apply, and observed that " They think that, in a case like the present, the learned Chief Justice was right in saying that the retrospective operation ought not to be given to the statute, ' unless the intention of the Legislature that it should be so construed is expressed in a plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment '. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him ". Again in *The Queen* v. *Guardians of Ipswich Union*(2) Cockburn, C.J., says: " It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts that may have ceased to exist nearly thirty years back ". There is no express statement here that section 53A is retrospective. In the House of Lords, *Smith* v. *Henry Callander*(3)—a case in which compensation was given to tenants under the Market Gardeners Compensation (Scotland) Act, 1897—the same rules apply. It is true that in these cases, as in the other cases to which I shall make reference, the words of a particular statute were being construed, but in each case there was no specific provision as to their retrospective character. With regard to the particular matter in question and in all cases the rule as to ambiguity was applied. In referring to certain Scottish cases Lord Hatherley in *James Gardner* v. *Lucas*(4) referred to Lord President's judgment in which he cited the opinion of Lord Cranworth in the case of *Kerr* v.

(1) (1861) 10 C.B. (N.S.) 179.

(2) (1877) 2 Q. B. D. 269.

(3) (1901) A. C. 297.

(4) (1878) 3 A. C. 582.

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The Marquis of Ailsa(1) to the following effect: "Unless there be something in the language, context or object of an Act of Parliament showing a contrary intention, the duty and practice of Courts of justice is to presume that the Legislature enacts prospectively and not retrospectively". In the case of *Pir Baksh* v. *Mahomed Tahar*(2) their Lordships of the Judicial Committee of the Privy Council referred to section 53A and said "Whereby a defendant in an action of ejectment may, in certain circumstances, effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships' views, as expressed in the present case, must therefore be understood to be referable to the state of the law before this partial importation into India of the English equitable doctrine of part-performance". The case referred to facts arising before the Act but from the Act their Lordships did not apply section 53A. Support is thus given to the decision of this Court in *Ramkrishna Jha* v. *Jainandan Jha*(3).

There is one matter, as I have said, which in my judgment puts the question beyond any dispute. Section 53A was enacted by Act XX of 1929—the Transfer of Property (Amendment) Act. By reason of a decision of the Calcutta High Court by which it was held that a document not registered could not be adduced in evidence to support a claim for specific performance and by reason also of the addition of section 53A to the Transfer of Property Act it became necessary to make an amendment by way of an addition to the Specific Relief Act of 1877. The amendment of the Specific Relief Act (now section 27A) made by section 3 of the Transfer of Property (Amendment) Act, 1929, allows a person to sue for specific performance notwithstanding that a contract

(1) 1 Macq. 736.
(2) (1934) I. L. R. 58 Bom. 650; L. R. 61 Ind. App. 388, 397.
(3) (1935) I. L. R. 14 Pat. 672. F. B.

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though required to be registered had not been registered, and in the circumstances that the lessee had taken possession of the property. The contract in this case is not a registered contract, and for that reason if section 53A is not retrospective, it cannot be relied upon. The last sub-clause of section 27A of the Specific Relief Act states that the section applies to contracts or leases executed after the 1st of April, 1930. There can be no serious dispute in this case that the contract in question had it been registered would have been valid; its form is not in question. If the argument that the Act is retrospective is to be accepted, then this anomalous position arises under the Act. If the defendant no. 6 when the Act of 1929 was passed giving him (according to the argument) rights to specific performance, had been alert and diligent and brought an action for specific performance of his contract, he would have been met with the sub-clause which clearly enacts that it applies only to leases or contracts made after the 1st of April, 1930. If, however, he slept on his rights and did nothing and was sued in an action for ejectment, then if the argument be accepted that section 53A is retrospective, he would be entitled to what would be equivalent to specific performance—contradictory positions which could not clearly be intended by the Legislature. In my judgment there can be no doubt that section 53A is not retrospective and that defendant no. 6 is not entitled to enforce his rights under its provisions. There is no question here, indeed there can be none, that section 53A is merely a matter of procedure. It is a section which gives substantive rights to the parties coming within its provision.

There is a further argument which incidentally disposes of the matter and that is that the defendant could not in this section obtain specific performance against the plaintiff alone who is a mere assignee of the mortgage. He could if at all obtain specific

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performance against the person from whom he obtained his contract and he is defendant no. 1. There can be no right in the nature of counter-claim against a co-defendant, nor against a plaintiff in India. The further contention is that any claim for specific performance is barred by limitation. There is no evidence here of refusal and I doubt, had the position been otherwise with regard to section 53A, whether on this point defendant no. 6 would have failed.

There is one other matter. The learned Judge in the Court below is quite clearly wrong in his order as regards defendant no. 6. It is agreed that the right, title and interest of this defendant as lessee will not be affected by plaintiff's mortgage decree in respect of 125 bighas of coal land in mauza Telmocho acquired under registered leases (Exhs. A-3, dated the 18th of December, 1925, A1-3, dated the 12th of August, 1927, and B-3, dated the 31st of August, 1927) and which is not the subject-matter of the agreement or ekrarnama (Exh. W-3, dated the 26th of August, 1923) relating to 450 bighas of coal land in mauza Telmocho. So far as these 450 bighas are concerned, the same would have to be said had the ekrarnama been a valid lease; but having regard to the decision at which I have arrived this is not so.

With the agreed modification as regards the 125 bighas of defendant no. 6 I would hold that the appeal fails and must be dismissed with costs.

MANOHAR LALL, J.—The first question which I propose to discuss in this case is whether the deed of release executed by Musammat Swarupini Devi, certificated guardian of the minor, Dharanidhar Roy, defendant no. 17, in favour of defendant no. 5 is valid and binding upon the plaintiff. The facts necessary to determine this matter may be shortly stated.

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On the 20th of January, 1922 the defendant no. 1 executed a mortgage bond for Rs. 1,30,000 in favour of defendant no. 17, Dharanidhar Roy (born in the year 1910) the eldest son of Promotha Nath Roy, defendant no. 19. The family of the Roys are Kshatriyas descended from one Gajadhar Roy, the common ancestor, who from his first wife had two sons Jugal Kishore Roy, defendant no. 18 and Promotha Nath Roy already mentioned: Jugal and Promotha had three step-brothers who were sons of their father Gajadhar Roy from his second wife and were named Ramshankar, Kalipada and Dakhina. At all material times it is admitted that sons of the first wife were separate from the sons of the second wife although actual partition of the properties by metes and bound had not taken place. The mortgage bond of January, 1922, mentioned above, comprises as its security village Mahuda in which the 5th defendant who is the appellant before us is interested in this way: Before the abovementioned mortgage of 1922 the first defendant had transferred the sub-soil rights in village Mahuda to Bengal Coal Co. who became liable to pay a certain royalty to the first defendant. The first defendant thereafter gave an ijara of this right to receive royalty to the 5th defendant. The 5th defendant was minded to acquire the full rights in this village in which he possessed only the sub-soil rights in ijara. Accordingly a transaction was entered into which is styled as a deed of release (which is the subject of serious controversy) in this manner. In the year 1908 Sitanala Colliery was taken in lease from the Raja of Pachet by Promotha, the 19th defendant. The three step-brothers of Promotho laid a claim to this property alleging that this was a joint family property in which they had three-fifth share although it stood in the name of Promotha and they filed a partition suit in 1917 for partition of all the properties making Jugal and Promotha as defendants in which they claimed three-fifth share in the Sitanala Colliery

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as well as in other properties. In the meantime Promotha having fallen in arrears for rent to the Raja the latter filed a suit in 1913 and obtained a rent decree for about three thousand rupees. This decree was executed in 1918 and the rights of Promotha in the Sitanala Colliery were put up to auction and purchased by or in the name of defendant no. 17 in the same year for a sum of Rs. 3,315. It will be noticed that the 17th defendant was aged only 8 years at that time. In June, 1919, the three step-brothers applied to the civil court for permission to deposit the decretal amount under the provision of Order XXI, rule 89, of the Code of Civil Procedure but the court rejected that application by a long order by which it held in a summary proceeding that the applicants had no right to deposit this amount. The sale was accordingly confirmed in the name of defendant no. 17, the boy Dharanidhar. An appeal was preferred from this order to the High Court. During the pendency of that appeal Musammat Swarupini, the mother of the boy, applied to the District Judge of Burdwan on the 18th of December, 1919, to be appointed as guardian of the person and property of her minor son Dharnidhar, the Sitanala Colliery being included as one of the properties in the schedule to the petition for guardianship. It is admitted and proved by the evidence in the case that this was a very valuable property worth about three to four lacs. The District Judge appointed the mother as guardian in February, 1920, after notice to and with the consent of the father and the uncle of the boy, and issued necessary certificate of guardianship on the 10th of March, 1920. On the 23rd of March, 1920, the mother applied to the District Judge for permission to sell the Sitanala Colliery for a sum of Rs. 3,50,000 to certain purchasers and necessary permission was in due course readily granted for this sale on the 14th of July, 1920. The purchasers took the precaution of getting a sale-deed from the three step-brothers also by paying a sum of

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Rs. 1,25,000 on the 26th of February, 1921. The mother was asked by the District Judge to furnish an account of Rs. 3,50,000 which she had received as sale price of Sitanala Colliery and she filed an account on the 13th of December, 1920, showing how she had disbursed various sums and showed a sum of Rs. 93, 834 only in cash in her hand. A mere perusal of the list of the so-called investments and expenditure by the minor's mother amounting to Rs. 2,56,165 shows how unsatisfactory the working of the Guardians and Wards Act has proved in practice. The District Judges have no time whatsoever in exercising proper control over the guardians whom they appoint under the provisions of the Act. Most of the expenditure is never scrutinised by the District Judge, the guardians are at liberty to put down the disbursements in any manner in which they like provided that some sort of voucher is produced or an affidavit is filed which is usually in an irregular form. It is the duty of the Legislature to intervene and make some drastic changes in this Act so that proper supervision and control may be exercised over the guardians in the real and effective interest of the minor. Looking into this account, which is exhibit 19, it is found in item no. 30 that a sum of Rs. 20,000 was kept in deposit with Jagannath Madan Gopal the very purchasers of July, 1920. Item no. 28 shows that a sum of Rs. 35,000 was kept for future purchases. Item no. 19 mentioned litigation expenses regarding Sitanala Colliery to the extent of Rs. 12,000 which must be a fictitious figure. As the evidence discloses there were no litigation expenses whatsoever about this Colliery and indeed it is difficult to understand how there could have been litigation expenses of such a large amount between 1918 when the property was purchased in an auction sale and July, 1920, when the property was sold. Items 26 and 27 show an expenditure of Rs. 12,500 on motor cars and item no. 29 shows about Rs. 30,000 as the arrears of royalty paid for this colliery. It is difficult to

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believe that these disbursements are correct. Be that what it may, the lady, as already indicated, had in her hand a sum of Rs. 93,834 in December, 1920. Even the District Judge was apparently struck by such a large deposit in the hands of the lady and directed her to invest this sum in a proper manner. After the lapse of a year and a half the lady informed the court on the 6th February, 1922, that she had invested the whole of that sum, namely, Rs. 93,834 by lending it out on a mortgage to the first defendant on the 20th of January, 1922, for a sum of Rs. 1,30,000 the balance of Rs. 37,000 being apparently paid by Jugal Kishore, the uncle of the minor. This is the mortgage bond in suit. To resume the narrative the partition suit started in 1917 was disposed of on the 26th of January, 1923, in terms of an award of the Raja of Pachet, by which the step-brothers were given certain shares in the family properties and they withdrew their claim to Sitanala Colliery the property having been sold, as already stated in 1920 and 1921 to Jagannath Madan Gopal. By this partition it was accepted that there were certain properties standing in the name of the minor, Dharanidhar, and that they were to be treated as if they belonged to him. In November, 1925, one Nagendra Nath Roy executed his decree against Jugal and Promotha by putting to sale certain properties of the family which were attached in execution (see page 60 of the paper book). On the 16th of April, 1926, the minor, Dharnidhar, and his younger brother Anil Dhar Roy, also a minor, preferred a claim through their mother, Musammat Swarupini Devi but it was rejected. On the 19th of April, 1926, the mother filed a suit for declaration of her title under the provision of Order XXI, rule 63. The sale evidently not having been allowed to be postponed some properties were sold on the 5th of May, 1926, for a sum of Rs. 13,093 in favour of the decree-holder. The judgment-debtors did not deposit the money which they wanted to deposit with the result that the

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sale was confirmed on the 11th of June, 1926. In the meantime it appears that the judgment-debtors Jugal and Promotha negotiated for a compromise with the decree-holder agreeing to pay the decretal amount in cash. It is alleged that they secured this sum by negotiations with the 5th defendant in this way. The 5th defendant agreed to advance a sum of Rs. 5,000 provided he got a deed of release from defendant 17 with respect to village Mahuda in which he had already obtained sub-soil rights and ijara as stated above and which he was anxious to sell to the Bengal Coal Co. who were willing to buy only if the village was freed from encumbrances of the mortgage of 1922. The 5th defendant also agreed to advance a further sum of Rs. 8,000 on hand-notes and thus it is stated that the deed of release in question came into existence on the 26th of June, 1926, and was registered on the 29th of June, 1926. The fact that the deed was executed on the 26th of June and registered on the 29th of June is not in controversy. On the 29th of June, 1926, the decree-holder auction-purchasers and the judgment-debtors filed a compromise petition by which they settled the petition which was filed under Order XXI, rule 90, on the 16th of June, 1926, by paying Rs. 13,000 which is stated to be obtained from the 5th defendant and the minor in the manner already indicated and the sale was set aside. It should be stated here that the deed of release of the 26th of June, 1926, was brought into existence without any sanction obtained from the District Judge. The evidence discloses the fact that attempt was made on the 26th of June, 1926, to obtain a sanction from the District Judge but for reasons which are unnecessary to state here the sanction was not granted; but sanction was granted on the 28th of April, 1927, that is to say, long after the transaction was formally put into writing. The learned Subordinate Judge has refused to give effect to this surrender on various grounds as set forth in the judgment, all of which were seriously assailed before us by the appellant.

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It is urged by Sir Sultan Ahmad, appearing for the appellant, that there was no necessity for any sanction of the District Judge because he proposes to show that the minor was simply a benamidar for the joint family and that the title in the property all along rested in the joint family of which Jugal Kishore was the karta and of which Dharanidhar and his brothers along with their uncle were the members. On the other hand the case of the plaintiff is that Dharanidhar himself was the owner of this property and in any event he was put forward as the ostensible owner by everybody concerned and treated as such by the defendant no. 5 himself and therefore it was necessary to obtain the sanction of the District Judge. It was also seriously contended at the trial and before us on behalf of the plaintiff that the so-called deed of release was neither read over nor explained to the lady Swarupini Devi who is a pardanashin lady without any business understanding and who did not know what she was doing and who obtained no independent advice in the matter of this transaction which was only for the benefit of Jugal and Promotha and not for the benefit of the minor at all and therefore it was contended that the so-called deed of release is not at all binding upon the minor. The plaintiffs, it should be stated here, are assignees of the rights of the minor in the mortgage bond by a deed bearing date 23rd of December, 1932, for valuable consideration from the minor who had attained majority in 1931. The learned Subordinate Judge upon a careful consideration of the oral evidence in the case has come to the conclusion:

> "that the deed of release is a fraudulent and collusive document and not a genuine document".

I agree with my learned brother that no sufficient reason has been shown to us why we should not accept this finding of the learned Subordinate Judge. The oral evidence of the lady which was given on commission and the nature of the questions put to her in cross-examination, the place where her signatures

are affixed on the right hand top corners of the deed of release and the fact that her husband has never signed it, are additional reasons which induce me to agree with the learned Subordinate Judge in holding that this document was never read over or explained to the lady. The evidence adduced by the plaintiff that the lady obtained any free or independent or any advice at all or that this document was read over to or explained to her is of the flimsiest kind and carries no conviction to my mind.

I now proceed to consider whether the minor was himself the full owner of the Sitanala Colliery, the sale proceeds of which were utilised in acquiring the rights under the mortgage of 1922. * * *

* * * * *

But I generally agree with the findings of the learned Subordinate Judge on these points also. If Promotha and Jugal were joint with Dharanidhar the evidence discloses conclusively, as I have just shown, that the minor was the owner of the Sitanala Colliery and had advanced the money to the first defendant who executed the mortgage in suit in his favour.

Sir Sultan Ahmad presents an alternative argument that even if Dharanidhar be accepted as the full owner of the property and as the real mortgagee, the plaintiff as a transferee from Dharanidhar has no right to avoid the deed of release which would be a voidable transfer being without the sanction of the District Judge, under section 30, of the Guardians and Wards Act; he contends that the right to avoid was a mere personal right of the minor himself which he could exercise on his attaining majority and inasmuch as the minor has never sued to avoid this transfer, the transfer stands and cannot be impeached by the plaintiff.

I am not impressed by the argument of Mr. P. R. Das who appears for the respondents that the transaction which is styled as the deed of release is a void transaction and therefore need not be avoided.

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In my opinion it was necessary for the minor to avoid this transaction and that the deed of release could not be called a void transaction. Mr. P. R. Das argued that the consideration mentioned in the deed of release is no consideration at all and that this consideration did not exist at the time the deed was entered into. I think there is a complete fallacy in this argument. The deed mentioned a consideration which is a good consideration in law. The facts mentioned in the deed of release, namely, that Jagdamba Lalla, the owner of the sub-soil rights in village Mahuda, had acquired the equity of redemption by purchasing the rights of the two Chatterjis are admittedly correct. It is also correct that there would be some litigation between the minor and the mortgagee and Jagdamba Lalla, the new purchaser, however slender the basis may have been for a controversy in a court of law. It cannot be said, therefore, that the deed of release was for no consideration at all; inadequacy of consideration is different from a total lack of consideration. The highest that can be stated in favour of Mr. P. R. Das's argument is that this deed of release was brought about in order to defraud the minor. Even then the deed would be voidable and not void. The deed was registered either to release the interest of the minor in the property or to transfer the interest of the minor in this property to Jagdamba Lalla and the fact, that the consideration mentioned in the deed is neither adequate nor reasonable nor for the benefit of the minor, is no ground whatsoever for holding that the deed is void. In my opinion this deed, as stated above, was a voidable transaction and requires to be avoided or set aside within the period of limitation and "by the person affected thereby".

The next question is whether the minor has avoided the deed of release. There is some confusion in the minds of the litigants that it is necessary for a minor either to institute a suit on coming of age to

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avoid the transaction entered into by his guardian on his behalf or that some other guardian or next friend of the minor must institute a suit to avoid the transaction which was entered into by another guardian. The minor can avoid the transaction in a variety of ways, for instance, by dealing with or transferring the very property which has been dealt with by the guardian on his behalf and which transaction he does not choose to ratify. In the present case the minor admittedly within three years of attaining majority executed a deed of assignment in favour of the plaintiff by which he completely ignored the deed of release supposed to have been executed on his behalf by the certificated guardian without the sanction of the District Judge. The minor is a party-defendant in this action and in the written statement he takes up the same position. He says definitely that he has no objection in regard to the obtaining of a decree by the plaintiff and in paragraph 4 of the written statement he definitely states that he alone had lent the money to the first defendant and that the first defendant executed the mortgage bond in the suit in his favour and that on the 23rd of December, 1932, he by a registered kabala sold the amount due under the said deed and all rights and titles of the said deed to the plaintiffs and has ceased to have any right. He also asserts that at his request the other *pro forma* defendants also executed the said deed jointly with him so that there may be no difficulty in the way of the plaintiff in obtaining his relief. Trevellyan in his well-known book on Minors, 5th edition, at page 202 states:

"A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority.

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It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation ".

In the case of *Hem Chandra Sarkar* v. *Lalit Mohan Kar*(1) Jenkins, C.J., in approving the decision in the case of *The Eastern Mortgage and Agency Co.* v. *Rebati Kumar Ray*(2) observed that " it is not necessary for a person in the position of the defendant to bring an action to set aside the transaction and it is sufficient if he declares his will to rescind by way of defence when an action is brought to enforce the mortgage against him ". The mortgage in that case was executed by the mother without the permission of the District Judge during the minority of the defendant. In the case of *Abdul Rahman* v. *Sukhdayal Singh*(3) Mr. Justice Banerji and Mr. Justice Richards took the same view and pointed out that a lease granted without obtaining sanction from the District Judge was not illegal or *ab initio* void and the omission to obtain sanction from the court relegated the parties to the position in which they would be if no certificate of guardianship had been granted, in other words, they held that it would not be necessary to set aside such a transfer made by the guardian. They also pointed out that the minor had validly repudiated the transfer entered into by his guardian because he sold the very property which his guardian had leased out to the contending party. Mr. Justice Richards observed that it was not necessary that a suit should be instituted to set aside the lease which was executed by the guardian of the minor. The case of *V. Muthukumara Chetty* v. *Anthony Udayar*(4) is also an authority for the proposition that a party who is entitled to avoid may

(1) (1912) 16 Cal. W. N. 715.
(2) (1906) 3 Cal. L. J. 260.
(3) (1905) I. L. R. 28 All. 30.
(4) (1914) I. L. R. 38 Mad. 867.

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do so by an unequivocal act repudiating the transaction or by getting a decree of a court to set it aside. At page 877 I find this observation "We cannot uphold Mr. Rangachariar's contention that wherever a transaction is voidable it can be avoided only by getting a decree of Court setting it aside. The party who is entitled to avoid may do so by an unequivocal act repudiating the transaction.....If Rajagopalan after attaining majority should wish to repudiate the lease, there can be no doubt he can do so without a suit ". In my opinion this is the correct view of the law and I hold that in the present case the minor has avoided the deed. It is unnecessary to deal with the argument whether the plaintiff who is the transferee from the minor can have any right whatsoever to avoid the deed which is said to be the personal right of the minor. I, therefore, agree that the appeal of the defendant no. 5 must fail and should be dismissed with costs.

I now proceed to consider the appeal of defendant no. 6. This relates to the sub-soil rights of village Telmocho. The facts necessary to determine the contention of the appellant may now be stated here.

By an agreement, dated the 26th August, 1923 (printed at page 50 of the paper book), defendant no. 1 entered into an agreement for settling the lands in village Telmocho (which will be referred to hereinafter as the disputed lands) with the defendant no. 6 (who will be hereinafter named as the appellant) for a term of 999 years upon a salami of Rs. 4,500 and an annual rent of Rs. 30 for some lands and Rs. 15 as the annual rent for some other lands as stated therein. The appellant was already in possession and was to continue to work as before—the defendant no. 1 also agreed that

"I too shall regularly execute patta and get the same registered. To that I or my heirs and successors-in-interest shall not be competent to raise any objection in regard to registration thereof. If I or they do, you will get the same registered by me with the help of the law. To that I shall have no objection ".

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Accordingly the appellant remained in possession from that date by virtue of this agreement and has been in possession since then. It is useful to state here that under the express stipulation mentioned in paragraphs 12 and 19 of the mortgage bond in the suit the mortgagor reserved the right to make settlement of the underground coal land of mauza Telmocho in these words:

"I shall be competent to settle the same, according to my sweet will. I shall remain bound to pay up the amount due to you with the amount of salami I shall get by making settlement of the underground coal land of the said mauza; otherwise it will be the cause of action for a suit".

The defendant no. 1 has received his rent from time to time from the appellant by virtue of the above agreement in writing but the Raja refused to or failed to register the patta which he stipulated to do under the terms of this agreement. To mention a few dates, on the 21st of February, 1929, the appellant's lawyer wrote to defendant no. 1 reminding him of his promise to execute and register the lease in respect of mauza Telmocho and that he had not done so although he had expressed his willingness to do so on several occasions and stated that

"In the above circumstances if you do not execute the lease and get it registered within a fortnight from the receipt hereof, my client will be ill bound to go to law court and in that case you will be responsible for costs and troubles of my client"

(Exhibit P-3, page 103). On the 29th of January, 1930, a similar notice from a pleader was again served on the defendant no. 1 and he was told that

"Under all these circumstances, my client asks you through me for the last time to have a deed written and registered within a fortnight from the receipt of this notice, otherwise my client will sue you for specific performance of contract and for damages"

[Exhibit P(1)-3, page 107]. Notwithstanding these two notices defendant no. 1 failed to register the patta. In the meantime the Amending Act of 1929 came into operation on the 1st of April, 1930. Sir Sultan Ahmad, therefore, relies upon the provision of

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section 53A in support of his argument that inasmuch as the appellant was in possession of the demised coal lands in village Telmocho and has done and is willing to do everything that was and is required to be done under the agreement of June, 1923, the plaintiffs as the assignees of the mortgagee are bound to treat the appellant as the lessee of the coal lands even if no registered patta has been executed in his favour (it being conceded by the respondents before us that the lease of village Telmocho in favour of the appellant is a lease which would otherwise be binding upon the mortgagee under the terms of paragraphs 18 and 19 of the mortgage bond or under the provisions of section 65A of the new Transfer of Property Act). The critical question to be considered, therefore, is whether section 53A can be held to be applicable to an agreement for lease which was entered into before the date when the new Act came into operation. Apparently there are a number of conflicting decisions of some of the High Courts on this point but before dealing with these authorities it will be desirable to keep in view the language of some of the provisions of the amending Act (XX of 1929) and of the amending Act (XXI of 1929). Both these enactments came into operation on the same date and both are addenda to the Transfer of Property Act, 1882.

It is necessary to keep in mind the following well-known canons of construction which are laid down by highest authorities in order to decide whether an Act is retrospective or prospective. (*1*) There is no presumption that the statute which takes away any existing right is intended to apply to a state of facts which came into existence before its commencement. (*2*) When the effect of the statute would be to make a transfer valid which was previously invalid, to make an instrument, which had no effect at all and from which the party had liberty to depart as long as he pleased, binding, the prima facie construction of the Act is that it is not to be retrospective. (*3*) If it is a necessary implication from the

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language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation because it is obviously competent for the Legislature if it pleases in its wisdom to make the provisions of an Act retrospective. (4) But if on the other hand the language employed by the Legislature is ambiguous or not clear and explicit, the Court must not give a construction to the new Act which would take away vested rights, in other words, should treat the Act as prospective.

In applying these propositions, which I reduce from a large number of celebrated authorities, the Courts have sometimes taken into consideration the state of law which was existing at the time when the Amendment Act was passed and they have tried to visualise the object which the Legislature had in view in introducing the sections in the new enactment in order to find out whether any light could be thrown on the intention of the Legislature with a view to find out the meaning of the words employed.

Now keeping these canons of construction in view I ask myself what was the state of law which was in existence before the 1st of April, 1930, and whether the Legislature had introduced that very law by the new amending Act? Fortunately this matter is quite clear. The state of law is lucidly mentioned in the judgment of the Privy Council in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli*(1) and also in the case of *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao*(2). But the remarks in both these decisions were treated as obiter in the subsequent well-known cases of the Privy Council of *Ariff* v. *Jadunath Majumdar*(3) which was decided in the year 1931 and of *Pir Bakhsh* v. *Mahomed Tahar*(4) decided in 1934. This

(1) (1914) I. L. R. 42 Cal. 801; L. R. 42 Ind. App. 1.

(2) (1916) I. L. R. 39 Mad. 509; L. R. 43 Ind. App. 138.

(3) (1931) I. L. R. 58 Cal. 1235; L. R. 58 Ind. App. 91.

(4) (1934) I. L. R. 58 Bom. 650; L. R. 61 Ind. App. 388.

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state of the law has not been reproduced in full by the new section under consideration because the section does not apply to parol agreements and makes the existence of a document in writing necessary, signed by the party, from which the terms of transfer or transaction could be ascertained with reasonable certainty and is made available only as a defence. Therefore this is a new legislation and the section must be held to be prospective and not affecting any transfer under the old law unless the Legislature speaks with a certain and clear voice. It has been held in numerous cases which have centred round the interpretation of this section that the language used by the Legislature is neither very clear nor express but on the other hand is "somewhat dubious, like that of the ancient oracles". When I look at section 3 of Act XXI of 1929 which is a part of the same amendment of the same Act which came into force on the same date I find that section 27A has been added to the Specific Relief Act and it allows either the lessor or the lessee to sue for specific performance of contract provided the other elements mentioned in sub-clauses (*a*) and (*b*) are established. But this section applies to contract of leases executed after the 1st of April, 1930. In my opinion this is a clear indication that the Legislature did not intend the new amendment to apply to contracts before the 1st of April, 1930, otherwise I do not see any reason why contracts of leases are exempted from the supposed intendment to apply the law to all transfers. I now turn to Act XX of 1929. Section 16 of the Act inserts the provisions under consideration. The argument of the appellant is that section 63 of the Act specifically mentions that a number of sections referred to therein shall not be deemed in any way to affect the terms or incidents of any transfer of property made or effected before the 1st date of April, 1930, etc. etc., and therefore it follows (so it is argued) that section 16 must be held to affect the terms or incidents of a transfer of property made or effected before the 1st date of April, 1930. In my

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opinion the Legislature has been over-careful in mentioning that the sections which they have referred to shall not be deemed to be retrospective but that does not show that they have expressly and clearly stated that the other sections shall be retrospective. The truth of the matter is that the Legislature have failed to say clearly whether section 16 is or is not retrospective and there is nothing to indicate that section 16 must necessarily be held to be retrospective.

I now proceed to consider two cases, one of this Court and the other of the Calcutta Court. The case of this Court which was referred to is the case of *Wakefield* v. *Kumar Rani Sayeeda Khatun*(1). The question in that case was whether a certain agreement, dated the 4th of August, 1923, by which the defendant obtained a farming lease from the Maharaj Kumar of Tikari for a term of twenty years (which was not registered) could be relied upon by the defendant to establish his contention that he was a tenant and not a trespasser. The Subordinate Judge who tried that case considered himself bound by the decision of the Judicial Committee of the Privy Council in *Ariff* v. *Jadunath Majumdar*(2) and found that the defendant could base no claim to be a lessee on the strength of the unregistered document of 1923; but he did not consider the effect of the acceptance of rent by the plaintiff from the defendant in recognition of the contract. It will be noticed that the only question to be decided in this case was whether the defendant should be treated as a trespasser or as a tenant. Mr. Justice James observed " It is manifest, in the first place, that the occupation of the defendant appellant during the years in suit cannot be treated as that of a trespasser liable to pay damages or mesne profits. Rent had been demanded from him up to the end of 1335 Fasli which was duly paid. A demand was made for rent

(1) (1936) I. L. R. 15 Pat. 786.
(2) (1931) I. L. R. 58 Cal. 1235; L. R. 58 Ind. App. 91.

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for the years 1336 and 1337 which was not satisfied. It is clear that he was a tenant, but it is not necessary for the purposes of this appeal to decide what may have been the terms of his tenancy". The learned Judge had, just before this quotation, made a passing reference to section 53A of the Transfer of Property Act in these words: "On the whole I think that the provisions of this section would apply to this contract and that the effect of section 63 of Act XX of 1929 is only to remove from the operation of the new section 53A those irregular part performed contracts which on the 1st of April, 1930, already formed the subject of pending litigation; but in the form which this appeal has ultimately taken, this question, strictly speaking, does not arise". The learned Chief Justice in his judgment took the same view. He stated that "the question of the retrospective nature of section 53A of the Transfer of Property Act is no longer of importance in this particular case" but proceeded to make some observations with regard to the effect of section 53A. With the utmost respect to the remarks of the learned Chief Justice I feel untramelled to take my independent view as to whether section 53A is retrospective or not when the learned Chief Justice expressly states that the point does not arise for consideration at all. It is to be observed that neither Mr. Justice James nor the learned Chief Justice made any reference to the provisions of section 27A of the Specific Relief Act which was added by Act XXI of 1929. I now refer to the case of *Sk. Mahammed Hushen* v. *Jamini Nath Bhattacharji*(1) where the two learned Judges of the Calcutta High Court have reviewed the case law at great length and have come to a conclusion, apparently with great hesitation, that the provisions of section 53A are retrospective and particularly applicable to the case before them where the transfer in question was a usufructuary mortgage bond executed on the 10th of December,

(1) (1937) 42 Cal. W. N. 38.

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1928, by which the mortgagor had placed the defendant in possession of the mortgaged lands. As already indicated, I do not agree with their conclusion because in my opinion the language used in section 63 is not clear and explicit and I am unable to draw any conclusion that it must follow as a necessary intendment of the Legislature that the Act must be held to be retrospective. I respectfully agree with the observation of Mr. Justice Mukherji at page 47 that " the Legislature no doubt speaks in a voice which is not very clear but is somewhat dubious like that of the ancient oracles ".

The question before us may also be considered thus. The appellant relies upon an unregistered agreement for lease. This topic has been carefully dealt with by the Legislature in section 27A of the Specific Relief Act which specifically provides that this shall not apply to contract of leases before the 1st of April, 1930. I am, therefore, fortified in my view that the Legislature could not have intended to make two contradictory provisions in the same Act with respect to contract for leases and therefore section 53A where it is sought to be invoked in defence of a lessee who had entered in possession upon the footing of an unregistered contract for lease cannot be allowed to resist the action where the contract for lease was of a date anterior to the 1st of April, 1930.

A question of some nicety arises as to whether the plaintiff is at all hit by the operation of section 53A assuming that it was retrospective. The plaintiff is not the transferor of the defendant. The plaintiff purchased his right from the mortgagee who obtained his rights in 1922. The contract for lease in this case was in August, 1923, that is, after the predecessor of the plaintiff had acquired an interest in this property as security for the mortgage amount. It will be difficult to hold that the plaintiff is a transferor from whom the defendant appellant derived

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his rights by reason of another transfer. The plaintiff is merely asking for a mortgage decree at present. He may not have to execute his decree or on execution somebody else may become the auction purchaser. It is for this reason, I think, that the learned Subordinate Judge did not deal with this matter because in his view it was unnecessary to decide it in the present action. The learned Subordinate Judge took the view that the plaintiff as an assignee of the mortgage bond was entitled to enforce his rights to recover his dues; " the fact as to whether defendant no. 6 has derived any valid rights on the basis of that agreement or not will remain unaffected by that sale of the surface and sub-soil rights of mouza Telmocho in this mortgage decree ". If the defendant chooses to redeem the plaintiff he may do so otherwise he must submit to a decree for sale of the mortgaged properties including those portions of village Telmocho which the appellant claims as his leasehold properties. In my view the appellant has no locus standi to resist the claim of the plaintiff to sell the properties covered by the contract for lease of August, 1923.

In the result I agree with my learned brother that the appeal of this defendant also fails. The appeal must be dismissed with costs.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

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

RAJA SHIVA PRASAD SINGH

v.

TOM SMITH.*

1938.

February, 2, 3, 4, 18.

Lease—mortgage by assignment by the lessee—mortgagee, whether liable for the rent reserved—Transfer of

*Appeal from Original Decree no. 80 of 1935, from a decision of Babu Haribar Prasad, Subordinate Judge of Dhanbad, dated the 6th December, 1934.

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Property Act, 1882 (*Act IV of* 1882), *section* 58(*c*)—*Transfer of property* (*Amendment*) *Act*, 1929 (*Act XX of* 1929)—*mortgage by assignment not strictly coming within the definition of "English mortgage", whether is effective—lessee covenanting to pay rent on behalf of himself and his assigns—mortgagee taking possession of leasehold property with express knowledge of covenant—privity of contract, whether exists between mortgagee and landlord.*

In India, a lessee mortgaging his interest by assignment as contemplated by section 58(*c*) of the Transfer of Property Act, 1882, passes the whole of the interest to the mortgagee and the latter (certainly when in possession) is liable for the rent reserved in the lease.

The law on this point remains unaltered by the Transfer of Property (Amendment) Act XX of 1929.

Bengal National Bank, Limited, v. *Janoki Nath Roy*(1), followed.

Falakrishna Pal v. *Jagannath Marwari*(2), not followed.

Section 58 of the Transfer of Property Act, 1882, does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage.

Where the lessee covenants on behalf of himself and his assigns to pay the rent to the landlord and the mortgagee from the lessee takes possession of the land under the mortgage with the express knowledge of the mortgagor's covenant, there is a privity of contract between the mortgagee and the landlord and the former is liable to pay the rent reserved; the fact that the mortgagor has covenanted with the mortgagee to pay the rent to the landlord and has actually paid the rent for a period of time is immaterial.

Jamna Das v. *Pandit Ram Autar Pande*(3) and *Nanku Prasad Singh* v. *Kamta Prasad Singh*(4), distinguished.

Williams v. *Bosanquet*(5), referred to.

(1) (1927) I. L. R. 54 Cal. 813.
(2) (1932) I. L. R. 59 Cal. 1314.
(3) (1911) I. L. R. 34 All. 63; L. R. 39 Ind. App. 7.
(4) (1922) 26 Cal. W. N. 771, P. C.
(5) (1819) 1 B. & B. 238; 129 E. R. 714.

Appeal by the plaintiff.

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

P. R. Das (with him *B. C. De* and *N. N. Ray*), for the appellant.

S. N. Bose and *J. C. Sinha*, for the respondents.

COURTNEY TERRELL, C. J.—On the 24th of April, 1907, Raja Durga Prasad Singh, ancestor of the plaintiff, granted to Mr. C. J. Smith a coal mining lease of land in his zamindari of Jharia for nine hundred and ninety-nine years at a royalty of 2 annas 6 pies per ton on the quantity of coal raised every year with a minimum of Rs. 975 per annum. The tenant was to pay Government cesses. Clauses 8, 9 and 13 were as follows:—

8. " That for the amount of royalty the leasehold land and the machineries and (here follows an illegible word) remain wholly hypothecated. If I make default in payment of royalty, you will be competent to realise the same by selling the leasehold land. In regard to the same I or my heirs or successors-in-interest shall have no objection ".

9. " That I shall be competent to transfer the leasehold land by gift, sale or otherwise, according to my wish. But thereby there will be no obstacle to the priority of dues, i.e., the transferee will remain wholly bound to pay the amount of royalty ".

13. " That I as well as my heirs and successors-in-interest remain wholly bound by the aforesaid terms.....".

On the 4th of February, 1920, Mr. C. J. Smith mortgaged his interest to the Jagadamba Loan Company, Limited, and their assigns. After reciting that the mortgagor was seized and possessed of the lands, hereditaments and premises subject to the payment of rents and royalties and after reciting the lease under which the mortgagor had obtained the same and after reciting that the mortgagor had requested the Company for a loan on cash credit basis of three lakhs of rupees the indenture witnessed that the mortgagor covenanted to pay on the 4th of February, 1923, the full amount of the floating balance for the time being owing by the mortgagor

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to the Company on the cash credit loan account together with interest and the indenture further witnessed that in further pursuance of the agreement

" he the mortgagor doth hereby grant, convey and transfer to the Company all those the mines, beds and seams of coal lying and under the lands hereditaments and premises described..... together with all collieries open and unopened and all erections therein and thereunto belonging or appertaining therewith usually held and enjoyed or occupied and also all estate, right, title and interest use trust property inheritance possession claim and demand whatsoever of law and in equity of him the mortgagor of into out of and upon the said premises and every part or parcel thereof including all rents and royalties payable to the mortgagor from the tenants of the same premises together with all deeds, pattas, muniments and writings and evidences of title whatsoever in anywise relating to or concerning the lands, tenements, buildings and premises or any part thereof which now are or thereafter shall or may be in possession or lawful power or control of the mortgagor or any other person or persons from whom he can procure the same without action or suit at law or in equity to have and to hold the same mines and premises hereinbefore expressed to be hereby granted, conveyed pattas or leases granted by the mortgagor as aforesaid and transferred unto the Company according to the nature and tenure thereof respectively subject nevertheless to the proviso for redemption hereinafter contained ".

Then follows a proviso that upon repayment of the money lent

" the Company shall at any time thereafter upon the request and cost of the mortgagor reconvey the said lands hereditaments and premises hereinbefore expressed to be hereby granted, conveyed and transferred unto the mortgagor as he shall direct."

Later on followed a clause by which the mortgagor covenanted with the Company that

" he the mortgagor will during the subsistence of their security pay all rents, royalties, taxes, rates and impositions that are now payable or may hereinafter be payable in respect of the mortgaged premises and shall also perform and observe the terms and conditions contained in the several head leases or pattas under which they are respectively held thereof."

The mortgagor then covenanted for good title to grant, convey and transfer the mortgaged premises to the Company and further that if defaults were made by the mortgagor in paying the rents,

" royalties and taxes in respect of the mortgaged premises and that if the mortgagor committed any breach of any of the covenants

and conditions the Company might either take proceedings to realise the money secured or to enter into possession of the mortgaged premises without being responsible or accountable as a mortgagee in possession and thenceforth to hold and enjoy and receive the rents, issues and profits without any interruption, claim and demand by the mortgagor."

Lastly there was a clause

"provided always and it is hereby agreed and declared that notwithstanding anything hereinbefore contained, the mortgagor shall be at liberty at any time hereafter to pay off the amount hereby secured and to obtain a reconveyance of the premises hereby mortgaged."

The mortgagee, Jagadamba Loan Company, Limited, entered into possession and remained in possession for some years.

On the 20th of April, 1928, a suit was brought by the receiver of the Jharia Raj estate against Mr. C. J. Smith, lessee of the property, the New Jinagora Coal Company and the Jagadamba Loan Company, Limited for recovery of the royalty commission. Mr. C. J. Smith having died during the pendency of the suit, his son and widow were substituted in his place. A preliminary decree was passed against all the defendants. A final mortgage decree was passed on the 30th August, 1930, for a sum of about Rs. 2,90,000. The decree was put into execution and the charged property was sold for a sum of Rs. 1,00,000 on the 25th June, 1931. The receiver of the Jharia Raj was discharged and Raja Shiva Prasad Singh of Jharia who succeeded to the estate and is the present plaintiff, filed an application under Order XXXIV, rule 6, of the Code of Civil Procedure, for a personal decree against the defendants for recovery of the unrecovered balance of the decretal amount.

The Subordinate Judge granted a personal decree against the Smiths but refused it as to the Jagadamba Loan Company, Limited, and this appeal is directed against that refusal. In the opinion of the learned Subordinate Judge the Company was not liable for the payment of the royalty either by

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privity of contract or by privity of estate and he held that the mortgage deed by Mr. Smith to the Jagadamba Loan Company was not an absolute assignment of Smith's interest in the leasehold properties and that the mortgage deed was not an "English mortgage" within the meaning of section 58(*e*) of the Transfer of Property Act. The whole argument is based upon the theory that under the Indian law, as expressed in the Transfer of Property Act, a mortgage by assignment always leaves some interest in the mortgagor and that consequently there cannot be an absolute assignment of the whole of the mortgagor's interest. In support of this principle reference has been made to a decision of Mukerji and Guha, JJ. in the case of *Falkrishna Pal* v. *Jagannath Marwari*(1). In this decision the learned Judges referred to an earlier decision of Rankin, C. J. in *Bengal National Bank, Limited*, v. *Janoki Nath Roy*(2) in which the learned Chief Justice had decided that in India a lessee mortgaging his interest by an English mortgage passed the whole of the interest to the mortgagee and that the latter became liable for the rent. Mukerji, J. expressed the view that this view could not be accepted in its entirety and that an English mortgage in India could not properly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. He arrived at this opinion by arguing that section 58, clause (*e*), must be read subject to the definition of a mortgage as given in clause (*a*). I am unable to agree with the opinion expressed by Mukerji, J., for section 58(*e*) expressly contemplates by the words

> "and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor."

the recognition of the principle of complete transfer, and no terms will be clearer than the terms set forth in the mortgage now under consideration. There

(1) (1932) I. L. R. 59 Cal. 1314.
(2) (1927) I. L. R. 54 Cal. 813.

certainly could not be a "reconveyance" of that which had not previously been conveyed. I prefer the opinion expressed by Rankin, C. J. that a mortgagee by assignment (certainly when in possession as in the case before us) is liable for the rent reserved by the lease.

An argument was addressed to us that the Transfer of Property Act was amended by Act XX of 1929 in which the right of a mortgagee being strictly limited to a right to sue for the mortgage money or for sale of the mortgaged property it was clear that the effectiveness of a transfer as contemplated by an English mortgage was effectually abolished and could no longer be regarded as an absolute transfer. But it may be observed that the legislature took no steps to amend section 58(*e*); nor did it, as it might have done, repeal section 58(*e*) and the Act continues to contemplate an absolute transfer of the mortgaged property.

It was further suggested that by reason of the fact that this mortgage does not bind the mortgagor to pay the mortgage money on a specific date but entitles him to have a reconveyance on payment "at any time hereafter", the mortgage in question is not within the strict definition of an "English mortgage". But section 58 does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. There is nothing in this point.

Some argument has been raised upon the fact that the mortgagor covenanted to pay the rent reserved under the lease, and it is certainly true that the lessee mortgagor could not release himself from the obligation to pay the rent. He was bound both to the landlord and to the mortgagee to fulfil this obligation. This, however, has nothing whatever to do with the liability of the mortgagee to the landlord. In my opinion this case is one of privity of contract between the mortgagee and the landlord.

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Mr. Smith covenanted on behalf of himself and his assigns to pay the rent to the landlord and the mortgagees took possession of the land under the mortgage with the express knowledge of their mortgagor's covenant. Whether or not the mortgagor covenanted to pay rent to the landlord and whether or not for a period of time he actually paid the rent is immaterial.

Dallas, C. J., delivering the judgment of ten judges in *Williams* v. *Bosanquet*(1), said:—

"there is privity of estate, if legal possession, that is, acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry, which it is, if there be justness in the observations already made; and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: ,it is, therefore, a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants."

There is, therefore, no need to discuss at length the vexed question as to whether the English conception of privity of estate exists or not in Indian law. The doctrine of privity of contract is certainly a part of Indian law.

On behalf of the respondents reliance was placed upon the decision of the Judicial Committee of the Privy Council in *Jamna Das* v. *Pandit Ram Autar Pande*(2). But this has no application, for there was certainly no covenant between the original mortgagor and the original mortgagee. They also relied on the Privy Council decision in *Nanku Prasad Singh* v. *Kamta Prasad Singh*(3) and the question for determination was whether the purchaser of a mortgaged property from the mortgagor became, by retaining part of the purchase price to enable him to pay off the mortgage, personally liable to discharge

(1) (1819) 1 B. & B. 238; 129 E. R. 714, 723.
(2) (1911) L. R. 39 Ind. App. 7.
(3) (1922) 26 Cal. W. N. 771, P. C.

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the mortgage debt. In this case there was certainly no privity of contract between the purchasers of the equity of redemption and the mortgagee. I agree with the argument of Mr. Das that this is a case in which the mortgagee has become a party to the original lease, and he has come in voluntarily and not by operation of law. The landlord is not seeking to make the mortgagee liable on the terms of the mortgage but to make him liable on the terms of the lease and consequently he is liable to a personal decree when the exercise of the charge by hypothecation has failed to satisfy the amount of the mortgage decree.

For these reasons I am of opinion that the refusal of such decree by the Subordinate Judge was erroneous and I would reverse his decision and pass a decree against the Jagadamba Loan Company, Limited, for the dues in respect of the six years preceding the institution of the suit with costs throughout to be paid by the Jagadamba Loan Company, Limited.

FAZL ALI, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Dhavle and Manohar Lall, JJ.

NRISINGHA CHARAN NANDY CHOUDHURY

v.

TRIGUNAND JHA KHOWARE.*

1938.

January, 31.
March 22.

Limitation Act, 1908 (*Act IX of* 1908), *section* 5—*mistaken advice given by legal practitioner, how far constitutes " sufficient cause "—refusal by lower appellate court to*

*Appeal from Appellate Decree no. 797 of 1936, from a decision of Rai Bahadur Satish Chandra Mukharji, District Judge of Santal Parganas, dated the 24th August, 1936, affirming a decision of Rai Bahadur Bishundev Narayan Singh, Subordinate Judge of Deoghar, dated the 29th March, 1932.

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extend time—High Court, when can interfere in second appeal—subordinate courts, duty of, to pronounce opinion on all important points in appealable cases.

An honest mistake on the part of a litigant caused by an erroneous advice given to him by a competent lawyer, after a reasonable care, is a " sufficient cause " entitling the litigant to the benefit of section 5 of the Limitation Act, 1908.

Where, upon a consideration of the facts, the lower appellate court is not satisfied that the appellant has reason to come beyond the time fixed by law, the refusal to extend time is final; but where, upon the facts found, the discretion is not judicially exercised so that the refusal to extend time is based upon the court misdirecting itself on a point of law, the High Court can interfere in second appeal.

Anup Mahto v. *Mita Dusadh*(1), *Secretary of State for India in Council* v. *Rameshwaram Devasthanam*(2), *Ramgopal* v. *Shamskhaton*(3), *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh*(4), *Kunwar Rajendra Bahadur Singh* v. *Rajeshwar Bali*(5), *S. C. Dey* v. *Musammat Rajwanti Kuer*(6), *Brij Indra Singh* v. *Kanshi Ram*(7), *Sunderbai* v. *Collector of Belgaum*(8), *Sundar Koer* v. *Lala Raghunath Sahai*(9), *Nagindas Motilal* v. *Nilaji Moroba Naik*(10), *Shib Dayal* v. *Jagannath Prasad*(11), *Ambica Ranjan Mazumdar* v. *Manikganj Loan Office, Ltd.*(12), *Dattatraya Sitaram Gaihari* v. *The Secretary of State for India in Council* (13), *Seth Jahar Mal* v. *G. M. Pritchard*(14), *Debi Charan Lal* v. *Sheikh Mehdi Hussain*(15), *Baijnath Prasad Singh* v. *Umeshwar Singh*(16) and *Surendra Mohan Rai Choudhury* v. *Mohendra Nath Banerjee*(17), reviewed.

(1) (1933) I. L. R. 13 Pat. 254, P. C.
(2) (1934) I L. R. 57 Mad. 652, P. C.
(3) (1892) I. L. R. 20 Cal. 93, P. C.
(4) (1918) I. L. R. 46 Cal. 189, P. C.
(5) (1937) 18 Pat. L T. 878, P. C.
(6) (1921) 6 Pat. L. J. 237.
(7) (1917) I. L. R. 45 Cal. 94; L. R. 44 Ind. App. 218.
(8) (1918) 43 Bom. 376; L. R. 46 Ind. App. 15.
(9) (1911) 12 Ind. Cas. 677.
(10) (1924) I. L. R. 48 Bom. 442.
(11) (1922) I. L. R. 44 All. 636, F. B.
(12) (1927) 32 Cal. W. N. 372.
(13) (1920) I. L. R. 45 Bom. 607.
(14) (1919) 4 Pat. L. J. 381.
(15) (1916) 1 Pat. L. J. 485.
(16) (1937) I. L. R. 16 Pat. 600, S. B.
(17) (1931) I. L. R. 59 Cal. 781.

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Observations on the duty of the subordinate Courts to pronounce their opinion on all the important points in appealable cases.

Tarakant Bannerjee v. *Puddomoney Dossee*(1), *Mahomed Solaiman* v. *Kumar Birendra Chandra Singh*(2) and *Jagannath Rao Dani* v. *Rambharosa*(3), referred to.

Per DHAVLE, J.—The true rule about mistaken advice from a legal practitioner must be taken to be that the circumstances of each particular case should be examined to see whether such advice gives rise to sufficient cause within section 5 of the Limitation Act.

Questions of law and of fact are sometimes difficult to disentangle, but the proper legal effect of a proved fact is essentially a question of law.

The facts on which the discretion under section 5 is exercised must be distinguished from the question whether in law they amount to sufficient cause within the section.

Sholts Iron Company, Limited v. *Fordyce*(4), referred to.

Appeal by the plaintiffs.

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

B. C. De (for *S. N. Bose*), for the appellant.

L. K. Jha and *Bindhyeswari Prasad*, for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the judgment and decree of the learned District Judge of Santal Parganas, dated the 24th August, 1936, dismissing the appeal of the plaintiff against the judgment and decree of the learned Subordinate Judge, dated the 29th March, 1932, by which the suit of the plaintiff was dismissed. This suit was instituted for specific performance of

(1) (1866) 10 Moo. I. A. 476.
(2) (1922) I. L. R. 50 Cal. 243; 27 Cal. W. N. 749, P. C.
(3) (1932) 37 Cal. W. N. 321, P. C.
(4) (1930) A. C. 503.

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contract to sell which was said to have been entered into by the first defendant with the plaintiff on the 22nd of April, 1928; the defendant-second-party to the action claimed title to the property in question by virtue of a sale deed executed in his favour by the first defendant about 2 months after the contract relied upon by the plaintiff. The principal questions raised by the defence were whether the suit for specific performance of contract was maintainable in the Santal Parganas and, secondly, whether the defendant-second-party had notice of the contract of sale in favour of the plaintiff. One of the issues in the case which has given rise to serious controversy was as to whether the suit had been purposely over-valued and this arose in this way. The plaintiffs had valued the suit at Rs. 5,100, namely, Rs. 4,400 as the value of the property and Rs. 700 as the approximate value of the mesne profits from the date of the contract till the date of delivery of possession assessed tentatively at Rs. 700. The learned Subordinate Judge, as already stated, dismissed the suit by his judgment, dated the 29th March, 1932, and the decree which followed the judgment was prepared on the 20th of April following. Within twelve days thereof the appellant preferred an appeal to this Court which was numbered as First Appeal no. 94 of 1932. One of the grounds in the memorandum of appeal is ground no. 16 which challenged the finding of the trial court that the plaintiff had calculated the mesne profits to which he was not entitled with the object of overvaluing the suit. This ground was necessary in view of the remarks and finding of the learned Subordinate Judge that the plaintiff had no cause of action with respect to the mesne profits pendente lite and because in his view the amount of mesne profits which could be validly claimed would be only Rs. 83, that is, between the date of the contract and the date of the institution of the suit. When this first appeal came to be heard before a Division Bench of this Court the learned Chief Justice repelled the contention of the appellant that he was

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entitled to take the course which he had taken in valuing the amount of claim of mesne profits at Rs. 700 [although the appellant had, apparently in support of his contention, drawn the attention of the Court to some observations to be found in a decision of this Court in the case of *Ramgulam Sahu* v. *Chintaman Singh*(1)], and held that even if the plaintiff paid court-fee by giving an approximate valuation as to the mesne profits pendente lite this would not have the effect in law of enhancing the valuation for the purpose of jurisdiction. In these circumstances this Court held that the plaintiff had taken a wrong forum of appeal and the memorandum of appeal should be returned for presentation before the District Judge. This order was passed on the 22nd January, 1936. The memorandum of appeal was returned to the advocate for the appellant on the 29th of January, 1936, who made it over to the plaintiff at Deoghar on the 30th of January, that is, the day after. On the 3rd of February, 1936, the appellant filed the memorandum of appeal before the District Judge at Dumka. It is obvious that the appellant was duly diligent in conducting his appeal from the very moment an adverse decree was passed against him by the trial court on the 20th of April, 1932, and that he did not allow any unreasonable time to elapse between the time the memorandum of appeal was returned to him at the end of January, 1936, and before he presented it to the proper court. The learned District Judge, however, on the point being raised by the respondents before him, took a very serious view and held that the appeal was not entertainable by him as being barred by the law of limitation and that he was unable to excuse the delay, in filing the appeal before him, under section 5 of the Limitation Act. He correctly held that

> "the Court has not any discretion to excuse the delay until a sufficient cause in point of law has been laid before the Court."

(1) (1925) I. L. R. 5 Pat. 361 (379), F. B.

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The excuse of the appellant for the deduction of the period from the 2nd of May, 1932, to the 22nd of January, 1936 (the period during which the appeal was pending for decision before this Court) was based upon the ground that the appellant bona fide acted on the advice of his advocate Mr. S. N. Bose, who had relied upon the decision of the Full Bench in *Ramgulam Sahu* v. *Chintaman Singh*(1). The question, therefore, which arose for determination was whether this was a sufficient cause in law for extending the period of limitation in this case. The learned Judge took the view that this was not a sufficient cause for extending the period of limitation "such as is contemplated by section 5 of the Limitation Act" because he held that he was not satisfied that Mr. S. N. Bose acted with due care and caution. His finding upon this point may be reproduced in his own words:

"The forum of appeal is also determined by the value of the suit. The defendant-respondents from the very beginning asserted that the plaintiff-appellant had purposely and maliciously overvalued the suit with a view to change the venue of appeal. This made it all the more necessary and incumbent on the appellant who has extensive money-lending business and his legal adviser Mr. S. N. Bose, an Advocate, to carefully consider the law on the subject before filing the appeal before the Hon'ble High Court. But instead of doing so, the Advocate who filed the memorandum of appeal and signed it stating in paragraph 16 merely as follows: (the quotation has already been given above). In view of the definite assertions of the defendant respondents on the point of over-valuation, this plea of *bona fide* mistake cannot stand. The law was clear on the point and it has been clearly stated in the judgment of the Hon'ble the Chief Justice. The defendant-respondents had made definite assertions of *mala fide* on the part of the plaintiff-appellant over the question of the over-valuation of the suit. Yet no care and caution appear to have been taken in determining in which court the appeal lay. The conduct of the plaintiff-appellant throughout betrays want of *bona fide*. A mere statement that the mistake was *bona fide* in the memorandum of appeal is certainly not sufficient..... In the circumstances, I am not satisfied that the delay in filing the appeal before this Court was due to a *bona fide* mistake on the part of the appellant's legal adviser."

This quotation from the judgment in appeal seems to indicate that the learned Judge was confusing the mala fide of the appellant with the carelessness or mala fide (as alleged) of the advocate for the

(1) (1925) I. L. R. 5 Pat. 861, F. B.

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appellant who advised him to file this appeal. In my opinion the learned Judge erred in law in refusing to extend the time under section 5 of the Limitation Act. The duty of the appellant was over when he consulted a lawyer of the standing of Mr. S. N. Bose who admittedly is known as a careful advocate of this Court. The appellant was entitled to challenge the finding of the learned Subordinate Judge upon issues 2 and 7 both on question of fact and on question of law. He had apparently an authority in his favour which was cited by his advocate before the learned Chief Justice. It is true that the learned Chief Justice had no difficulty whatsoever in distinguishing that case but until that case was distinguished it was open to any learned advocate of this Court to take the view as Mr. S. N. Bose did. That view cannot be said to have been unreasonable and no amount of care or diligence on the part of any advocate can make him anticipate what view the Judges of this Court would take upon such a difficult matter as the valuation of a suit for the purpose of court-fees where the value depended upon an addition or substraction of the amount claimed as mesne profits, past, present and future. It may be observed that on examining the memorandum of appeal which was presented to this Court on the 2nd of May, 1932, I find that the Stamp Reporter sent for the record of the case from the court below and on the 26th of May, 1932, he made the following report:

> "Examined the plaint in the case. The court-fee paid is sufficient according to valuation."

I have no hesitation whatsoever in holding that upon the facts found in the present case the learned Judge committed an error of law in refusing to extend the period of limitation.

It was vehemently contended by the learned advocate for the respondents that this Court had no jurisdiction whatsoever to interfere with the findings of fact however gross and inexcusable the error may

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be which the lower appellate court had committed in arriving at these findings. The proposition so stated must be accepted. This is supported by numerous decisions of their Lordships of the Privy Council which were reviewed compendiously in the latest case of *Anup Mahto* v. *Mita Dusadh*(1) and *The Secretary of State for India in Council* v. *Rameshwaram Devasthanam*(2). It must be conceded that this Court has no jurisdiction to interfere with the findings of fact but at the same time it is the duty of this Court to carefully disentangle the findings of fact from the inferences which may be drawn from these facts and to review the legal conclusion if erroneous [*See* the Privy Council cases of *Ramgopal* v. *Shamskhaton*(3) and *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh*(4)]. It has been laid down recently by their Lordships of the Judicial Committee in the case of *Kunwar Rajendra Bahadur Singh* v. *Rajeshwar Bali*(5) that a reasonable care by a competent lawyer would be a sufficient cause within the meaning of section 5 of the Indian Limitation Act (the advice given by Mr. S. N. Bose satisfies both these conditions. The advice given by him was based upon a Full Bench decision of this Court and he is a competent lawyer). In the case of *Krishnasami Panikondar* v. *Ramasami Chettiar*(6) the Judicial Committee apparently would have been disposed to interfere with the decision of the subordinate Court refusing to extend time under section 5 of the Limitation Act if it had been shown that the High Court had fallen into any error. Sir Dawson Miller in the case of *S. C. Dey* v. *Musammat Rajwanti Kuer*(7) adopted the view that to attract the operation

(1) (1933) I. L. R. 13 Pat. 254, P. C.
(2) (1934) I. L. R. 57 Mad. 652, P. C.
(3) (1892) I. L. R. 20 Cal. 93 (99), P. C.
(4) (1918) I. L. R. 46 Cal. 189 (195), P. C.
(5) (1937) 18 Pat. L. T. 878, P. C.
(6) (1917) 41 Mad. 412; L. R. 45 Ind. App. 25.
(7) (1921) 6 Pat. L. J. 237.

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of section 5 of the Indian Limitation Act it was enough if it was shown that the mistake was of such a description that it may arise even amongst practitioners of experience and that the litigants should not be made to suffer for such an error. In the case of *Brij Indar Singh* v. *Kanshi Ram*(1) Lord Dunedin, in delivering the judgment of the Privy Council, laid down the mode in which discretion should be exercised in cases under section 5 of the Limitation Act by pointing out that although each case depended upon its own circumstances, this depended on the idea that there can be a general rule regulating all such cases, that the discretion must be judicial and not arbitrary and that "if the judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion, and the Superior Court—in this case this Board—must either remit the case or exercise the discretion themselves".

In the case of *Sunderbai* v. *Collector of Belgaum*(2) the identical question before us was raised. Under the mistaken advice of the Legal Remembrancer of the Bombay Government the defendant appealed to the High Court at Bombay on the 19th of July, 1910, and this was well within 90 days allowed for appeal to the High Court (as in the present case). The High Court on the 11th of March, 1912, decided that the appeal lay to the court of the District Judge and not to the High Court (there also the forum of appeal depended upon the valuation to be fixed by the reliefs claimed). The High Court thereupon directed that the memorandum of appeal should be returned to the appellant for presentation to the District Judge. On

(1) (1917) I. L. R. 45 Cal. 94; L. R. 44 Ind. App. 218.

(2) (1918) I. L. R. 43 Bom. 376; L. R. 46 Ind. App. 15.

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the 16th March, 1912, that is, within 5 days, the defendant presented the memorandum of appeal to the court of the District Judge alleging that the appeal had been presented to the High Court by him under the bona fide belief based upon legal advice that the appeal lay to that Court and prayed that it might be admitted. It is interesting to note that the District Judge to whom the memorandum of appeal was presented was himself the Legal Remembrancer under whose advice the appeal had been preferred to the High Court. The question as to whether the discretion under section 5 of the Limitation Act should be exercised was elaborately considered by the High Court and the learned Judges pointed out at page 23 that "the fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation [*see Brij Indar Singh* v. *Kanshi Ram*(1)]". In the case of *Sundar Koer* v. *Lala Raghunath Sahai*(2) Mookerjee and Carnduff, JJ. laid down the following test in such matters: "The test, therefore, to be applied to the case before us is, whether there has been any negligence or inaction or want of bona fides on the part of the appellant. We are satisfied upon the materials which have been placed before us that the question must be answered in the negative"; the mistake made by the petitioner was in calculating the time within which the appeal should have been filed and it was based upon the advice she got from the pleader in the matter which turned out to be wrong and they considered that a mistake of that description may arise even amongst practitioners of experience. It may be noticed that the learned Judges interfered in revision and extended the time.

(1) (1917) I. L. R. 45 Cal. 94; L. R. 44 Ind. App. 218.

(2) (1911) 12 Ind. Cas. 677.

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In the case of *Nagindas Motilal* v. *Nilaji Moroba Naik*(1) Marten, J., in exhaustively dealing with the question, held that " if a party acts on the advice of his pleader he comes within the protection of section 5 of the Limitation Act ". The same view was accepted in the Full Bench case of *Shib Dayal* v. *Jagannath Prasad*(2) where the learned Judges unanimously held that " an honest mistake on the part of a litigant caused by erroneous advice given to him by his vakil in the district, by reason of which an appeal was not filed until the period of limitation therefor had expired, is a good ground for the application in favour of the would-be appellant of the provisions of section 5 of the Indian Limitation Act". In the case of *Ambica Ranjan Mazumdar* v. *The Manikganj Loan Office, Ltd.*(3) Suhrawardy and Graham, JJ. granted a relief to the applicant in revision although it was held that the appellant's pleader was guilty of great carelessness and filed the appeal in the wrong court but it was impossible to hold that the appellant had acted otherwise than bona fide in the matter. In the case of *Dattatraya Sitaram Gaihari* v. *The Secretary of State for India in Council*(4) the advice by a pleader was held to be sufficient in law to entitle the litigant to the benefit of section 5 of the Limitation Act.

In the case of *Seth Jahar Mal* v. *G. M. Pritchard*(5) Chief Justice Sir Dawson Miller in dealing with the identical question pointed out that "although he (District Judge) was entitled, and in fact it was his duty to exercise his discretion, if one finds that the conclusions of fact at which he arrived which were the basis of his decision were not such as could possibly support that decision then I think this court is entitled, and, indeed, is bound, to say that that

(1) (1924) I. L. R. 48 Bom. 442.
(2) (1922) I. L. R. 44 All. 636, F. B.
(3) (1927) 32 Cal. W. N. 372.
(4) (1920) I. L. R. 45 Bom. 607.
(5) (1919) 4 Pat. L. J. 881.

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discretion was not exercised in a legal and proper manner". This was a second appeal and although the District Judge had in his discretion extended the time for filing the appeal before him but inasmuch as he exercised his discretion in favour of the appellant by choosing to excuse the remissness or negligence of the litigant's servants the learned Chief Justice held: "That is not a ground upon which the courts ought to exercise in their discretion any indulgence in favour of litigants, and therefore I think that the decision of the learned District Judge in allowing the time to be extended for filing this appeal cannot possibly stand". Mr. Justice Roe in agreeing pointed out that upon the facts found the order of the district court was directly contrary to the principle that the master is responsible for the negligence of his servant and he associated himself entirely with the views of the learned Chief Justice upon the other matter.

I find, on examination of a large number of cases (some of which have been referred to by me above), that there is a cursus curiae that the superior court has power to interfere with a wrong exercise of discretion by the subordinate courts in such cases both in its revisional and appellate jurisdiction.

It remains to consider the case of *Debi Charan Lal* v. *Sheikh Mehdi Hussain*(1) where the learned Chief Justice pointed out at page 487: "It is now settled 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 not filing an appeal within time, the High Court in second appeal will not interfere". Reliance is placed upon this passage by the learned advocate for the respondents in support of his contention that this Court is powerless to interfere with the decision of the learned District Judge refusing to extend time. In my opinion the authority under consideration does

(1) (1916) 1 Pat. L. J. 485

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not militate against the principle which I have extracted from the various decisions already referred to by me; this decision merely affirms the proposition that where, upon a consideration of the facts, the lower appellate court is not satisfied that the appellant has reason to come beyond the time fixed by law the refusal to extend time is final but it is no authority for the proposition that where, upon the facts found, the discretion is not judicially exercised so that the refusal to extend time is based upon the court misdirecting itself on a point of law the High Court cannot interfere in second appeal. This case was approved by the learned Chief Justice in a recent case of *Baijnath Prasad Singh* v. *Umeshwar Singh*(1) when he delivered the leading judgment in the Full Bench case which dealt with the question whether the subordinate court is bound to grant an extension of time in case of deficit court-fee upon the plaint which has been presented. The learned Chief Justice observed " 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 ".

Our attention was also invited to a recent decision of the Calcutta High Court in the case of *Surendra Mohan Rai Chaudhury* v. *Mohendra Nath Banerjee*(2) where upon a review of a large number of authorities it was laid down that " there is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if bona fide acted upon by a litigant, will entitle him to the protection of section 5 of the Act. Each case of this sort depends on its facts but the sound working formula would be this: In cases where a suiter has suffered from negligence or gross want of legal skill of his legal adviser, he has his remedy against that legal adviser and meantime the suiter must suffer.

(1) (1937) I. L. R. 16 Pat. 600, F. B.

(2) (1931) I. L. R. 59 Cal. 781.

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But where there has been a bona fide mistake, not through misconduct or through negligence nor through want of reasonable skill, but such as a skilled person might make, the client is entitled to indulgence ". The learned Judges accepted the rule expressed by Brett, M. R. in *Highton* v. *Treherne*(1) as a sound working formula. The Calcutta case under consideration dealt with the situation which arose on account of the appellant not having filed an appeal from a preliminary mortgage decree and in attempting to argue the appeal from the final decree he wanted to show that the grounds stated therein also assailed the validity of the preliminary decree. The case having been adjourned an affidavit was put in on the next day with a prayer " that the formal defects, if any, in the memorandum of appeal might be allowed to be amended and a short delay in filing the appeal specifically against the preliminary decree may be excused and a certified copy of the preliminary decree annexed herewith might be received ". It was also sought to be proved by means of an affidavit that the appellant sent his papers to Dr. Kanjilal, a well-known advocate of the Calcutta High Court since dead, and Dr. Kanjilal advised that a copy of the final decree should be obtained which was then applied for and actually received in time and thereafter the appellant personally made over to Dr. Kanjilal copies of the judgment and of the preliminary and final decrees and all relevant papers and thereafter Mr. Quasim, an advocate of that Court, filed the appeal; and Dr. Kanjilal then informed the appellant that the appeal was filed within time. Upon this the learned Judges observed as follows: " If these circumstances were made out there would be a very strong case for allowing the appellant extension of time for preferring an appeal from the preliminary decree and for converting the present appeal in the way asked for. Unfortunately for the appellant a material portion of this story, at any rate, is not

(1) (1878) 48 L. J. Ex. 167.

true " and in particular they pointed out that the statement that a copy of the preliminary decree had been obtained before the present appeal was filed on the 25th of June, 1927, was wholly false and that a certified copy of the preliminary decree which was now being filed was not obtained before July, 1931. Upon these facts it is clear to my mind that the facts in the Calcutta case did not establish that the litigant was prevented from filing an appeal under a mistaken or careless advice given by his lawyer and the learned Judges were forced to take the view: " The result is that the explanation which the appellant has given for not having preferred an appeal from the preliminary decree fails; and the appeal having been filed on the very last day that it could be filed, in view of the dates on the copy of the final decree that he had obtained, no question of any particular diligence on his part arises ". It is to be noticed that there was no other statement of fact made by Mr. Quasim, the advocate who had filed the appeal under consideration, and that on the facts found it was not necessary to decide the question which the learned Judges so elaborately discussed as to whether a litigant is entitled to an extension of time on account of a mistake made on the part of his advocate. Their observations are entitled to respect and must be considered whenever the question arises before the courts in dealing with an extension of time based upon the allegation that the delay is due to the mistaken or careless advice given by the lawyer; but I may respectfully point out that the remedy suggested to the litigant against his legal adviser for negligent or unskilful advice is no more than a nominal remedy. In my opinion this case also does not lay down any proposition of law contrary to those indicated by me above.

I would point out that the courts of facts should be very careful in deciding such cases when the excuse pleaded is the advice given by a lawyer and they should ask themselves whether the litigant

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should be allowed to suffer for no fault of his other than that he filed his appeal in the forum relying upon that advice of his lawyer.

Upon a careful consideration of the facts and circumstances, I am unhesitatingly of opinion that the learned District Judge has misdirected himself on a point of law and that he committed an error of law in refusing to extend the time upon the findings of fact which he arrived at. I would, therefore, set aside the judgment appealed against and remand the case to the learned District Judge for disposal in accordance with law.

The attention of the learned District Judge is directed to the well-known observation of the Judicial Committee in the case of *Tarakant Bannerjee* v. *Puddomoney Dossee*(1) where it was pointed out that the courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige the superior courts to remand a case which might otherwise be finally settled on appeal and observed: "This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Court below, their Lordships find themselves unable to dispose of the suits". These observations were repeated by the Judicial Committee in the case of *Mahomed Solaiman* v. *Kumar Birendra Chandra Singh*(2). Sir George Lowndes, in delivering the judgment of the Judicial Committee in the case of *Jagannath Rao Dani* v. *Rambharosa*(3), observed as follows: "It has been repeatedly pointed out by this Board that it

(1) (1866) 10 Moo. I. A. 476 (488).
(2) (1922) I. L. R. 50 Cal. 243; 27 Cal. W. N. 749, P. C.
(3) (1932) 37 Cal. W. N. 321 (324), P. C.

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is the duty of the Courts below to pronounce their opinion on all the important points in an appealable case, and that a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs ". In the present case if the learned Judge had disposed of the other questions of fact which arose before him, for example, the question of notice or want of notice to defendant-second party, this Court would have been able to terminate this litigation which unfortunately has to be prolonged even after a lapse of 10 years.

DHAVLE, J.—I agree.

In the recent case of *Kunwar Rajendra Bahadur Singh* v. *Rajeswar Bali*(1) Sir George Rankin observed that " mistaken advice given by a legal practitioner may, in the circumstances of a particular case, give rise to sufficient cause within section 5 of the Limitation Act, though there is certainly no general doctrine which saves parties from the results of wrong advice ". The facts of the case were examined on the footing adopted in the High Court (without, however, pronouncing it to be correct) that if Counsel, on whose advice the appellant had acted, did not exercise due care and attention and acted with gross negligence in the matter, that would suffice to justify the dismissal of the appeal, and it was pointed out that this involved that the view taken by Counsel was not such as could have been entertained by a competent practitioner exercising reasonable care. It seems to me that on this decision it may well be doubted whether the Judicial Committee entirely approve of the rule that for wrong professional advice to afford sufficient cause within section 5, the mistake must be of such a description that it may arise even amongst practitioners of experience. In *S. C. Dey* v. *Musammat Rajwanti Kuer*(2) Dawson

(1) (1937) 18 Pat. L. T. 878, P. C.
(2) (1921) 6 Pat. L. J. 237.

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Miller, C.J. (with whom Mullick, J. agreed) found such a rule laid down in *Sundar Koer* v. *Raghunath Sahai*(1) and was prepared to adopt it, though the actual decision of the case turned on the failure of the appellant to make out that it was a pleader that had given the wrong advice. This rule has been criticised as perhaps a little too narrow in *Surendramohan Ray Chaudhri* v. *Mahendra Nath Banerji*(2). A Full Bench of the Allahabad High Court held in *Shib Dayal* v. *Jagannath Prasad*(3) that an honest mistake, even though a negligent one, ought not in the present state of the profession in the districts to be allowed to operate to the prejudice of clients: the negligence in that case (it may be added) was not of a gross, inexcusable description. In Bombay the ill-advice of a pleader containing "a stupid, though not an unaccountable, blunder" was not taken "necessarily or prima facie to establish a want of good faith"—*Ram Ravji* v. *Pralhaddas*(4)—and a party who wrongly filed an appeal in the High Court, acting on the advice of a pleader, was held not to be acting without good faith merely because he relied upon a person whose status entitled him to give advice to litigants—*Dattatraya Sitaram* v. *Secretary of State for India*(5) followed in *Nagindas* v. *Nilaji*(6). This view receives direct support from the decision of the Privy Council in *Sunderbai* v. *Collector of Belgaum*(7) where it was held that the fact that an appellant has acted on mistaken advice as to the law in appealing to the High Court—that appeal, it may be observed in passing, was filed long after the expiry of the period of thirty days allowed for an appeal to the District Judge—does not preclude him

(1) (1911) 12 Ind. Cas. 677.
(2) (1931) I. L. R. 59 Cal. 781.
(3) (1922) I. L. R. 44 All. 636, F. B.
(4) (1892) I. L. R. 20 Bom. 133.
(5) (1920) I. L. R. 45 Bom. 607.
(6) (1922) I. L. R. 48 Bom. 442.
(7) (1918) I. L. R. 43 Bom. 376; L. R. 46 Ind. App. 15.

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from showing that it was owing to his reliance on that advice that he had not presented the appeal to the court of the District Judge within the period of limitation. In dealing with a similar mistake in *Krishna* v. *Chathappan*(1) the Madras High Court pointed out that the section gives the Courts a discretion in respect of jurisdiction which is to be exercised in the way in which all judicial power and discretion ought to be exercised, the words ' sufficient cause ' receiving a liberal construction so as to advance substantial justice where no negligence or inaction nor want of bona fides is imputable to the appellant. The true rule about mistaken advice from a legal practitioner must now be taken to be that the circumstances of each particular case should be examined to see whether such advice gives rise to sufficient cause within the section. Let us therefore examine the circumstances on the lines followed in *Kunwar Rajendra Bahadur Singh's* case(2). The error of the advocate who advised the appellant is clearly not attributable to bias. The court-fee on the appeal as filed in the High Court was in excess of that payable on an appeal to the District Judge; and though the period of limitation for an appeal to the High Court was much longer, the appeal was in fact filed within the much shorter period prescribed for an appeal to the District Judge. The observations of Mullick, J. in the Full Bench case of *Ramgulam Sahu* v. *Chintaman Singh*(3) related to the question of court-fees, a point on which there had been differences of opinion, and the advocate who advised the appellant erroneously took them to be applicable to the question of jurisdiction, a question on which there was apparently no previous decision to the contrary—we have certainly not been referred to any. The District Judge considers that the appellant and his advocate should have been all

(1) (1889) I. L. R. 13 Mad. 269.
(2) (1937) 18 Pat. L. T. 878, P. C.
(3) (1925) I. L. R. 5 Pat. 361 (379), F. B.

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the more careful to consider the law before filing the appeal in the High Court because the defendants "from the very beginning asserted that the plaintiff-appellant had purposely and maliciously overvalued the suit with a view to change the venue of appeal". But paragraph 14 of the written statement of defendant 1 said nothing about changing the venue of appeal and only spoke of the suit being purposely overvalued "in order to ruin and harass the defendants". The assertion, such as it was, was accepted by the trial court merely because there was no cause of action at the commencement of the suit for the mesne profits *pendente lite*, while it was these mesne profits that increased the plaintiff's claim to just beyond Rs. 5,000, the pecuniary limit of an appeal to the District Judge. The finding of the trial court on issue no. 2 that the suit had been purposely overvalued was thus clearly open to a bona fide attack and was attacked in paragraph 16 of the memorandum of appeal on the ground

> "that the court below is wrong in holding that the plaintiff included the mesne profits to which he is not entitled with the object of overvaluing his suit, whereas it should have been held that at best it is a *bona fide* mistake on his part."

In holding that the suit had been purposely overvalued, the trial court had failed to consider whether a practitioner of experience may not have honestly, and indeed correctly according to the observations of Mullick, J. in *Ramgulam Sahu's* case(1), advised the plaintiff to include in the claim on which court-fees were to be paid the mesne profits *pendente lite*, especially as the inclusion of these profits did not affect the jurisdiction of the trial court. The learned District Judge also did not advert to this aspect of the matter, nor did he refer to any ground worth the name for holding that the appellant had not proceeded *bona fide* in acting on the advocate's advice for the appeal. It is difficult to see what could

(1) (1925) I. L. R. 5 Pat. 361, F. B.

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be required of the appellant beyond consulting a legal practitioner of the standing of Mr. S. N. Bose, to find out the Court to which the appeal lay. The District Judge apparently thought that the advocate's mistake was not *bona fide* because he failed to consider the law with the care that was required in the circumstances, and further that this by itself disentitled the plaintiff-appellant to the benefit of the plea of *bona fide* mistake which, if made out, would have been sufficient within section 5 of the Limitation Act. To describe the mistaken advice given by the advocate in the circumstances of this case as other than *bona fide* is to visit him with a censure undeserved, and to use the expression *bona fide* (which does not occur in the section) in an unnecessarily severe sense. The learned District Judge refers to the fact that the appellant has extensive money-lending business as if it had much bearing on the defence assertion of *mala fides* on his part; but I am unable to see how it can in any way lead to the conclusion that he acted without good faith in relying upon the advice of an advocate whose standing certainly entitled him to advise litigants and who only fell into a not unaccountable blunder in failing to notice that Mullick, J.'s observations did not relate to the question of jurisdiction. On the footing also that the suit was deliberately overvalued in order to change the venue of appeal the respondents have little to complain of, for they have had no difficulty in opposing the plaintiff at every stage. As regards the delay that has occurred, the respondents cannot be regarded as having ever had more than a conditional right to treat the plaintiff's suit as at an end since the appellant actually challenged the decision of the trial court within even the shorter period of limitation prescribed for an appeal to the District Judge. The question to which Court an appeal lies is such that legal advisers often differ in their opinion about it, as is shown by reported decisions from all the High Courts. It is also a question on which litigants have to be guided by the

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advice of their lawyers. The mistake of the advocate in this case was in my opinion by no means of such a description as to disentitle the plaintiff-appellant to the indulgence provided under section 5 of the Limitation Act, nor does the plaintiff-appellant appear to have proceeded without diligence or good faith [using this expression here in the strict sense given to it in section 2(7) of the Act] in relying on that advice.

It was also contended on behalf of the respondents that the finding of the District Judge against the sufficiency of the mistaken advice of the advocate as a cause for not preferring the appeal to that court within the period of limitation is a finding of fact which is binding upon this court in second appeal. Now, it is a well-settled rule 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 not filing an appeal within time, the High Court in second appeal will not interfere ". But it may be observed that the question whether the court of first appeal has correctly found that sufficient cause has or has not been established will only arise in second appeals, and I am not aware of any decision in which it has been held that the High Court in second appeal will not interfere with the conclusion of the lower appellate court on the point on the ground that it is a finding of fact. Questions of law and of fact are sometimes difficult to disentangle, but the proper legal effect of a proved fact is essentially a question of law. The power under section 5 of the Limitation Act to admit an appeal after the period of limitation prescribed therefor has been always recognised as a discretionary power, and the discretion must be a judicial and not an arbitrary discretion; and the High Courts have repeatedly interfered in second appeal on the ground, as expressed in *Kichilappa Naickar* v. *Ramanujam Pillai*(1) (where previous

(1) (1901) I. L. R. 25 Mad. 166.

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cases are referred to), that the exercise of the discretion was judicially unsound, though they have declined to interfere merely on the ground that they themselves would have drawn a different inference from the facts where a lower appellate court had exercised its discretion after appreciation and consideration of all the facts material for the purpose of exercising a judicial discretion and after the application of the right principle to those facts. In *Seth Jahar Mal* v. *G. M. Pritchard*(1) this Court in second appeal interfered with the discretion of the lower appellate court under section 5 of the Limitation Act because it had been exercised on a ground upon which the courts ought not, in their discretion, to allow any indulgence in favour of litigants. The facts on which the discretion is exercised must be distinguished from the question whether in law they amount to sufficient cause within section 5. This distinction may be supported by an analogy. Proviso (*b*) to section 14, sub-section (*1*) of the (English) Workmen's Compensation Act, 1925, provides that the failure to make a claim within six months shall not be a bar to the maintenance of proceedings for the recovery of compensation for an injury if it is found that the failure was occasioned by a mistake, absence, or other reasonable cause; and in *Shotts Iron Company, Limited* v. *Fordyce*(2) it was decided by the House of Lords that the question whether the facts found constitute reasonable cause is a question of law. As Viscount Dunedin put it, the inference to be drawn from the facts found " is not an inference in fact but is an inference in law ". The analogy to section 5 of the Limitation Act is close, and helps in understanding how all the High Courts have consistently interfered in second appeal with the discretion of courts of first appeal in the matter of the admission of appeals beyond time if the discretion has not been exercised in a legal and proper

(1) (1919) 4 Pat. L. J. 881.
(2) (1930) A. C. 503.

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manner. The contention that we in second appeal are bound by the view of the lower appellate court as by a finding of fact must, therefore, be rejected; the facts themselves are not in dispute here, and the District Judge has fallen into more than one error of law in holding that the advice received by the appellant from his advocate did not entitle him to the benefit of section 5.

S. A. K.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

1938.

March 2, 3.

FOUZI LAL KURMI

v.

SRIMATI DHANA KUMARI DEVI.*

Landlord and Tenant—general law as to abatement of rent on the ground of diluvion, whether applies to the Santal Parganas—Santal Parganas Settlement Regulation, 1872 (*Reg. III of* 1872), *section* 3(2)—*Santal Parganas Act,* 1855 (*Act XXXVII of* 1855), *section* 2—*Bengal, Agra and Assam Civil Courts Act,* 1887 (*Act XII of* 1887), *section* 37(2).

The general law that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated, applies also to the Santal Parganas where the tenancy is governed by the Santal Parganas Regulations.

Held, also, that the failure of the tenant to establish a contract to that effect can in no way prevent his getting the relief to which he may be entitled under the general law.

Dukha Lal Choudhuri v. *Musammat Manabati* (1), and *Arun Chandra Singha* v. *Shamsul Huq*(2), followed.

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* Appeals from Appellate Decrees nos. 263 and 264 of 1937, from the decisions of Babu Raghunandan Prasad, Subordinate Judge of Purnea, dated the 21st of January, 1937, modifying the decisions of Babu Nilkanta Bagchi, Munsif of Katihar, dated the 31st of January, 1936.

(1) (1936) I. L. R. 15 Pat. 594, S. B.
(2) (1931) I. L. R. 59 Cal. 155, F. B.

Appeal by the defendants.

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

Sir Manmatha Nath Mukharji (with him *J. C. Sinha* and *G. P. Sahi*), for the appellants.

B. C. De, for the respondents.

WORT, J.—This is the defendants first party's appeal arising out of two actions for rent for the 2-annas kist of 1334, the whole of the years 1335 and 1336 and 14-annas kist of 1337 B.S. Excepting with regard to the last 2-annas kist of 1335, the Judge in the Court below has given a decree to the plaintiff for the whole of the rent claimed. There is no appeal with regard to the last 2-annas kist of 1335 and, therefore, it is unnecessary to make any statement in that regard.

As regards the 2-annas kist of 1334 it is contended on behalf of the appellants that the action of the plaintiff was barred by limitation. The right to sue for this kist, it is admitted, continued in the predecessor of the plaintiff, i.e., defendant no. 2, up to the 12th of April, 1931. The plaintiff's claim with respect to that kist arose under an assignment dated the 11th of May, 1931. It is obvious, therefore, that on the date of the assignment the claim for that instalment of the rent was barred by limitation, and, in any event, therefore, the appeal must be allowed as regards that part of the claim.

As regards the other years the position was this. Two suits relating to two holdings—one Gopalpur and the other Gadai—were brought. The area of the first was approximately 409 bighas at a rent of Rs. 409 (fixed) or Re 1 per bigha, while the area of the second holding was 358 bighas at a rent of Rs. 358-4-0. The defendants resisted the suit on the footing that they were entitled to remission of rent by reason of diluvion of the greater part of the area of the holdings. The

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learned Judges in the Courts below have held as a fact that in 1335 the lands were completely under water. I have already stated my reasons for the conclusion that the claim for the year 1334 was barred by limitation and therefore this question does not arise with regard to that year. As regards the year 1336, 100 bighas of the diluviated lands had reappeared and reformed in the holding Gopalpur on the Bihar side of the Ganges. So far as the other holding is concerned 65 bighas had reappeared on the Bihar side of the Ganges. The same may be said to be the state of affairs in the year 1337. The defendants pleaded in paragraph 7 of their written statement that

> "so long the lands remained under water or sandy, i.e. unfit for production of crops, there would be remission of rents for the period and further that when the defendants enjoyed the lands after reformation, the defendants would pay rent, defendants' title remaining intact".

It is obvious from what I have read from the written statement that the defendants based their case not upon the general law but upon a contract.

Mr. De in his argument attempted to make a point with regard to this, but the short answer to that contention is that the fact that the defendants made the position to depend upon the agreement of the parties would not in any way detract from the rule of the general law which would be applicable to the case: in other words, if it were found to be the general law which entitled the tenants to apportionment or abatement of rent with regard to lands that had diluviated, the failure of the defendants to establish a contract to that effect would in no way prevent their getting the relief to which they would be entitled under the law. As regards the general law, the defendants rely upon the Full Bench decision of this Court, being the case of *Dukha Lal Choudhuri* v. *Musammat Manabati*(1). Fazl Ali, J., delivering

(1) (1936) I. L. R., 15 Pat. 594, 601, S. B.

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the judgment of the Court, made this observation: "Now, whatever may be the state of the law in England it has always been held in this country that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated". In the course of the judgment reference was made to the case of *Arun Chandra Singha* v. *Shamsul Huq*(1) where Sir George Rankin said: "The right of a tenant at the general law to claim an abatement of rent by reason of a portion of the land of his tenancy having been washed away by the action of a river cannot now be disputed. The loss by fluvial action of part of the lands of a tenancy is of very frequent occurrence in India. English rivers differ so much from the rivers of India in this respect [*Cf. Srinath Roy's case*(2)] that it is not a matter for surprise that there is scant authority in England as to the law to be applied in such conditions. There is, however, some old authority for the proposition that if land is permanently covered by the eruption of the sea, the tenant is entitled to an apportionment of rent [1 Rol. Ab. 236 Bac. Ab. Rent (M) (2), volume VII, page 63]; and it may be said that the case of *Mathey* v. *Curling*(3) is not inconsistent with this doctrine, although it seems clear enough that abatement of rent is not permitted by the law of England merely because a portion of the demised premises is destroyed by fire or damaged by an extraordinary flood or occupied by an alien enemy. In India, the rule, in cases of diluvion, has long been settled in favour of the tenant".

Now, so far as Bihar is concerned, there can be no difficulty with regard to the matter having regard to sections 38 and 52 of the Bihar Tenancy Act, as pointed out by Fazl Ali, J. in the case of this Court to which I have referred, observing as he does that

(1) (1931) I. L. R., 59 Cal. 155, F. B.
(2) (1914) I. L. R. 42 Cal. 489 (531); L. R. 41 Ind. App. 221 (243).
(3) (1922) 2 A. C. 180.

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section 52 is much wider in its terms than section 38 and holding that the latter section applies to the case of a tenure-holder. That being so, we have to consider in this case the argument of Mr. De, first of all, that the matter is governed by the Santal Parganas Regulation and, secondly, that the general law does not apply to that part of the country. I do not think there can be any serious dispute that so far as the lands with regard to which an apportionment or abatement of rent is claimed are concerned, the matter must be governed by the law of the Santal Parganas. The question, therefore, arises whether the general law as laid down in the case to which I have referred applies to that part of the country.

Mr. De relies upon certain Regulations of the Santal Parganas. The first is Regulation III of 1872, section 3 (2) of which provides:

"No other enactment, heretofore or hereafter passed, shall, unless the Santal Parganas be expressly named therein, be deemed to apply to the said Parganas, except so far as regards the trial and determination of the civil suits, referred to in section 2 of Act XXXVII of 1855 in which the matter in dispute exceeds the value of one thousand rupees."

It might be mentioned in this connection that this suit does involve a sum in excess of Rs. 1,000 referred to in the Regulation. Section 11 of the Regulation of 1872 provides:

"No suit shall lie in any Civil Court, regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules, regarding the interests and rights abovementioned, shall have the force of a decree of Court."

I refer to this clause of the Regulation with regard to an argument in connection with the decision of the Settlement Officer referred to in the judgment of the learned Judge in the Court below. There appears, in the first place, to have been an order of the Settlement Officer fixing the rents. There is a further argument in this connection to the effect that the order fixing the rents was final and conclusive and

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that no abatement therefore could be allowed. But the learned Judge in the Court below deals with the order of the Settlement Officer, in connection with which I have referred to section 11 of the Regulation, in these words:

"There can be no doubt that the defendants knew the fluctuating character of these lands at the time of the settlement. They therefore requested the Deputy Commissioner of the Santal Parganas to make a note to the effect that the defendants were not liable to pay rent when the lands were under water and were unfit for cultivation. The Deputy Commissioner of the Santal Parganas discussed the matter from different points of view in connection with the preparation of a table of rates and roll... ";

and, later

"As remarked by the learned Munsif, the learned Deputy Commissioner assigned cogent reasons for rejecting the prayer of the tenants."

I refer to the words used by the learned Judge as they are the only materials before this Court as regards the facts of that order of the Deputy Commissioner. It appears that the application was made by tenants other than the present defendant-appellants. The section speaks of the order of the Settlement Officer having the force of a decree. It is quite clear therefore that it can have no more force than a decree, and the present defendants, not being a party to that application, and therefore not a party to the order of the Deputy Commissioner, were not bound by it, even if it were to be held that by reason of section 11 of the Regulation of 1872 the decision of the Settlement Officer was final and conclusive.

Mr. De next relies upon Regulation II of 1886, section 3 whereof provides that the rent fixed by the Settlement Officer shall not be changed except in the course of the settlement proceedings by an order of the Settlement Officer. Under section 6(*b*) of that Regulation:

"Rent shall remain unchanged in the case of a settlement made after this Regulation comes into force, for fifteen years from the time of the adjustment and record."

That is no more than the similar general provision in the Bihar Tenancy Act with regard to the enhancement of rent after a period of fifteen years,

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and in my judgment quite clearly would not disentitle the tenant from the benefits of the general law with regard to abatement. The defendant-appellants on the other hand rely on section 2 of Act XXXVII of 1855. That clause is to the effect that:

"Provided that all civil suits in which the matter in dispute shall exceed the value of one thousand rupees shall be tried and determined according to the general law and Regulations in the same manner as if the Act had not been passed."

Reliance is also placed on the Bengal, Agra and Assam Civil Courts Act (XII of 1887) which provides for the application of the rule of justice, equity and good conscience in the absence of any rules regulating the matter in dispute. The words are:

"In cases not provided for by sub-section (1) of section 37, the Court shall act according to justice, equity and good conscience."

Apart from the particular enactment to which I have just referred, there seems to be no valid reasons for holding that the Full Bench decision of this Court as to the general law with regard to this matter does not apply to the Santal Parganas. There would certainly be no logical reasons for coming to such a conclusion particularly having regard to the fact, as pointed out by Sir Manmatha Nath Mukherji during the course of his argument, that the Santal Parganas were formed in 1855 from two districts of the Province of Bihar. There are no logical reasons, to repeat myself, for coming to the conclusion that the general law in this regard does not apply to the Santal Parganas. What the general law is has been finally decided so far as this Court is concerned by the decision to which I have already referred. In my judgment, therefore, whether governed by the Bihar Tenancy Act or by the law as applicable to the Santal Parganas, the defendants in this case were entitled to abatement with regard to these lands diluviated for the years in suit.

One matter I should have dealt with and that is the argument of Mr. De that to the land which was the subject-matter of the contract between the parties, that is to say, with regard to which the defendants

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had agreed to pay fixed rent and to the diara land section 180 of the Bihar Tenancy Act applied. The short answer to the case is the other contention of Mr. De. namely, that the law as regards the Santal Parganas applies in this case and not the Bihar Tenancy Act. But there is a further answer to the argument: assuming that the Bihar Tenancy Act applies, if section 180 is to be construed in the manner in which it was construed in the case of *Srinibash Proshad Singh* v. *Ram Raj Tewari*(1), the exception will apply during the first twelve years of the tenancy as provided by the Act. There is, however, reason to suppose in this case that the tenancy was in existence for many more years than twelve.

For those reasons it seems to me that the learned Judge in the Court below was in error in coming to the conclusion that the onus was on the defendants to show that there was some contract between the landlords and the tenants entitling the landlords to this right which they would have under the general law of the land. The judgment of the learned Judge in the Court below must therefore be reversed; the defendants will be entitled to a total remission of rent for the years 1335; they will be entitled to remission of rent for the year 1336 as regards those lands other than the 100 bighas of Gopalpur which had reformed and those lands other than the 65 bighas which had reformed in the other holding Gadai. The same may be said for the year 1337. The appeal is also allowed for the reasons which I have stated with regard to the year 1334.

The defendant-appellants succeed and are entitled to their costs.

This order will govern both the appeals nos. 263 and 264 of 1937.

AGARWALA, J.—I agree.

S. A. K. *Appeals allowed.*

(1) (1914) 18 Cal. W. N. 598.

APPELLATE CIVIL.

Before James and Chatterji, JJ.

MAKHAN SAHU

v.

MUSAMMAT BIBI KAMRUN NISSA.*

1938.

March 22.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXIV, rules 5 and 6—mortgaged property directed to be sold by the decree no longer available—mortgagee, whether entitled to a personal decree.*

The conditions under which a personal decree under Order XXXIV, rule 6, Code of Civil Procedure, 1908, may be asked for are satisfied if the properties directed by the mortgage decree to be sold are no longer available.

In a mortgage suit by a puisne mortgagee a final decree for sale was passed under Order XXXIV, rule 5, Code of Civil Procedure 1908, but in the meantime another decree was obtained by a prior mortgagee in execution of which bulk of the mortgaged properties were sold in satisfaction of the debt due to the prior mortgagee. Thereafter the puisne mortgagee executed his decree and the remaining property not affected by the prior mortgage decree was sold for a sum which was not sufficient to pay off the decretal amount. Thereupon the puisne mortgagee applied for a personal decree under Order XXXIV, rule 6, *held*, that the puisne mortgagee was entitled to a personal decree.

Adhar Chandra Naskar v. *Sarnwamoyi Dasi* (1) and *Samanta Gagarnath Mahapatra* v. *Lokenath Sukul*(2), followed.

Jenna Bahu v. *Permeshwar Narayan Mahta*(3), referred to

Held, further, that the failure on the part of the puisne mortgagee to redeem the prior mortgage did not debar him from asking for a personal decree.

* Appeal from Original Decree no. 179 of 1936, from a decision of Maulavi Muhammad Ibrahim, Subordinate Judge of Muzaffarpur, dated the 5th February, 1936.

(1) (1928) 32 Cal. W. N. 1160.

(2) (1921) 6 Pat. L. J. 106.

(3) (1918) I. L. R. 47 Cal. 370, P. C.

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Appeal by the decree-holders.

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

A. K. Mitter, for the appellants.

S. M. Mullick and *S. A. Khan*, for the respondents.

CHATTERJI, J.—This is an appeal against an order refusing a personal decree under Order XXXIV, rule 6, of the Civil Procedure Code. The plaintiffs obtained a preliminary mortgage decree on the 15th June, 1934, on the foot of three mortgages. The decree was made final on the 16th December, 1934 The first two mortgages were in respect of the same property and the third was in respect of two other properties. Between the preliminary decree and the final decree all these properties excepting one covered by the third mortgage were sold in execution of a prior mortgage decree. It is not disputed that there were no surplus proceeds of that sale left. The plaintiffs executed their decree against the remaining property not affected by the prior mortgage decree and, we are told, it was sold for Rs. 600 only. As this amount was far short of the decretal amount, the plaintiffs made an application under Order XXXIV, rule 6. The objection taken on behalf of the defendants was that under the terms of Order XXXIV, rule 6, it was incumbent upon the plaintiffs to exhaust the mortgaged properties before they could apply under that rule. This objection has been accepted by the learned Subordinate Judge who has rejected the application. Hence this appeal.

The question for decision in this appeal turns on the interpretation of Order XXXIV, rule 6, of the Civil Procedure Code. Apart from any decisions it seems to me that it is quite plain upon a true reading of this rule that the conditions under which a personal decree may be asked for are equally satisfied if the properties directed by the mortgage decree to be sold are no longer available. It will be most unreasonable

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CHATTERJI, J.

to hold that the plaintiffs before they can apply under Order XXXIV, rule 6, must go through the farce of selling the mortgaged properties though the properties have ceased to be available to them. The point is covered by authorities and I should in particular refer to the decision in *Adhar Chandra Naskar* v. *Sarnwamoyi Dasi*(1) where on similar facts it was held that "where in a mortgage suit by a puisne mortgagee, a final decree for sale was passed under Order XXXIV, rule 5, of the Civil Procedure Code, but before that decree could be executed, another decree was obtained by a prior mortgagee in execution of which the mortgaged properties were sold in satisfaction of the debt due to the prior mortgagee and thereupon the puisne mortgagee applied for and obtained a personal decree under Order XXXIV, rule 6, the Court had jurisdiction to pass the decree under Order XXXIV, rule 6". This is based on the Privy Council decision in *Jeuna Bahu* v. *Permeshwar Narayan Mahtha*(2) in which, however, the precise question for consideration was whether a personal decree could be validly made and embodied in the mortgage decree itself, and if so, how it was to be executed. Reference may also be made to the decision of this Court in *Samanta Gagarnath Mahapatra* v. *Lokenath Sukul*(3) which lays down that where a mortgagee decree-holder has, in execution of his decree, sold some of the properties but has not realized sufficient to pay off the amount due, and is unable to sell the remaining properties by reason of their being situated in a State which will not execute the decree of a British Indian Court, the decree-holder is entitled to a personal decree against the judgment-debtor. In the present case the prior mortgage decree amounted to about Rs. 50,000 and the properties were sold for the same amount. So it would have been absolutely useless for the plaintiffs to sell those properties again in execution of their

(1) (1928) 32 Cal. W. N. 1160.

(2) (1918) I. L. R. 47 Cal. 370, P. C.

(3) (1921) 6 Pat. L. J. 106.

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own decree. The learned Subordinate Judge considers that it was their duty to redeem the prior mortgage and as they did not do so it was for their default that the mortgaged properties were sold and thus ceased to be available to them. This view is entirely wrong. No doubt the plaintiffs as subsequent mortgagees had the right to redeem the prior mortgage but it will not be correct to say that they were bound to do so. If they thought that redemption would not be of any advantage to them they were quite at liberty not to exercise their right. The failure on their part to exercise this right in the present case does not in my opinion debar them from asking for a personal decree.

It is pointed out by the learned Advocate on behalf of the respondents that though the suit was based on three mortgages, the decree that was passed was for the consolidated sum due on all the mortgages; and it is urged that inasmuch as the first mortgage bond was beyond six years of the suit, the decretal amount cannot be split up so as to give relief to the plaintiffs on the basis of the other bonds. This contention is without any substance. In the plaint separate account was given and it will be an easy matter of calculation as to what amount would be due on the two mortgages which were within six years. From the amount so found due, the sum which has already been realised by the plaintiffs by sale of one of the mortgaged properties will be deducted and a personal decree will be passed for the balance. As the amount has not been determined, the matter will be sent back to the Subordinate Judge. The decree, however, cannot exceed twelve thousand rupees because the appellant before admission of this appeal relinquished his claim to a larger amount.

There is another small point. It is pointed out that the original mortgagor is dead and the application under Order XXXIV, rule 6, is directed against his heirs and therefore they cannot be personally liable.

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The decree will direct that the amount will be realizable from the assets, if any, left by the mortgagor.

The appeal is therfore allowed with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

RAMA PRASAD GUPTA

v.

THE COLLECTOR OF SHAHABAD.*

1938.

March 25, 29.

Court-Fees Act, 1870 (*Act VII of* 1870), *section* 19-*D and Schedule* 1, *article* 11—*coparcener of joint Hindu family, whether is a "trustee" for other coparceners— joint family property, whether can be treated as trust property—coparceners applying for letters of administration in respect of joint family property, whether liable to pay court-fee.*

A coparcener of a joint Hindu family interested to the extent of an undivided share in the whole of the property of the joint family is not a trustee for the other coparceners.

Where, therefore, on the death of a coparcener the surviving members of the family apply for letters of administration in respect of the joint family property (whether it is necessary for them to apply or not), they are liable to pay the proper court-fee according to article 11 of Schedule 1 of the Court-Fees Act, 1870. Section 19-D of the Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint family in respect of property which he gets by survivorship.

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* Appeal from Original Order no. 91 of 1937 with Civil Revision no. 257 of 1937, from an order of Rai Bahadur Saudagar Singh, District Judge of Shahabad, dated the 14th of April, 1937.

In the Goods of Madho Prasad (1), followed.

Collector of Kaira v. *Chunilal Hari Lal* (2), *In the Goods of Pokurmull Augarwallah*(3), *Kashinath Parsharam Gadgil* v. *Gouravabai* (4) and *Estate of Ram Kumar Prasad, In re* (5), distinguished.

Appeal by the applicants.

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

S. M. Mullick and *S. N. Bose*, for the appellants.

Advocate-General and *Government Pleader*, for the respondents.

WORT, J.—This appeal is directed against the order of the District Judge of Shahabad, dated the 14th of April, 1937, in which he has held that the appellants, who were the petitioners before him for Letters of Administration of the estate of one Amir Chandra, were liable to pay court-fee on the total value of the properties, the subject-matter of the application. The property consisted of Government loans to the value of Rs. 2,19,400, money in deposit with the Bank, Rs. 1,00,000, and shares in limited companies valued at Rs. 79,785. The actual figures are not in dispute and are immaterial for the purposes of the decision of the point in issue.

The contention in the court below, and indeed the contention in this Court is that, as these properties were the properties of the joint family of which the applicants were members, the properties must be treated as trust properties and, therefore, not liable to the ad valorem court-fee demanded by the order of the Judge. Reliance was placed upon Schedule III of the Court-Fees Act which, it is contended, by implica-

(1) (1935) I. L. R. 57 All. 881.
(2) (1904) I. L. R. 29 Bom. 161.
(3) (1896) I. L. R. 23 Cal. 980.
(4) (1914) I. L. R. 39 Bom. 245.
(5) (1920) 5 Pat. L. J. 510.

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tion provides that the property of the description which I have stated, that is to say, property of the joint family, is not liable for court-fees. The form Annexure A provided under Schedule III sets out various items of property the description of which is to be given in an application for Letters of Administration. Annexure B is headed "Schedule of Debts etc.," and not only includes debts owing by the estate of the deceased, the funeral expenses and mortgage, but also 'property held in trust not beneficially or with general power to confer a beneficial interest' and 'other property not subject to duty'. It seems to me clear, if I were to decide the matter, although I do not decide it, that the total of items in Annexure B is to be deducted from the total of Annexure A : that much is clear, the duty being payable on the balance. Section 19-I provides that the Court must be satisfied that the fees payable under article no. 11 of the first schedule are paid before entertaining an application for Letters of Administration, so far as the actual valuation is concerned. The provision made in section 19-H gives jurisdiction to the Collector to decide these matters finally, but it seems to be perfectly clear from the provision of section 19-I, to which I have already referred, that the Judge had jurisdiction to enter into the question which he determined by his order and which is the subject-matter of this appeal.

Reliance is placed upon the decision of the Bombay High Court in *The Collector of Kaira* v. *Chunilal Hari Lal*(1), a decision of Sir L. H. Jenkins and Batty, J. Upon this question so far as regards the actual point which comes before us for determination, that is to say, whether Amir Chandra was a trustee for the other members of the joint family, the learned Chief Justice was of the opinion that the matter had been decided in *In the goods of Pokurmull Augurwallah*(2), the main point of decision being the

(1) (1904) I. L. R. 29 Bom. 161.

(2) (1896) I. R. R. 23 Cal. 980.

question whether, although the notification which the Local Government was entitled to make under the Court-Fees Act had been, under section 35 of the Act of 1870, rescinded, the trust property was still exempt from duty. The learned Chief Justice came to the conclusion that in spite of the fact that the notification had been rescinded by reason of the provisions amending the Probate and Administration Act the trust property was still exempt. It seems to me that once the matter is decided that this is trust property, it necessarily follows by reason of the form in Schedule III to which I have referred that the property is held in trust not beneficially or with general power to confer a beneficial interest and is exempt from duty. In this connection, although the section does not deal actually with the point to which I am referring, reference might be made to section 250 of the present Indian Succession Act. The decision upon which the Bombay High Court relied for the proposition that the joint family property in the circumstances and with which the learned Chief Justice was dealing was trust property was the case of *In the goods of Pokurmull Augurwallah*(1), which I have already named. It is just possible, although I do not propose to come to that conclusion, that the case of *In the goods of Pokurmull Augurwallah*(1), can be distinguished by reason of the facts of that case. There four members of a joint family had purchased a property as tenants in common—at least according to the Report of the case the conveyance purported to convey to the brothers as tenants in common not only for themselves but for other members of the family—and in those circumstances Ameer Ali, J. as he then was, held "that the property, though conveyed to the brothers as tenants in common, vested in them as trustees for the benefit of all the coparceners and consequently was not liable to duty". Whatever view might be taken of the authority of that case, it could not be said, having regard to the facts to which I have referred, to apply to the facts of this case.

(1) (1896) I. L. R. 23 Cal. 980.

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Here there is no question of conveyance to Amir Chandra on behalf of the other members of the family. It was property at the Bank which, according to the facts which do not seem to be disputed, was property of the joint family. Incidentally I might mention that the Bank would not recognize the property as the property of any person other than Amir Chandra and therefore would not recognize any trust.

I propose briefly to refer to other cases, one of which was the case of *Kashinath Parsharam Gadgil* v. *Gouravabai*(1). The head-note in the case correctly states the decision at which Beaman, J. arrived. It was an application for probate of will of a person who was admittedly a member of a joint Hindu family and the decision was "where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will". The decision may be shortly stated in these words—as the duty to be paid was the duty on the property included in the will and as the property was included in the will, there could be no question of its being trust property, nor could the fact of any allegation that it was joint family property affect the incidence or amount of the duty.

There is a decision of this Court of Coutts, J. in the case of *In re Estate of Ram Kumar Prasad*(2) where a Hindu by a will left the residue of his property to his son and the executors. It was held that, although in applying for probate of the will the son claimed the property as by survivorship, "they were not entitled to the exemption", the basis of the decision being similar to that of the decision of the

(1) (1914) I. L. R. 39 Bom. 245.
(2) (1920) 5 Pat. L. J. 510.

Bombay High Court in *Kashinath Parsharam Gadgil* v. *Gouravabai*(1) to which I have just referred. A decision* of the Full Bench of the Bombay High Court in an application for administration by each of the sons of a joint family limited to their shares in the joint family held that no court-fee should be levied on limited Letters of Administration sought by the sons as to the shares belonging to the joint family.

The case, however, which is directly in point is the decision of the Allahabad High Court in the case of *In the Goods of Madho Prasad*(2). Before referring to that case in detail I would like to observe that it is possible so far as this fact is concerned in the cases to which I have already referred, to distinguish at least some of them on the ground that they were applications for probate of the will. For the reasons stated in two of the cases to which I have referred, it might be said that the applicant could not go behind the terms of the will, and that the principle applicable to those cases in which the application was for Letters of Administration might be different. The case to which I am now referring deals with an application for Letters of Administration and the decision by Sir Shah Muhammad Sulaiman, Chief Justice, and Ganga Nath, J. is to the effect that "where a person chooses to apply for letters of administration, whether absolutely necessary or not, and they are granted, he must pay the proper court-fee according to section 6 or article 11 of schedule I of the Court-Fees Act. Section 19-D of that Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint Hindu family in respect of property which he gets by survivorship and not by inheritance as an heir". I do not propose to refer to the reasoning of the learned Chief Justice in that case—reasoning with which I entirely agree. It is, as the learned Chief Justice points out, not a

(1) (1924) I. L. R. 39 Bom. 245.
(2) (1935) I. L. R. 57 All. 881.
* (1923) I. L. R. 48 Bom. 75.

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question for the Hgh Court whether it was necessary to apply for Letters of Administration merely because the Bank demanded it. But when once the application was made, for the reasons therein stated exemption could not be had. In connection with the point as to the necessity of applying for Letters of Administration, I would in passing refer to section 212 of the Indian Succession Act which provides:

"No right to any part of the property of a person who had died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction", but it also provides that "this section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jain or Indian Christian".

As I said at the commencement of my observation, the only point to be determined in this case was whether Amir Chandra was a trustee for his coparceners. In my judgment, with great respect to the decision of some of the learned Judges to which I have referred, it seems to me impossible to contend that a co-sharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is a trustee for the other co-sharers. I repeat it is impossible to hold that view. In the circumstances whether an application for Letters of Administration was necessary or not, it is a matter not to be determined in this Court; when once an application has been made in order to obtain Letters it is necessary in my judgment to pay the duty according to the provisions of the Act.

In my view, therefore, the decision of the learned Judge was right and must be affirmed and the appeal must be dismissed with costs.

AGARWALA, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

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

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February 24, 25. March 7, 8, 31.

BAIJNATH PRASAD

v.

BINDA PRASAD SINGH.*

Hindu Law—legal necessity, what constitutes—" necessity " and " benefit to estate " whether controvertible terms —karta, limitation on the power of—alienation for acquiring new property, how far binds the family—test—money borrowed by karta for family necessity on a hundi or promissory note—other members, whether are liable to be sued on the instrument—Negotiable Instruments Act, 1881 *(Act XXVI of* 1881), *section* 28.

The karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu Law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law-givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family.

The only reasonable limitation which can be imposed on the karta is that he must act with prudence and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager will thus not be allowed to enter into any transaction which may be speculative or fraught with risks or which may involve a possibility of loss to the family and the court will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income.

But in certain exceptional circumstances the court may uphold the alienation of a part of the joint family property by a karta for the acquisition of new property as, for example,

* Appeals from Original Decrees nos. 113 of 1935 and 10 of 1936, from the decision of Babu Brij Bilas Prasad, Additional Subordinate Judge of Patna, dated the 31st March, 1935

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where all the adult members of the joint family with the knowledge available to them and possessing all the necessary information about the means and requirement of the family were convinced that the proposed purchase of the new property was for the benefit of the estate, the property alienated was of no particular utility to the family and where by the acquisition of the new property the family was able to acquire proprietary interest which had the effect of converting them from mere tenants liable to pay a heavy rent to the landlord into landlords themselves.

Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a defensive nature, but must be proved to be such as a prudent owner would have carried out in the interest of the family with the knowledge available to him at the time.

Hunooman Prasad v. *Musammat Babooee Kuer*(1), *Hurry Mohun* v. *Ganesh Chunder*(2), *Bhagwan Das Naik* v. *Mahadeo Prasad*(3), *Shankar* v. *Bechu Ram*(4), *Inspector Singh* v. *Kharak Singh*(5), *Ragho* v. *Zaga*(6), *Jagat Narain* v. *Mathura Das*(7), *Tula Ram* v. *Tulsi Ram*(8), *Mahabir Prasad* v. *Amla Prasad*(9), *Nagindas* v. *Mahomed Yusuf*(10), *Jado Singh* v. *Nathu Singh*(11), *Beni Madho* v. *Chander Prasad* (12) *and Shaikh Jan Mohamad* v. *Bikoo*(13), reviewed.

Palaniappa Chetty v. *Deivasikamony Pandara*(14), explained.

Where money is borrowed on a hundi or promissory note by a manager for the benefit or necessity of the joint Hindu family the other members of the family are liable to be sued on the instrument.

Hindu Law does not recognise any distinction between the liability of the joint family when the debt is contracted by its

(1) (1856) 6 Moo. I. A. 393.
(2) (1884) I. L. R. 10 Cal. 823, F. B.
(3) (1923) I. L. R. 45 All. 390.
(4) (1925) I. L. R. 47 All. 381.
(5) (1928) I. L. R. 50 All. 776.
(6) (1928) I. L. R. 53 Bom. 419.
(7) (1928) I. L. R. 50 All. 969, F. B.
(8) (1920) I. L. R. 42 All. 559.
(9) (1924) I. L. R. 46 All. 364.
(10) (1921) I. L. R. 46 Bom. 312.
(11) (1926) I. L. R. 48 All. 592.
(12) (1924) I. L. R. 3 Pat. 451.
(13) (1928) I. L. R. 7 Pat. 798.
(14) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.

karta under a promissory note or a bill of exchange and its liability when the debt is contracted otherwise. Under that law all that is necessary to make all the members of the family liable is that the debt should have been contracted for family necessity or for the benefit of the family. There is nothing in the Negotiable Instruments Act which should preclude a Court from applying the principles of Hindu law to a suit based on negotiable instruments.

Sadasukh Janki Das v. *Maharaja Sir Kishen Pershad*(1), explained.

Abdul Majid v. *Saraswati Bai*(2), followed.

Sreelal Mangtulal v. *The Lister Antiseptic Dressing Company, Limited*(3), *Hari Mohan Ghosh* v. *Sourendra Nath Mitter*(4), *Thait Othahil* v. *Purushotam Doss*(5) and *Birkeshwar Raut* v. *Ram Lochan Pandey* (6), not followed.

Appeal no. 113 on behalf of the plaintiffs.

Appeal no. 10 on behalf of the defendants.

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

Baldeo Sahay (with him *Chaudhuri Mathura Prasad*, *Harinandan Sahay Sinha* and *S. Mehdi Imam*), for the appellants in F. A. 113 and respondents in F. A. 10.

B. C. De (with him *B. N. Rai*, *Krishna Deva Prasad*, *A. N. Lal* and *Ram Swarup Sinha*), for the respondents in F. A. 113 and appellants in F. A. 10.

FAZL ALI, J.—These appeals arise out of two suits instituted by the plaintiffs to recover from the defendants who constitute a Hindu joint family, their dues under a mortgage bond dated the 17th August, 1913, and four hundis dated the 26th October, 1930.

(1) (1918) I. L. R. 46 Cal. 663, P. C.
(2) (1933) L. R. 61 I. A. 90; 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) (1934) 16 Pat. L. T. 117.

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The mortgage bond as well as the hundis were executed by a deceased member of the defendants' family, namely, Jang Bahadur, who had been given a general power of attorney by all the adult members of the family about six in number and who according to the plaintiffs was to all intents and purposes the karta of the family. By this bond (which is the subject-matter of Mortgage Suit no. 48 of 1933) Jang Bahadur mortgaged certain joint family properties to secure a loan of Rs. 10,000 and agreed to pay compound interest at the rate of fifteen rupees per cent. per annum with annual rents. The hundis (which form the subject-matter of the second suit—Money Suit no. 3 of 1934) had been drawn by him for a sum of Rs. 16,100 to replace three other hundis for Rs. 12,000 which according to the plaintiffs had been signed by Jang Bahadur on the 2nd August, 1927, to satisfy certain dues other than the dues under the mortgage bond. Both the suits were tried together as the parties were common and the main defence put forward on behalf of the defendants in them was that Jang Bahadur was not the karta of the family and neither the mortgage bond nor the hundis were binding on the defendants inasmuch as there was no legal necessity for the debts contracted by means of these documents. In the mortgage suit the defendants raised two further pleas, viz., (*1*) that the rate of interest provided in the mortgage bond was exorbitant and it was not at all necessary for Jang Bahadur to contract a loan at that rate and (*2*) that the debts for which Jang Bahadur is alleged by the plaintiffs to have given the first hundis in 1927 had been paid off prior to that date and these hundis had in fact been drawn in part payment of the dues under the mortgage bond dated the 17th August, 1913. In support of the last plea the defendants rely on an endorsement in the mortgage bond itself and it is contended on their behalf that the account given by the plaintiffs in the plaint is incorrect inasmuch as no credit has been given for the sum of Rs. 12,000 for which the hundis had been drawn by Jang Bahadur

on the 2nd August 1927. The defendants raised various other pleas in the court below but none of them was pressed during the hearing of these appeals in this Court.

In dealing with the appeal in the mortgage suit it will be convenient at this stage to dispose of the defendants' criticism of the account put forward by the plaintiffs in respect of the dues under the mortgage bond. It appears that Jang Bahadur had made certain payments from time to time in connection with the debt due under the mortgage bond and these payments had been duly endorsed on the back of the bond. The aggregate of the payments which were made before the 22nd August, 1927, came to Rs. 12,000 and after going through the accounts in presence of Jang Bahadur, Baijnath Prasad, one of the plaintiffs, made the following note on the back of the bond:—

"The principal and interest in respect of the bond comes to Rs. 34,430-4-0 on adjustment of account, out of which Rs. 2,430-4-0 is remitted; Rs. 12,000 received formerly stands credited as above, the balance Rs. 10,000 has been received to-day, on account of interest, so there remains due up to this date the balance Rs. 10,000 (rupees ten thousand), on which interest will run according to the terms of the bond, the interest and compound interest from this day will run according to the terms in the bond....."

A similar note was made by Jang Bahadur on the bond which runs as follows:—

"On calculating interest and compound interest, on setting off the amounts credited above and on paying Rs. 10,000 in cash this day, we paid in full the interest and compound interest up to this date. Now Rs. 10,000 principal, remained due by us, upon which interest and compound interest will run from to-day in accordance with the stipulations made in the bond."

These endorsements plainly mean that on the 22nd August, 1927, a sum of Rs. 10,000 only was found to be due to the plaintiffs under the mortgage bond but this is not what the figures upon which the account is based show. These figures show that out of an aggregate sum of Rs. 34,430-4-0, Rs. 2,430-4-0 was remitted and Rs. 10,000 was paid by Jang Bahadur. This leaves a balance of Rs. 22,000 and not Rs. 10,000.

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The defendants' explanation of the discrepancy is that on the very date which the endorsements bear Jang Bahadur had paid off Rs. 12,000 by drawing three hundis for that sum in favour of the plaintiffs which were accepted by Janki Singh, the seniormost member of the defendants' family and thus the debt due under the mortgage bond was reduced to Rs. 10,000. The plaintiffs' case on the other hand is that the hundis had been drawn by Jang Bahadur to pay off an entirely separate debt (to which I shall have to advert presently) and that by oversight the sum of Rs. 12,000 which had been paid before the 22nd August, 1927, and which had been already taken into consideration in arriving at the total figure of Rs. 34,430-4-0 was deducted once more from that sum. Their case in short is that on the 22nd August, 1927, the defendants owed to them Rs. 22,000 and not Rs. 10,000 and the statement in the endorsement that they owed Rs. 10,000 is a mistake.

Now prima facie it seems difficult to believe that the plaintiffs who are money-lenders by profession would commit such a palpable error in adding up the account, but after hearing the arguments addressed to us on behalf of the parties I am not on the whole inclined to disagree with the learned Subordinate Judge who seems to have devoted considerable attention to this part of the case. It is both parties' case that the sum of Rs. 34,430-4-0 found due to the plaintiffs as a result of the accounting between the parties had been arrived at after giving credit to the defendants for the sum of Rs. 12,000 which had been paid before the 2nd August, 1927, by several instalments but in the endorsements made by Baijnath on that date it is stated that—

"Rs. 12,000 received formerly stands credited as above and the balance Rs. 10,000 has been received to-day."

These words do lend some support to the case of the plaintiffs that the sum of Rs. 12,000 was calculated twice over and their case is further strengthened by

the fact that there is no reference to the hundis in the endorsement nor is it stated that in addition to the sum of Rs. 10,000 paid in cash on 2nd August, 1927, a further sum of Rs. 12,000 had been paid to the plaintiffs on that date. What is of still greater importance is that such evidence as there is on the record strongly points to the conclusion that the hundis of 2nd August, 1927, had been drawn by Jang Bahadur to pay off debts other than the debt due under the mortgage bond. It will be convenient at this stage to refer to the nature of those debts.

It appears that Jang Bahadur used to manage on behalf of the plaintiffs two villages named Manikpur which the plaintiffs had purchased from its previous proprietor in 1913 and village Saksora of which they were *ijaradars*. The plaintiffs' case is that on going through the accounts it was found that a sum of Rs. 8,691 was due to the plaintiffs from Jang Bahadur out of the total collections made by him in these two villages and the defendants further owed to the plaintiffs a sum of Rs. 6,370, as rent for two other villages which were held by them in *thika* under the plaintiffs through Jang Bahadur. The defendants further owed a sum of Rs. 4,000 which was the price of an elephant and a horse both of which had been purchased by Jang Bahadur from the plaintiffs. From the total of these three sums of money and a sum of Rs. 859, charged as interest there had to be deducted various sums which had been previously paid by Jang Bahadur and this left a balance of Rs. 12,000, for which Jang Bahadur drew in favour of the plaintiffs three hundis which were accepted by Janki Singh, the seniormost member of the defendants' family. These facts are fully supported by a number of entries in the plaintiffs account books and although some attempt was made on behalf of the defendants to show that certain entries in the account books were not reliable the defendants entirely failed to substantiate their case. If, therefore, the plaintiffs' account books are accepted as they must be in the present state of the

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evidence, the defendants' case that the hundis had been drawn by Jang Bahadur to pay off a portion of the debt due under the mortgage bond must fail. It may be stated here that the defendants 1 and 2 have admitted in the eighth paragraph of their written statement that the total dues of the plaintiffs including the price of an elephant and a pony and, what is described as tahwil or collection money, amounted to a little over Rs. 23,000; but their case is that the whole of this amount was paid off by them before the 2nd August, 1927. They have, however, produced no reliable evidence to support their statement.

The next point to be decided in the mortgage suit is whether the mortgage by Jang Bahadur is binding upon the entire joint family of the defendants. Now there appears to have been some controversy before the learned Subordinate Judge as to whether Jang Bahadur was or was not the karta of the family in the strict sense of the term. But from the clear and exhaustive summary to be found in the judgment of the learned Subordinate Judge of the evidence on the point, the only conclusion which can be reasonably drawn is that Jang Bahadur, though he was not the seniormost member of the family, was in fact its karta and was allowed to act in that capacity by all the major members of the family. Thus the real question to be determined is whether the mortgage transaction concluded by Jang Bahadur can be justified on the ground of legal necessity or benefit to the joint family to which he belonged. Now it is recited in the mortgage bond that out of the total sum of Rs. 10,000 borrowed by Jang Bahadur a sum of Rs. 6,000 was required to meet certain expenses in connection with the marriage of a female member of the family and the defendants do not dispute that so far as this item is concerned the borrowing was justified. The dispute really centres round the rest of the money which was required to purchase a proprietary interest in village Sirsi known as the patti of Raja Babu. It appears that in village Sirsi there are two other pattis known as the patti of

Nandkishore and the patti of Mahkumar. The defendants have admittedly spent a considerable sum of money in purchasing the patti of Nandkishore and an eight-annas share in the patti of Mahkumar. The patti of Raja Babu was also purchased through Jang Bahadur for a sum of Rs. 34,000 out of which Rs. 9, 500 was raised by means of the present mortgage bond and Rs. 15,000 by means of another mortgage bond in favour of the vendor of the property in question who had been persuaded to charge interest at the very low rate of six per cent. per annum. The remaining Rs. 9,000 apparently came from the joint family savings. Now from the evidence of one of defendants himself (Narendra Narayan Singh, defendant no. 6) it appears that all the adult members of the family (who were seven in number) not only approved of this transaction but were of the opinion that "the family would be a great loser if they did not purchase the property". This witness has further made the following statement on the subject:

> "For three months before we purchased the property several members of the family stayed at Barh for humouring Raja Babu (the vendor of the property) and his mokhtaram Ghasita Lal to sell that property to us..... We were anxious to purchase that property at any cost..... and we never repented the purchase of that property."

These statements are sufficient to show that not only Jang Bahadur but all the adult members of the defendants' family regarded the transaction as highly beneficial to the family. The learned Subordinate Judge has also after reviewing the evidence at great length shown that the income of the property was sufficient to leave a profit of about Rs. 600 to the family after paying interest on the sums borrowed by Jang Bahadur for purchasing the property in question. This conclusion is to some extent supported by the admission of Narendra Narayan Singh, defendant no. 6, who has stated that the patti of Raja Babu was in thika with the defendants' family and after paying the thika rent the defendants' family made an annual profit of Rs. 300. Further the evidence of Nandu

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Mahto (p.w. 3), who worked as a patwari in this village under Jang Bahadur shows that the defendants possessed 100 to 125 bighas of raiyati kasht land in Raja Babu's patti most of which was held by them at a bhaoli rent which they saved by becoming proprietors of the estate. It would seem, therefore, that the transaction for which the money was raised by Jang Bahadur was rightly regarded as a profitable one by the major members of the defendants' family.

It is, however, strongly contended on behalf of the defendants that even if it is assumed that the transaction was expected to bring some profit to the family it cannot be upheld because under the Hindu Law the manager or karta of a joint Hindu family, which includes some minor members also, has no authority to encumber the whole or any portion of the joint property of the family in order to raise money to purchase fresh property. This contention is supported by a number of authorities and I propose to deal with it at some length.

The most authoritative pronouncement on the subject is to be found in the judgment of the Judicial Committee of the Privy Council in the famous case of *Hunooman Persaud* v. *Musummat Babooee*(1). In that case their Lordships said—

"The power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona-fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded .....Their Lordships think that the lender is bound

(1) (1856) 6 Moo. I. A. 393.

to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that under the circumstances, he is bound to see to the application of the money."

The rule laid down in this passage has been constantly applied to alienations by shebaits, heads of Maths as well as managers of joint Hindu families and it is conceded by both the parties that this authority must govern the decision of the present case also. The important point, however, to be decided is how the expression "benefit to the estate" used in this authority is to be construed. On this point there are numerous decisions which may be broadly divided under two heads. On the one hand there is a line of authorities which lay down that the benefit contemplated by their Lordships of the Privy Council was benefit of a defensive nature calculated to protect the estate from some possible or threatened danger or destruction [*See Hurry Mohan* v. *Ganesh Chunder*(1), *Bhagwan Das Naik* v. *Mahadeo Prasad*(2), *Sanker* v. *Bechu Ram*(3), *Inspector Singh* v. *Kharak Singh*(4), *Ragho* v. *Zaga*(5)]. On the other hand it has been held in a number of cases that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of a defensive nature but must be proved to be such as a prudent owner would have carried out in the interest of the family with the knowledge available to him at the time

(1) (1884) I. L. R. 10 Cal. 823. F. B.
(2) (1923) I. L. R. 45 All. 390.
(3) (1925) I. L. R. 47 All. 381.
(4) (1928) I. L. R. 50 All. 776.
(5) (1928) I. L. R. 53 Bom. 419.

[See *Jagat Narain* v. *Mathura Das*(1), *Tulsi Ram*(2), *Mahabir Prasad* v. *Amla Prasad*(3), *Nagindas* v. *Mahomed Yusuf*(4), *Jado Singh* v. *Nathu Singh*(5), *Beni Madho* v. *Chander Prasad*(6) and *Shaikh Jan Mohammad* v. *Bikoo*(7)]. The conflict between these two views seem to have been greatly accentuated since the pronouncement of the Judicial Committee in *Palaniappa Chetty* v. *Deivasikamony Pandara*(8), in which their Lordships, while dealing with an alienation by a mohant of debattar land which is governed by the same principle as an alienation by a manager of a Hindu joint family, observed as follows :—

> "No indication is to be found in any of them (the cases cited before their Lordships) as to what is in this connection the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lorships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

It has been pointed out in some cases that there is nothing in these observations to encourage the notion that any adventurous or speculative transaction which might probably bring profit to the estate could properly be regarded as beneficial to the estate but rather they import that any act for which the benefit to the estate can reasonably be claimed must necessarily be a defensive act undertaken for the protection of the estate

(1) (1928) I. L. R. 50 All. 969, F. B.
(2) (1920) I. L. R. 42 All. 559.
(3) (1924) I. L. R. 46 All. 364.
(4) (1921) I. L. R. 46 Bom. 312.
(5) (1926) I. L. R. 48 All. 592.
(6) (1924) I. L. R. 3 Pat. 451.

already in possession of the family. The view expressed above has also in some cases been supported by a reference to the 28th and 29th verses in Chapter I of the Mitakshara which deal with the power of a father to alienate ancestral property without the consent of his sons. The 28th verse which contains the text of Brihaspati runs as follows:—

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes."

This text is explained in verse 29 as follows:—

"The meaning of that text is this: while the sons and grand-sons are minors, and incapable of giving their consent to a gift and the like or while brothers are so and continue unseparated; even one person who is capable may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."

Now as pointed out by Patkar, J. in *Ragho* v. *Zaga*(1), the explanation of the text of Brihaspati by Mitakshara in verse 29 is by no means to be considered as exhaustive and may be treated as illustrative. I venture to suggest that the same remarks apply to the passage which I have quoted from the judgment of the Judicial Committee in *Palaniappa Chetty* v. *Deivasikamony Pandara*(2). In that passage their Lordships simply enumerated certain obvious cases of "benefit to the estate" but the very fact that they took care to emphasize that it was impossible to give a precise definition of that expression applicable to all cases and that it was difficult "to draw the line as to what are benefits and what not" clearly indicate that they did

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not intend to lay down any exhaustive rule on the subject. On the other hand in *Hunooman Persaud's* case(1) they draw a distinction between a case of "need" and one of "benefit to the estate" and also between "a danger to be averted from the estate" and "the benefit to be conferred upon it" which shows that necessity and benefit are two separate tests and not merely two different expressions conveying necessarily the same meaning. It is no doubt true that where there is a pressure on the estate or it is threatened with danger and the pressure or the danger, as the case may be, is removed, the estate is necessarily benefited thereby; but it does not follow that every case of benefit must also be a case of necessity or protection of the estate from danger. In my opinion the proper way to investigate the matter is not to attach too much importance to mere verbal expressions used either in the text or in the judgments of the Privy Council but to extract the true principle from them.

Now, the karta of a family being merely a manager and not an absolute owner, the Hindu Law has like other systems of law placed certain limitations upon his power to alienate property of which he is not the absolute owner. It appears to me, however, that the Hindu Law-givers could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. This is evident from the comprehensive expression "for the sake of the family" or "for the purposes of the family" used in the old text of which the expression "benefit to the family" is the modern translation. I think, therefore, that the only reasonable limitation which can be imposed on the karta is that he must act with prudence and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager will thus not be allowed to enter into any transaction which may be speculative or fraught with risks or which

(1) (1856) 6 Moo. I. A. 393.

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may involve a possibility of loss to the family and the courts will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the prospect of a better income. There are, however, reported cases in which in certain peculiar circumstances the alienation of a part of the joint family property by a karta for the acquisition of a new property has been upheld. [*See Beni Madho* v. *Chander Prasad*(1), *Shaikh Jan-Mohamad* v. *Bikoo*(2) and *Jado* v. *Nathu*(3).]

Now as I have already stated the peculiar feature of the present case is that no less than seven adult members of the defendants' family with the knowledge available to them and possessing all the necessary information about the means and the requirement of the family were convinced that the proposed purchase of the new property was for the benefit of the estate and so far as the materials on the record go, they show that they were not guided by merely sentimental considerations but acted as a prudent owner would have acted in the circumstances of the case. Indeed it has not been shown to us that the property which was mortgaged in this case was of any particular utility to the family; on the other hand there is evidence on the record to show that in village Simri the defendants had acquired certain other proprietary interests and the consolidation of these interests had the effect of converting them from mere tenants who had to pay a heavy rent to the landlord into landlords which fact by itself was of great advantage to the family. Besides having regard to the attitude of all the adult members of the family then living it cannot be said that the plaintiffs when they advanced the loan did not act honestly or that they had not good

(1) (1924) I. L. R. 3 Pat. 451.
(2) (1928) I. L. R. 7 Pat. 798.
(3) (1926) I. L. R. 48 All. 592.

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reason to be satisfied that Jang Bahadur was acting in this particular instance for the benefit of the estate. On the whole therefore I am inclined to think that the learned Subordinate Judge was right in upholding the transaction.

The only other point which arises in the mortgage suit is whether the high rate of interest at which the money was borrowed was justified in the circumstances of the case. The learned Subordinate Judge has answered the point in favour of the defendants and he has given the plaintiffs a decree only for Rs. 7,000 odd which sum was arrived at by calculating simple and not compound interest on the principal sum at the rate of Rs. 15 per cent. per annum. Now it appears that the defendants have already paid a sum of about Rs 22,000 to the plaintiffs and that if the rate of interest mentioned in the bond is applied throughout they would be entitled to a further sum of Rs. 49,000 odd at the date of the suit. These being the circumstances of the case there was no real controversy between the parties that the defendants were entitled to some relief. The parties were also agreed that there is nothing *per se* wrong or improper about compound interest being claimed by a creditor, especially when the debtor does not pay interest from year to year or at such periods when the interest is payable. The real dispute between the parties was confined to the rate of interest to be charged in the circumstances of the case. Having, however, given careful consideration to the arguments addressed to us on the subject, we have come to the conclusion that the decision of the learned Subordinate Judge which was based not only upon the evidence adduced before him but upon his knowledge of the local conditions should be upheld.

The only point which remains to be considered is one which arises in the money suit based upon the hundis and it is whether the entire joint family is liable for the debts contracted by means of these

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hundis. The first question to be considered is whether the debt for the payment of which these hundis were executed was a joint family debt. The arguments on this subject were confined to two items only—(*1*) an item of Rs 4,000 which is said to represent the price of an elephant and a horse supplied by the plaintiffs to Jang Bahadur and (*2*) an item of Rs. 8,691 which represents the amount due by Jang Bahadur on account of the collections or as it is called tahwil of two villages Manikpura and Saksora of which he was in charge on behalf of the plaintiffs. Prima facie there seems to be considerable force in the argument advanced before us on behalf of the defendants that these amounts cannot be regarded as legal necessity. But here again the question has to be decided with reference to the peculiar circumstances of the case. Upon the evidence on the record there can be no doubt that these debts were regarded as legitimate debts not only by Jang Bahadur but by all the adult members of the family and when Jang Bahadur executed the hundi, he executed it with the concurrence of all the adult members. There was no dispute before us that at least three members of the family, namely, Jang Bahadur himself, his son Binda and Janki Singh, who was according to the case of the defendants themselves the seniormost member and karta, were present when the accounts were gone into and they accepted the accounts. It appears also that though the hundi was drawn by Jang Bahadur, it was accepted by Janki himself. The circumstances of the case thus strongly suggest that the tahwil money for which the hundis were executed must have been spent on the legitimate needs of the family, though naturally owing to lapse of time because the defendants are not willing to disclose the true facts the evidence as to how the money was actually spent is not available. As to the price of the elephant and the horse, it is contended that they are more in the nature of a luxury than necessity but in determining the question one cannot ignore the circumstances under which the family was

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placed and the fact that the elephant and the horse were in use of the entire family and regarded as the common property. This is virtually conceded in the evidence of one of the defendants himself. Besides if the view, which seems to me to be fully justified by the evidence and the probabilities of the case, is correct that the debts covered by the hundis had been virtually contracted by all the adult members of the family through Jang Bahadur, all the defendants must necessarily be liable to pay the debts because they are sons or grandsons of one or the other of the adult members.

The question which still remains to be considered is whether in those cases where the manager of a joint family borrows money on a hundi or promissory note to meet a joint family necessity, the other members of the family may be sued on the hundi or promissory note. The question has arisen in many cases in connection with a promissory note, but as both a promissory note and a hundi are negotiable instruments, it is clear that the answer must be the same in each case. It appears that before the decision of the Judicial Committee in *Sadasukh Janki Das* v. *Maharaja Sir Kishan Pershad*(1) the view which prevailed in several High Courts was that all the members of a joint family were liable to be sued on a promissory note executed by the manager of the family alone provided that it was established that the money was borrowed on the promissory note for joint family purposes. [*See Krishna Ayyar* v. *Krishnasami Ayyar*(2), *Nagendra Chandra Dey* v. *Amar Chandra Kundu*(3), *Baisnab Chandra De* v. *Ramdhon Dhor*(4).] Since that decision, however, there has arisen a conflict of opinion among the High Courts with the result that while in some cases the view expressed in

(1) (1918) I. L. R. 46 Cal. 663, P. C.
(2) (1900) I. L. R. 23 Mad. 597.
(3) (1903) 7 Cal. W. N. 725.
(4) (1906) 11 Cal. W. N. 139.

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older cases has been adhered to [*See Krishnanand Nath Khare* v. *Raja Ram Singh*(1), *Bhagwan Singh and Co.* v. *Bakshi Ram*(2) *and Tikan Chand Chaudhury* v. *Sudarsan Trigunait*(3)], in others it has been held that the manager of a joint 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 to be charged. [*See Sreelal Mangtulal v. The Lister Antiseptic Dressing Co., Ltd.*(4). *Hari Mohan Ghosh* v. *Sourendra Nath Mitter*(5), *Thait Ottahil* v. *Purushotam Doss* (6) and *Birkeshwar Raut* v. *Ram Lochan Pandey*(7)).] In *Sirikant Lal* v. *Sidheshwar Prasad Narain Singh*(8) I had the occasion to deal with the matter at some length but out of deference to the decision of a Division Bench of this Court in *Birkeshwar Raut* v. *Ram Lochan Pandey*(7) I preferred to rest my judgment in that case on another point which was quite sufficient for the purpose. As, however, the question is an important one and it has been raised repeatedly in this Court as well as in other High Courts, it appears to me to be necessary to decide it in the present case.

In *Sadasukh Janki Das* v. *Maharaja Sir Kishan Pershad*(9) their Lordships of the Judicial Committee had to deal with a case in which the chief question to be decided was whether on certain hundis executed by a certain person without disclosing that he was acting as an agent for another person he could be heard to say that he had executed the hundis not on his own behalf but on behalf of an undisclosed principal.

(1) (1922) I. L. R. 44 All. 393.
(2) (1933) A. I. R. (Lah.) 494.
(3) (1933) 14 Pat. L. T. 623.
(4) (1925) I. L. R. 52 Cal. 802.
(5) (1925) 41 Cal. L. J. 535.
(6) (1910) 21 Mad. L. J. 526.
(7) (1934) 16 Pat. L. T. 117.
(8) (1937) I. L. R. 16 Pat. 441.
(9) (1918) I. L. R. 46 Cal. 663, P. C.

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Their Lordships of the Judicial Committee decided that the plea was not available to him 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 1884, 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."

Now, there can be no doubt that if the manager of a joint family acted merely as an agent for the other members, the principle laid down by the Judicial Committee would be fully applicable to a hundi or a promissory note executed by him; but as I ventured to point out in *Sirikant Lal* v. *Sidheshwar Prasad Narain*(1) the Hindu joint family is an institution peculiar to this country and Hindu Law gives its karta the power to contract loans to meet a family necessity or for the benefit of the family according to his own discretion and without any express authority from the other members of the family. A managing member cannot thus be regarded as a mere agent for the family, because he is himself a member of the

(1) (1937) I. L. R. 16 Pat. 441.

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family and having regard to the powers which vest in him under the Hindu Law, he may well be regarded as the principal. At any rate as was pointed out in *Krishnanand Nath Khare* v. *Raja Ram Singh*(1) a joint Hindu family being a legal person according to Hindu Law may be represented and may act through the managing member or the head thereof. Thus in my opinion the decision in *Sadasukh Janki Das* v. *Maharaja Sir Kishan Pershad*(2) could not have the effect of overruling the earlier decision which propounded the view that if money was borrowed on a promissory note by a manager for the benefit or necessity of the joint family, the other members of the family in a suit on the promissory note would be liable.

The matter which is now before us seems to have been very lucidly dealt with by Shephard, J. in *Krishna Ayyar* v. *Krishnasami Ayyar*(3) in the following passage :—

" At common law, a married woman and her husband were both liable on her contracts entered into before marriage and the liability of the husband was in no way dependent on or limited by the existence of property derived by him from his wife. If, before marriage, she made a promissory note, an action could be brought against her husband and her (*see* form in Bullen and Leake's ' Pleadings ', 3rd edition; Byles on ' Bills ', page 74, citing *Mitchinson* v. *Hewson*(4). The Married Woman's Property Act, 1882, altered the law by limiting the liability of the husband to the value of his wife's property acquired by him. There is in this case no joint liability, nor is the liability of the husband that of a surety, but it resembles it, inasmuch as any defence which would be open to the debtor would equally

(1) (1922) I. L. R. 44 All. 393.
(2) (1918) I. L. R. 46 Cal. 663, P. C.
(3) (1900) I. L. R. 23 Mad. 597.
(4) (1797) 7 T. R. 348; 101 E. R. 1013.

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be open to him [*Beck* v. *Pierce*(1)]. It appears to me that these observations apply equally to the present case or to that of a Hindu father whose son is joined in an action for debt brought against them. If it is consistent with the English rule of law relating to bills-of-exchange that the husband may be joined in an action against his wife, it is no less consistent with the law of this country that a member of a Hindu family should be joined in an action against the manager on a promissory note made by him. In the one case, as in the other, there is a liability which is, so to speak, external to the obligation arising on the making of the promissory note, and in both cases that liability is limited, while the liability of the maker is absolute."

It seems obvious that if a person suing on a promissory note executed by a Hindu father impleads not only the father but also the son as a defendant on the doctrine of the Hindu Law that a son is under a pious obligation to pay his father's debt, a court may pass a decree not only against the father but also against the son. I think that the same rule would have applied if there had been an express enactment to the effect that in all suits where the manager of a Hindu joint family is sued on debts contracted for family necessity all the members of the joint family would be liable and no exception was made in that enactment with regard to suits based on negotiable instruments If it is so, I do not see how the position is altered, if the rule enunciated above though not subject of an express enactment is part of the law of the country. As I have pointed out on an earlier occasion, Hindu Law does not recognise any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note or a bill of exchange and its liability when the debt is contracted otherwise. Under that law all that is necessary to make all the members of the family liable is that the debt should have been contracted for

(1) (1889) 23 Q. B. D. 316.

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family necessity or for the benefit of the family. Where, therefore, these conditions are satisfied I do not see on what ground a court can refuse to grant a decree against the other members of the family, unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it. The learned Advocate appearing for the defendants read out to us various sections of the Negotiable Instruments Act but we found nothing in any of these sections which should preclude a court from applying the principles of Hindu Law to a suit based on negotiable instruments. The learned Advocate for the defendants was further unable to show to us how the negotiability of the document can be retarded or otherwise affected if the rule of Hindu Law is applied to a suit based on such an instrument. Indeed it would always be open to the holder of the instrument to sue the maker and the acceptor of the instrument and he need not sue all the members of the joint family if he so chooses. He will also be entitled to avail himself fully of the benefit of the specific provision in the Negotiable Instruments Act which is to the effect that once the execution of the document is proved, consideration will be presumed. He may, however, waive the benefit of this provision and adduce direct evidence to prove the passing of consideration. Similarly there should be nothing to prevent him if he has evidence in his possession from proving that the maker of the instrument borrowed money to meet a family necessity and I do not see why, if he succeeds in proving it, the court should refuse to apply the Hindu Law on the subject, merely because the suit is based on a negotiable instrument. The matter, however, need not be pursued any further because the view which I have ventured to put forward seems to me to be supported by the decision of the Judicial Committee in *Abdul Majid* v. *Saraswati Bai*(1). In that case an action had been brought by the plaintiff on two promissory notes executed by a person held to

(1) (1933) L. R. 61 I. A. 90; 15 Pat. L. T. 99, P. C.

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be the karta of a joint family and the question to be decided was whether the members of the joint family other than the karta could be made liable on them. It is obvious that if the correct legal position is that in an action based on a negotiable instrument no person other than the maker of the instrument can in any circumstances whatsoever be held to be liable, the case might well have been disposed of by the Privy Council on that ground alone. Their Lordships, however, found it necessary to decide whether the particular sums for which the action was brought had been borrowed for the purpose of the joint family business and they dismissed the action against the members other than the karta on the ground that the evidence was not sufficient to prove the plaintiff's case. They also had to point out that when a promissory note is signed by the karta, there is no presumption that the borrowing was for the purpose of the joint family and the lender must prove it. In my opinion this decision should set at rest all controversy on the subject and in this view it seems unnecessary for us to refer the matter to a larger Bench. I may state here that my Lord the Chief Justice who was a party to the decision in *Birkeshwar Raut* v. *Ram Lochan Pandey*(1) takes the same view of the matter.

There is one peculiar aspect of the case to which our attention had been called by the learned Advocate for the plaintiffs. It appears that if the main pleas raised by the defendants in these appeals are given effect to, they will be placed in a far more unfavourable position than they are under the decree passed by the Subordinate Judge. Their main plea in the money suit is that there should be a money decree only against the heirs of Jang Bahadur who drew the hundi and those of Janki who accepted it. It is true that if this plea is accepted, some of the properties which have been sold in execution of the decree of the Subordinate Judge and passed to the possession of the

(1) (1934) 16 Pat. L. T. 117.

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plaintiffs may have to be returned to them. On the other hand, if we accept the case of the defendants that no mortgage decree in the mortgage suit can be passed because the mortgage was not justified by legal necessity, the defendants are, as was conceded by them, faced with this position that there must be a money decree not only against the seven adult members who approved of and affirmed the mortgage transaction but also against the other defendants who are the sons and grandsons of these persons. It is also not disputed that in that case the money decree will have to be passed not for the sum of Rs. 7,000 for which a decree has been passed by the Subordinate Judge, but for the sum of Rs. 49,000. Thus the result will be that the plaintiffs will have a decree for the large sum of Rs. 49,000 against all the defendants in the mortgage suit and the money decree passed by the Subordinate Judge will be upheld with this modification that it will be enforceable only against the shares of the heirs of Jang Bahadur and Janki. Such a situation even the defendants cannot possibly contemplate with equanimity and their Advocate frankly conceded before us that a decree in these terms will be of no use to them.

In the result both the appeals nos. 10 and 113 as well as cross-objection in Appeal no. 113 are dismissed, but in the circumstances of the case we would direct the parties to bear their respective costs in this Court. It seems also unnecessary to fix a fresh period of grace, for the mortgage decree passed by the learned Subordinate Judge is upheld.

COURTNEY TERRELL, C.J.—I have carefully read and considered the clear and careful judgment prepared by my brother Fazl Ali. I agree entirely with his opinion on the facts and on the law and have nothing to add.

S. A. K.

Appeals dismissed.
Cross-objection dismissed.

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May 6, 12, 23.

JURY REFERENCE

Before Manohar Lall and Chatterji, JJ.

KING-EMPEROR

v.

SOHRAI KOERI*.

Government of India Act, 1935 (25 *and* 26 *Geo. V. Ch.* 42), *sections* 220 *and* 222—*Letters Patent of the Patna High Court, clause* 2—*Chief Justice, death of— office remaining vacant—High Court, constitution of, whether affected during the period of vacancy—appointment by Governor-General, effect of.*

When a Chief Justice dies the office does not die with him but still continues. It only remains vacant until it is filled up.

During the interval, therefore, the constitution of the High Court remains unbroken and unchanged.

The only effect of the vacancy in the office of the Chief Justice, so long as it continues, is that there will be nobody to perform his duties unless, under section 222(*1*) of the Government of India Act, 1935, the Governor-General appoints some one of the other Judges to do the same.

Lal Singh v. *Ghansham Singh*(1), *Balwant Singh* v. *Rani Kishori*(2) and *Collector of Etah* v. *Rani Gulab Kunwar*(3), followed.

Queen-Empress v. *Ganga Ram*(4), referred to.

Per MANOHAR LALL, J.—Even if it be assumed that it is obligatory upon the Governor-General to appoint some Judge of the High Court to perform the duties of the Chief Justice on his death, the time within which he is required to make such appointment is left entirely to his discretion. The delay in making the appointment in such a case does not alter the

* Jury Reference no. 2 of 1938. Reference made by Mr. Sadhucharan Mahanti, Additional Sessions Judge of Patna, in his letter no. 794, dated the 30th March, 1938.

(1) (1887) I. L. R. 9 All. 625.
(2) (1898) I. L. R. 20 All. 267; L. R. 25 Ind. App. 54.
(3) (1935) A. I. R. (All.) 322.
(4) (1894) I. L. R. 16 All. 186, F. B.

constitution of the High Court nor does the promptitude in appointing a Judge to perform the duties of the Chief Justice fill up the vacancy which can only be done by His Majesty.

Reference under section 307 of the Code of Criminal Procedure.

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

The Advocate-General and *Government Pleader*, for the reference.

Avadesh Nandan Sahay, against the reference.

CHATTERJI, J.—Before dealing with the merits of this case I should like to dispose of an objection of an unusual character that was taken by the learned Advocate on behalf of the accused. The hearing of this case was concluded on the 9th instant and judgment was reserved. Unfortunately on the 10th instant news was received of the lamentable death of the Chief Justice Sir Courtney Terrell which took place in England. On the 11th the learned Advocate for the accused raised the objection that there being no Chief Justice, the High Court was not properly constituted and this Bench ceased to have jurisdiction to pronounce judgment in the case. This objection was based on the fact that clause 2 of the Letters Patent by which this High Court was created provides that it shall consist of a Chief Justice and six other Judges. After notice to the Crown through the Government Pleader we heard this objection on the 12th instant. At the close of the hearing we announced our decision that the objection was overruled and we intimated that we would give our reasons in the judgment in the case itself.

This High Court was established by Letters Patent bearing date the 9th of February, 1916, in exercise of the powers reserved to His Majesty under section 113 of the Government of India Act, 1915. Clause 2 of the said Letters Patent determines the

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constitution of this High Court by declaring that it shall consist of a Chief Justice and six other Judges. The same clause also mentions the names of the first Chief Justice and six other Judges. The Letters Patent, however, does not provide how the succeeding Judges are to be appointed or how vacancies in the office of the Chief Justice and other Judges are to be filled up. The reason is obvious, because these matters were covered by the provisions of the Government of India Act then in force, namely, the Act of 1915. This Act has since been replaced by the Act of 1935 and it is by this latter Act that we are now governed. Section 220 of the Act of 1935 which substantially corresponds to section 101 of the Act of 1915 relates to the constitution of the High Court. In clause 1 of the section it is enacted that every High Court shall consist of a Chief Justice and such other Judges as His Majesty may from time to time deem it necessary to appoint. The subsequent clauses prescribe the mode of appointment of the Judges. Provisions for filling up vacancies in the office of the Chief Justice and other Judges are made in section 222 of the Act of 1935 (corresponding to section 105 of the Act of 1915). Clause (*1*) of section 222 runs as follows:—

> "If the office of Chief Justice of a High Court becomes vacant, or if any such Chief Justice is by reason of absence, or for any reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose."

Thus the contingency of the office of Chief Justice remaining vacant for some time is expressly recognised and provided for. In the case of a vacancy caused by death some time must necessarily elapse before a new appointment is made. It will be preposterous to hold that during that interval there is no properly constituted High Court. The vacancy in any office implies that the office exists. Vacancy must be distinguished from abolition of the office. When a Chief Justice dies the office does not die with him but still

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continues. It only remains vacant until it is filled up. In my opinion so long as the office is not abolished the constitution remains unbroken and unchanged. The only effect of the vacancy in the office of the Chief Justice, so long as it continues, is that there will be nobody to perform his duties unless the Governor-General appoints some one of the other Judges to do the same. No such difficulty arises in the present case because we are now sitting in the Vacation Bench. We are not required to do any of the duties of the Chief Justice. We have heard the case and our jurisdiction to pass judgment cannot on any intelligible principle be questioned.

Now I come to the merits of the case. It is a reference under section 307 of the Code of Criminal Procedure by the learned Additional Sessions Judge of Patna who, disagreeing with the jurors' verdict of "not guilty", has found two of the accused, namely, Sohrai Koeri and Pathlu Mahto, guilty under sections 147 and 326/149 of the Indian Penal Code. These two, together with eight others, were charged with various offences in respect of an occurrence which took place on the 19th of October, 1937, resulting in the death of two persons named Yasub and Hamza who were brothers. The occurrence was due to a dispute over some lands, bearing plot nos. 1699 and 1700 in village Karai, between Ali Akbar (P.W. 11) and the accused Sohrai. The deceased Yasub was a gomastha of Ali Akbar.

The prosecution case is as follows: Ali Akbar and others who are the proprietors of village Karai, within which the disputed plots lie, purchased the lands by two sale deeds (Ex. 5) and (Ex. 6) dated the 9th of December, 1918. Exhibit 5 which was in respect of plot no. 1700 only was executed by one Budhu, son of Raudi, who was recorded in respect thereof in the last survey records. Exhibit 6 which was in respect of both the plots 1699 and 1700 together with some other lands was executed by Dahu for self and as guardian of his nephews including the accused

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Sohrai. Two sale deeds were obtained in respect of plot no. 1700 apparently to avoid any dispute as to title. Since the purchase Ali Akbar and his co-sharers were in possession of the plots 1699 and 1700. Subsequently in 1919 there was a private partition amongst them by which Ali Akbar alone got the plots. He was accordingly in exclusive possession of those plots. On the 17th of October, 1937, that is, two days before the occurrence, there was a kisan sabha at Masaurhi which is eight miles from village Karai. On the 18th October Sohrai with a number of people wrongfully ploughed up the disputed fields and sowed sarso seeds thereon. On the 19th of October (the date of the occurrence) Ali Akbar's people including the deceased went to have the disputed fields ploughed and while this was being done, Sohrai came with a large mob armed with garasas, bhalas and lathis. They wanted to dispossess Ali Akbar's people and when the latter remonstrated Sohrai and two others of his party, named Mangar Gope and Jadu Gope, struck Yasub and Hamza with bhala and garasa with the result that both of them died. Some other persons on Ali Akbar's side were also injured. The same day at about 4 P.M. the Sub-Inspector of Masaurhi reached the spot on receiving information of an impending riot from the chaukidar. He then came to the house of Ali Akbar and there he recorded the first information report on the statement of Ali Azim who had been to the spot at the time of the occurrence on behalf of Ali Akbar and received injuries from some of the accused persons. The Sub-Inspector after investigation sent up ten persons including Sohrai and Pathlu and all of them were committed to the court of session. Sohrai was charged under sections 302, 302/149 and 148 of the Indian Penal Code and Pathlu under sections 302/149 and section 148 of the Indian Penal Code.

The defence is that the disputed plots belong to Sohrai and his uncle, that the kebala (Ex. 6) executed by Dahu was a mere paper transaction and that the

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lands were all along in possession of Sohrai. Sohrai had sown sarso on the disputed plots on the 18th October and on the next day in the morning Ali Akbar with a mob armed with guns and other deadly weapons went to the disputed fields to take forcible possession. On seeing the mob people of the basti came to the help of Sohrai and eventually there was a fight between Ali Akbar's party and the villagers in course of which Yasub and Hamza were killed and the accused persons also received injuries. In fact Pathlu had two wounds on two fingers one of which, as told by the doctor, was grievous.

The case was tried with the help of nine jurors. Their verdict was that the accused persons were not guilty. The learned Additional Sessions Judge accepted their verdict with regard to eight of the accused and acquitted them; but as regards the accused Sohrai and Pathlu he did not agree with their verdict and accordingly referred the case to this Court with the finding that they are both guilty under sections 147 and 326/149. His view is that the prosecution witnesses who prove the actual attack by Sohrai on Yasub and Hamza with a bhala are not disinterested persons and therefore it is not safe to hold that Sohrai actually committed the murder of Yasub and Hamza or was armed with a bhala. He also finds that there is no evidence that Pathlu was armed with a deadly weapon. He has, however, come to the definite finding that both Sohrai and Pathlu were members of the unlawful assembly of which the common object was to dispossess Ali Akbar from the disputed plots and having regard to the nature of the weapons carried by some of its members they must have known that grievous hurt was likely to be committed. He accordingly finds that both Sohrai and Pathlu are guilty under sections 147 and 326/149 of the Indian Penal Code

* * * * *

[His Lordship then discussed the evidence and proceeded as follows.]

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It is strenuously contended by Mr. Avadesh Nandan Sahay, the learned Advocate appearing on Sohrai's behalf, that the learned Additional Sessions Judge in his charge to the jury having directed their attention to the question of possession and the jury having returned a verdict of " not guilty ", this Court should not lightly interfere with that verdict. On a reference under the provisions of section 307 of the Criminal Procedure Code the High Court may exercise any of the powers which it may exercise on an appeal and shall consider the entire evidence on record and at the same time should give due weight to the opinions of the Sessions Judge and the jury. After considering the evidence and giving due weight to the opinions of the Sessions Judge and also the jury, I am clearly of opinion that the view taken by the learned Judge is quite correct. He has very carefully analysed the evidence and has given very cogent reasons for his finding. I should do well to quote from his judgment the following passage in which he sums up his finding :—

" In spite of the unsatisfactory nature of the prosecution evidence the outstanding facts proved in the case are that violence was committed by an unlawful assembly consisting of Sohrai, Pathlu and others, the common object of the assembly being to forcibly oust Ali Akbar, that during the riot Yasub and Hamza were killed, that Azim, Afzal and Saheb Ali received simple hurts and accused Pathlu grievous hurt and that the members of that unlawful assembly were armed with Bhala, garasa and that some members of the unlawful assembly caused the death of Yasub and Hamza and inflicted wounds on Saheb Ali, Azim and Afzal. In view of the common object of the unlawful assembly and the nature of weapons carried by some members of it I am of opinion that the members of the unlawful assembly must have known that grievous hurt was likely to be committed."

It is contended on behalf of Sohrai that his party had a right of private defence, first, to prevent the mischief that was being done by Ali Akbar's party to the sarso that had been sown on the previous day by Sohrai and, secondly, to protect themselves from the attack by Ali Akbar's party which had already fired a gun as found by the learned Sessions Judge. As regards the first ground, I have already held that the sowing of sarso by Sohrai on the 18th of October was

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an act of trespass on his part. When, therefore, on the 19th morning Ali Akbar who was in rightful possession sent his people to plough the lands, it cannot be said that they were doing any mischief to Sohrai. As regards the second ground, it is quite clear that Ali Akbar's party did not fire the gun at anybody. There is no suggestion that the gun shot was aimed at anybody in Sohrai's party or that it injured anybody. It seems that a gun was fired only with a view to scare away Sohrai's party. They were, however, not deterred in any way but proceeded to the disputed fields and committed rioting. In the circumstances I do not think the plea of private defence is available to Sohrai.

In my opinion Sohrai was a member of the unlawful assembly and some members of the assembly inflicted the fatal blows on Yasub and Hamza. The question then arises as to what offences Sohrai can be said to be guilty of. In this matter I would accept the well-considered finding of the learned Additional Sessions Judge and hold that Sohrai is guilty under sections 147 and 326/149 of the Indian Penal Code.

As regards Pathlu, however, different considerations arise. He was not in an way interested in the land. There is no satisfactory evidence that he was armed with any weapon. He was undoubtedly in the mob as he himself received injuries on two fingers; but beyond the fact that he was a member of the mob there is hardly any evidence to show that he shared the object of the unlawful assembly. It might be that he joined the party and went to the field as a mere sight-seer. I do not feel inclined to accept the learned Additional Sessions Judge's finding so far as Pathlu is concerned. I would accordingly acquit him.

Then there remains the question of sentence to be passed on Sohrai. Having regard to the fact that there was a free fight between the two parties I think

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the ends of justice would be met if he is sentenced to five years' rigorous imprisonment under section 326/149 of the Indian Penal Code. No separate sentence need be passed under section 147 of the Indian Penal Code.

I would accordingly accept the reference, convict the accused Sohrai under sections 147 and 326/149 and sentence him to five years' rigorous imprisonment under section 326/149 of the Indian Penal Code. The reference is discharged with regard to Pathlu who is acquitted.

MANOHAR LALL, J.—I agree.

I wish to deal with an objection which was raised on behalf of the learned Advocate for the accused as to the competency of this Bench to dispose of this reference.

This reference was heard by us on two days, namely, on the 6th and the 9th of May, when judgment was reserved for our consideration. On the 10th of May, 1938, news having been received of the lamentable death of Sir Courtney Terrell, Chief Justice of this Court, the High Court was closed as a mark of respect to the memory of the deceased. On the 11th of May, 1938, the learned Advocate for the accused intimated to us in Court that he was raising an objection that, in view of the death of the Chief Justice on the night of the 9th of May and no Chief Justice having been appointed yet, the present Bench had become functus officio and therefore not competent to pass any order in the Jury Reference. We intimated that, on notice to the Crown, this objection would be heard on the 12th of May at 11 A.M. Accordingly on that day, the learned Advocate-General appearing on behalf of the Crown, this matter was argued: at the conclusion of the debate we gave out our views that we would overrule this objection and that the reasons would be given in the judgment that will be pronounced in the Jury Reference.

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In my opinion, this objection is wholly unsound and is based upon a misunderstanding of the provisions of the Government of India Act, 1935, and of the Letters Patent of this Court.

The Patna High Court was constituted by Letters Patent bearing date the 19th of February, 1916. Clause 2 of the Letters Patent deals with the constitution of this Court and also names the first Chief Justice and the puisne Judges who were appointed to take their seats. The constitution of this Court was ordered to consist of a Chief Justice and six other Judges for the time being. Various clauses in the Letters Patent define the jurisdiction which the Judges of this Court are authorised to exercise. It is significant that the first forty out of the total forty-one clauses of the Letters Patent do not deal with the case of a vacancy in the office of the Chief Justice or of the other Judges : the last clause 41 provides that all the provisions of the Letters Patent are subject to the legislative power of the Governor-General in Legislative Council and of the Governor-General in Council under the Government of India Act, 1915 (this is now replaced by the Government of India Act, 1935). The situation which arises upon the happening of a vacancy is distinctly dealt with by section 222 of the present Government of India Act. Sub-section 1 thereof enacts that :

> "if the office of the Chief Justice of the High Court becomes vacant..... those duties (i.e. the duties of the Chief Justice) shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof..... be performed by such one of the other Judges of the Court as the Governor-General may in his discretion think fit to appoint for the purpose."

To my mind, it is obvious that the provisions just quoted adequately deal with the situation which has arisen in the present case. The duties of the Chief Justice can only be performed by either a new Chief Justice who, on being appointed, enters upon the duties of his office or by such other Judge as the Governor-General may think fit to appoint. But this

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does not affect the jurisdiction of the other Judges in the least; they are as heretofore unable to perform the duties of the Chief Justice. It was also admitted, and indeed it is obvious, that the present Bench is not performing in the vacation any of the duties which had to be performed by the Chief Justice. The duties that we are performing are the duties which are assigned to Vacation Judges as provided in Chapter II of the Patna High Court Rules.

It is to be noticed that the Legislature has not for obvious reasons of convenience and practicability fixed any time limit within which the Governor-General shall appoint another Judge to perform the duties of the Chief Justice or within which His Majesty may appoint a new Chief Justice in cases where a vacancy has arisen permanently. Necessarily this appointment must take some time—an hour, a day, a week, a month or a year—and the time during which such appointment is to be made is necessarily left to the discretion of the Governor-General or of His Majesty, as the case may be and they ordinarily are the best Judges of the reasonableness of the time which should be taken to make this appointment. It is conceivable that the Governor-General or His Majesty may take, for some reasons, inordinate time in making the appointment, but the result thereof will only be that the duties of the Chief Justice cannot be performed in that period, and not that the constitution of the High Court will break down because the office of the Chief Justice does not become abolished by the death of the Chief Justice or by a late filling up of the vacancy in that office. It is also to be observed that even if the Governor-General does make an appointment in the case of death the office of the Chief Justice remains vacant till it is filled up by the order of His Majesty. All that section 222 requires, as indicated above, is that the duties of the Chief Justice shall be performed by another Judge but not that the office of the Chief Justice shall be filled up by the Governor-General: in other words, as I pointed out in the course of the

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argument, the appointment of a Judge to perform the duties of the Chief Justice is not the same thing as the appointment of a Chief Justice. The death of the Chief Justice does not destroy the office of the Chief Justice but only creates a vacancy therein and the manner in which the vacancy is to be filled up and how in the interval the interim duties of the Chief Justice are to be performed are clearly and accurately laid down in the Statute. I, therefore, have no hesitation in deciding that the death of the Chief Justice does not affect our jurisdiction in the least in passing orders in the Jury Reference or in any other case which is within our jurisdiction as provided by the law and the Rules of the High Court.

The case law on the point is not very voluminous and may be conveniently dealt with now. It is curious that all the reported cases are from the neighbouring Province. In the case of *Lal Singh* v. *Ghansham Singh*(1) the question arose in somewhat peculiar circumstances. The contention raised was that the Allahabad High Court, at the time of the objection, did not consist of the Chief Justice and five puisne Judges which was the constitution provided in the Letters Patent, the number of puisne Judges who were then working were less than five. It was, therefore, argued that the High Court was improperly constituted and that the jurisdiction of the High Court had ceased until another Judge was appointed, whether permanent or officiating, to make up the number Five of the puisne Judges as provided in the Letters Patent. The learned Judges of the Allahabad High Court had no difficulty whatsoever in overruling this objection. Mahmud, J. made these weighty observations in the course of the argument. "The fact that His Majesty has omitted for several years to fill up a vacancy does not alter the constitution of the Court or make it illegal nor does it amount to altering section 2 of the Letters Patent. *If your argument is*

(1) (1887) I. L. R. 9 All. 625.

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correct, supposing a Judge was to die the whole working of the Court would be brought to a standstill until his successor could be oppointed."

A little later on he observed that even if the Crown is bound to fill up a vacancy within a specified time and acts illegally in not filling it up "it does not follow that the constitution of the Court is vitiated so as to deprive the remaining Judges of all other jurisdiction". I respectfully agree with these observations.

In the case of *Queen-Empress* v. *Ganga Ram*(1) a question arose on the construction of the words "Upon the happening of a vacancy in the office of any other Judge" in section 7 of the Statute 24 and 25 Vic. Chapter 104; the learned Judges decided that these words must be construed as meaning that the power conferred by section 7, namely, to fill up the vacancy, must be exercised within a reasonable time, that is to say, a practicable time, after the happening of a vacancy and they observed that the power conferred by this section cannot be held in suspense for several years and then be legally exercised.

In a case that went up to the Privy Council a similar objection was taken as to the late appointment of Burkitt, J. and it was boldly argued that the effect was that the decree passed by the Bench composed of Burkitt, J. was void; but the Judicial Committee, in dealing with the objection in *Balwant Singh* v. *Rani Kishori*(2), made this observation in the words of Lord Hobhouse: "It is alleged that the decree of the High Court is void, because one of the Judges, Mr. Burkitt, was not properly appointed. .....Their Lordships understand that the appointment is questioned on the ground that it was not made immediately upon, or within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot discover any ground for the objection. Under the High Courts Act the Lieutenant-

(1) (1894) I. L. R. 16 All. 186, F. B.
(2) (1898) I. L. R. 20 All. 267; L. R. 25 Ind. App. 54.

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Governor of the North-Western Provinces has power to appoint an acting Judge upon the happening of a vacancy among the puisne Judges of the Court. No limit of time is mentioned within which the appointment should be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a Court of law to invent a restriction not contemplated by the Legislature". In my opinion these words of Lord Hobhouse apply with great force to the situation which has arisen here. Even if it is assumed that it is obligatory upon the Governor-General to appoint some Judge of this Court to perform the duties of the Chief Justice on his death, the time within which he is required to appoint a Judge is left entirely to his discretion. The delay in making the appointment in such a case does not alter the constitution of this Court nor does the promptitude in appointing a Judge to perform the duties of the Chief Justice fill up the vacancy which, as already pointed out, can only be done by His Majesty.

In the case of *Collector of Etah* v. *Rani Gulab Kunwar*(1) a Division Bench of that Court had to construe the words of section 101, clause 4, of the then Government of India Act which provided that at least one-third of the Judges of the High Court shall be barristers. It was argued that on the appointment of one of the puisne Judges of that Court (who was a barrister Judge) as the Chief Justice of the Lahore High Court [and no barrister Judge having been appointed in his place the result was that the number of barrister Judges of that High Court became less than the statutory requirement of one-third] the constitution of the Allahabad High Court came to a standstill and the other Judges including the Chief Justice became incompetent to perform any judicial work. The learned Judges pointed out—"But this does not mean that if on account of certain reasons a vacancy occurs the other Judges of the High Court

(1) (1935) A. I. R. (All.) 822.

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shall be deemed incompetent to carry on the work of the High Court till the vacancy has been filled up. For reasons which may occur without any previous intimation, for example, if a Barrister Judge or a Civilian Judge happens to die suddenly, there is bound to be a vacancy and, if the argument of Mr. Baleshwari Prasad be good, the other Judges cannot work legally till the vacancy has been filled up. Now it will take some time for the local Government to secure a suitable appointment. If the argument of Mr. Baleshwari Prasad had been sound, we should have expected some provision in the Government of India Act, which should have said that the High Court should not function till the appointment had been made."

With respect I adopt this reasoning as correct and applying it to the facts of the present case I have no hesitation whatsoever in overruling the contention, that on the death of Sir Courtney Terrell, Chief Justice of the High Court, on the 7th of May, 1938, and communicated to us on the 10th of May, 1938, the present Bench have been rendered incompetent to carry on their judicial work and pass orders in the Jury Reference.

Reference accepted in part.

APPELLATE CIVIL.

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April 27, 28.

Before Fazl Ali and Agarwala, JJ.

MUSAMMAT BAS KUER

v.

THE GAYA MUNICIPALITY.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 22—*transferee from claimant after disposal of claim case and before institution of suit under Order XXI, rule* 63, *whether*

* Appeal from Appellate Decree no. 981 of 1936, from a decision of D. E. Reuben, Esq., I.C.S., District Judge of Gaya, dated the 26th August, 1936, reversing a decision of Babu Priya Lal Mukerjee, Munsif of Gaya, dated the 20th December, 1935.

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a necessary party to that suit—transferee impleaded after period of limitation—suit, whether time-barred—Code of Civil Procedure, 1908 *(Act V of* 1908*), Order XXI, rules* 58 *and* 63*—Transfer of Property Act,* 1882 *(Act IV of* 1882*), section* 53*—suit by unsuccessful creditor for himself alone under Order XXI, rule* 63*, on the ground that transfer was fraudulent, if maintainable.*

P having obtained a money decree against *D*, proceeded to attach his house on the 23rd April, 1932, *C* preferred a claim under Order XXI, rule 58, on the ground that the house had been conveyed to him by *D* and the claim was allowed on the 20th November, 1933. On the 11th September, 1934, *C* conveyed the house to *L*. On 6th October, 1934, *P* instituted the present suit under Order XXI, rule 63, for a declaration that the deed set up by *C* was a fraudulent one. *L* was made a party to the suit on the 15th May, 1935. The District Judge found that the conveyances by *D* in favour of *C* and by *C* in favour of *L* were without consideration and were never intended to pass any title and they did not confer any title on them.

Held, that a suit brought under Order XXI, rule 63, is a mere continuation of the proceedings in the claim petition and therefore *L* the purchaser was an alienee *pendente lite* and was not a necessary party to the suit.

Krishnappa Chetty v. *Abdul Khader Sahib*(1), followed.

Protap Chandra Gope v. *Sarat Chandra Gangopadhyaya*(2), dissented from.

Held, also, that the transfer being void, *L* was not a necessary party to the suit and as such section 22 (*1*) had no application and the suit was not barred by limitation.

Mohamed Ishaq v. *Sheikh Akramul Haq*(3), followed.

Held, also, that a creditor who avails himself of the provisions of Order XXI, rule 63, can sue on his own behalf for having the alienation in favour of the claimant declared void without mentioning any other creditors or their debts and section 53 of the Transfer of Property Act has no application to such a case.

(1) (1913) I. L. R. 38 Mad. 535.
(2) (1920) 25 Cal. W. N. 544.
(3) (1907) 6 Cal. L. J. 558.

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Maung Tun Thein v. *Maung Sin*(1) and *U. Maung Nge* v. *P. L. S. P. Chettiar Firm*(2), followed.

Appeal by the defendant.

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

Sarjoo Prasad, for the appellant.

Rajkishore Prasad, for the respondent.

FAZL ALI, J.—This second appeal arises out of a suit brought by the Municipal Commissioners of Gaya municipality under Order XXI, rule 63, of the Code of Civil Procedure in the following circumstances :—

The plaintiffs having obtained a money decree against defendant no. 5 on the 23rd April, 1932, proceeded to attach in execution of their decree a house in Gaya which according to them belonged to the judgment-debtor. Thereupon defendants 1 to 4 (sons of one Bullak Ram) preferred a claim under Order XXI, rule 58, alleging that the house in question had been purchased by their father from defendant no. 5 for a sum of Rs. 1,000. This claim was allowed on the 20th November, 1933, and the house was released from attachment. On the 11th September, 1934, defendants 1 to 4 executed a conveyance in respect of the house in favour of defendant no. 6 for a sum of Rs. 1,500. Thereafter on the 6th October, 1934, the plaintiffs brought the present suit for a declaration that the deed set up by defendants 1 to 4 was " fraudulent and executed by defendant no. 5 in the name of a near relation without any consideration and as such it was illegal and defendants 1 to 4 did not derive any title thereunder ". Defendant no. 6 was made a party to the suit on the 15th May, 1935.

(1) (1934) I. L. R. 12 Rang. 670.
(2) (1934) A. I. R. (Rang.) 200.

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The trial court dismissed the suit but it was decreed by the District Judge of Gaya who has held that the conveyance executed by defendant no. 5 in favour of the father of defendants 1 to 4 as well as that executed by defendants 1 to 4 in favour of defendant no. 6 were without consideration and never intended to pass any title and they did not confer any title upon the transferees. In this appeal which has been preferred by defendant no. 6 the findings of fact arrived at by the learned District Judge have not been questioned but his decree is attacked on three grounds. The first ground which is the only serious ground is that the suit is barred by limitation against defendant no. 6 who was made a party to the suit more than a year after the decision of the case under Order XXI, rule 58, of the Civil Procedure Code.

The appellant's contention is undoubtedly supported by the decision of the Calcutta High Court in *Protap Chandra Gope* v. *Sarat Chandra Gangopadhyaya*(1) but with great respect to the learned Judges who decided that case I am not prepared to accept their view on the question of limitation. It has been held in a number of cases that a suit brought under Order XXI, rule 63, is a mere continuation of the proceedings in a claim petition. Relying on this principle the Madras High Court has held in the case of *Krishnappa Chetty* v. *Abdul Khader Sahib*(2) that a purchaser of property from a claimant, after an order has been passed in his (claimant's) favour but before a suit under Order XXI, rule 63, was instituted, is an alienee *pendente lite* and is therefore not a necessary party to the suit; and if the necessary parties had been brought on the record within one year, the alienee could not advance the plea of limitation as section 22(*2*) of the Indian Limitation Act expressly excludes the operation of clause (*1*) in such

(1) (1920) 25 Cal. W. N. 544.
(2) (1913) I. L. R 38 Mad. 535.

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cases. With this view I am inclined to agree because it can also be supported by a reference to section 64 of the Code of Civil Procedure as will appear from the following head-note of the decision of the Calcutta High Court already quoted:

"The order for release from attachment does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes: if a suit is brought by the decree-holder to establish his right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Therefore in such a case any private transfer of the property by the claimant, though made after an order under rule 60 releasing the property from attachment, would be void under section 64 of the Code of Civil Procedure."

Now if the transfer is void under section 64 it is liable to be ignored by the plaintiff and the person in whose favour the transfer is made is not a necessary party to the suit under Order XXI, rule 63. But so far as the present case goes the matter does not rest there. The learned District Judge has found that in fact there was no transfer either in favour of defendants 1 to 4 or in favour of defendant no. 6 and they did not derive any title under the deeds of transfer relied on by them respectively. If there was no real transfer and defendant no. 6 was not a transferee in the proper sense of the term, she was also not a necessary party. It has been pointed out in a number of cases that as limitation merely bars the remedy by a suit, the only parties in a suit between whom a question of limitation can possibly arise are those who seek relief and those against whom it is necessary to seek relief [*see Mohamed Ishaq* v. *Sheikh Akramul Haq*(1)].

(1) (1907) 6 Cal. L. J. 558.

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Therefore when a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party. In the present case it was not necessary for the plaintiff to claim any relief against defendant no. 6 and in fact no relief has been claimed against her. The question of limitation, therefore, does not arise and cannot affect the decree passed by the court below.

The next question raised on behalf of the appellant was that the suit instituted by the plaintiff-respondent was essentially a suit under section 53 of the Transfer of Property Act and inasmuch as the plaintiffs did not sue in a representative capacity on behalf of all the creditors, their suit is not properly framed and therefore not maintainable. Now it has been held by the Rangoon High Court in at least two cases that a creditor whose attachment has been raised at the instance of a claimant under Order XXI, rule 58, and who avails himself of the right given by Order XXI rule 63, can sue on his own behalf alone for having the alienation in favour of the claimant declared void without mentioning any other creditors or their debts—[*See Maung Tun Thein* v. *Maung Sin*(1) and *U. Maung Nge* v. *P. L. S. P. Chettiar Firm*(2)]. The necessity for the plaintiff to bring a suit under Order XXI, rule 63, arises by reason of a summary decision under Order XXI, rule 58, passed in execution of his own decree and there is no reason why he should be compelled to sue on behalf of other creditors also. But even if it is held that it was incumbent on him to do so, the point cannot arise in this case because there is nothing on the record to show that defendant no. 5 had any other creditors excepting the plaintiffs. In my opinion, therefore, the second objection also must fail.

(1) (1934) I. L. R. 12 Rang. 670.

(2) (1934) A. I. R. (Rang.) 200.

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The last objection is that the plaintiffs are estopped from challenging the appellant's title in this suit because her name and the names of her vendors have been mutated in the Municipal registers and the plaintiffs have accepted taxes from them. In order, however, that estoppel may arise, it must be shown that the person against whom estoppel is set up has intentionally caused or permitted any person to believe anything to be true which is not true and to act upon such belief. In the present case it is not alleged in the pleading or evidence that the plaintiffs caused the defendants to believe something to be true which is not true and they acted upon such belief. On the other hand on the findings arrived at by the learned District Judge the defendants must be held to have been fully aware of the fact that defendant no. 5 had never parted with his title in the house which is the subject-matter of the present suit. There can, therefore, be no estoppel in the present case.

As no other points were urged in this appeal we must uphold the decision of the learned Judge and dismiss this appeal with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

1938.

April, 5, 6, 7.
May, 4.

Before Fazl Ali and Manohar Lall, JJ.

MAHANTH MAHABIR DAS

v.

UDIT NARAIN VERMA.*

Receiver—settlement of land by receiver appointed by court, how far binding—decision of a Division Bench, binding nature of.

* Appeal from Original Decree no. 130 of 1935, from a decision of Babu Jadunath Sahay, Subordinate Judge, First Court at Monghyr, dated the 31st May, 1935.

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A receiver appointed by the Court is a landlord for the time being within the meaning of the Bihar Tenancy Act, and therefore a settlement made by him bona fide in the interest of the estate in the ordinary course of management and not so as to prejudice the rights of the landlords is binding on them.

Raja Kamleshwari Prasad Singh v. *Bisseswar Rai*(1), followed.

Jurawan Singh v. *Ramsarekh Singh*(2), dissented from.

If a Judge does not agree with the decision of a Division Bench it is his duty as a matter of constitution to refer the matter to a larger Bench.

Appeal by the plaintiff.

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

B. C. De (with him *A. K. Mitra* and *D. C. Varma*), for the appellant.

Sarjoo Prasad (with him *Parsuram Prasad Varma*, *K. Dayal*, *Ramnandan Prasad*, *Ramchander Prasad* and *Girijanandan Prasad*), for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the judgment and decree of the learned Subordinate Judge of Monghyr dated the 31st of May, 1935, by which he dismissed the suit of the appellant which was instituted on the 17th of March, 1934, to eject the defendants first party. The defendants second party were impleaded in the action as bataidars under the defendants first party. Defendant no. 3, Balesar Prasad, has admittedly been impleaded uselessly as a defendant.

It is convenient to set out here the circumstances which led up to the institution of this suit and which though apparently of a complicated nature are extremely simple. The lands in dispute, with an

(1) (1916) S. A. 1044 of 1915 (unreported).
(2) (1933) 14 Pat. L. T. 113.

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area of 50 bighas, 15 kathas and 10 dhurs, is situated in village Lakho within the proprietary right of Mahant Jagannath Das of Bishanpur Asthal in Begusarai thana. This Mahant in the year 1925 executed a registered document, which has been spoken of in these proceedings as a Mahantinama, by which he appointed the appellant, his trustworthy chela, as a Mahant from that date and authorised him to get his name registered in the Collectorate department which was immediately done. The old Mahant owing to ill-health then proceeded to Calcutta; on his return he found the attitude of the new Mahant entirely changed towards him. For this reason as well as for other reasons which need not be stated here, the old Mahant cancelled the Mahantinama and this led to the institution of a number of criminal proceedings between the old and the new Mahant beginning from July, 1927. Ultimately the matter was taken to the civil courts and a regular title suit no. 99 of 1928 was instituted by the old Mahant on the 24th of November, 1928, for a declaration that the old Mahant was still the Mahant of the Bishanpur Asthal, that the new Mahant had no right whatsoever to the Mahantship of the said Asthal and its properties, that the new Mahant by the deed dated the 12th of July, 1925, was constituted as a future Mahant after the death of the old Mahant, that the said deed did not confer any present right or title to the properties attached to the schedule of the plaint or to the Asthal, that by the deed dated the 23rd July, 1927, the nomination of the defendant as a future Mahant has been cancelled and the defendant has no right to the Mahantship of the Asthal in future, that the defendant had fraudulently and wrongly got himself recorded as proprietor and that the plaintiff is entitled to have the name of the defendant removed from the Collectorate register wherein he has been recorded as proprietor. The plaint also asked for confirmation of possession over the properties of the Asthal and for other incidental reliefs. During the pendency of

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this suit a receiver who was appointed by the order of the learned Judge dated the 25th February, 1929, took charge of the Asthal properties and realised rents from the tenants for the period of his receivership which appears to have ended in September or October, 1930, as the contending parties were able to compose their differences by that time by a petition which is to be found at page 65 of the record bearing date 26th of August, 1930. The old Mahant died on the 9th May, 1931, and the present plaintiff became the rightful Mahant.

On the 19th September, 1931, the Sub-Inspector of Begusarai reported to the Subdivisional Officer that a breach of the peace was imminent owing to a dispute arising between the plaintiff and the defendants first party as to the possession of the lands in dispute in the present case. The learned Magistrate made an emergency order under section 144, Criminal Procedure Code, on the 21st September, 1931, and subsequently on the 2nd October, 1931, proceedings under section 145, Criminal Procedure Code, were drawn up. In these proceedings the claim of the first party was that he was entitled to khas possession of the lands in dispute which were khudkasht lands of the Asthal and that the second party was illegally trying to interfere with this possession. The claim of the second party, that is to say, the defendants first party in the present action, was as is now, that the lands in dispute were settled with one Chaturbhuj Sahay, Mukhtar, by the old Mahant by means of a hukumnama, dated 18th September, 1921, on receiving a salami of Rs. 4,860 and agreeing to receive the rent at the rate of Rs. 4 a bigha and that Chaturbhuj continued to be in possession on paying rents for the years 1329, 1330, 1331 to 1334 Fasli (in which year he died in the month of Baisakh) as evidenced by receipts, exhibits A(*2*), A(*3*), A(*4*) and A(*6*), that thereafter the defendants first party, who succeeded to the rights of Chaturbhuj in these lands by virtue of a certain will or a gift, continued in possession and paid rent for

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those lands for the year 1335 Fasli as evidenced by receipts, exhibit A(7) to the old Mahant and that when the receiver came into possession the defendants first party paid rent to him for the year 1336 on the 7th of May, 1929, and obtained a receipt (Exhibit A) and also paid a portion of the rent for the next year in 1337 and obtained a receipt exhibit A(1). The defendants also produced a receipt, exhibit A(5), for the year 1338 Fasli by which, it is stated, they paid the amount in arrears to the old Mahant amounting to about Rs. 398 on the 27th of April, 1931. In this state of affairs, it was alleged, the old Mahant died but the present Mahant refused to acknowledge the title and possession of the defendants first party with the result that the matter was taken in criminal courts. The learned Subdivisional Officer in an elaborate judgment dated the 14th July, 1932, held that the hukumnama was a most suspicious and untrustworthy document, that although it bore the signature of the old Mahant it appeared to be antedated and in any case the document being unregistered was inadmissible in evidence; but he found that the old Mahant had actually settled the lands with the defendant first party who were let into possession in 1927 or 1334 Fasli; he also believed the rent receipts granted by the receiver. He accordingly held that the defendants first party came into possession of the disputed lands in 1927 and have remained in possession ever since. Being aggrieved by this order the present suit has been lodged.

The only points that are seriously in controversy in the present litigation are whether Chaturbhuj and after him the defendants first party obtained any rights whatsoever to remain in possession of the lands in dispute as tenants on the stipulated jama calculated at the rate of Rs. 4 a bigha. The learned Subordinate Judge in a careful judgment has come to the conclusion that the story that Chaturbhuj paid a salami of Rs. 4,860 in return for a mere unregistered document (the hukumnama) by which he obtained

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perpetual lease of a large area of land is absolutely unbelievable. He has given cogent reasons for coming to this conclusion and although we were invited in an elaborate argument on behalf of the respondent to hold otherwise we have no hesitation whatsoever in agreeing with the learned Subordinate Judge in his conclusion. A mere look at the hukumnama shows that it is a got up document. There is no witness who comes to prove the passing of this large salami nor is it evidenced by any receipt granted by or on behalf of the old Mahant. The document is unregistered and bearing in mind that Chaturbhuj was a Mukhtar it is unbelievable that he will part with such a large sum and be content with receiving a mere unregistered hukumnama.

The question then arises whether there is any other evidence of a reliable character to prove that Chaturbhuj had entered into possession of the disputed lands as a tenant from some time before his death and if he continued in possession as a tenant till Baisakh, 1334, when he died. It is unnecessary to decide this question because whatever rights, if any, Chaturbhuj had acquired by the so-called hukumnama of the 18th September, 1921, disappeared with his death. The defendants first party do not claim as heirs of Chaturbhuj. Sheonandan Prasad who is defendant no. 2 in the action says in his evidence at page 43 as follows:

"Chaturbhuj Sahay brought up my mother from her childhood and performed her marriage. Since my hosh I lived with Chaturbhuj—I do not know if Chaturbhuj requested my father to give me in adoption—There is no paper to show that he brought me up."

A few lines later he says "Chaturbhuj and his wife executed a registered will about 15 years ago". But it may be noticed here that the Will is not probated and, therefore, no rights whatsoever can be founded upon this Will. So far as the lands in dispute are concerned it was sought to be made out by this witness that Chaturbhuj told him that he had taken a settlement in the name of Udit, the first defendant, as he

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had already executed a Will in his favour and added

"I did not conclude from this that he intended Udit to be owner of the suit land."

The evidence of Palakdhari Jha (D. W. 9) is to the same effect. He says at page 38

"Chaturbhuj gifted all his properties excepting the suit land to Sheonandan. He made an oral gift of the suit land to Udit. I do not know when this oral gift was made."

It is clear from a mere perusal of the oral evidence of this defendant—and this is all the evidence in the case on this topic—that the defendants have no right whatsoever to the inheritance of Chaturbhuj and, therefore, can have no right whatsoever to the lands in suit as heirs or as transferees from Chaturbhuj—the result is, as I have stated already, that the rights of Chaturbhuj disappeared with his death.

It was, however, argued on behalf of the respondents that the receipts, exhibits A and A(*1*), granted by the receiver for 1336 and 1337 Fasli and the receipt, exhibit A(*5*), granted by the old Mahant for 1338 Fasli are themselves sufficient to show that these defendants were recognised as tenants of the disputed lands. The learned Subordinate Judge has relied upon these receipts. I do not see any reason whatsoever why this Court should not rely upon the receipts, exhibits A and A(*1*). Basdeo Narain, witness no. 6 for the defendants, gives his evidence in very clear terms that he was a Tahsildar of village Lakho under the receiver and that he granted receipts to Udit under the orders of the receiver, that exhibit A is written by the witness and exhibit A(*1*) is written by Sital Prasad Patwari and that the first receipt was granted by him after seeing the hukumnama for which it appears the receiver gave a receipt (exhibit B) on the 22nd May, 1929. There is some discrepancy in this evidence; the evidence suggests that the receipt, exhibit A, which bears date 7th May, 1929, was given after exhibit B which was written on the 22nd May, 1929, but it may be that the receipt

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(exhibit A) was granted on the 7th of May, 1929, and on that date the hukumnama was shown to and kept with the receiver and thereafter the receipt (exhibit B) was obtained to show that the hukumnama was left with the receiver. The learned advocate for the plaintiff, however, argues, relying upon exhibit 3 which is to be found at page 67, that the receipt, exhibit A, must be forged because on the 18th September, 1929, the receiver had submitted a report to the learned Subordinate Judge drawing his attention to the fact that a large number of hukumnamas bearing one-anna stamps and bearing dates long before the appointment of the plaintiff as a Mahant were being put forward as having been granted by the old Mahant and that if these settlements, whether genuine or not, were to be upheld this would mean a tremendous loss to the estate; he also pointed out that the new Mahant was not recognising these hukumnamas or settlements and was insisting on treating the lands covered by them as kamat in the jamabandi filed by him; he also drew attention to the fact that if this attitude of the new Mahant is to be adopted there would be every likelihood of a breach of the peace because the settlement-holders were laying serious claims to the lands on the strength of the hukumnamas and receipts granted by the old Mahant. The learned Subordinate Judge dealt with this report in his order which is printed in the margin and ordered that if the new Mahant was not recognising the so-called settlement-holders and described the lands as kamat these were good reasons to believe that these were bogus persons. He suggested that an enquiry should be made by the receiver to ascertain this and if the version of the new Mahant was true then these hukumnamas should not be acted upon and the settlements should not be recognised. The argument of the learned advocate is that in the face of this order of the learned Subordinate Judge and in the absence of any report submitted by the receiver giving the results of his enquiry and without the sanction of the Subordinate Judge it was not open to the receiver to have accepted Udit and

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Sheonandan as tenants of these lands by granting a receipt on the 7th May, 1929, that is exhibit A. But the order of the Subordinate Judge is in September, 1929, and apparently relates to lands which are not the subject-matter of this appeal. The inference I draw from this is that nobody objected to the receipt of rent from Udit. I am satisfied that the receiver accepted the defendant first party as a tenant bona fide and received rents from him in 1336 and 1337 Fasli.

But the learned Advocate for the appellant relying upon the case of *Jurawan Singh* v. *Ramsarekh Singh*(1), contends that the settlement made by the receiver can enure only during the period of his receivership and confers no right which might prejudicially affect the rightful owner of the land. Kulwant Sahay, J., who delivered the judgment in this case, refused to follow the Division Bench ruling of this Court in *Raja Kamateshwari Prasad Singh* v. *Bisseswar Rai*(2). In that case the learned Judges had held that a receiver during the time of his management of the property under section 146 of the Code of Criminal Procedure was in the position of the party to whom the land was afterwards made over and everything done by him would bind that party as an act done by the landlord for the time being and also that the status of the person taking a settlement of the land for agricultural purposes from the receiver was at the very least that of a non-occupancy raiyat. If the learned Judge did not agree with this decision of the Division Bench it was his duty as a matter of constitution to have referred the matter to a larger Bench but instead of doing so he disagreed with that view in these words: "With very great respect to the learned Judges, I am unable to agree with this view. The

(1) (1933) 14 Pat. L. T. 113.
(2) (1916) S. A. no. 1044 of 1915 (Unreported).

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status of such a settlement-holder as a non-occupancy raiyat can be maintained only as against the receiver, if at all, and not against the rightful owner ". The remarks of the learned Judge assume that the person with whom settlement is made by the receiver is claiming right by virtue of such a settlement but that is not so. It is the law which confers a right upon the tenant after he has been let into possession and the only thing which the court should carefully consider is that the so-called settlement by a receiver who admittedly is the landlord for the time being within the meaning of the Bihar Tenancy Act is made bona fide in the interest of the estate in the ordinary course of his management and not so as to prejudice the rights of the landlord. The reason which I have just indicated is the foundation of the reason upon which the Full Bench case of *Binad Lal Pakrashi* v. *Kalu Pramanik*(1) is based which has been constantly followed in this Court with certain exceptions that do not apply to this case. If the view laid down by Kulwant Sahay, J. is to be adopted as correct, receivers of an estate would find it impossible to make any profitable settlement with tenants who feeling their position insecure would not willingly come forward to take settlements at proper rates if at all. With great respect I accept the decision in *Raja Kamaleshwari Prasad Singh* v. *Bisseswar Rai*(2) as correct law as we are constitutionally bound to do. The decision in the later case of *Jurawan Singh* v. *Ramsarekh Singh*(3) dealt with the situation where the receiver was in possession on behalf of the contending parties who were asserting their rights as raiyats but not as landlords. In such cases it is obvious that different consideration would apply, namely, that the settlement by the receiver would be ineffective so far as he was settling the raiyati lands with the raiyats beyond the period of his possession.

(1) (1893) I. L. R. 20 Cal. 708.
(2) (1916) S. A. 1044 of 1915 (unreported).
(3) (1933) 14 Pat. L. T. 113.

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It has been clearly established then that the possession of the defendants must be accepted to have commenced as raiyats from 1929, that is, when they obtained the receipt (exhibit A) from the receiver. This possession as a raiyat was again recognised when they obtained another receipt, exhibit A(*1*), from the receiver for 1337 Fasli. The receiver was in juridical possession of the estate by the implicit consent of the parties under the orders of the court and he must be treated as a landlord for the time being. His accounts were open to inspection and if he was doing anything which was detrimental to the interest of the estate it would be the duty of the party aggrieved to bring that matter to the notice of that court. What has the plaintiff proved in the present case? There is no evidence of a reliable character given in the present case from which I can conclude that the receiver was not acting bona fide when he recognised the possession of the defendants as tenants. It may be he was misled by the hukumnama which appears to contain a genuine signature of Mahant Jagannath Das or it may be that he was induced to do so by the view he took of the receipts, exhibits A(*6*) and A(*7*) of the year 1334 and 1335 Fasli or it may be that he was satisfied upon an enquiry at the spot or in his office that the present defendants have a bona fide right to be in possession of these lands but be that what it may the action of the receiver was bona fide in the ordinary course of management. It will be noticed that I have so far omitted from consideration the receipts, exhibit A(*5*), which has been proved to have been granted by the old Mahant for 1338 Fasli. This has been proved by D. W. 7 and the defendant himself. The patwari Rajeswar Lall was not called to deny this and he was stated to be in the service of the plaintiff at the time of the trial. It is noteworthy that the plaintiff did not produce his collection papers for the years 1334 to 1339 Fasli and the learned Subordinate Judge is correct in drawing an inference against the plaintiff that the absence of such papers leads to the conclusion that the land was in possession

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of the defendants as tenants during the critical period. This further strengthens the conclusion to which I have arrived that these defendants were accepted bona fide as raiyats by the receiver.

It was then argued that where the lands in suit are admitted to be in village Lakho within the ambit of the zamindary of the plaintiff the onus is on the defendants to prove their tenancy. This is no doubt a correct statement of the law. The defendants have not been able to prove an actual settlement with them or with Chaturbhuj but if the receipts, exhibits A and A(*1*), are genuine it must follow that they have proved their right to remain upon the lands. It would be useful to read here the decision of their Lordships of the Privy Council in the case of *Chandra Churdeo* v. *Laldhari Prasad Singh*(1) where their Lordships pointed out that " if the receipt was genuine, it must, in the opinion of this Board, be not merely a recognition of some tenancy but of a raiyati tenancy " and the question whether occupancy right has been acquired would then depend upon the surrounding circumstances in the case and if the person to whom receipts have been granted is able to show that he has been in continuous and unbroken possession for the statutory period he would acquire rights as an occupancy raiyat. The nature of the tenancy right cannot be determined in the present action, but I do not agree with the views of the learned Subordinate Judge that " the defendants by their continuous possession for 12 years have acquired right of occupancy in the suit land ". For the reasons already indicated it is clear that the defendants were in possession from 1335; that is, 1927 onwards, and when this suit was instituted only 7 years had expired.

It was strongly contended for the appellant that it was not within the power of the old Mahant to have made a permanent settlement of the lands even on receiving a proper salami unless such a transfer was imperative due to pressing necessity or " for the benefit of the Asthal " within its technical meaning;

(1) (1932) 14 P. L. T. 57, P. C.

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but this argument has no force. In the case of *Mahanth Jai Krishna Puri* v. *Bhukhal Gope*(1) it was decided by this Court that a Mahanth can grant a lease of math lands provided such a settlement is made in the ordinary course of management. In the case of *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(2) it was pointed out by their Lordships of the Privy Council that a limited owner like the Mahant can create derivative tenures and estates conformable to usage. Were it otherwise it will be impossible for limited owners to manage their estates in the ordinary course.

In the case of *Bhabani Charan Banikya* v. *Suchitra Baisnabi*(3) a shebait of debuttar property granted a lease of a tank which was held not to be for fixed rent but which provided that the tenancy was permanent so long as rent was regularly paid the rent being liable to enhancement according to law. It was held that such a lease was within the competence of the shebait to make and the case relied upon by the appellant, namely, the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(4) was distinguished on the ground that in the Madras case the lease was at a fixed rent. It was also pointed out that an idol's estate is left with the benefit of an augmentation of rent from time to time and this is within the competence of the shebait. Similar is the position in the present case.

For these reasons the appeal is dismissed but under the circumstances, as the defendants have not succeeded in establishing their case that they had obtained a settlement of these lands by paying a large salami of Rs. 4,860, each party will bear its own costs of this litigation throughout.

FAZL ALI, J.—I agree.

Appeal dismissed.

J. K.

(1) (1921) 6 Pat. L. J. 638.
(2) (1869) 13 Moo. I. A. 270.
(3) (1929) 51 Cal. L. J. 25.
(4) (1917) I. L. R. 40 Mad. 709.

REVISIONAL CRIMINAL.

Before Manohar Lall and Chatterjee, JJ.

SATNARAIN DAS

v.

KING-EMPEROR.*

1938.
April, 28, 29.
May, 5.

Penal Code, 1860 (*Act XLV of* 1860), *section* 99—*right of private defence.*

The right of private defence can be exercised only in special circumstances and with the restrictions imposed by section 99 of the Penal Code. The important considerations which always arise in order to determine whether the action of the accused is covered by the right of private defence are, firstly, what is the nature of the apprehended danger and, secondly, whether there was time to have recourse to the Police authorities, always remembering that when both the parties are determined to fight and to go up to the land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappears.

Queen-Empress v. *Pryag Dutt*(1), *Ghyasuddin Ahmad* v. *Emperor*(2), *Anup Singh* v. *Emperor*(3), *Ramphal Das* v. *Emperor*(4), *Fauzdar Rai, In re*(5), *Subedar Singh* v. *King-Emperor*(6), *Matte Mandal* v. *Emperor*(7) and *Ramlagan Singh* v. *Emperor*(8), reviewed.

Ramsagar Gope v. *Emperor*(9), distinguished.

The natural tendency of the law of all civilised states is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be

* Criminal Revision no. 149 of 1938 and Criminal Revision no. 189 of 1938, against an order of A. Salisbury, Esq., I.C.S., Additional Sessions Judge of Muzaffarpur, dated the 2nd February, 1938, dismissing an appeal from the order of Maulvi Syed Faruq Azam, Subdivisional Magistrate of Muzaffarpur, dated the 13th December, 1937.

(1) (1898) I. L. R. 20 All. 459.
(2) (1932) I. L. R. 11 Pat. 523.
(3) (1935) Cr. Rev. 588 of 1935 (Unreported).
(4) (1929) A. I. R. (Pat.) 705.
(5) (1917) 3 Pat. L. J. 419.
(6) (1933) 14 Pat. L. T. 228.
(7) (1932) 13 Pat. L. T. 193.
(8) (1936) Cr. Rev. 319 of 1936 (Unreported).
(9) (1936) 18 Pat. L. T. 21.

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safely applied to a country like India. If a person prefers to use force in order to protect his property when he can, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Penal Code, no matter what the intention of the person may be.

The mere fact that one party came on the field first would not justify him to have resort to force.

Kabiruddin v. *Emperor*(1), applied.

Applications in revision.

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

Sir Sultan Ahmed and *A. K. Mitra*, for the petitioners in Cr. Rev. 149 of 1938.

Sarjoo Prasad, for the petitioners in Cr. Rev. 189 of 1938.

Assistant Government Advocate, for the Crown.

MANOHAR LALL, J.—*Criminal Revision no.* 149: This is an application in revision on behalf of 13 persons who have been convicted by the learned Sub-divisional Officer of Muzaffarpur for offences under sections 148 and 147, Indian Penal Code. Two of the petitioners, namely, Satnarayan Das and Babaji Raut, were also convicted under section 326, Indian Penal Code and sentenced to various terms of imprisonment—the sentences to run concurrently. The convictions and sentences have been upheld in appeal by the learned Additional Sessions Judge of Muzaffarpur.

The facts which are necessary to be stated in order to determine the questions agitated before this Court and which have now been concurrently found by the two courts of fact are these: On the 5th and 6th May, 1937, complainant Harnandan purchased the land in dispute by means of two documents from some persons who were neither the heirs of the

(1) (1908) I. L. R. 35 Cal. 868.

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admitted owner, Manrup deceased, nor were in possession of this land. On the 14th May, 1937, the same property was purchased by means of a registered kebala by Sudarsan Das, chela of the mahant Ramlakhan Das of Chourauth, from some persons who were the rightful heirs of Manrup and who were also in possession thereof up to the date of the transfer. The land is in village Khoria in which the complainant's party live and has an area of 2 bighas and 4 kathas at a distnce of about two miles from the village Chourauth. The accused who are adherents of Sudarsan Das live either in village Chourauth or in the neighbourhood. Ever since the date of the rival purchases there was an apprehension of a breach of the peace between the two kebaladars; rumours of this apprehension had reached the police authorities who on being informed deputed a dafadar to remain at the spot in order to see that no serious breach of the peace occurred. On the morning of the 3rd July, 1937, choukidar Ramphal Raut was sent by the dafadar to go and inform the Sub-Inspector about the immediate apprehension of a breach of the peace between the men of Sudarsan Das on the one side and Harnandan and others on the other; he reached the police-station at about 11 A.M. and came back to the spot with the Sub-Inspector but by this time the marpit had already taken place. After the choukidar was sent to the police-station the situation evidently became very tense and the dafadar, Janki Singh, states that as he had learnt that Harnandan Raut of Khoria and Mahant Ram Lakhan Das's men were going to come into conflict and have a marpit in village Khoria he went to Ram Lakhan Das and on enquiries Ram Lakhan told him that he knew nothing about it, Sudarsan Das was there but he said nothing. On going to village Khoria, however, he met Harnandan who told him that he had a document for the land from before and that he expected that a mob would come from village Chourauth and that he would resist. Acting on this information he had sent the choukidar to the police-station as stated already. But soon

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after, to use the exact words of the dafadar as translated,

> "the mob of both sides came and I asked them not to fight..... They were also asked to avoid a breach of the peace and wait for the daroga who was to come..... None of the parties listened to me and there was a marpit."

As a result of the encounter between the two parties a very serious riot took place on the spot.

Upon these facts the petitioners have been convicted for having been members of an unlawful assembly the common object of which was "by force or show of force to enforce a right or a supposed right" of the land in dispute in village Khoria.

Sir Sultan Ahmad, appearing for the petitioners, contends that when it is found that the title and possession of the land in village Khoria was with the accused party the convictions under sections 147 and 148, Indian Penal Code, are not maintainable. He relies upon the concurrent findings of fact of the courts below to the effect that

> "Harnandan Raut and others purchased the land under a mere colourable pretence of title"

and that the

> "conveyance deeds executed in favour of Harnandan and others are spurious documents in order to set up mere colourable pretence of title".

It must be remembered, however, that the right of private defence can be exercised only in special circumstances and with the restrictions imposed by section 99 of the Penal Code. The important considerations which always arise in order to determine whether the action of the accused is covered by the right of private defence are, firstly, what is the nature of the apprehended danger and, secondly, whether there was time to have recourse to the police authorities, always remembering that where both the parties are determined to fight and go up to the land fully armed in full expectation of an armed conflict in order

to have a trial of strength the right of private defence disappears. In the present case there are very clear findings of fact in these terms that

"Mahant's men went to the place with the full knowledge that they would be opposed by the Gwalas of village Khoria. Harnandan's party also came there with full consciousness that they will have to fight them. Both parties were out for a trial of strength; the simultaneous arrival of the mobs shows a state of preparation on both sides. The mobs were in no mood to listen to the remonstrance of the dafadar who asked them to wait till the arrival of the Sub-Inspector. The plain fact is that men on both sides came with the avowed object of meeting force with force and violence with violence."

The findings are also clear that

"No portion of the land was cultivated with any crop. There was no standing crop on the land anywhere. No property was in danger of being destroyed. No harm would have accrued if the parties were to wait for the police to whom information had already been sent."

In my opinion these findings bring the present case within the well-known rule of law laid down by a large number of cases some of which will be noticed presently and render the action of the accused punishable.

It was argued by Sir Sultan Ahmad, however, that upon the findings arrived at in this case it is clear that the Mahant's men had already ploughed up 5 kathas of the disputed land and had also dug up 1½ kathas out of 11 kathas and therefore he argues that the petitioners, who were in peaceful occupation and engaged in the ploughing of a portion of the land to which their title by purchase has been proved, were justified in resisting by force the forcible aggression by the men of the complainant's party who came immediately after with the avowed object of dispossessing them; in other words, he contends that the petitioner's party was the first to be on the field. But this contention must be rejected because, as laid down in the case of *Kabiruddin* v. *Emperor*(1), "such an enunciation of law would be dangerous to the peace of the country. It would justify a regular race between two factions as to who should arrive first". In my opinion since it is found that the police were

(1) (1908) I. L. R. 35 Cal. 368, 380.

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present on the spot and were dissuading the parties not to fight but to await the arrival of the Sub-Inspector who had been sent for, that there was no immediate danger whatsoever of any property (in this case, as I have already pointed out, there was no standing crop on the land nor any valuable structure which was going to be demolished) and when both the parties knew, the one expecting an immediate attack from the other, the object of the assembly of the petitioners was not to prevent an aggression but to try out their strength by means of a pitched battle.

The law applicable under these circumstances has been the subject of consideration in a large number of decisions in this Court. In my view the true position has been accurately summed up in two recent cases of this Court where the correct distinction was pointed out as to the limits of the applicability of the law laid down by the Calcutta High Court in the case of *Queen Empress* v. *Pryag Dutt*(1) and by this Court in *Ghyasuddin Ahmad* v. *Emperor*(2). My brother Rowland in the case of *Anup Singh* v. *Emperor*(3) has summed up the position in law as follows: "The law is thus stated in *Queen-Empress* v. *Pryag Dutt*(1) 'there can be no right of private defence where the riot is premeditated on both sides unless the object of the assembly is shown to have been to repel forcible and criminal aggression'. In *Ramphal Das* v. *Emperor*(4) the above dictum was adopted. In *Ghyasuddin Ahmad* v. *Emperor*(2) the decision turned on 'whether it is proved that Udro Singh (i.e. accused's party) had grown this tori crop and that his possession required to be protected by force against the offence of theft'. That question being answered in the negative conviction resulted.' These decisions recognise, and it is well settled, that in appropriate cases the right of private defence is an

(1) (1898) I. L. R. 20 All. 459.
(2) (1932) I. L. R. 11 Pat. 523.
(3) (1935) Cr. Rev. 588 of 1935 (unreported).
(4) (1929) A. I. R. (Pat.) 705.

answer to a charge of rioting. There is no inconsistency between the above decisions and such cases as *Fauzdar Rai*(1) and *Subedar Singh*(2). These were cases in which the person in possession of property saw an actual invasion of his rights which invasion amounted to an offence under the Penal Code. He was entitled to defend himself and his property by force and to collect such numbers and such arms as were necessary for that purpose, there being no time to get police help.

The cases of *Kabiruddin*(3) and of *Matte Mandal*(4) were cases in which the accused, claiming rights in the one case of irrigation in the other of fishery, knowing those alleged rights to be disputed, having no particular occasion or necessity to exercise them on the day of occurrence, went forth under arms expecting and intending to bring on a violent encounter. It was held that whether their claim was good or bad, there could be no right of private defence in those circumstances. The observations made in those cases must be read with reference to those circumstances ".

In my opinion this proposition of the law which have been summarised by the learned Judge apply in its full vigour to the circumstances of the present case. My brother Noor in the case of *Ramlagan Singh* v. *Emperor*(5) had again to consider the identical question and agreed with the observations of Rowland, J. in the case from which I have quoted in extenso above and pointed out that in the case before him, as in the present case, the accused knew full well that the constables were there and also that there were men on behalf of the complainant's party who would resist the removal of the crop and of the hut; and although it may be noticed that the hut and the crops

(1) (1917) 3 Pat. L. J. 419.
(2) (1933) 14 Pat. L. T. 228.
(3) (1908) I. L. R. 35 Cal. 368.
(4) (1932) 13 Pat. L. T. 193.
(5) (1936) Cr. Rev. 319 of 1936 (unreported).

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were found in that case to belong to the accused but nevertheless the learned Judge held: "Therefore, from the circumstances it is clear that they went there to exercise their right by use of criminal force or show of criminal force". The natural tendency of the law of all civilised states is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be safely applied to a country like India. If a person prefers to use force in order to protect his property when he can, for the protection of such property, easily have recourse to the public authorities his use of force is made punishable by the Indian Penal Code, no matter what the intention of the person may be. The law says that he must not use force in such cases but should invoke the aid of the tribunals charged with the enforcement of the law [*per* Holloway, J.(1)].

Lastly, reliance was placed upon the latest decision of this Court in the case of *Ramsagar Gope* v. *Emperor*(2) but the facts of that case are entirely different. In that case it is pointed out that "the circumstances in which an aggrieved party is bound to have recourse to the public authorities instead of taking his own measures for the defence of his property are not always easy to determine; but at least it is lawful for a person which has seen an invasion of his rights to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence". The Court, however, in that case negatived the contention advanced on behalf of the Crown that there was evidence in the case that both parties had gone to the spot determined to fight and held that bearing in mind that the accused party were in effective possession at the time of the occurrence having grown the khesari crop they were entitled to go to the land to see that their crops were not removed by the complainant's party and when the complainant's party

(1) (1873) 7 Mad. H. C. R. XXXV (notes).
(2) (1936) 18 Pat. L. T. 21.

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came it was found that the accused did not resort to use of force but seemed to have shown on the other hand some amount of forbearance. The learned Judges pointed out that the fight began when an attack was made on Prahlad up to which time the accused were entirely in the right and it was held that when the assault began the prosecution party became unlawful assembly and the accused had a right of private defence.

Upon a careful consideration of the circumstances in the present case I am of opinion that the conviction of the accused must be maintained.

The question which has greatly troubled us is the imposition of a proper sentence of imprisonment. On the one hand it is quite clear that the accused had title and possession of the land for which they had paid valuable consideration to the persons who had a right to sell but on the other the accused did not listen to the remonstrances of the dafadar who had sent for the Sub-Inspector to come to the spot and instead prepared themselves for a battle in full expectation of being resisted by the Gowalas at a time when no immediate danger of their person or property was apprehended. It is pointed out, however, that the party of the accused was very severely assaulted in the encounter. The injuries on the accused party have been given in detail at pages 8 and 9 of the judgment of the learned Additional Sessions Judge. In these circumstances I consider that the ends of justice will be met if the accused in this case be sentenced each to six months' rigorous imprisonment; the sentences under section 326, Indian Penal Code, will be concurrent. In the result the convictions of the petitioners are maintained with the variation ordered above.

Sentence reduced.

Criminal Revision no. 189: This is a counter case arising out of the facts which led to the institution of proceedings against the accused which has just been disposed of in Criminal Revision no. 149

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of 1938. It is unnecessary to deal with the relevant facts separately in this judgment. We have heard Mr. Sarjoo Prasad on behalf of the petitioners at great length but we are unable to come to the conclusion, as he contends, that the Gowalas were in possession of the land and that the findings of fact of both the courts below were vitiated because they went into the question of title of Harnandan. It was certainly open to the courts to go into the question of title incidentally in order to decide whether they could believe the evidence of possession and in order to see which of the parties was really acting in exercise of his right or whether he was making out a pretence to engage in a pitched battle. In my opinion there are very clear findings of fact of both the courts which make it impossible for this Court to interfere in revision. The facts found are that the accused without any show of title or right, having secured a spurious document from a person not in possession, went armed in order to engage in a pitched battle with the persons who were expected to come on behalf of the Mahant to support Sudarsan Das who had obtained a sale deed from the original owners who were in possession of the land in village Khoria and that the accused refused to resist from a fight although the dafadar had tried his utmost to dissuade them from so doing. The accused Harnandan, the leader of the accused party, definitely told the dafadar in the morning that he was expecting an attack from the Mahant's side but as he had a document in his favour he would resist the attack with force of arms. In this case I agree with the learned Additional Sessions Judge that " the accused party engaged in a pitched battle to take forcible possession of the land and that this action must be sternly discouraged. The petitioners are not men who have been brought down to crime by poverty; they acted in contumacious defiance of the law ". I would, therefore, dismiss the application of these petitioners in revision. In my opinion the sentences awarded are quite appropriate.

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We desire to express our appreciation of the action of the Subdivisional Officer who insisted on obtaining a charge sheet in the teeth of the final report submitted by the local police. It is difficult to understand how in the case of such a serious riot the police could submit a report with the remarks that the matter was of a civil dispute. A perusal of the record shows that the Superintendent of Police very rightly insisted on the 3rd August, 1937, that a charge-sheet should be called for in the interest of justice against both the parties.

CHATTERJI, J.—I agree.

Rule discharged.

J. K.

APPELLATE CIVIL.

Before Fazl Ali and Agarwala, JJ.

1938.

April, 25, 26. May, 5.

DWARKADAS GOBINDRAM FIRM

v.

SALIGRAM REKHRAJ FIRM.*

Execution—decree transferred to another court for execution—application to recall the proceedings, whether is a step-in-aid of execution—powers of the Court transferring a decree for execution—Limitation Act, 1908 (*Act IX of* 1908), *Article* 182—*Code of Civil Procedure,* 1908 (*Act V of* 1908), *section* 41.

A court when it transfers a decree for execution does not thereby altogether lose control over the decree and is quite competent to recall it. Therefore, an application made to the court transferring the decree to recall the executors proceedings is a step-in-aid of execution made in accordance with law before the proper court.

* Appeal from Appellate Order no. 307 of 1937, from an order of Babu Radha Krishna Prasad, Subordinate Judge of Chaibassa, dated the 10th September, 1937, confirming an order of Maulavi Saiyid Ahmad, Munsif of Jamshedpur, dated the 13th February, 1937.

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Chandulal Hathichand v. *Mulchand Ratanchand*(1), *Abda Begam* v. *Muzaffar Husen Khan*(2), *Sheshaiyer Rajamanner Aiyer* v. *Madan Mohan Patnaik*(3) and *Kanto Narain* v. *Madan Gopal*(4), relied on.

Maharaja of Bobbili v. *Narasarju Peda Srinulu*(5), *Rajani Kanta Pattadar* v. *Kazi Saiyed Golam Mahiuddin*(6) and *Fatechand Rampratap Marwadi* v. *Jitmal Rupchand*(7), referred to.

Appeal by the decree-holder.

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

B. C. De and *N. N. Roy*, for the appellant.

B. N. Mitter and *Ajit Kumar Mitter*, for the respondent.

FAZL ALI, J.—This is an appeal by a decree-holder from an order passed by the Subordinate Judge of Chaibassa dismissing his petition for execution on the ground of limitation.

The decree which is sought to be executed was passed by the Subordinate Judge of Wardha on the 21st January, 1932. On the 1st of March, 1932, the appellant applied to the Subordinate Judge to transfer the decree to Jamshedpur for execution and his application was granted on the 14th March, 1932. The appellant, however, took no steps at Jamshedpur and so the decree could not be executed. On the 4th of March, 1935, he made a second application to the Subordinate Judge at Wardha in which he asked him *to recall the proceedings* from Jamshedpur so that the decree might be executed at Wardha. The Subordinate Judge, however, before passing any final order on the petition wanted to be satisfied

(1) (1926) I. L. R. 50 Bom. 439.
(2) (1897) I. L. R. 20 All. 129.
(3) (1932) I. L. R. 11 Pat. 513.
(4) (1935) A. I. R. (Lah.) 465, F. B.
(5) (1916) I. L. R. 39 Mad. 640; L. R. 43 Ind. App. 238.
(6) (1934) 39 Cal. W. N. 129.
(7) (1929) I. L. R. 53 Bom. 844.

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that the decree had not been executed at Jamshedpur and the decree-holder filed an affidavit to this effect on the 5th March, 1935. Thereupon the Subordinate Judge of Wardha issued a warrant of arrest against the judgment-debtor as was prayed for by the decree-holder. The judgment-debtor, however, could not be arrested and the execution proceedings were struck off on the 3rd May, 1935. On the 9th November, 1935, the decree-holder made a third application to the Subordinate Judge at Wardha asking him to transfer the decree once more to Jamshedpur. This application was granted and the decree was transferred on the 21st November, 1935. On the 9th July, 1936, the present application for execution was filed at Jamshedpur but it was opposed by the judgment-debtor on the ground of limitation. His contention was that the application made by the decree-holder on the 4th March, 1935, before the Subordinate Judge at Wardha asking him to recall the execution proceedings from Jamshedpur was not an application made to the "proper court" and, therefore, did not save limitation under Article 182 of the Limitation Act. This contention has been upheld by both the courts below and hence this appeal.

The courts below have relied mainly on the well-known case of *Maharaja of Bobbili* v. *Narasarju Peda Srinhulu*(1) in which it was held by the Privy Council that when a decree passed by a District Court had been sent to the Court of a Munsif for execution and had not been returned to that Court an application for execution made in the first Court was not an application to the 'proper court' and, therefore, did not save limitation. This case has been much discussed in recent times and while some of the Courts have rigidly followed it and held that until the Court to which a decree is transferred for execution sends to the transferring Court the certificate under section 41 of the Code of Civil Procedure,

(1) (1916) I. L. R. 39 Mad. 640; L. R. 43 Ind. App. 238.

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the latter Court cannot entertain an application for execution, it has been laid down in certain cases that even after the decree has been transferred to another Court, the Court which passed the decree is not precluded from entertaining an application for execution under certain circumstances, as for instance, when the decree-holder proposes a different mode of execution or wishes to proceed against a different property. It has also been pointed out in some cases that the point on which the Privy Council rested their decision in *Maharaja of Bobbili's* case(1) was that the decree-holder wished to sell in that case certain land which was within the jurisdiction not of the District Court but within the jurisdiction of the Munsif to whom the decree had already been sent for execution [*see Rajani Kanto Pattadar* v. *Kazi Saiyid Golam Mahiuddin*(2) and *Fatechand Ramprataр Marwadi* v. *Jitmal Rupchand*(3)]. In my opinion it is unnecessary for the purpose of deciding this appeal to discuss the divergent views which have been expressed with reference to *Maharaja of Bobbilli's* case(1). The point on which all the Courts are agreed is that the Court when it transfers the decree for execution does not thereby altogether lose control over the decree, but may still pass certain order in connection with execution. For instance, it has power to stay execution, to make an order for simultaneous execution by another Court and to decide an objection as to limitation if referred to it by the Court to which the decree has been transferred for execution. Again if after a decree has been transferred for execution the judgment-debtor dies, the Court which passed the decree is, by section 30 of the Code of Civil Procedure, the proper court to order that execution should proceed against the legal representative. These being admittedly the powers of the transferring Court, the question as to whether it has the power to recall the execution proceedings

(1) (1916) I. L. R. 39 Mad. 640; L. R. 43 Ind. App. 238.
(2) (1934) 39 Cal. W. N. 129.
(3) (1929) I. L. R. 53 Bom. 844.

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from the Court to which the decree has been transferred for execution admits of one answer only and it is that prima facie such power must exist, because if the Court can transfer the decree it must also have the power to bring it back. The point seems to have been directly raised in the case of *Chandilal Hathichand* v. *Mulchand Ratanchand*(1) and was answered by Macleod, C. J. in the following words: "It is true that under section 41 of the Code a Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution or where the former Court fails to execute the same, the circumstances attending such failure. But it cannot possibly be deduced from the provision of that section that once the Court which originally passed the decree has sent it for execution to another Court, it has no power to order that the decree be returned." The same view is strongly suggested by the decision of the Allahabad High Court in *Abida Begam* v. *Muzaffar Husen Khan*(2) and of this Court in *Sheshaiyer Rajamanner Aiyer* v. *Madan Mohan Patnaik*(3) and the observations made by Kemp, J. in *Kanto Narain* v. *Madan Gopal*(4).

Now once it is held that the Court which has transferred the decree to another Court has the power to recall the execution proceedings from that Court, the application made by the decree-holder on the 4th March, 1935, must be held to be a step-in-aid of execution made in accordance with law before the proper court. The expression "proper court" has been somewhat loosely defined in *Explanation II* of Article 182 "as the court whose duty it is to execute the decree." It was contended before us on behalf of the appellant that this definition was wide enough to include a Court which has transferred a

(1) (1926) I. L. R. 50 Bom. 439.
(2) (1897) I. L. R. 20 All. 129.
(3) (1932) I. L. R. 11 Pat. 513.
(4) (1935) A. I. R. (Lah.) 465.

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FAZL ALI, J.

decree for execution to another Court. In view, however, of the authorities on the subject it appears to me to be not permissible to give to this expression the wide meaning attributed to it on behalf of the appellant. But if the Court which has transferred the decree has the power to execute it after it has been recalled, it must be held that the Court at Wardha was the "proper court" for dealing with the application which was made by the decree-holder in this case on the 14th March, 1932. In my opinion the application of the decree-holder dated the 14th March, 1932, was made to a proper court and it saves limitation.

I would, therefore, allow this appeal, set aside the orders of the courts below and direct that the execution may be proceeded with. The appellant decree-holder will be entitled to his costs in this Court as well as in the Courts below.

AGARWALA, J.—I agree.

J. K.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Manohar Lall and Chatterjee, JJ.

1938.

May, 5, 12.

DINANATH SAHAY

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 162 *and* 537—*summons case—accused, whether entitled to copies of statements before police—refusal to grant copies, whether vitiates the trial—section* 537, *whether can be called in aid by prosecution.*

Where the accused in a trial for an offence under section 182 of the Penal Code applied for copies of statements made by witnesses before the police but the Magistrate rejected

*Criminal Revision no. 202 of 1938, against an order of Babu N. Maitra, District Magistrate of Gaya, dated the 23rd February, 1938, affirming a decision of Babu S. N. Sinha, Sub-Deputy Magistrate, Second Class, Gaya, dated the 1st February, 1938.

the prayer and the trial proceeded and the accused were convicted;

Held, in revision, that as the accused had a statutory right under section 162 of the Code of Criminal Procedure to be furnished with a copy of the statements of witnesses for the prosecution before the police, the refusal to grant copies vitiated the trial.

Held, also, that section 162 applied to summons as well as warrant cases.

Saadat Mian v. *King-Emperor*(1), *Ramgulam Teli* v. *King-Emperor*(2) and *Jhari Gope* v. *King-Emperor*(3), reviewed.

Section 537 of the Code of Criminal Procedure cannot be called into aid by the prosecution because unless the statements of the witnesses before the police have been furnished to the accused or have been seen by the Court itself it is impossible to say if the accused has or has not been prejudiced.

Application in revision.

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

The case was in the first instance heard by Varma, J. who referred it to a Division Bench by the following order:

VARMA, J.—The chief point urged in this case is that the petitioner was not supplied with a copy of the statements of the witnesses before the Investigating Officer. As a result of an information which he lodged on the 13th of November, 1937, about the theft of some of his property, a case under section 182, Indian Penal Code, was instituted against him on the 25th of November, 1937. On the 8th of December the accused appeared and the evidence was explained to him, and the next date fixed was 20th of December, 1937. On the 20th of December, 1937, the prosecution witnesses were not present and another date was fixed for which the prosecution witnesses were summoned and the accused was asked to be ready with his witnesses. That date happened to be the 12th January, 1938. On that date a petition was filed by the petitioner for a copy of the final report and statements of witnesses before the police. On that petition the Magistrate passed orders to the effect that the petitioner should be shown a copy of the final report before the case was taken up. The

(1) (1926) I. L. R. 6 Pat. 329.
(2) (1927) I. L. R. 7 Pat. 205.
(3) (1928) I. L. R. 8 Pat. 279.

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order of the Magistrate is silent with regard to the prayer for a copy of the statements of the witnesses before the police, with the result that the petitioner continued the cross-examination of the seven prosecution witnesses without a copy of their statements to the police. The trial was under section 182, Indian Penal Code, and therefore the procedure applicable to summons cases was followed, i.e., cross-examination went on as the prosecution witnesses were being examined. The defence witnesses were examined on the 4th of January, 1938, and judgment was delivered on the 1st of February, 1938.

In this Court one of the earliest cases on the point is *Saadat Mian* v. *King-Emperor*(1) which has been differed from in the case of *Ram Gulam Teli* v. *King-Emperor*(2). In *Jhari Gope* v. *King-Emperor*(3) it has been observed that " the language of section 162 is mandatory and the learned Assistant Sessions Judge had no power to refuse the application once it had been made unless the case came under the second proviso to section 162 of the Code of Criminal Procedure and in his opinion the statement made by the witness was not relevant to the subject-matter of the inquiry or trial and that its disclosure to the accused was not essential in the interest of justice and was inexpedient in the public interest ". There is no pronouncement of a Division Bench of this Court on the subject in connection with a summons case, because the right of the accused to ask for a copy, according to the provisions of the Criminal Procedure Code, arises when a witness is called. In my opinion, therefore, this is a fit case to be disposed of by a Division Bench.

On this reference.

G. P. Das, for the petitioner.

Assistant Government Advocate, for the Crown.

MANOHAR LALL, J.—This case has been referred to us by Varma, J. by his order, dated the 28th April, 1938, on the ground that there is no reported Division Bench authority of this Court which covers the question raised herein. The facts which are necessary to elucidate the matter in controversy are extremely simple and may be stated thus:

On the 12th November, 1937, Dinanath Sahay lodged an information before the police regarding theft of a tin box said to contain some miscellaneous articles worth about Rs. 4-12-0 and certain documents. As the result of the investigation the police took the view

" that the complainant had lodged the information knowing that believing it to be false, intending thereby to cause a public servant to do a thing which such public servant ought not to do if the true state

of facts respecting which such information was given were known to him and to use his lawful power to the injury or annoyance of the suspects."

and lodged a complaint under section 182 of the Indian Penal Code against the petitioner Dinanath before the Subdivisional Officer who, on taking cognizance, issued a warrant of arrest against the accused on the 25th of November, 1937. The accused appeared on the 8th of December and on that date the ingredients of the offence were explained to him in the manner laid down for the trial of a summons case. Upon the accused pleading not guilty, the learned Magistrate ordered that the witnesses for the prosecution should be summoned for the 20th December. As all the witnesses were not present on that date, the learned Magistrate, upon his view,

"as this is a summons case it is desirable to examine all the witnesses on the same date."

adjourned the case to the 12th of January, 1938, for which the witnesses for the prosecution were again summoned to attend and also directed the accused to adduce his defence evidence on the same date. On the 12th January, 1938, the prosecution witnesses were present but before their examination actually began, the accused put in a petition to the learned Magistrate complaining that although he made an application asking for a copy of the final report in the case, which is the basis of the complaint against him, he had not been supplied any copies so far. He also stated in that petition that he is not in possession of the statements of the witnesses in the police diary and therefore he prayed that the court may be pleased

"to order the copies to be given to him before he is asked to cross-examine the witnesses. As it is extremely difficult to cross-examine the witnesses without copies of the above documents the cross-examination may kindly be postponed."

The learned Magistrate upon that petition passed the following order:

"The A. S. I. will show the final report to the accused before the case is taken up."

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Thereafter the witnesses for the prosecution were examined and cross-examined by the accused without his being in possession either of a copy of the final report or of the statements of the prosecution witnesses. The accused was not ready with his defence witnesses and the court adjourned the case to the 24th January, 1938, on which date he examined two witnesses and on their being cross-examined the case was adjourned to the 29th January for the passing of orders. On the 1st of February, 1938, an order was passed convicting the accused under section 182 of the Penal Code and sentencing him to pay a fine of Rs. 200. An appeal against this order was dismissed by the appellate court summarily on the 23rd of February, 1938. Against these orders this Court has been moved in revision.

The only question which was argued before Varma, J. was whether the conviction of the petitioner should not be set aside on the ground that his trial had been vitiated because the learned Magistrate failed to comply with the requirements of section 162 of the Criminal Procedure Code, namely, of that part of the proviso to sub-clause (*1*) which enacts that

> "when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witnesses in the manner provided by section 145 of the Indian Evidence Act, 1872."

Before considering the case law referred to in the order of reference it will be useful to examine if the rights of the accused which are clearly laid down in the above quotation have been curtailed in the present case by reason of the course adopted by the accused, because it was argued by the learned Assistant Government Advocate for the Crown that the accused did not adopt the proper procedure and suggested that the accused should have renewed his application either orally or in writing after each

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witness who was being called by the prosecution had entered the witness-box and after his examination-in-chief had been recorded. In my opinion, this will be taking a very narrow view of what the accused intended by reason of this application of the 12th January, 1938. The accused definitely informed the court that he would be unable to cross-examine the witnesses of the prosecution unless he was supplied with the copies of the statement of those very witnesses before the police. The learned Magistrate by his order clearly indicated that he had refused that application because he simply ordered the police Sub-Inspector to show the final report to the accused. But the legislature has given a statutory right to the accused to insist upon his being supplied with the copies of the statements before the police so that he may be able to show by means of cross-examination that the witnesses are making statements in court which are directly contradictory to what they stated before the police, and the courts should be careful to see that the trial of an accused is conducted in the manner so carefully laid down by the Code. It was conceded that the provisions of section 162 are applicable to the trial of a summons case as well as to trial of a warrant case and indeed this is obvious because section 162 of the Code of Criminal Procedure does not speak of warrant cases only. The provisions of section 537 of the Code of Criminal Procedure cannot be called into aid by the prosecution in this case because unless the statements of the witnesses before the police have been furnished to the accused or have been seen by the court itself, this Court is unable to say that the accused has not been prejudiced and where there is a violation of the plain directions in the statute as to the mode in which the trial of the accused should be conducted this Court is bound to assume prejudice to the accused in the circumstances existing in the present case. In my opinion the trial of the accused was vitiated and he is entitled to have a retrial upon the terms

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which will be indicated hereafter irrespective of whether he made a complaint on this score to the appellate Court.

In the case reported in *Saadat Mian* v. *King-Emperor*(1) the accused had applied for copies of statements made by the prosecution witnesses to the police during the investigation, and the Magistrate having ordered such copies to be furnished to him, the accused declined to cross-examine the prosecution witnesses until such copies were actually handed over to him, and the Court held that the Magistrate had no option but to postpone the cross-examination. Macpherson, J. in the judgment which he delivered stated, however, that the question of furnishing to the accused a copy of the statement of a witness before the police does not arise until the witness is called for the prosecution and, secondly, that the Court is not competent to direct that the accused be furnished with a copy of such statement unless it contains something which constitutes a contradiction to a statement made by the witness in his deposition at such inquiry or trial. If this view was correct it will not be possible for an accused to conduct his cross-examination effectively because he or his lawyer will have to make up his mind at once as to where the contradiction existed and it would entail a duty upon the court to place itself in the position of an Advocate and try to find whether there was a contradiction or not before it allowed the handing over of the statement to the accused. In my opinion, the true interpretation is that the accused has a statutory right to be furnished with a copy of the statements of the witnesses for the prosecution before the police who were going to be called (and this can easily be seen from the hazri which is filed by the prosecution) and the only duty which rests upon the Court is that it will not allow any part of such statement contained in writing made by the police in the course of the investigation to be used in evidence during the course

(1) (1926) I. L. R. 6 Pat. 829.

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of cross-examination unless this contradicts the previous statement of the witnesses, and this may well be left for the stage of final arguments. In the case of *Ramgulam Teli* v. *King-Emperor*(1) a similar question was again considered by this Court and it was held that as soon as a witness is produced in court and the accused applies for a copy of the statement before the police recorded in writing, the court is bound under section 162, Code of Criminal Procedure, to refer to the writing and to direct that the accused be furnished with a copy thereof and it was pointed out that it was not necessary that before the copy be given some foundation be laid in cross-examination for the suggestion that the evidence given in court is contradicted by the previous statement recorded by the police. Jwala Prasad, J. held that the meaning of the words, " the court shall refer to such writing " is that the court is to exercise discretion under the second proviso and that it does not mean that the right of the accused is at all restricted to obtain a copy, the discretion wherein had been expressly taken away by the legislature, and distinctly held, agreeing with Ross, J., that " the court cannot refuse the granting of a copy till the accused has by his cross-examinations showed that there is a contradiction between the statement in court and the statement referred to before the police ". This view of the Division Bench was expressly affirmed the next year in the case of *Jhari Gope* v. *King-Emperor*(2) where the learned Chief Justice agreed with the judgment of the Court delivered by Fazl Ali, J. who expressed himself thus upon the point which is now being considered by me: " The language of section 162 is mandatory and the learned Assistant Sessions Judge had no power to refuse the application once it had been made unless the case came under the second proviso to section 162 of the Code of Criminal Procedure and in his opinion

(1) (1927) I. L. R. 7 Pat. 205.
(2) (1928) I. L. R. 8 Pat. 279.

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the statement made by the witness was not relevant to the subject-matter of the inquiry or trial and that its disclosure to the accused was not essential in the interests of justice and was inexpedient in the public interest. Further there is nothing in section 162 of the Code of Criminal Procedure to authorize the Court to look into the statement in the police diaries for the purpose of finding out whether it is contradictory to the statement made in court or not before granting the application. This is really the function of the lawyer for the accused after a copy of the statement has been granted to him. There may be cases in which the accused or his lawyer is inclined to treat certain statements as contradictory whereas the Court may think there are no contradictions and there is nothing in the Code to suggest that the decision of the Court on the point must prevail; nor is there anything in the language of the section to suggest the view that the accused are to be debarred from examining the statements for themselves to find out if there are any contradictions, merely because the Court has formed an opinion that there are no contradictions ".

Upon the examination of the case law which exists in this Court, as no contradictory authority of any other High Court has been brought to our notice, I hold that the learned Magistrate failed to follow the clear mandatory directions of the Code in refusing to give to the accused copies of the statements to which he was entitled under the law. In practice there need be no difficulty in complying with the statute even in a summons case, although it is true that the accused is ordinarily called upon in a summons case immediately to cross-examine the prosecution witnesses as soon as the statement-in-chief of each witness has been recorded; but that procedure is subject to the provisions of section 162 of the Code of Criminal Procedure and assumes that at that time the accused had been provided with the statutory materials which it is his undoubted right

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to possess in order to cross-examine the prosecution witnesses. In such cases it will be convenient and consistent with the requirements of the Code that the witnesses for the prosecution are examined in chief on one day and then a very short adjournment is given to the accused during which time he can be provided with the copies of the statements of those witnesses who have been examined by the police. In the present case the case had to be adjourned from the 12th January to the 24th January and the learned Magistrate could well have finished the examination of the prosecution witnesses on the 12th of January, 1938, and after seeing that the accused had been provided with the copies of the statements before the police either on that very day or on the next day, the cross-examination of the witnesses could have been fixed for either on the 13th or the 14th January, 1938, or on such other date as would have suited the convenience of the court, of the witnesses and the parties.

I would, therefore, set aside the conviction and sentence passed on the accused and direct that the case be remanded to the learned trial court so that after the accused has been furnished with the copies of the statements of the witnesses before the police and with the final report he may fix a date on which the witnesses for the prosecution may be cross-examined further by the accused in the light of these materials which were denied to him on the 12th of January, 1938. It may be that the accused will not like to cross-examine the witnesses further if he does not find any materials for contradiction in the statements of the witnesses which will now be supplied to him. After such cross-examination, if any, has been allowed the learned Magistrate will proceed to dispose of the case by calling upon the accused to produce such further defence witnesses as he may choose to do so. Thereafter he will dispose of the case after hearing arguments of both sides. If the learned Magistrate has been transferred in the

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meantime, the proceedings shall commence de novo by a fresh examination-in-chief of the witnesses for the prosecution.

CHATTERJI, J.—I agree.

J. K.

Conviction set aside.
Case remanded.

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April, 27, 28. May, 23.

Before Varma, Manohar Lall and Chatterji, JJ.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 103—*search-witness, whether is under an obligation to sign search-list—refusal to sign, whether punishable as an offence—Penal Code,* 1860 (*Act XLV of* 1860), *section* 187—"*assistance*", *whether ejusdem generis—statute, rules of construction of.*

Per VARMA and MANOHAR LALL, JJ. (CHATTERJI, J. *contra*): There is nothing in section 103 of the Code of Criminal Procedure, 1898, which makes it obligatory on the person witnessing a search to sign the search-list. By clause (5) of the section, what is made penal is only the refusal without reasonable cause to attend and witness a search and not the refusal to sign the search-list.

The word "assistance" in the first part of section 187, Penal Code, 1860, is *ejusdem generis* with the various forms of assistance specified in the latter part of the section; the "assistance" demanded must have some direct personal relation to the execution of the duty by the public officer.

The signing of the search-list required by section 103 of the Code of Criminal Procedure, 1898, is an independent duty imposed on the witness.

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*Criminal Reference no. 10 of 1938. Reference made by D. E. Reuben, Esq., I.C.S., Sessions Judge, Patna, in his letter no. 485, dated the 16th February, 1938.

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Therefore, the refusal by a search-witness to sign the search-list cannot by itself be deemed to be an offence punishable under section 187 of the Penal Code, 1860.

Ramaya Naika, In the matter of(1), followed.

Kali Prosunna Ghose, In the matter of(2) and *Emperor* v. *Joti Prasad*(3), relied on.

Ippili Magatha v. *Emperor*(4), distinguished.

Per curiam: In order to bring about and materialise the obligation imposed by section 103 of the Code of Criminal Procedure, 1898, an order in writing by the officer concerned is necessary, but where no such written order is issued, no person is bound by law to render assistance to the officer in making the search, and if a person omits to do so, he commits no offence under section 187 of the Penal Code, 1860.

Per MANOHAR LALL, J.—It would be adding to the language of the statute to interpret the words "witness the search" in section 103 as meaning "witness the search and to sign the search-list".

The Court is bound to adopt the true construction of the statute aided by the meaning of the words deliberately adopted by the Legislature irrespective of the consequences that it may have on an assumed policy of the legislature or on its unexpressed intention.

Where a search has been conducted under section 103 of the Code of Criminal Procedure, 1898, evidence can be given regarding the things and regarding the places in which they were found irrespective of the evidence of the list which the law directs to be drawn up relating to the particulars of the property found and the provisions of the Evidence Act, 1872, do not prevent the adoption of this course.

Solai Naik v. *Emperor*(5), followed.

Refusing to sign the search-list is not refusing to assist a public servant in the discharge of his public duties within the meaning of section 187 of the Penal Code, 1860.

(1) (1903) I. L. R. 26 Mad. 419, F. B.
(2) (1881) 7 Cal. L. R. 575.
(3) (1920) I. L. R. 42 All. 314.
(4) (1920) A. I. R. (Mad.) 286.
(5) (1910) I. L. R. 34 Mad. 349.

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Per CHATTERJI, J.—The duty of signing a search-list imposed on the search-witnesses by section 103(*2*) of the Code of Criminal Procedure, 1898, is not an independent duty and is covered by the word "assistance" used in section 187 of the Penal Code, 1860.

A person who has become bound by an order in writing issued by the officer concerned under the last part of clause (*1*) of section 103 to become search-witnesses, is also under an obligation to sign the search-list that may be prepared and if he refuses to do so, he is guilty of refusing to render assistance within the meaning of section 187.

Reference under section 438 of the Code of Criminal Procedure.

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

The case was in the first instance heard by Dhavle, J. who referred it to a larger Bench by the following judgment:

DHAVLE, J.—The learned Advocate, who appears for the persons who moved the court of session in revision, agrees with the learned Sessions Judge that the point involved in this case is one of great importance to excise and police officers throughout the province. That point is whether or not the refusal by a search-witness to sign a search-list amounts to an offence within the meaning of section 187 of the Indian Penal Code. In the matter of *Ramaya Naika*(1) a Full Bench of the Madras High Court held that the signing of the search-list is an independent duty imposed on a search-witness by section 103 of the Criminal Procedure Code and does not come within the meaning of the word "assistance" used in the first part of section 187 of the Indian Penal Code. But in *Ippili Magatha, In re*(2) Aiyar and Phillips, JJ. declined to hold that a person, who was called upon by a Salt Inspector to assist in a search under section 103 of the Code of Criminal Procedure and refused to do so, was not guilty of an offence under section 187 of the Indian Penal Code. They referred to the Full Bench decision in the case of *Ramaya Naika*(1) and considered that the duty of assisting a search—though it presumably meant no more than attending and witnessing it—was ejusdem generis with the duty of assistance mentioned in the second part of section 187. But if that be so—and the learned Judges made their observations in order to distinguish the case before them from the case before the Full Bench—it is not very easy to see why men who are called upon to witness a search and do so but refuse to sign the search-list (a duty apparently ejusdem generis with witnessing the search) are only guilty of breach of an independent duty (without being liable

(1) (1903) I. L. R. 26 Mad. 419, F. B.
(2) (1920) A. I. R. 286.

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to any penalty that has been referred to in any of the cases) but not guilty of an offence under section 187. It is impossible to deny the great importance of the point in connection with searches under section 103 of the Criminal Procedure Code; and in my opinion the point should be authoritatively dealt with by a larger Bench, in view of the apparent obscurity created by the two decisions to which I have referred.

Let the case be laid before the Hon'ble the Chief Justice for orders.

The case was then heard by a Division Bench which referred it to a Full Bench.

On this reference.

Ishwarinandan Prasad, in support of the reference.

Assistant Government Advocate, against the reference.

VARMA, J.—This is a reference by the Sessions Judge of Patna, which was originally heard by Mr. Justice Dhavle and then by a Division Bench of this Court, and has now been placed before us under the orders of the Hon'ble the Chief Justice.

The three accused persons were tried under section 187 of the Indian Penal Code for having refused to sign a search-list prepared by the Excise Sub-Inspector of Barh in connection with a search in the house of one Gainu Pasi. The case for the prosecution was that the Excise Sub-Inspector raided the house of Gainu Pasi and recovered four bottles of liquor, five seers of fermented mahua, and some apparatus in presence of the three accused persons. The articles seized were labelled and the three accused persons signed the labels. Accused Ram Prasad actually granted a receipt for having received the seal with which the bottles were sealed up. The Sub-Inspector prepared a search-list (Exhibit 2) and requested the three accused persons who attended as witnesses to sign the search-list. The prosecution case was that the accused were dissuaded by the mahalla people and therefore they refused to put their signatures on the search-list in spite of the warning given

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to them by the Sub-Inspector as to the consequences attending their refusal to do so. There were three witnesses on behalf of the defence and four on behalf of the prosecution. The defence was that the accused refused to sign the list because they wanted to mention in it that the bottles were planted in the house by the Sub-Inspector and his staff but the Sub-Inspector did not permit them to do so; and they further alleged that the Sub-Inspector handled them roughly for their attitude. The defence set up was not accepted by the Court and ultimately the accused were convicted and sentenced under section 187, Indian Penal Code, to pay a fine of Rs. 25 each in default to undergo simple imprisonment for one and a half months.

Manifestly the search was held under the provisions of section 103, Criminal Procedure Code, which runs as follows:

(1) Before making a search under this Chapter (Chapter VII, Of Processes to Compel the Production of Documents and other Moveable Property, and for the Discovery of Persons wrongfully confined), the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person, who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

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The final passage in clause (*1*)—" and may issue an order in writing to them or any of them so to do " —and the entire clause (*5*) have been introduced by the amending Act of 1923. The effect of these provisions is, in my opinion, that the officer making a search can, if necessary, secure the attendance of persons by issuing written orders to attend and witness a search; and clause (*5*), if at all, purports to emphasise the fact that a refusal or neglect to attend and witness a search would not be deemed to be an offence if an order in writing was not delivered to the person, or, if he had some reasonable cause to refuse or neglect to attend in spite of an order in writing given to him to attend and witness. It is admitted that no order in writing was delivered or tendered in the present case.

Under these circumstances the question for consideration by this Full Bench is whether the accused have been rightly convicted under section 187, Indian Penal Code.

In this connection reference has been made to the opinion of a Full Bench of the Madras High Court in *In the matter of Ramaya Naika*(1) where the learned Judges held that the accused was not guilty of an offence under section 187, Indian Penal Code, simply because he had refused to sign the search-list. In coming to their conclusion the learned Judges assumed that under section 103(*1*) of the Code of Criminal Procedure, the party called upon to attend and witness a search is under a legal obligation to attend the search and sign the search-list. But in construing the substantive section 187 of the Indian Penal Code, their Lordships observed that the word " assistance " occurring in the first half of the section is *ejusdem generis* with the various forms of assistance specified in the latter half of the section; that the " assistance " demanded must have some direct personal relation to the execution of the duty

(1) (1903) I. L. R. 26 Mad. 419, F. B.

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by the public officer; and that the word "assistance" as used in the section implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself. Their Lordships were of the opinion that the signing of the search-list required by section 103 (Criminal Procedure Code) is an independent duty imposed on the witness. In a subsequent decision of the same High Court in *Ippili Magatha* v. *Emperor*(1) the learned Judges of the Division Bench upheld the conviction of the accused under section 187, Indian Penal Code, for having refused to assist the Salt Inspector in making a search. Although the report of that case is very meagre, yet it is quite clear that the learned Judges did not think that the case was covered by the opinion of the Full Bench in *In the matter of Ramaya Naika*(2). It is obvious also that in the case of *Ramaya Naika*(2) the question before the Full Bench was whether or not there was any criminal liability incurred by the person who had attended the search but had refused to sign the search-list, whereas in the later case of *Ippili Magatha*(1) the conviction of the accused was for having refused to assist a public officer in the act of making a search. Refusal to assist in making a search, and a refusal to sign a search-list after having attended and witnessed a search, are really two different acts. In the former case the person altogether withholds his assistance to the public officer; whereas in the latter case he only withholds his signature from the document called the search-list.

Section 187, Indian Penal Code, covers offences arising out of omission to assist public servant when bound by law to give assistance. It provides:

"Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally

(1) (1920) A. I. R. (Mad.) 286.
(2) (1903) I. L. R. 26 Mad. 419, F. B.

omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Reference may be made to various other cases in illustration of offences covered by section 187, Indian Penal Code. In the case of *In the matter of Kali Prosunna Ghose*(1) the accused was convicted under section 187, Indian Penal Code, for having neglected to nominate a successor of a village watchman on being called upon by a public officer to do so; but their Lordships of the Calcutta High Court set aside his conviction on the view that section 187 " applies to direct refusal or omission of a person bound by law to render or furnish assistance to a public servant to do so ". A similar view has been taken by the Allahabad High Court in *Emperor* v. *Joti Prasad*(2). In that case an agent of a zamindar had refused to lend the gun of the zamindar and some villagers refused to join an expedition of the Sub-Inspector of Police in search of dacoits; and the learned Judges held that in those circumstances the accused were not guilty of any offence punishable under section 187 inasmuch as the refusal of the accused to the public servant so to assist did not amount to a failure of public duty required under section 42 of the Criminal Procedure Code.

It must be said that by the amendments of 1923 in section 103 of the Code of Criminal Procedure it has been provided that the refusal to attend and witness a search when called upon to do so in writing will be deemed to be an offence under section 187, Indian Penal Code. Section 103 requires that a search

(1) (1881) 7 Cal. L. R. 575.
(2) (1920) I. L. R. 42 All. 314.

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is to be made in the presence of witnesses, and, as I read it, there are only three important stages in a search: viz., (*1*) that there must be some respectable persons present at the spot to witness the search; (*2*) that every process in the conduct of the search must be witnessed by those witnesses; and (*3*) that a list must be prepared, which will bear the signatures of those witnesses, of the things seized in the search. Now, when a person turns up to witness a search and has actually witnessed all the details in the conduct of the search, if he refuses thereafter, with or without reasonable cause, to sign the search-list prepared, it cannot be said that he has not attended or witnessed the search as required by section 103; he can still be called as a witness to prove the search. By providing in clause (*1*) of the section that the officer about to make a search "may issue an order in writing to them or any of them so to do", the Legislature invests the officer engaged in a search with a power which he might exercise, if necessary, to compel the attendance of witnesses so as to be able to conduct a valid search; and by clause (*5*) what is made penal is only the refusal without reasonable cause to attend and witness a search. Penal laws must be strictly construed. There is nothing in the section to compel the person witnessing the search to sign the search-list also. In my opinion the Legislature has deliberately omitted to make penal the refusal to sign the search-list, and there are good reasons behind it. When a witness puts his signature on the search-list it indicates his approval; but if he has any reason to be dissatisfied with the manner of the search, he must be given an opportunity to signify his disapproval then and there, which can be done by refusing to sign the search-list. It may be said that the witnesses could sign the search-list after noting the irregularities which came to their notice; but we find that the search-list (Ex. 2) is on a printed form prescribed for "List of Articles found on search under section 72 or 74, Act II of 1915, etc.". Although column 7

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provides for "Remarks of the officer conducting the search", column 8 provides only for the "signature of witnesses at the time of search". There is nothing in the form to provide for remarks of witnesses present at the search. The result of a witness's refusal to sign the list may necessitate proving the search in some other way. Indeed under clause (*2*) of section 103 no person witnessing a search shall be required to attend the Court as a witness of the search unless specially summoned by it. The amendment in clause (*1*) of the section strengthens the hands of the officer making a search by authorising him to issue written orders to secure the presence of witnesses and their witnessing the search. But so far as the signing of the list is concerned, the position is the same as it was at the time of the opinion pronounced by the Full Bench of the Madras High Court [*In the matter of Ramaya Naika*(1)]. Refusal by a witness to sign the search-list can be made penal under section 103, only by holding that signing the search-list is a part of witnessing the search; but such an interpretation will not be tenable in view of the injunction in clause (*2*) that

> "the search shall be made in their (the witnesses') presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses."

Of the three stages in a search, that I have mentioned above, with regard to the first stage no authority is needed to show that the witnesses must be in attendance before the search actually begins. With regard to the second stage, i.e., the actual search, I may usefully quote the observations of a Division Bench of the Bombay High Court in *Dinkar Nhanu* v. *Emperor*(2). Their Lordships said as follows:

"We consider that both the letter and the spirit of section 103, namely, the provisions that the panches

(1) (1903) I. L. R. 26 Mad. 419, F. B.
(2) (1930) A. I. R. (Bom.) 169.

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are to attend and witness the search, and that the search shall be made in their presence, require that the panches should actually accompany the persons making the search and should be actual witnesses to the fact of the finding of the property. It is not, in our opinion, a sufficient compliance with this section that the panches should merely be summoned and kept present outside a building while the search is being carried on within it, and then called in to see what has been found."

With regard to the third stage, i.e., the search-list, the presumption of validity of a search arises from the search-list which has been signed by witnesses. In the case of *Ana Dewa Singh* v. *Emperor*(1) where the search-list consisting of three pages was signed by the search-witness only on the first two pages, the learned Judge refused to draw any inference against the accused on the basis of the unsigned pages. In my view section 103 enacts that searches must be conducted with all due care, that there must be respectable persons present at them to bear testimony to the fact that the manner of the searches was above board.

The learned Assistant Government Advocate has argued that once a person comes to witness a search he is bound to sign the search-list and that the absence of any written order from the officer would not absolve the witness of the obligation and refusal to sign the search-list would be punishable under section 187, Indian Penal Code. This argument cannot prevail, because that would amount to holding a person guilty of an offence by agreement. There may be rare instances in which a witness may refuse to sign the search-list without a reasonable cause: but in section 103, Criminal Procedure Code, the Legislature has not taken notice of a rare possibility of the kind. There is no doubt in my mind that the

(1) (1907) 7 Cr. L. J. 411.

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word "assistance" in the first part of section 187, Indian Penal Code, is *ejusdem generis* with the various forms of assistance specified in the latter half of the section. As some doubt seems to have been raised by the various decisions about the penal liability of witnesses who refuse to take part in certain stages of the search the amendment of 1923 has made it penal by clause (*5*) of section 103, Criminal Procedure Code, for a witness to refuse when asked in writing to attend and witness a search. In other words, assisting a search officer by attending and witnessing a search has been made *ejusdem generis* by Legislature with the kind of assistance referred to in the second part of the section. But again it is the refusal to attend and witness the search that has been made penal and not the signing of the search-list.

With great respect, therefore, I entirely agree with the opinion expressed by the learned Judges of the Madras High Court in the case of *Ramaya Naika*(1) and, for the reasons given above, I am of opinion that a refusal to sign a search-list by a witness to search cannot by itself be deemed to be an offence under section 187, Indian Penal Code.

I, accordingly, accept the reference, set aside the conviction and sentence passed on the accused and direct that the fines, if paid, be refunded to them.

MANOHAR LALL, J.—The question referred to the Full Bench is to consider the correctness of the decision of the Full Bench of the Madras High Court in *In the matter of Ramaya Naika*(1) and necessitates an examination of the validity of the contention that an accused person, who refuses to sign the search-list when required to do so by the Sub-Inspector after having attended and witnessed the search as provided by section 103 of the Code of Criminal Procedure is guilty under the provisions of section 187 of the Indian Penal Code. This case was originally heard

(1) (1903) I. L. R. 26 Mad. 419, F. B.

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by Dhavle, J. who, considering the importance of the question involved, referred it for a decision to a Division Bench who, in their turn, thought that the matter should be decided by a larger Bench. Accordingly under the orders of the Hon'ble the Chief Justice this Full Bench has been constituted.

The facts of the case are no longer in controversy and may be shortly stated thus: On the morning of the 4th of October, 1937, the Excise Sub-Inspector raided the house of a certain Pasi and recovered some bottles of liquor and other articles. These articles were admittedly labelled and signed by the three accused persons. Thereafter the Sub-Inspector prepared a search-list and asked the three accused persons, who had attended and witnessed the search, to sign the list, but they refused to do so. Their defence that they did not refuse to sign the list without any reasonable and just cause need not be considered here because it has been rejected by the Court of fact. That Court was under the impression that the provisions of section 103 of the Code of Criminal Procedure did not apply to a search made under the Excise Act but this view is erroneous (*see* section 85 of the Excise Act). It is only necessary to state here another circumstance which may have some bearing on the decision of the question at issue, namely, that it is an admitted fact in the present case that the Excise Sub-Inspector did not call upon the petitioners by *any order in writing* to attend and witness the search.

The question then arises whether the petitioners are not guilty of the offence provided in section 187 of the Indian Penal Code on the ground that they "being bound by law to render or furnish assistance to a public servant (the Excise Sub-Inspector) in the execution of a public duty (namely, to conduct a search) intentionally omitted to give such assistance". It is important to find out in the first instance what are the obligations in law of any private individual

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in the position of the present petitioners to render or furnish assistance to a public servant in the execution of a public duty. To my mind this can only be answered by construing the provisions of section 42 of the Code of Criminal Procedure or any other law bearing on the subject which for the time being may be in force. It would also be necessary to ascertain what the public duty in the present case was which the Sub-Inspector was executing or discharging. Section 42 of the Code of Criminal Procedure lays down definite circumstances in which every person is bound to assist a police officer reasonably demanding his aid. These are specifically mentioned in clauses (*a*) and (*b*) of that section. It is common ground that the demand of the Sub-Inspector does not come within the provisions of section 42. It was argued by the learned Assistant Government Advocate, who appeared to assist us at our request, that the petitioners were bound to sign the search-list because this is specifically provided in sub-clause 2 of section 103 of the Code of Criminal Procedure. Now sub-clause (*2*) runs as follows:

"The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses."

It is obvious that the Statute here merely gives a direction that after the search has been completed and a search-list has been prepared by the Sub-Inspector it is to be signed by the witnesses attending and witnessing such search, but it does not provide any penalty if they refuse to sign it: the penalty, if any, must be found elsewhere—it is not in sub-clause (*2*) of the section.

The critical question to decide is, whether when the Sub-Inspector asked the witnesses to sign the search-list he was doing so in execution of any public duty? In my opinion the answer must be in the negative. The public duty of the Sub-Inspector in the present case was to conduct the search in the manner provided in the Code, that is

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to say, he was required to call upon certain witnesses of the locality, so as to make a search in their presence and after this was done he was required to prepare a search-list; and then his duty ended. It is argued that it was also his duty to get the witnesses to sign the search-list, but I am not prepared to accept this. The Legislature has not said so and provides no penalty for a refusal of a witness to sign the search-list or for an omission of the Sub-Inspector in getting it signed. If the search-list is not signed, the Sub-Inspector in my opinion cannot be said to have been refused assistance in the execution of his public duty. All the assistance which the law required the search witnesses to give to the Sub-Inspector was to be present at the search and to witness the search. The word "witness" is defined in Annandale's Dictionary, 9th Edition, to mean "to see or know by personal presence, to observe". This meaning of the word 'witness' as used by the Legislature is also clear when the language of section 103 is examined. It is to be noticed that the Statute uses the words "to witness the search" and not "to witness the search-list". In my opinion it will be adding to the language of the Statute to interpret the words "witness the search" as meaning "witness the search and to sign the search-list".

It is interesting to notice that by Act XVIII of 1923 some additions were made to section 103. In the first clause the words "and issue an order in writing to them or any of them so to do" and the whole of sub-clause (5) were added. But in the sub-clause so added the words "any person who refuses to sign the search-list" are not mentioned. Nevertheless I am asked to construe the words "witness the search" as including "sign the search-list" upon the argument that if such a construction is not admitted, the result would be that the search-list would never be admissible in evidence and it will open the door to witnesses unreasonably refusing to sign the search-list and thereby stultifying the very object

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of the Legislature in having the document duly witnessed by the search witnesses for production in Court at the time of the trial. The answer to this contention is that it is not the function of the Court to legislate or to look into the possible inconvenience that may arise to the prosecution or to the accused if the true construction of the Statute is adopted. The Court is bound to adopt the true construction of the Statute aided by the meaning of the words deliberately adopted by the Legislature irrespective of the consequences that it may have on an assumed policy of the Legislature or on its unexpressed intention. I may usefully refer here to the case of *Solai Naik* v. *Emperor*(1) where a Full Bench of the Madras High Court gave the opinion that where a search has been conducted under section 103 of the Code of Criminal Procedure, evidence can be given regarding the things and regarding the places in which they were found irrespective of the evidence of the list which the law directs to be drawn up relating to the particulars of the property found and that the provisions of the Indian Evidence Act do not prevent the adoption of this course. In the course of the argument it was pointed out by the learned Judges that a search cannot be made in writing and that the observations of physical facts must always and can be allowed to be proved by oral testimony in Courts. With respect, I agree with those remarks.

I now come to the case law upon the point. The most important case upon the subject is the case of *Ramaya Naika*(2) the correctness of which is being considered in the present reference. In that case the identical question before us was in debate. The accused in that case was called upon by an Abkari Inspector to attend a search which he did, but refused to sign the search-list after it was prepared. The learned Judges held that the assistance which a person is required to give to a public officer must have

(1) (1910) I. L. R. 34 Mad. 349, F. B.
(2) (1903) I. L. R. 26 Mad. 419, F. B.

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some direct personal relation to the execution of the duty by the public officer and that the signing of the search-list required by section 103 is an independent duty imposed upon the witness and also that the word "assistance" implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself. With great respect in my opinion this is the correct exposition of the law only in so far as it defines the meaning and limits of the word "assistance", but I do not agree that the section casts any obligation or legal duty on the witnesses to sign the search-list. By refusing to sign the search-list the search-witness does not prevent the search from being carried out. The list which he is required to sign is the search-list which has been prepared after the search has been conducted in the manner provided by the Code. After the search-list has been prepared the Sub-Inspector cannot physically force the witnesses to sign it. It is the law which gives a direction which only means that in order that a search-list may be valid it must bear the signatures of the search-witnesses, but unfortunately the Legislature has not provided or has not thought fit to provide any penalty if a search-witness refuses to sign it as they have done in cognate cases: e.g.

Section 178 of the Indian Penal Code where a person refuses to bind himself by oath or affirmation to state the truth;

Section 179 of the Indian Penal Code where a person refuses to answer any material question put to him;

Section 180 of the Indian Penal Code where a person refuses to sign any statement made by him.

I have selected these three instances as in every one of these cases it may be argued with equal force that the person concerned is refusing to assist the public servant concerned in the discharge of his duty. If that argument were correct these provisions would

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be redundant. It may well be that the Legislature thought that any person who takes the trouble to attend a search would have no hesitation in signing such a search-list if asked, and left it to his discretion not to sign it as nobody can be forced to sign an incorrectly drawn-up document as if it was true. It is also to be noticed that when section 103 was amended by inserting sub-clause (*5*) the Legislature must be presumed to have known the judicial interpretation which was placed upon the section, as it then existed, by the Madras High Court; nevertheless they did not think it proper to amend the law in such a way as to indicate that the Madras Full Bench decision was incorrect.

The amendment by the insertion in clause (*1*) and of clause (*5*) is again of very great importance for the decision of the present case. It provides that a Sub-Inspector may issue an order in writing to any person to attend and witness a search and if after such an order has been delivered or tendered to such a person he refuses or neglects to attend and witness a search under this section without reasonable cause he shall be deemed to have committed an offence under section 187 of the Indian Penal Code. In other words, were it not for this amendment the refusal by a person to attend and witness a search would not be punishable under the Penal Code. This confirms my view that a refusal to attend and witness a search does not come within the duty imposed upon the subject by section 42 of the Criminal Procedure Code. Why did the Legislature, then, omit to insert the words "and sign the search-list?" The obvious answer to my mind is that refusing to sign the search-list is not refusing to assist a Sub-Inspector in the discharge of his public duties. A similar interpretation of section 187 of the Indian Penal Code was adopted as far back as the year 1881 by the Calcutta High Court in *In the matter of Kali Prosunna Ghose*(1). In that case the landholder who was called upon under section

(1) (1881) 7 Cal. L. R. 575.

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21 of Regulation XX of 1817 to nominate some person to act as a village watchman, the former watchmen having either died or been dismissed, neglected to do so although a purwannah was issued reminding him of his duty. The landholder was, upon these facts, convicted under section 187 of the Indian Penal Code. In setting aside the conviction the learned Judges observed: "That section (section 187) applies to direct refusal or omission of a person bound by law to render or furnish assistance to a public servant to do so".

The next case which I notice is the case of *Emperor* v. *Joti Prasad*(1). In that case the Sub-Inspector of Police who received an information that some persons who had been concerned in a number of dacoities in the neighbourhood and who recently committed a dacoity at a village about two miles off had been seen in a forest tract near by, called upon the zamindar's agent to lend him a gun which belonged to his master but who was then absent and also called upon two villagers to join him in a search for the dacoits. The agent refused to lend the gun and the two villagers refused to join the expedition in search of the dacoits. In these circumstances the conviction of the accused under section 187 of the Indian Penal Code was set aside by a Division Bench of that Court. In the course of their decision the learned Judges pointed out that the duties which are imposed upon the public must come within the express words of section 42 of the Code of Criminal Procedure and that the accused were perfectly justified in refusing to carry out the wishes of the Sub-Inspector. In other words, the accused in that case were not bound by law to render or furnish the assistance which the public servant required on the allegation that it was in execution of his public duty.

In the case of *Ambica Prasad* v. *Emperor*(2) again the test employed to determine the validity of

(1) (1920) I. L. R. 42 All. 314.
(2) (1932) A. I. R. (All.) 506.

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the conviction under section 187 of the Indian Penal Code was to see if the conduct complained of came within the mischief of section 42 of the Code of Criminal Procedure.

The only other case which may be noticed is the case of *Ippili Magatha* v. *Emperor*(1) a decision of the Madras High Court, which, it was suggested in the course of the argument, appears to throw some doubt upon the correctness of the earlier Madras Full Bench decision. The facts of this case are not sufficiently reported but it appears from the meagre report that the accused were called upon to assist the Salt Inspector in witnessing a search but they refused to attend. Their excuse was that they were not compellable by the Inspector to attend the Court to give evidence without a summons in that behalf. It was pointed out that the duty for discharging which the accused were requisitioned by the Inspector to assist him in making a search was *ejusdem generis* with that mentioned in the second clause of section 187 of the Indian Penal Code. Consequently it was held that the refusal of the accused to assist the Inspector was rightly punished under the Penal Code. In my opinion this decision far from throwing any doubt on the correctness of the decision of the Full Bench of the Madras High Court directly affirms and in fact follows that decision accurately. But the importance of this ruling is that it appears to be the occasion for the amendment of the section 103. The Legislature felt that there was no duty on a person to come and attend and witness the search as it was not covered by section 42. Therefore they created a duty on a person to a limited extent as provided by the amendments already noticed.

In the result I would hold that the decision of the Madras Full Bench in *In the matter of Ramaya*

(1) (1920) A. I. R. (Mad.) 286.

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Naika(1) is the correct law to the extent indicated above and the effect of this decision is not in the least touched by the amendment of sub-clause (*5*) inserted in 1923 in section 103 of the Code of Criminal Procedure.

It was argued on behalf of the accused that in the present case the conviction is illegal because the Sub-Inspector admittedly had never issued any order in writing to them to attend and witness the search. On behalf of the Crown it was contended by the learned Assistant Government Advocate in reply that the provisions of sub-section (*5*) have no application to the facts of the present case because it was not necessary for the Sub-Inspector to issue an order in writing as the accused themselves offered to come and attend the search and in fact they did so. His argument is that sub-clause (*5*) only applies to those cases where the Sub-Inspector has reason to suspect that the person whom he will call upon to attend and witness the search will refuse to do so. He also contends that where the accused, as in the present case, themselves come to attend the search and witness it they are bound in law to sign the search-list. I am unable to agree with this contention. The opening clause of section 187 of the Indian Penal Code is :

> " whoever being bound by law to render or furnish assistance to any public servant ";

the words are not " whoever agrees or volunteers to render or furnish assistance to any public servant ". It may be that the Sub-Inspector has a statutory right to call upon the persons to attend and witness the search but the statute to my mind before the amendment in 1923 did not make it obligatory upon the persons so called even to attend and witness the search. This obligation and only this obligation has now been imposed for the first time by sub-clause (*5*) and in order to bring about and materialse this obligation the statute requires that an order in writing by

(1) (1903) I. L. R. 26 Mad. 419, F. B.

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the Sub-Inspector is necessary before the person called upon can be deemed to have committed an offence by his refusal or negligence to do so without reasonable cause. According to the well-known principles of Jurisprudence the requirements of a statute must be strictly observed and complied with before the liberty of the subject can be taken away by sending him to jail or by exacting a fine from him. The conviction is consequently liable to be set aside on this ground also.

I therefore, for the reasons indicated, agree with my learned brother Varma and hold that the convictions and sentences passed on the petitioners must be set aside.

CHATTERJI, J.—This is a reference under section 438 of the Code of Criminal Procedure relating to the conviction of three persons under section 187 of the Indian Penal Code. It was originally heard by Dhavle, J. but on account of the general importance of the question involved it has been referred to this Full Bench. The point is whether refusal by a search-witness to sign a search-list prepared under section 103 of the Criminal Procedure Code amounts to an offence within the meaning of section 187 of the Indian Penal Code. In the present case the search was conducted by an Excise Sub-Inspector in exercise of his powers under section 74 of the Bihar and Orissa Excise Act (Act II of 1915). By virtue of the provisions of section 85 of the Excise Act the search must be taken to have been held under section 103 of the Criminal Procedure Code. What happened was that the Excise Sub-Inspector called the three accused persons to attend and witness the search of a house. He did not issue any order in writing but they came at his verbal request and witnessed the search. Certain articles were recovered and a search-list was prepared by the Sub-Inspector. In the meantime a large number of people of the locality assembled and at their intervention the witnesses, though asked to do so, refused to

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sign the search-list. They were accordingly placed on trial for having committed an offence under section 187 of the Indian Penal Code. They were convicted and sentenced to pay a fine of Rs. 25 each.

Against the conviction and sentence the accused persons filed an application for revision in the court of the Sessions Judge. The learned Sessions Judge in referring the case to this Court relied on a Full Bench decision of the Madras High Court in *In the matter of Ramaya Naika*(1) where it was held that the signing of a search-list is an independent duty imposed on a search-witness by section 103 of the Criminal Procedure Code and does not come within the meaning of the word "assistance" used in section 187 of the Indian Penal Code.

Section 187 of the Indian Penal Code runs as follows :—

"Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

It is obvious that in order to constitute an offence under this section the person charged with the offence must be bound by law to render assistance to the public servant concerned in the execution of his public duty. Now it will be necessary to refer to the following relevant provision of section 103 of the Criminal Procedure Code :—

"(*1*) Before making a search under this Chapter the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate

(1) (1903) I. L. R. 26 Mad. 419, F. B.

to attend and witness the search, and may issue an order in writing to them or any or them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.....

(5) Any person who without reasonable cause refuses or neglects to attend and witness a search under this section when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code."

The last portion of clause (1) which has been underlined and the entire clause (5) were introduced in the Code by the amending Act of 1923. These amended portions of the section make it clear that when an order in writing is issued by the officer concerned to any person to attend and witness the search, the person so ordered is bound by law to obey it and if he fails to do so without any reasonable excuse he will be deemed to have committed an offence under section 187 of the Indian Penal Code. It follows that where no such written order has been issued by the officer no person is bound by law to render assistance to him in making the search. In the present case, as I have already stated, there was no written order issued by the Excise Sub-Inspector to the search-witnesses. No doubt they came to attend and witness the search on his verbal request but it cannot be said that they were bound by law to do so. Necessarily they were not bound to sign the search-list either. It is contended by the learned Assistant Government Advocate on behalf of the Crown that though at the verbal request of the Sub-Inspector the witnesses were not bound to attend and witness the search, when they did in fact come and witness the search they became search-witnesses and were therefore bound to sign the search-list under the provisions of clause (2) of section 103 of the Criminal Procedure Code which require that the search-list shall be signed

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by the witnesses. I am unable to accept this contention. It will be unreasonable to hold that if a person who is not bound by law to do a certain act valuntarily agrees to do it, he will be deemed to have made himself subject to any criminal liability that may attach to the non-performance of the act. Criminal liability is the creation of statute and cannot be created by agreement. I am, therefore, of opinion that the accused person in the present case did not commit any offence under section 187 of the Indian Penal Code, and the reference ought to be accepted and they should be acquitted.

In this view it is unnecessary to decide as an abstract proposition of law whether refusal to sign a search-list amounts to an offence under section 187 of the Indian Penal Code. But as the question has been referred to this Full Bench and was argued at the bar I desire to express my own opinion in the matter. By section 103, clause (*5*), of the Criminal Procedure Code, what is made penal is the failure to attend and witness a search in obedience to the written order issued under clause (*1*) of that section. To witness a search means to be present at the search and does not include the act of signing the search-list. Therefore the signing of the search-list is not an obligation imposed by the written order nor is the refusal to sign the list made punishable under clause (*5*) of section 103. But clause (*2*) of the section enjoins that the search-list shall be signed by the search-witnesses. This to my mind casts an obligation on them. Now the question is, whether failure to discharge this obligation amounts to refusal to render assistance to the officer concerned in the execution of his public duty. The duties of an officer conducting a search under section 103, Criminal Procedure Code are laid down in that section. He is required to make the search in the presence of two or more respectable witnesses of the locality and, if any articles are seized in the search, to make a list of them which shall be signed by those witnesses. Obviously it is his duty to

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to see that the search-list is prepared and completed according to the requirements of the section. Unless and until that is done his duty is not executed. In order to enable him to execute his duty it is necessary that the search-witnesses should assist him by signing the search-list because without their signatures the list will not be complete according to the provisions of law. With all respect to the learned Judges who decided the Full Bench case of *In the matter of Ramaya Naika*(1) I do not consider that the duty of signing a search-list imposed on the search-witnesses by section 103, clause (*2*), of the Criminal Procedure Code, can be regarded as an independent duty which does not come within the meaning of the word "assistance" used in section 187, Indian Penal Code. In my opinion, the persons who have become bound by an order in writing issued by the officer concerned under the last part of clause (*1*) of section 103 to become search-witnesses, are also under the obligation to sign the search-list that may be prepared and if they refuse to do so they are guilty of refusing to render assistance within the meaning of section 187, Indian Penal Code. If in the present case the Excise Sub-Inspector had issued an order in writing I think the search-witnesses by their refusal to sign the search-list would have committed an offence under section 187 of the Indian Penal Code.

In taking this view I regret I have to differ with great respect from my learned brothers, Varma and Manohar Lall, JJ.

In the result, however, I agree that the reference should be accepted and the accused acquitted.

S. A. K.

Reference accepted.

(1) (1903) I. L. R. 26 Mad. 419, F. B.

APPELLATE CIVIL.

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April, 12.

Before Wort, A.C.J. and Manohar Lall, J.

ABDUL MATIN

v.

BIDESI RAJWAR.*

Workmen's Compensation Act, 1923 (*Act VIII of* 1923), *sections* 10 *and* 30—*amount awarded as compensation to two workmen, whether can be consolidated for purposes of valuation of appeal—" instituted ", meaning of—ignorance of law, whether is a sufficient cause within the meaning of the proviso to section* 10.

The Commissioner acting under the Workmen's Compensation Act awarded Rs. 231-1-7 compensation for an accident to *M* and Rs. 462-3-2 to *B*. In both the cases the claim was made more than six months after the accident, but the Commissioner took the view that the workmen being of the coolie class could not be expected to know the rules, and accordingly entertained the claim. The employer appealed to the High Court.

Held, that the total amount of compensation allowed was immaterial and that the rights of one workman could not be governed by the conditions and circumstances of the case of the other workman and therefore the appeal against *M* who was awarded compensation below Rs. 300 was incompetent.

Held, also that the word ' instituted ' was not synonymous with the word ' made '. The word ' instituted ' is an act referable to the making or filing formally before the appropriate court of a claim for compensation.

Abdul Karim v. *Eastern Bengal Railway*(1), doubted and distinguished.

Held, also that the Commissioner could not excuse the delay on account of the ignorance of law on the part of the workmen.

Roles v *Pascall and Sons*(2), relied on.

* Appeal from Original Order no. 164 of 1937, from an order of J. S. Hardman, Esq., acting as Commissioner under the Workmen's Compensation Act, Gaya, dated the 22nd June, 1937.

(1) (1934) I. L. R. 61 Cal. 508, F. B.

(2) (1911) 1 K. B. 982.

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ABDUL MATIN v. BIDESI RAJWAR.

Appeal by the employer under the Workmen's Compensation Act, 1923.

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

N. K. Prasad II and *Ramanugrah Prasad*, for the appellant.

Choudhury Mathura Prasad, for the respondents.

WORT, A.C.J.—The appeal in this case is by the employer against the order of the Commissioner acting under the Workmen's Compensation Act granting compensation for an accident which arose out of and in the course of his employment of one Meghan awarding Rs. 231-1-7 for permanent disability and in the case of one Bidesi compensation amounting to Rs. 462-3-2. Under section 30 of the Act an appeal is given to this Court in a case which raises a substantial question of law, but it provides that no appeal lies in a case in which the amount in dispute is less than Rs. 300. So far as Meghan's case is concerned, that condition is not complied with, as I have already said, because the compensation awarded is only Rs. 231 odd although in the other case it was in excess of the Rs. 300, that is, in Bidesi's case. Now, it is contended by the learned Advocate, who appears on behalf of the appellant, that the words of the proviso to section 30 must be construed as entitling the employer to appeal where the total amount in the appeal involves a sum of more than Rs. 300. If that argument is to be accepted, then the rights of one workman would be governed by the conditions and circumstances of the case of the other workman. That in my judgment, as I have said, is an impossible contention. We must treat each of these cases as separate cases although they may be the subject-matter of one appeal, and that being so, the appeal so far as Meghan's case is concerned, in my judgment, does not lie to this Court.

The circumstances of both cases, however, are very similar with regard to the point which is in

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dispute. The learned Commissioner has come to the conclusion that sufficient cause within the proviso to section 10 has been shown entitling him to take cognizance of these cases, although the claim was made more than six months after the accident. That the claim before the Commissioner was made six months after the accident is not in dispute; but it is contended by the learned Advocate appearing on behalf of the workmen that the words "unless the claim for compensation with respect to such accident has been instituted within six months" must be construed as meaning a claim made against the employer and, although this Court is not entitled to go into the evidence, we have been referred to the evidence in support of that contention. The evidence of Bidesi himself is that he was three months in the hospital, that he received nothing from Matin Babu and afterwards when he went to him he refused to give him anything. Now, in my judgment, even if we had jurisdiction to go into the evidence it would be impossible to hold on that evidence a view contrary to that held by the Commissioner that either a claim for compensation had been made to the employer, or, to use the words of the section itself, a claim had "been instituted within six months." The question whether the words "has been instituted within six months" mean a claim against the employer, or the institution of legal proceedings before the Commissioner, has been the subject-matter of a decision of the Calcutta High Court in the case of *Abdul Karim* v. *Eastern Bengal Railway*(1) where Buckland, A.C.J. made the observation that the word "institute" in the first sub-clause of section 10 is an unfortunate substitution for the word "make" in the English Act. The words in the Act are the following: "unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of

(1) (1934) I. L. R. 61 Cal. 508, F. B.

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death." In my judgment, the question does not strictly arise in this case; but had it arisen and had it been necessary for the purpose of the decision of this case it would seem to me that the proviso to sub-section (*1*) of section 10 would make the matter clear. The words of the proviso are—

"Provided, further, that the Commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been instituted, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or institute the claim, as the case may be, was due to sufficient cause."

In my judgment, as I have said, it seems to me that those words are quite conclusive as regards the meaning of the words "instituted within six months". The word "institute" is an act referable to the making or filing formally before the appropriate court a claim for compensation. The learned Commissioner in this case appears to have taken that view of the section, and comes to the conclusion that sufficient cause has been shown in the following words:

"Meghan is of the coolie class, he was in hospital for a long while seriously ill, and cannot be expected to know the rules. Bidesi is also of the same class. The accident is not denied, as it was reported by the manager on the 16th February 1936. I consider that adequate cause has been shown."

It would appear from the order that he was of the opinion that in the case of Bidesi sufficient or adequate cause had been shown by reason of Bidesi's ignorance of his right or ignorance of the law. Sufficient authority against that view of the matter is a decision on the same words in the English Act in the case of *Roles* v. *Pascall and Sons*(1) where the Court of Appeal held that ignorance on the part of the workman of the existence of the Act was not a reasonable cause, and it is perfectly obvious, if I may be allowed to say so, with respect to the decision of the learned Judges of the Court of Appeal that their decision is obviously right and necessarily ignorance

(1) (1911) 1 K. B. 982.

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of the law cannot be any reasonable cause within the meaning of the Act. That being so, it seems to me that Bidesi's case should have been held by the Commissioner as not maintainable. So far as Meghan's case is concerned, I have already said that no appeal lies.

The appeal so far as Meghan's case is concerned will, therefore, be dismissed, but in the case of Bidesi the appeal will be allowed and the order of the learned Commissioner awarding compensation will be set aside. There will be no order as to costs.

MANOHAR LALL, J.—I entirely agree. In my opinion, when proper occasion arises it will be necessary to consider the correctness of the decision of the Calcutta High Court in *Abdul Karim* v. *Eastern Bengal Railway*(1). The question which arose in that case does not fall to be determined in the present case.

Appeal allowed in part.

J. K.

LETTERS PATENT.

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April, 20.

Before Wort, A.C.J. and Manohar Lall, J.

MANBODH BHAGAT

v.

JASWANT KUMAR SINGH.*

Landlord and tenant—suit for rent against some of the tenants, whether maintainable—Contract Act, 1872 (*Act IX of* 1872), *section* 43.

Where the landlord sued some of the tenants for the whole rent of a holding and it was contended that the action was not maintainable,

Held, that in view of the law as laid down in section 43 of the Contract Act, the suit was maintainable.

* Letters Patent Appeal no. 5 of 1937, from a decision of the Hon'ble Justice Sir Khaja Mohammad Noor, dated the 20th January, 1937, in Second Appeal no. 807 of 1934.

(1) (1934) I. L. R. 61 Cal. 508, F. B.

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Jagan Mohan Sarkar v. *Brojendra Kumar Chakrabarti*(1), followed.

Pilley v. *Robinson*(2) and *Kendall* v. *Hamilton*(3), referred to.

Appeal by the defendants.

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

Mahabir Prasad and *D. N. Varma*, for the appellants.

B. B. Saran and *A. Badri N. Sinha*, for the respondents.

WORT, A.C.J.—This is an appeal from a decision of a Judge of this Court in which the question was raised whether an action against some only of the tenants of a holding for the whole rent was maintainable. The learned Judge holding the view that such an action was maintainable, affirmed the decision of the lower court and dismissed the appeal.

The facts shortly are that defendants 1 to 10 with two other persons named Neta and Dukhan were tenants of this holding. It is said that there had been a separation and that the parties are actually in possession of individual plots or portions of the holding. It is, therefore, contended by Mr. Mahabir Prasad that the only action that could be brought against these ten persons was an action with regard to the separate plots of which they were in possession. That certainly would be an attempt to split up the holding and, by the provisions of the Bihar Tenancy Act applicable to this case, could not be done without the consent of the landlord.

The point in dispute was decided by a Full Bench of the Calcutta High Court (two of the learned Judges dissenting) to the effect that such an action was

(1) (1925) I. L. R. 53 Cal. 197, F. B.
(2) (1888) 20 Q. B. D. 155.
(3) (1879) L. R. 4 App. Cas. 504.

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maintainable, reliance having been placed on what was described as the general law as well as section 43 of the Indian Contract Act. So far as the general law was concerned, the persons in that case being tenants in common, there was privity of estate between individual tenants and the landlord, and, therefore, the landlord became entitled to the whole rent. Section 43 of the Contract Act is in my judgment perfectly clear as regards the matter:

> "When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract."

Now that quite clearly is a variation of the common law of England with regard to joint promisors. In *Pilley* v. *Robinson*(1) it was held that under the provisions of Order XVI, rule 11, of the Supreme Court Rules, "Where an action is brought against one only of several joint contractors the defendant is entitled as of right to have his co-contractors joined as defendants". Section 43 of the Indian Contract Act is a variation of that rule of the common law but even in England an action brought against one of several joint promisors is an action which is maintainable, but has this result as shown in the well-known decision of *Kendall* v. *Hamilton*(2)— if the other joint promisors had not insisted upon the joinder of their fellow promisor in the action against the defendant then the action continues and then the plaintiff failing to recover against one is precluded from bringing an action against the other. But with that we have no concern.

Mr. Mahabir Prasad's argument is based on the contention that the position of the defendants is the position of persons who are under the obligations entered into by the original tenants and their

(1) (1880) 20 Q. B. D. 155.
(2) (1879) L. R. 4 A. C. 504.

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ancestors. That altogether ignores the position of persons in possession of land governed by the Bengal Tenancy Act. It is a complete fallacy to say that these defendants are in possession as the heirs or successors of the original tenants. They are in possession of these several plots forming the holding (the subject-matter of this action) in their own right, and by reason of section 43 of the Contract Act, the landlord is entitled to sue one or all of them as he pleases. The question whether the Bihar Tenancy Act had been complied with in the sense that the plaintiff was entitled to a rent decree is another matter. We are concerned only in this case with whether the action itself is maintainable. Nor does Order 1, rule 6, assist the defendants in their contention. Order 1, rule 6, of the Code of Civil Procedure, merely allows a plaintiff to join as parties in the same suit all or any of the persons severally or jointly and severally and precludes the objection being taken that several causes of action as against several different persons have been wrongly joined in the action. In my judgment the decision (if I may say so with great respect to the judgments of the majority) in the case of *Jagan Mohan Sarkar* v. *Brojendra Kumar Chakrabarti*(1) was right and this action in the form which it had taken was maintainable.

I would confirm the decision of the learned Judge of this Court and dismiss the appeal with costs throughout.

MANOHAR LALL, J.—I entirely agree.

J. K.

Appeal dismissed.

(1) (1925) I. L. R. 53 Cal. 197, F. B.

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May, 5.

LETTERS PATENT.

Before Wort, A.C.J. and Dhavle, J.

RAI BAHADUR BANSIDHAR DHANDHANIA

v.

KAIROO MANDAR.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 92—*subrogation—purchaser paying previous mortgagees which he had undertaken to pay, if entitled to subrogation—express covenant.*

T and others conveyed their 16 annas shares to *D* and left the consideration for payment to the mortgagees. He however did not disclose one other mortgage and the mortgagee sued. *D* pleaded subrogation.

Held, that in the absence of an express covenant in the sale deed by the mortgagor giving him the right to subrogation he was not entitled to the relief by way of subrogation under section 92 of the Transfer of Property Act.

Jagmohan Das v. *Jugal Kishore*(1), *Hira Singh* v. *Jai Singh*(2) and *Naduvile Marathe Ikkali* v. *Kuruppath Ammalu*(3), relied on.

Appeal by defendant no. 2.

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

G. N. Mukherjie, for the appellant.

K. N. Lal, for the respondents.

WORT, A.C.J. and DHAVLE, J.—This is an appeal under the Letters Patent from a decision of a Judge of this Court. It arises out of a suit brought to enforce a mortgage executed by one Tahur in 1927. In 1930 Tahur and two co-sharers of his sold their

* Letters Patent Appeal no. 29 of 1937, from a decision of the Hon'ble Mr. Justice Manohar Lall (sitting singly), dated the 6th September, 1937.

(1) (1931) 36 Cal. W. N. 4, P. C.
(2) I. L. R. [1937] All. 880, F. B.
(3) (1935) I. L. R. 59 Mad. 359, F. B.

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entire sixteen annas share to defendant no. 2, the appellant before us. The consideration money for this sale was left with the appellant in accordance with an express covenant in the sale deed that the vendee would pay off two mortgages executed by Tahur and another co-sharer in 1918 and 1919 and one mortgage executed by the third co-sharer in 1924. The existence of the mortgage of 1927 executed by Tahur was not disclosed to the purchaser appellant, who set up the defence that he was entitled to subrogation in respect of the mortgages of 1918 and 1919. The trial court and the court of first appeal accepted the contention in principle, but declined to give the appellant any relief on the ground that although the mortgages covered other properties the appellant had not established what share of the burden was to fall upon the property in suit. On appeal by defendant no. 2 to this Court the learned Judge of this Court held it settled by the decision of the Judicial Committee in *Jagmohan Das.* v. *Jugal Kishore*(1) that " a purchaser of the equity of redemption who discharges a prior encumbrance which he is by contract bound to discharge is not entitled to the benefit of the equitable rule of subrogation for the simple reason that he merely performs his own obligation or covenant," or, to put it briefly, " covenant excludes subrogation ".

It has been contended on behalf of the appellant that the transaction is governed by section 92 of the Transfer of Property Act as amended in 1929, and this contention is not opposed by the other side. It has further been contended on behalf of the appellant that his rights are determined by the first and not by the third paragraph of the section. No decision of this Court on this point has been placed before us. The first paragraph of section 92 would undoubtedly have entitled the appellant as purchaser of the equity of redemption to subrogation if he had

(1) (1931) 36 Cal. W. N. 4, P. C.

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redeemed the prior mortgages on his own account and indepedently of any agreement with the mortgagor who is specifically excluded in this paragraph; but the appellant paid off the prior mortgagees with monies that were left with him for the purpose by the vendors-mortgagors. The third paragraph of the section, which it is claimed by the respondent would apply to the appellant, provides that a person who has advanced to a mortgagor money with which a mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated. The monies with which the previous mortgages in this case were paid off were clearly monies that had been advanced to the mortgagors by the appellant. That they were not paid into the hands of the mortgagors is immaterial, for it was by agreement with them (if not at their instance) and in pursuance of what the learned Judge of this Court has called an express covenant that the appellant actually paid them to the old mortgagees, though even in the absence of an express covenant the purchaser would be under an implied obligation to pay off the prior mortgages on the mortgagors' account if the consideration money were left with him for the purpose. In such a case the third paragraph only entitles the person who has advanced the money to subrogation "if the mortgagor has by a registered instrument agreed that such person shall be so subrogated". There was no such agreement in the present case, and the appellant is, therefore, not entitled to subrogation. This view of the law as laid down in section 92 is in accordance with the view that has ultimately prevailed in the Allahabad High Court, as will be seen from the recent case of *Hira Singh* v. *Jai Singh*(1) decided by a Full Bench of five Judges. Much the same view of section 92 was taken by a Full Bench of three Judges in Madras—*Nadivile Marathe Ikkali Amma's Daughter Tavazhi Manager Lakshmi Amma* v. *Kuruppath Ammalu Amma's son Sankara Narayana*

(1) I. L. R. [1937] All. 880, F. B.

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Menon(1). The matter would scarcely have been open to argument if the decision of the Privy Council in the case of *Jugmohan Das* v. *Jugal Kishore*(2), referred to by the learned Judge of this Court, had proceeded on the new section. But the principle on which that decision proceeded, namely, that covenant excludes subrogation, is clearly reflected in the new section also, which in the first paragraph deals with persons (other than the mortgagor) paying off previous mortgages on their own account and in the third paragraph deals with subrogation by agreement with the mortgagor who raises monies to pay off some previous mortgage. In our opinion the view taken by the learned Judge of this Court is correct, and we must dismiss this appeal with costs.

J. K.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Manohar Lall and Chatterji, JJ.

1938.

June, 13, 14.

MAKSOOD ALI

v.

PRESIDENT, UNION BOARD.*

Code of Criminal Procedure, 1898 (*Act V of* 1898) *section* 133—*public nuisance—magistrate, whether can prohibit a trade which is a nuisance—prescriptive right.*

Section 133 of the Code of Criminal Procedure empowers a Magistrate to prohibit the carrying on of a business which is dangerous to the health of the community in a particular locality, if he finds it to be a nuisance.

No length of enjoyment can legalise a public nuisance involving actual danger to the health of the community.

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*Criminal Reference no. 18 of 1938, made by T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, in his letter no. 1834-M., dated the 30th April, 1938.

(1) (1935) I. L. R. 59 Mad. 359, F. B.

(2) (1931) 36 Cal. W. N. 4, P. C.

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Municipal Commissioners of the Suburbs of Calcutta v. *Mahomed Ali*(1) and *Municipal Commissioners for the Suburbs of Calcutta* v. *Amanat Ali*(2), followed.

Reference under section 438 of the Code of Criminal Procedure, 1898.

The case was first heard by Manohar Lall, J. who referred it to a Division Bench.

On this reference.

M. Rahman and *Syed Imam Hasan*, in support of the reference.

Awadhesh Nandan Sahay and *Vishnu Deva Narayan*, against the reference.

MANOHAR LALL, J.—This is a reference by the Judicial Commissioner of Chota Nagpur recommending that the order of Mr. S. W. A. Bilgrami, Deputy Magistrate with first class powers at Daltonganj, dated the 25th of February, 1938, passed under section 133 of the Code of Criminal Procedure against the opposite party may be modified in the manner suggested by the learned Judge. The order passed was that the opposite party as butchers do close the business of slaughtering animals and selling meat and beef in their respective houses within a month. The learned Judicial Commissioner thought that this order was far more drastic than was warranted by the findings and therefore recommended that, as the effect of this order would be to deprive the butchers of their means of livelihood, they should not be deprived of those means without being given a chance to improve their methods. They have been admittedly carrying on the business up to the date of the order. The learned Judge recommended that the order should be altered in this wise that an order should be passed in these terms that the butchers

(1) (1871) 7 Beng. Rep. 499.
(2) (1871) 7 Beng. Rep. 516.

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may be ordered " to regulate their business in such a way as to eliminate the defects noticed ".

We have heard the learned Advocate on behalf of the opposite party and Mr. Awadesh Nandan Sahay on behalf of the Crown.

The proceedings were started as a result of an application before the Subdivisional Magistrate of Daltonganj filed by the tahsildar of the Union Board of Garhwa, dated the 6th of October, 1937. The allegations in that petition were, in brief, that

> " owing to the slaughter-house being near the public institutions and the way in which the slaughter-house is kept and the meat and beef are kept for sale the butchers were creating a great nuisance to the public and the members of the public living in that locality and to the general passers by."

It was also alleged that the bones and hides that are kept in the houses of the opposite party give out bad smell causing a complete nuisance to the public in the neighbourhood. For several years past the Health Officer of the school and the other authorities were alleged therein to have pointed out that the existence of this slaughtering house and the carrying on of the trade so close to the High English School had the result that the hostel and the school were rendered insanitary and undesirable. The Inspector of Chota Nagpur Division, it stated, had also strongly condemned the existence of this slaughter-house and had directed the authorities of the school to take proper steps in the matter. The Union Board, it was then stated in the application, made every attempt to stop the nuisance but owing to the alleged obstinacy of the opposite party the nuisance still continued and now that the nuisance had become very great and was injurious to the health and physical comfort of the community he, the petitioner, prayed that proper proceedings should be taken to stop and prohibit the nuisance.

Seven witnesses were examined on behalf of the complainant. We have gone through the evidence of

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these witnesses at length as we have been invited to do so by the learned Advocate for the opposite party who insisted that there was no evidence whatsoever to justify the finding of the Magistrate that these slaughter-houses (private) were a nuisance. Several of the important witnesses are public officers whose evidence is entitled to a great weight and the learned Magistrate who had the witnesses before him had no hesitation whatsoever in relying completely upon the statements elicited from them. Witness no. 1, who is a Tahsildar of the Union Board, states that

"the houses of the accused are east of the road. On the west side of the road there is the Garhwa High English School which has a hostel. The thana and the hostel are close to the school. The slaughter of cattle in those courtyards is a nuisance to passersby as the sight and the smell are both offensive. The hides are kept in those courtyards. In rainy season there is very bad smell."

Witness no. 2 (Mr. J. N. Gupta) speaks of the previous reports which were submitted by him on this matter from time to time and he speaks in his evidence in these words:

"I inspected the school on the 25th April 1936.....When I was giving lantern lecture in the school compound on 25th April 1936 at about 6-30 P.M. I felt stinking smell which was rather nauseating which might be due to tanning of raw hides.....I asked the Headmaster to take necessary steps for the removal of the slaughter-house from the vicinity of the school."

Witness no. 3 for the prosecution is a Medical Officer of the school. He states that the Headmaster drew his attention to the existence of the slaughter-house near the school which was 50 yards off and in answer to the question put by the court he stated that

"bad smell comes from the side of the slaughter-house when wind blows from that side. During inspection I smelt the bad smell coming from that side."

Witness no. 4 for the prosecution is an officer in charge of the police-station at Garhwa—he says that

"bad smell comes from the slaughter-house"

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and he gives his reason for not taking any steps in the matter because he says that he understood that the school authorities were taking necessary steps for the removal of the slaughter-house. Witness no. 5 is a shopkeeper of the village who states that the slaughter-houses in question are visible from the road and are kept in bad condition and bad smell comes therefrom, the houses of the accused are katcha houses. The next witness is also a man of that place and is a cultivator and sweetmeat seller—he says that the houses of the opposite party give very bad smell, the bad smell is felt when strong wind blows. The last witness is the Headmaster himself who says in his evidence,

"frequently bad smell comes from the houses of the accused persons to the school classes, and the hostel and Headmaster's quarters. Within the school compound we often find pieces of meat and bones dropped by birds or dogs. Sometimes when the smell becomes unbearable, we have to dismiss the classes."

We were also taken through the documentary evidence in the case. This completely corroborates and supports the oral evidence which has just been summarised.

The evidence which I have briefly summarised above was accepted by the learned Magistrate who heard these witnesses and saw their demeanour in the witness-box. I cannot see any error in law which he has committed in accepting this overwhelming evidence and I hold that the conclusion at which he has arrived was absolutely justified by the evidence. I am not referring to the evidence of the opposite party because the learned Magistrate has given good reasons why he cannot place any reliance upon that evidence and as a court of fact his decision is final.

The question then arises whether the recommendation made by the learned Judicial Commissioner should be accepted. Now it is to be remembered that the learned Magistrate had complete jurisdiction to adopt either of the courses provided in section 133.

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Sub-clause (*1*) itself contemplates that a Magistrate may order that the trade or occupation be prohibited or regulated. In this case the only dispute between the parties was whether the trade which was being carried out by the opposite party should be ordered to be stopped. There was no dispute that it should be regulated in any manner. The opposite party were insisting that they were carrying on their trade in a proper manner and that it was in these circumstances not a nuisance; and when that matter has been decided against them it is not within the province of a court of revision to impose some conditions which the evidence in the present case does not justify and to which the minds of the parties were never directed. The learned Magistrate in his explanation has pointed out why he did not think it proper to pass a conditional order for regulating the trade of the butchers. He says that he was of opinion that the court was not able to frame a set of rules, or a set of conditions for regulating the slaughtering of animals and selling of meat by the opposite party. He also thought that the imposing of conditions would lead to a never-ending trouble between the butchers and the Garhwa Union because there will be complaints by the Union that the conditions were violated in this way and that way and the best course was to prohibit the trade (as he was fully empowered to do under the law) and to enable the butchers to fix their trade at some other convenient place distant from the school premises. Ordinarily a Magistrate is not allowed to supplement his judgment by means of an explanation; but in this case as the question was raised for the first time before the Judicial Commissioner and later on before this court on behalf of the opposite party (there being nothing in the evidence whatsoever which suggested that the trade could be or should be allowed to be regulated in any particular manner) we have allowed ourselves to be impressed by the explanation which the learned Magistrate has given. In these circumstances we think that the learned Magistrate had

exercised his discretion in a proper and legal manner in passing the order which he has done.

We have derived assistance from the two leading cases on this point in *Municipal Commissioners of the Suburbs of Calcutta* v. *Mahomed Ali*(1) and *Municipal Commissioners for the Suburbs of Calcutta* v. *Amanat Ali*(2). Both these cases related to similar facts. At page 535 the learned Judges observed: "The evidence of the witnesses for the prosecution goes to show that this slaughter-house, constructed as it is, could not be carried on without creating nuisance. Looking at the whole evidence, we think it cannot be said that the cause shown ought to have satisfied the Magistrate that his order ought not to have been made. We cannot say that in poiut of law he was not fairly justified in coming to the conclusion, upon the evidence before him, that the trade of slaughtering cattle, *as carried on by the defendants* at the Kurya slaughter-house, was injurious to the health of the community; nor can we say that his order that such trade should be suppressed, was not a legal and proper order". These remarks apply *a fortiori* to the facts of the present case. At page 507 of the earlier case the following instructive passage occurs: "As observed by Lord Tenterden, in a case somewhat similar to the present, *Rex* v. *Cross*(3) the license would not entitle the defendant to continue the business one hour after it became a public nuisance to the neighbourhood. Although Commissioners had taken no steps under Act VII of 1865 against the defendants, the defendants had ample warning to set their house in order by the prosecution instituted against them by many hundreds of their neighbours in the course of last year". In the present case also the opposite party though repeatedly informed from at least 1930 have not set their houses in order. As to the argument that the butchers had

(1) (1871) 7 Beng. Rep. 499.

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prescriptive right to continue the trade which existed in some form or other in this locality from 1844 the learned Judges observed as follows: "As to the claim of a prescriptive right alluded to by the learned Judge, we may observe that no prescriptive right to maintain the slaughter-house in its present condition was set up before the joint Magistrate, nor could any such right have been effectually asserted; first, because it appears on the evidence that the slaughter-house has existed in its present position only for about six, or at most ten years; (as also in the case before us): secondly, there is no evidence that, even during the whole of that time, the place was used in the same manner and the stenches emitted to the same extent as at present; thirdly, in our opinion it is clear that no length of enjoyment can legalize a public nuisance involving actual danger to the health of the community". It is unfortunate that this order may to some extent interfere with the carrying on of the trade by the butchers who do not seem to be persons in substantial positions in life, but when people choose to live in a well ordered society their personal liberties are often curtailed in the interest of the public at large and indeed the health of the public must be considered to be of paramount importance. Following the reasoning in the two cases referred to above I consider that the facts as found by the learned Magistrate justified him in making the order which is recommended for revision and I have no hesitation in discharging the reference and confirming the order passed by Mr. S. W. A. Bilgrami.

CHATTERJI, J.—I agree.

J.K.

Reference discharged.

REVISIONAL CRIMINAL.

Before Khaja Mohamad Noor and Rowland, JJ.

1938.
July, 28.

RAMANAND TELI

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 215—*person suspected of theft, whether can be convicted of offence under section* 215—*saving clause, import and meaning of—onus.*

A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under section 215 of the Penal Code, 1860.

Emperor v. *Mukhtara*(1), followed.

The saving clause in section 215 is in the nature of an exception, and once the elements of an offence under that section have been established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on the defence, particularly where there has been a spontaneous demand of money by the accused in circumstances indicating an intention not to bring the offender to justice.

Arman Ulla v. *King-Emperor*(2), followed.

Emperor v. *Mangu*(3), distinguished.

Application in revision.

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

The case was first heard by Chatterjee, J. who referred it to a Division Bench.

On this reference

*Criminal Revision no. 319 of 1938, from an order of Rai Bahadur Saudagar Singh, Sessions Judge of Shahabad, dated the 5th May, 1938, affirming an order of Kedar Nath Sinha, Magistrate, First Class, Arrah, dated the 30th March, 1938.

(1) (1924) I. L. R. 46 All. 915.
(2) (1932) 37 Cal. W. N. 360.
(3) (1927) I. L. R. 50 All. 186.

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RAMANAND TELI v. KING-EMPEROR.

S. Naqui Imam and *S. M. Siddique*, for the petitioners.

Assistant Government Advocate, for the Crown.

ROWLAND, J.—The two petitioners were convicted under section 215 of the Indian Penal Code by a Magistrate of first class and their appeals to the Sessions Judge were dismissed.

The substance of the prosecution case was that the cycle of Kedarnath having been stolen, the accused tried to get Rs. 10 from Kedarnath as consideration for getting the cycle back for him. It was Ramanand who actually accosted the complainant, but Moizuddin was with him, and the transaction is said to have been between the complainant and both the accused. Kedarnath haggled and would only pay Rs. 2 and in the sequel he did not get back his cycle.

The case coming before a single Judge has been referred to a Bench for hearing as it gives rise to a point of law.

The first contention raised was that the accused may be themselves thieves, and in that event section 215 should not be held to be applicable to them. In the Allahabad High Court this view was at one time held; but the law is now held in that court to be as laid down in *Emperor* v. *Mukhtara*(1) which, in my opinion, correctly states the law. A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under section 215.

The second point is that the section only applies "unless the accused uses all means in his power to cause the offender to be apprehended, etc." and we are asked to interpret this as making failure to use means to secure the apprehension of the offender as one of the ingredients in the offence which it is necessary for the prosecution to establish in order to

(1) (1924) I. L. R. 46 All. 915.

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ROWLAND, J.

obtain a conviction. For this reference was made to *Emperor* v. *Mangu*(1). The facts of that case appear to be rather different from those before us. The complainant had approached Mangu and asked him to give a clue for recovery of the missing property, and as the Judges pointed out " there was no impropriety in either the request of Chhajju Singh, the complainant, or in the answer of Mangu that it was possible that a clue might be found but that the tracing would be a matter of money ". In the present case, however, it was the accused who accosted the complainant and told him that if he spent Rs. 10 his cycle could be recovered—that is to say, the very terms in which complainant was approached implied that there was expected to be no questions asked as to the actual offender and no attempt at his apprehension or conviction. On Kedar paying Rs. 2, Ramanand told him that the cycle would be restored to him on 7th February, 1938, in the morning, but it was not done. The circumstances of this case appear more analogous with those of *Arman Ulla* v. *King-Emperor*(2) where the accused persons demanded money and realised it on the pretext of helping the complainant to recover a stolen boat. The distinction between the ingredients of the offence under section 215 and that under section 214 which involves screening of an offender from legal punishment is clearly brought out, and it is said that the saving clause is of the nature of an exception, and " once the elements of an offence under section 215 have been established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on the defence ". With that statement of the law we agree, particularly where there has been a spontaneous demand by the accused of money in circumstances indicating an intention not to bring the offender to justice.

(1) (1927) I. L. R. 50 All. 186.
(2) (1932) 37 Cal. W. N. 360.

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Finally it was said that the sentence was too severe. But in this matter we do not feel disposed to interfere.

The application is dismissed.

ROWLAND, J.

The petitioners should surrender to their bail and serve out the remainder of their sentences.

KHAJA MOHAMAD NOOR, J.—I agree.

Rule discharged.

S.A.K.

REVISIONAL CRIMINAL.

Before Khaja Mohamad Noor and Rowland, JJ.

1938.

July, 29.

SHEO AHIR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 195 *and* 476—*unlawful assembly and obstruction to attachment—sanction to prosecute, when necessary—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 143 *and* 186—*several offences committed in course of same transaction—sanction necessary in regard to some—prosecution in regard to others, whether requires sanction.*

Where the petitioners were convicted under section 143 of the Penal Code for being members of an unlawful assembly with the object of rescuing cattle attached by a Civil Court peon and it was contended in revision that the conviction was bad in law as there was no sanction of the court which issued the writ of attachment, *held*, that no sanction was necessary. If in course of the same transaction a number of offences are committed, some requiring sanction for prosecution of some authority or the other, and others not requiring sanction, it is not necessary that the prosecution for such

*Criminal Revision no. 326 of 1938, from an order of M. M. Philip, Esq., I.C.S., Sessions Judge of Gaya, dated the 4th May, 1938, modifying an order of Rai Sahib B. C. Mukharji, Magistrate of First Class, Gaya, dated the 25th March, 1938.

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offences which do not require such sanction should depend upon the obtaining of the sanction for prosecution of those offences which required such sanction. The law requires that for the prosecution of a particular offence sanction of the court should be obtained; but it does not say that if in course of the commission of an offence which requires sanction for prosecution other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these latter offences unless the court sanctions the prosecution of the former.

Emperor v. *Sri Narain Singh*(1) and *Ravanappa Reddi. In re*(2), distinguished.

Krishna Pillai v. *Krishna Konan*(3) and *Tarsu Beg* v. *Muhammad Yar Khan*(4), relied on.

Application in revision.

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

The case was first heard by Chatterjee, J. who referred it to a Division Bench.

On this reference

N. K. Prasad II, for the petitioners.

Assistant Government Advocate, for the Crown.

KHAJA MOHAMAD NOOR, J.—The petitioners were convicted by a first class Magistrate of Gaya under section 143 of the Indian Penal Code and were sentenced to three months' rigorous imprisonment and a fine of fifteen rupees each—in default of payment of fine they were to undergo another one month's rigorous imprisonment. They were also convicted under section 342 of the Indian Penal Code, but no separate sentence was passed in respect of this offence.

On appeal the learned Sessions Judge has upheld the conviction under section 143 of the Indian Penal

(1) (1924) I. L .R. 47 All. 114.
(2) (1931) I. L. R. 55 Mad. 343.
(3) (1907) I. L. R. 31 Mad. 43.
(4) (1924) A. I. R. (All.) 296.

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Code, has maintained the sentences but has set aside the conviction under section 342 of the Indian Penal Code.

The prosecution case shortly stated is that the landlords of the petitioners who had obtained four decrees against them, took out four warrants for attachment of their moveable properties. The petitioners formed the majority of the judgment-debtors. On 9th November, 1937, four civil court peons along with two landlords' men went to the village to effect the attachment. They attached about thirty heads of cattle of the judgment-debtors and were proceeding to attach more when the petitioners along with others came armed with lathis, rescued the cattle and chased the two landlords' men, the identifiers, till they took shelter in their kachahri. It was alleged that the mob chained the door of the kachahri from outside and also restrained the peons for some time. One Dalip Narain Singh heard about the occurrence, came to the village, reasoned with the mob and then the two identifiers, Somnarain Singh and Bansidhar Narain Singh, were allowed to come out of the kachahri.

The learned Magistrate found the occurrence to be entirely proved and convicted and sentenced the petitioners as stated above.

The learned Sessions Judge, though he held the main occurrence to be true, has not believed the shutting up of the identifiers in the kachahri, and, therefore, has set aside the conviction under section 342 of the Indian Penal Code.

The case was at first placed before a learned Judge of this court, who thinking that a question of law arose which required consideration, has referred the case to a Division Bench.

The main argument of the learned Advocate for the petitioners is that the case required sanction of

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the court which issued the warrants of attachment, and without the sanction the prosecution and the conviction were illegal. I find no authority in support of the proposition urged by the learned Advocate. If there is an assemblage of five or more men with the common object of resisting by force or show of force the execution of processes of law every one of them is guilty of being a member of an unlawful assembly whether resistance is offered or not. If force is used by any member of the assembly, each one of them becomes liable for rioting under section 147. But if actual resistance is offered, a separate offence of resistance of the process of law punishable under section 186 of the Indian Penal Code is committed. Being member of an unlawful assembly and resistance to the process of law are two separate offences though they may be committed in the course of the same transaction. If in course of one transaction a number of offences are committed some requiring for prosecution sanction of some authority or the other and others not requiring such sanction, it is not necessary that the prosecution for those offences which do not require such sanction should depend upon the obtaining of the sanction for prosecution of those offences which required such sanction. The law requires that for the prosecution of a particular offence sanction of the court should be obtained; but it does not say that if in course of the commission of an offence, which requires sanction for prosecution other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these latter offences, unless the court sanctions the prosecution of the former. Take, for instance, a case in which in the course of resistance of process of law the offender commits murder or other cognate offences: can it be said that the police or the magistracy are incompetent to take cognizance of those offences, simply because they were committed while resisting the process of law? The learned Advocate for the petitioners has argued that as long as there is

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an unlawful assembly with the object of resisting by force the execution of a writ but no resistance is offered, the police or the magistracy is competent to prosecute the members of the assembly for being members of an unlawful assembly, but once the members of the assembly do actually resist the writ of the court, the offender cannot be prosecuted even for the offence of the unlawful assembly or rioting without the sanction of the court. The argument is untenable and the learned Advocate has not been able to place before us any authority in support of his contention. He relied upon the decision in *Emperor* v. *Sri Narain Singh*(1). The judgment of the court is a very short one and commences at about the middle of page 117 and ends at the top of page 118. It has absolutely no application to the facts of this case and does not in the least support the contention of the learned Advocate. In this case the conviction of the accused was under section 173 of the Indian Penal Code. This is one of those sections for which sanction is necessary before a magistrate can take cognizance of it. There was, however, no sanction. The learned Magistrate, who convicted the accused, in his explanation stated that he took cognizance not of the offence punishable under section 173 of the Indian Penal Code but one punishable under section 225B of the Indian Penal Code and having once taken cognizance, he punished the offender under section 173 of the Indian Penal Code. His point of view seems to have been that the prohibition of the law was against taking cognizance and not against conviction. The learned Judge of the Allahabad High Court pointed out that this was not permissible and no device could be adopted to evade the clear words of section 195 of the Code of Criminal Procedure. It is clear that this case has absolutely no application.

We have found a case [*Ravanappa Reddi, In re*(2)] which at first sight may appear to support

(1) (1924) I. L. R. 47 All. 114.
(2) (1931) I. L. R. 55 Mad. 343.

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the contention of the learned Advocate, but in fact it does not. There a private party complained before a magistrate of an offence which was obviously punishable under section 193 of the Indian Penal Code but he showed the offence to come within sections 467 and 109 of the Indian Penal Code. Their Lordships of the Madras High Court held that the offence was really one under section 193 of the Indian Penal Code and as such required sanction, and, therefore, they set aside the conviction as being without jurisdiction for want of sanction. Here also it was not a case of any independent offence committed while committing an offence for which sanction is needed. The very offence for which the accused was convicted was held by the court to be coming under section 193 of the Indian Penal Code.

Apart from the considerations which I have set out on the meaning of the law, the view which we are inclined to take is supported by observations in some decided cases. In the case of *Krishna Pillai* v. *Krishna Konan*(1) a man was assaulted when trying under the orders of an amin to open the door of the judgment-debtor's house. The argument advanced before their Lordships of the Madras High Court was exactly the same which has been advanced before us by the learned Advocate for the petitioners. But it was held that as hurt was an offence for which a separate charge was permissible under section 323 of the Indian Penal Code, it was immaterial that there was no sanction and that the complaint was ordered to be proceeded with.

In *Tarsu Beg* v. *Muhammad Yar Khan*(2) Stuart, J. observed as follows :—

" The law on the subject is this. No complaint, the institution of which requires sanction under section 195 of the Code of Criminal Procedure,

(1) (1907) I. L. R. 31 Mad. 43.
(2) (1924) A. I. R. (All.) 296.

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can be entertained unless that sanction exists. But when a complainant combines such a complaint with a complaint which does not require sanction, the court must investigate the complaint which does not require sanction while refusing to investigate the complaint which requires it."

In this case also the Magistrate was ordered to proceed with the complaint. Therefore, on the whole, I have no hesitation in holding that there is no substance in the contention of the learned Advocate.

The second contention of the learned Advocate was that as the civil court which issued the warrant of attachment took no steps on the report of the peons, we should infer that the peon's report did not disclose the commission of any offence; and, therefore, the case must be false. I am unable to accept this contention for more reasons than one. First of all, the report is not before us. If the petitioners had any reason to believe that the reports of the peons who were examined as witnesses in this case and who supported the version of the complainant were not according to their evidence in court, it was open to them to ask the trying magistrate to send for the reports and to confront the peons with them. This was not done. It cannot be presumed that the evidence of the peons was inconsistent with their reports. Secondly, because the learned Munsif, for some reason or other which is not before us, did not think it fit to take steps under section 476 of the Code of Criminal Procedure for the disobedience of his warrant, there is no reason why the complainant should be debarred from getting his redress in criminal court for offences for which the sanction of the court was not necessary. The occurrence is said to have taken place on 9th November, 1937, and the complainant in this case was examined on oath on 11th November, 1937. It may be that the civil court, having been apprised that a criminal case in connection with the same incident was pending before a

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magistrate, did not think it fit to take action under section 476 of the Criminal Procedure Code, thinking that the offenders could be adequately punished for an offence which did not require the sanction of the civil court.

Finally it was urged that the sentence was severe. I do not think so. I look upon the defiance of the processes of law as a serious offence, as they hamper the administration of justice. If allowed to be committed with impunity, the prestige of the court is lost. In my opinion in view of the manner in which the offence, as found by both the courts, was committed, the sentence is not only adequate but, in my opinion, somewhat lenient.

The application is rejected.

The petitioners should surrender to their bail and serve out the unexpired portion of their sentences.

ROWLAND, J.—I agree.

Rule discharged.

J.K.

APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

BAHURIA RAM SAWARI KUER

v.

DULHIN MOTIRAJ KUER.*

1938.

August, 16.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 2(2) *and Order VII, rule* 11—*Order rejecting memorandum of appeal as insufficiently stamped, whether is appealable as a "decree"—Order VII, rule* 11(*c*), *whether applies to*

*Appeal from Appellate Decree no. 289 of 1937, from a decision of S. K. Das, Esq., I.C.S., District Judge of Saran, dated the 18th November, 1936, affirming a decision of Muhammad Shamsuddin, Munsif at Chapra, dated the 28th September, 1936.

1938.

BAHURIA RAM SAWARI KUER v. DUTHIN MOTIRAJ KUER.

appeals—Court, whether bound to give time to appellant to make up the deficit before rejecting memorandum of appeal.

An order of rejection of a memorandum of appeal on the ground that it was insufficiently stamped (particularly when it is passed without giving the appellant any time at all to make up the deficit), is a "decree" and is appealable as such.

Suraj Pal Pandey v. *Uttim Pandey*(1), *Rup Singh* v. *Mukhraj Singh*(2) and *Ayyanna* v. Nagabhooshanam(3), followed.

Jnanadasundari Shaha v. *Madhabchandra Mala*(4), distinguished.

The provisions of Order VII, rule 11, Code of Civil Procedure, 1908, apply to appeals and, therefore, it is the duty of the court, in cases coming under clause (*c*), to require the appellant to make up the deficiency in court-fee within a time to be fixed by the court before rejecting the memorandum of appeal.

Achut Ramchandra Pai v. *Nagappa*(5) and *Jananadasundari Shaha* v. *Madhabchandra Mala*(4), followed *quoad hoc*.

Baijnath Prasad Singh v. *Umeshwar Singh*(6), applied.

Akkaraju Narayana Rao v. *Akkaraju Seshaman*(7), not followed.

Held, further, that if an insufficiently stamped memorandum of appeal has in fact been accepted by the court by inadvertence, time may be given to the appellant to supply the deficiency.

Appeal by the defendants.

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

B. P. Sinha and *S. C. Chakravarty*, for the appellants.

(1) (1922) A. I. R. (Pat.) 281.
(2) (1885) I. L. R. 7 All. 887.
(3) (1892) I. L. R. 16 Mad. 285.
(4) (1931) I. L. R. 59 Cal. 388.
(5) (1913) I. L. R. 38 Bom. 41.
(6) (1937) I. L. R. 16 Pat. 600, S. B.
(7) (1914) 26 Ind. Cas. 33.

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BAHURIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER.

K. Husnain and *Jaleshwar Prasad*, for the respondents.

DHAVLE AND AGARWALA, JJ.—This is an appeal against an order of the District Judge of Saran, rejecting a memorandum of appeal on the ground that it was insufficiently stamped.

The learned advocate for the plaintiffs respondents has raised a preliminary objection that no appeal lies against such an order, citing in support *Jnanadasundari Shaha* v. *Madhabchandra Mala*(1). That, however, was a case in which the point actually decided was that though the District Judge had rejected a memorandum of appeal on the failure of the appellant to put in deficit court-fees by the time allowed, he had jurisdiction to entertain a fresh application for time under Order VII, rule 13, applying section 5 of the Limitation Act. In the case before us the District Judge rejected the memorandum of appeal as soon as the deficiency in court-fees was brought to his notice. In *Suraj Pal Pandey* v. *Uttim Pandey*(2), following the Allahabad and Madras rulings in *Rup Singh* v. *Mukhraj Singh*(3) and *Ayyanna* v. *Nagabhoosanam*(4), moreover, it was held in this Court that an order of dismissal by a District Judge construed as an order rejecting a memorandum of appeal for the appellants' failure to make up a deficit in court-fees is tantamount to a decree within the meaning of the Civil Procedure Code. An order of rejection passed without giving the appellant any time at all to make up the deficit would seem even more clearly to be a decree, for to such an order it is impossible to apply Order VII, rule 13, the provision on which the decision in *Jnanadasundari's* case(1) was rested. The learned Calcutta Judges

(1) (1931) I. L. R. 59 Cal. 388.
(2) (1922) A. I. R. (Pat.) 281.
(3) (1885) I. L. R. 7 All. 887.
(4) (1892) I. L. R. 16 Mad. 285.

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did indeed make it clear that in their opinion the definition of "decree" in section 2 as inclusive of the rejection of a plaint is not extended by section 107(2) to the rejection of a memorandum of appeal. But the cases of *Rup Singh* v. *Mukhraj Singh*(1) and *Ayyanna* v. *Nagabhooshanam*(2) were decided under the Code of 1882 which provided that an order rejecting a plaint "is within the definition" of "decree", and this provision is substantially reproduced in the present Code, even though the clause defining "decree" was materially modified in other respects in 1908. It may at first sight seem rather strange that the rejection of a plaint should under section 2 be deemed to be included in a decree and yet under Order VII, rule 13, should not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action; but this is probably to be got over by a reference to the usual words in the defining section (section 2) "unless there is anything repugnant in the subject or context". Be that as it may, the rejection of the memorandum of appeal in the present case was not rejection in any of the circumstances specified in any clause of rule 11 of Order VII, as happened in *Jnanadasundari Shaha's* case(3), and rule 13 only refers to rejection on the grounds given in rule 11. If it had been the intention of the Legislature to make the rejection of a memorandum of appeal in circumstances to which Order VII, rule 13, does not apply non-appealable, the rulings under the Code of 1882 would, it may be presumed, have led to a material change as regards the rejection of a plaint in the definition of decree or to a clear provision to that effect somewhere else in the Code of 1908. From this point of view it is impossible to hold that the rejection of the memorandum of appeal in the present case is not a decree (and is therefore not appealable

(1) (1885) I. L. R. 7 All. 887.
(2) (1892) I. L. R. 16 Mad. 285.
(3) (1931) I. L. R. 59 Cal. 388.

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as such) merely because section 107(2) of the Code, as Suhrawardy, J. pointed out, "does not purport to give the order passed by an appellate court the same effect as an order passed by an original court of a like nature". The preliminary objection must, therefore, be overruled.

The learned Government Pleader, who appears for the appellants, began by endeavouring to show that the memorandum of appeal was not in fact insufficiently stamped. This is, however, opposed to an express decision of the Taxing Judge in *T. K. Rowlins* v. *Lachmi Narain Jha*(1). The learned advocate referred to our recent Full Bench decision in *Thakan Chaudhuri* v. *Lachhmi Narain*(2) where several previous decisions relating to court-fees payable by a mortgagor decree-holder when he appeals or proceeds to execution were approved. But in the present case it was the defendants (the mortgagor and her transferees) that appealed to the lower appellate court. It has been pointed out in several cases that the relief that defendants in such suits have to seek from the appellate court is different from what a plaintiff appellant would have to seek. On this being realised, the point was not pressed, and it must be held that the appeal to the District Judge was not in fact sufficiently stamped.

It was next contended that the learned District Judge should not have summarily rejected the memorandum of appeal on noticing the deficiency, but ought to have given the appellants some time for filing the necessary stamps. Order VII, rule 11, which deals with the powers of original courts in such matters, has been recently considered by a Full Bench of this Court in *Baijnath Prasad Singh* v. *Umeshwar Singh*(3), and it has been held that it is the duty of the court in cases coming under clause (*c*) of rule 11 of Order VII to require the plaintiff to

(1) (1916) 3 Pat. L. J. 443.
(2) (1934) I. L. R. 14 Pat. 4, F. B.
(3) (1937) I. L. R. 16 Pat. 600, S. B.

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supply the requisite stamp paper within a time to be fixed by the Court before rejecting the plaint. It has been pointed out on behalf of the respondents that there has been some difference of opinion on the question whether Order VII, rule 11, applies to courts of appeal. The Bombay High Court, in *Achut* v. *Nagappa*(1), held that section 107(2) of the Civil Procedure Code does make Order VII, rule 11, applicable to appeals. This view was not accepted in Madras in *Akkaraju Narayana Rao* v. *Akkaraju Seshamma*(2), but the learned Judges in this case proceeded on what had been held in *Balkaran Rai* v. *Gobind Nath Tiwari*(3) regarding High Courts to which Order VII, rule 11 (*c*), is made inapplicable by Order XLIX, rule 3. In *Jnanadasundari Saha's* case(4) it seems to have been held that Order VII, rule 11, is applicable to the Court of the District Judge as a Court of appeal; and the same view is implied in *Suraj Pal Pandey's* case(5) which has been already referred to. In Allahabad and Calcutta the view also taken seems to be that if an insufficiently stamped memorandum of appeal has in fact been accepted by the Court by inadvertence, time may be given to the appellant to supply the deficiency. Now, this is what happened in the present case, for the memorandum of appeal was presented on the 17th of November, 1936 (the first open day after the Civil Court vacation), and was ordered by the District Judge on that date to be registered; it was rejected on the following day on a stamp report pointing out the deficiency in court-fees. The learned advocate for the respondents has relied on the observation in *Ram Sahay's* case(6) that section 149 should not be construed—and time extended—in such a way as to nullify section 6 of the Court-fees Act. But it was

(1) (1913) I. L. R. 38 Bom. 41.
(2) (1914) L. R. 26 Ind. Cas. 33.
(3) (1890) I. L. R. 12 All. 129, F. B.
(4) (1931) I. L. R. 59 Cal. 388.
(5) (1922) A. I. R. (Pat.) 281.
(6) (1917) 3 Pat. L. J. 74.

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also said in that case that "when the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the court may properly receive the appeal and allow time for the deficiency, if any, to be made good". The appellants (as already indicated) were the defendants in the mortgage suit, and they valued their appeal at the figure at which the plaintiffs had valued it in the trial court. According to the ruling in *Rowlins'* case(1), they ought to have valued it a little higher by including the interest pendente lite—a relatively small matter. There was also a number of rulings which would at first sight suggest that the appellant need not pay court-fees on such interest. It is plain that the learned Judges who decided *Ram Sahay's* case(2) would have had no hesitation, on the principles laid down by them, in giving such an appellant the benefit of section 149 or Order VII, rule 11. The argument for the appellants becomes all the more irresistible when we see that the stamp report about the deficiency was evidently dealt with by the District Judge without the knowledge of the appellants. The learned advocate for the respondents has endeavoured to argue that no consideration ought to be shown to the appellants, because after the rejection of their memorandum of appeal they applied to the District Judge under section 151 of the Civil Procedure Code, and when it was pointed out to them that their proper remedy was by an application under Order XLVII, rule 1, which required the payment of court-fees equal to half the court-fees payable on the appeal they took no further action. What this, however, has to do with the propriety of the order of rejection passed by the District Judge on the 18th of November, 1936, it is not very easy to see.

(1) (1916) 3 Pat. L. J. 443.
(2) (1917) 3 Pat. L. J. 74.

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DHAVLE AND AGARWALA, JJ.

The appeal must, in our opinion, be allowed, and the order of rejection passed by the lower appellate court set aside, the case being sent back to the lower appellate court for disposal in accordance with the law.

S. A. K.

Appeal allowed.

FULL BENCH.

1938.

August, 22.

Before Wort, A.C.J., Varma and Manohar Lall, JJ.

NRIPENDRA NATH CHATTERJEE

v.

KULDIP MISRA.*

Landlord and tenant—sale in execution of rent decree—notification of arrears for subsequent years in sale proclamation, effect of—landlord auction-purchaser, how far affected by the notification—suit for rent for those years, whether maintainable.

Where in a sale proclamation it was notified that the arrears of rent for subsequent years were an incumbrance, *held*, that the auction-purchaser purchased the holding subject to the incumbrance. A landlord auction-purchaser was in no better position than a stranger purchaser and therefore, he was debarred from bringing a suit for rent for those years.

Sailaja Prasad Chatterjee v. *Gyani Das*(1) and *Kamaldhari Lal* v. *Tarachand Marwari*(2), followed.

Jugal Kishore Narayan Singh v. *Bhatu Modi*(3) and *Haradhan Chattoraj* v. *Kartik Chandra Chattopadhaya*(4), distinguished.

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*Appeal from Appellate Decree no. 419 of 1936, from a decision of Babu Kshetra Mohan Kumar, Subordinate Judge of Bhagalpur, dated the 11th March, 1936, affirming a decision of Babu Damodar Prasad, Munsif of Bhagalpur, dated the 16th September, 1935.

(1)((1912) 18 Cal. L. J. 29.

(2) (1934) 16 Pat. L. T. 73.

(3) (1923) I. L. R. 2 Pat. 720.

(4) (1902) 6 Cal. W. N. 877.

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Appeal by the plaintiff.

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

The appeal was heard in the first instance by Wort, J. who referred it to a Division Bench by the following judgment:

WORT, J.—I propose to refer this case to a Division Court for decision.

I find some difficulty in the decisions of this court, particularly the case of *Jugal Kishore Narain Singh* v. *Bhatu Modi*(1) and the case of *Kamaldhari Lal* v. *Tarachand Marwari*(2) decided by my brother James. From the decision of my brother James, I should feel inclined to hold that there can be no difference between an auction-purchaser being a third party and an auction-purchaser who is the landlord or decree-holder himself. I should have stated that I am concerned in this case with the question of the liability for rent between the date of the decree and the date of the sale in execution of a rent decree, the proclamation having stated that there were arrears for that period. *Jugal Kishore's* case(1) was a case of two decrees for rent for consecutive periods, and Mullick, J. (who delivered the judgment of the Court) was of the opinion that the landlord was not estopped by reason of the statements in the sale proclamation, of the fact of the second decree, from taking out execution with regard to that second decree I must say I can see no particular difference between a decree and a liability for rent which has not so far been subject of a decree, and, as I have already said, on the other hand, from the decision of my brother James, I should feel bound to come to the conclusion that if a third party purchaser is liable to pay the arrears of rent which were notified in the sale proclamation and the tenant is relieved from that payment, the result of the purchase by the landlord would be that the tenant was relieved of payment, although of course there will be no liability by the landlord to himself, necessarily.

In referring the case to a Division Bench, I would like to mention the case of *Haradhan Chattoraj* v. *Kartick Chandra*(3), a decision of which Mr. Justice James has never been in doubt, the decision in *Syed Mohammad Jawad Hussain* v. *Gopal Narain Singh*(4), the case of *Faez Rahman* v. *Ramsukh Bajpai*(5) and also the case to which I have already referred.

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1934) 16 Pat. L. T. 73.
(3) (1902) 6 Cal. W. N. 877.
(4) (1921) 2 Pat. L. T. 248.
(5) (1893) I. L. R. 21 Cal. 169.

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The case then came up for hearing before Wort, A.C.J. and Manohar Lall, J. who referred it to a Full Bench by the following Order of Reference:

WORT, A.C.J.—The only course that I think can be adopted in this case, having regard to the decision in *Jugal Kishore Narain Singh* v. *Bhatu Modi*(1), is to refer the matter to a larger Bench. It would appear that this very point has been decided in the Calcutta High Court in *Sailaja* v. *Gyani*(2) and for reasons there expressed which, speaking for myself, appeal to me more than once, as well as for the reasons stated by Mullick, J., the case is referred to a Full Bench.

MANOHAR LALL, J.—I agree.

On this reference.

S. C. Mazumdar (with him *Vishnu Deva Narain* and *Ram Anugrah Narain Singh*), for the appellant: The landlord has two remedies: he can enforce the charge under section 65 of the Bengal Tenancy Act or he can proceed against the tenant personally. A suit for rent is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be made enforcing the charge. The law is well settled that an auction-purchaser is not liable for the arrears of rent that have accrued due after the suit and before the sale; in such a case it is the tenant alone who is liable for the arrears. [Reference was made to *Faez Rahman* v. *Ramsukh Bajpai*(3) and *Syed Mohammad Jawad Hussain* v. *Maharaja Kumar Gopal Narain Singh*(4)].

[WORT, A.C.J.—What is the law with regard to strangers purchasing a holding in execution of a decree for arrears of rent, subject to a charge for outstanding rent?]

The law is that if a third party purchases the holding subject to a charge notified in the proclamation, he is bound by it and he cannot be heard to

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1912) 18 Cal. L. J. 29.
(3) (1893) I. L. R. 21 Cal. 169.
(4) (1921) 2 Pat. L. T. 248.

repudiate the liability which he has undertaken to satisfy—*Faez Rahman* v. *Ramsukh Baipai*(1); *Jugal Kishore Narayan Singh* v. *Bhatu Modi*(2)

[WORT, A.C.J.—Is the position of a landlord purchaser different from that of a third party purchaser?]

Yes: otherwise the landlord would be left without a remedy. When a stranger purchases a holding subject to such a charge, the holding in his hands would be liable for the past rent and the landlord may proceed against the holding or he may still enforce the personal liability of the tenant. If the landlord purchases the holding, and the encumbrance is notified, he can still resort to the second remedy by suing the tenant. If, as is suggested, the landlord cannot sue the tenant, he would be left without a remedy and the arrears of rent to which he is entitled cannot at all be realized by any mode.

The case of *Jugal Kishore* v. *Bhatu*(2) is on all fours with the facts of the present case. There Mullick, J. pointed out that even after the sale the *landlord purchaser* could proceed against the tenant for arrears of rent which had already fructified into a decree. The only difference between that case and the present one is that in *Jugal Kishore's case*(2) there was a decree for arrears of rent which was sought to be executed while in our case it is the liability for rent which the landlord is seeking to enforce. Mullick, J. further pointed out that the principle of the decision in *Haradhan Chattoraj* v. *Kartik Chandra*(3) had no application at all where the decree-holder is himself the purchaser. In *Sailaja Prosad Chatterjee* v. *Gyani Das*(4) the distinction between the two remedies open to a landlord was not clearly brought out.

(1) (1893) I. L. R. 21 Cal. 169.
(2) (1923) I. L. R. 2 Pat. 720.
(3) (1902) 6 Cal. W. N. 877.
(4) (1912) 18 Cal. L. J. 29.

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There is no question of any estoppel or prejudice here—*Jugal Kishore Narayan Singh* v. *Bhatu Modi*(1).

G. C. Das, for the respondent: On principle there is absolutely no distinction between a third party purchaser and a landlord purchaser. The effect of the notification of the incumbrance in the sale proclamation appears to be that the holding is sold subject to the liability for arrears of rent—*Kamaldhari Lal* v. *Tarachand Marwari*(2). This means that the tenant would no longer be personally liable for such rent; in other words, the liability is attached to the holding. If the landlord happens to be the purchaser, the debt in his favour is extinguished. The landlord in notifying the charge gave out that the holding would be liable for the rent and presumably paid all the less for it. He is estopped from proceeding against the tenant. As Das, J. remarked in *Maharaja Kesho Prosad Singh* v. *Musammat Paramjota Koer*(3), "you notify to the world that you are selling the holding subject to the rent charge in your favour, then clearly you have elected to hold the holding responsible for your rent, and cannot proceed against the properties of the judgment-debtor other than the holding.....By virtue of the notification, the purchaser purchases the holding subject to the rent charge, and the holder of the charge cannot be heard to say, 'Now that I have purchased the holding, I will waive the charge and proceed against the properties other than the holding' ". The landlord has made the election once for all. The case of *Jugal Kishore Narayan Singh* v. *Bhatu Modi*(1) proceeded on the footing that both the decrees were alive. Their Lordships did not attempt to decide the point that falls to be considered here. The case that is of real assistance to us is that

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1934) 16 Pat. L. T. 73.
(3) (1921) 6 Pat. L. J. 354.

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of *Sailaja Prosad Chatterjee* v. *Gyani Das*(1) where the identical point was considered.

Mookerjee, J. has considered the argument, as is advanced here, that the landlord has two remedies and if he purchases the holding he does not lose the personal remedy against the tenant. I also rely on *Hardhan Chattoraj* v. *Kartik Chandra*(2) which is in point.

S. C. Mazumdar, in reply.

S. A. K.

WORT, A.C.J.—This case was referred to a Full Bench as there seemed to be some question with regard to the decision in *Jugal Kishore Narain Singh* v. *Bhatu Modi*(3) particularly having regard to a decision in the Calcutta High Court on the point at issue.

The short facts are these. The appellant who was the landlord obtained a decree for rent and taking out execution got the property sold on the 3rd of August, 1934, becoming the purchaser. Between the time of the rent decree and the date which I have just stated other arrears of rent accrued and there can be now no dispute that in the sale arising out of the execution of the rent decree to which I have already referred the property was put up for sale subject to those arrears of rent, in other words, subject to these incumbrances.

Mr. Mazumdar who argues the case on behalf of the appellant contends that on a proper reading of the sale proclamation this was not the fact. But this being a second appeal and both the courts below having held that it was so sold it is impossible to accept the contention of Mr. Mazumdar in this regard. We can take it, therefore, that the property

(1) (1912) 18 Cal. L. J. 29.
(2) (1902) 6 Cal. W. N. 877.
(3) (1923) I. L. R. Pat. 720.

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was sold subject to these encumbrances and the real point at issue is whether Mr. Mazumdar's client, being the decree-holder and a purchaser, is in a different position from a third party purchaser. It is conceded, indeed it has been decided in a number of cases, that a third party purchaser would be liable to pay off the encumbrance which was notified in the proclamation. The argument on behalf of the appellant is that a decree-holder purchaser is in a different position. In this connection and in support of the argument the case of *Jugal Kishore Narain Singh* v. *Bhatu Modi*(1) is relied upon. Before dealing with that case, however, I would refer to the decision of my learned brother James in *Kamaldhari Lal* v. *Tarachand Marwari*(2), an authority for the proposition, which I stated a moment ago, to the effect that " an auction-purchaser who purchased a holding with notice that it is saddled with liability for arrears of rent for a period anterior to the date of the sale is liable for the rent of that period ". There was an argument addressed to us by Mr. Mazumdar to the effect that the notification in the sale proclamation in the circumstances was illegal and that, therefore, no liability can accrue on the footing that there was such a notification. James, J., in the case to which I have referred, pointed out that in *Jugal Kishore Narain Singh's* case(1) the decision of this Court was not that it was an illegality but an irregularity. In my opinion, no support can be got by the decree-holder from that contention. We come back to the point at issue, namely, whether the decree-holder is in any different position from that of a third party purchaser. On the one hand, the case to which I referred a moment ago—*Jugal Kishore Narain Singh* v. *Bhatu*(1) is relied upon by Mr. Mazumdar, and on the other hand, against that contention is the case of *Sailaja*

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1934) 16 Pat. L. T. 73.

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Prosad Chatterjee v. *Gyani Das*(1). I propose to deal with that case first. The facts of that case were that two decrees had been obtained by the decree-holder, one in 1904 and another in 1906. The decree of 1906 was a money-decree, the earlier one a rent decree; and in putting up the property in execution of the second decree there was a notification with regard to the decree of 1904. The argument addressed to the Court in that case was the same argument as Mr. Mazumdar addresses to us in this case, namely, that the decree-holder had two remedies open to him. He could put up the property for sale, in other words, execute for his charge upon the property or he could obtain a money decree: in other words, hold the judgment-debtor personally liable; and it is his contention in the case before us that in bringing an action for rent he is pursuing the personal remedy against his judgment-debtor or tenant. Mookerjee, J. in the case made this observation: "It may be conceded that a decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; he is under no obligation to proceed in the first instance against the defaulting tenure. This principle, however, is of no assistance to the decree-holders". The learned Judge then goes on to point out what was the real question in the case and subsequently made this observation: "It was thus, at their instance, that the proclamation was very properly made that the tenure would be sold subject to the judgment-debt under the decree of 1904. Whoever, therefore, purchased at the sale, would take the property subject to the liability notified, and it makes no difference that the decree-holders themselves are the purchasers; the judgment-debt in their favour must consequently be deemed to have been extinguished". If I may say so with respect to the learned Judge, it is impossible to add

(1) (1912) 18 Cal. L. J. 29.

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to the reasoning which he there gives in dealing with a proposition silimar to the one before us. Now, as regards the authority upon which Mr. Mazumdar relies [*Jugal Kishore Narain Singh* v. *Bhatu Modi*(1)] particular stress is laid upon the observation of late Sir Basanta Mullick to this effect "in such cases (that is to say, in cases where there is a notification such as in the case before us) the auction-purchaser is concluded by *res judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction-purchaser to discharge the liability which he has undertaken. He then referred to the decision in *Haradhan Chattoraj* v. *Kartik Chandra Chattopadhaya*(2) and said "But that case has no application at all where the decree-holder is himself the purchaser". The Subordinate Judge in the case in which Sir Basanta Mullick was delivering judgment had held that the decree-holder himself being the auction-purchaser and having bought the holding subject to the liability the debt was satisfied and the execution could not proceed. The learned District Judge, whose judgment this Court reversed, had held that there was an equitable estoppel and the proper remedy for the decree-holder was to sell the holding and then, if the decree remained unsatisfied, to proceed against other properties of the judgment-debtor. The effect of the High Court judgment was to hold that the decree-holder was under no such obligation as stated by the District Judge. But the vital difference between that case and the case before us is that it was recognized by all parties concerned that the decree was alive contrary to the decision of the Subordinate Judge. In my judgment, therefore, that decision can be of no assistance to the decree-holder in this case, and speaking for myself, I fail entirely to see any error (if I may use the expression) in the reasoning of Mookerjee, J. in the case of

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1902) 6 Cal. W. N. 877.

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Sailaja Prosad Chatterjee v. *Gyani Das*(1). To state the matter in other words, on principle it is impossible to distinguish between the position of a third party purchaser who purchased the property subject to the encumbrance and that of the decree-holder who himself purchased under like circumstances.

In my opinion, therefore, the appeal fails and is dismissed with costs, and the suit dismissed with costs throughout.

VARMA, J.—The facts of the case have been quite clearly summarised by the courts below. There was a decree for rent for the years 1334 to 1337 and in execution of that decree the property was sold on the 3rd of August, 1934. In the sale proclamation it was mentioned that there were arrears of rent for the subsequent period, i.e. 1338-1341 F. which were an encumbrance on the property. The present appellant filed a suit on the 26th of September, 1934, to recover rents for the years 1338 to 1341. This suit was dismissed on the 16th of September, 1935, about six days after the sale (that was held on the 3rd of August, 1934) was confirmed. The suit was dismissed on the ground that when the decree-holder purchased the property in execution of his decree and subject to the encumbrance, he put himself in the position of the tenant and, therefore, he combined in himself for the time being the attributes of a landlord as well as a tenant, and therefore he was not entitled to get a decree. On appeal also the same view was held and the lower appellate court confirmed the judgment of the trial court.

Mr. Mazumdar appearing on behalf of the appellant before us has relied mainly upon the decision in *Jugal Kishore Narain Singh* v. *Bhatu Modi*(2). But, as has just now been pointed out, there were certain points that are at issue in this

(1) (1912) 18 Cal. L. J. 29.
(2) (1923) I. L. R. 2 Pat. 720.

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case which were taken for granted in *Jugal Kishore Narain Singh's* case(1). The case that is really similar to the case in hand was the case of *Sailaja Prosad Chatterjee v. Gyani Das*(2); there the argument that was so strenuously adavnced by Mr. Mazumdar in this case had been amply disposed of. To make my meaning clear, I would just mention that Mr. Mazumdar always insisted upon saying that the landlord had two remedies: (*1*) that he could proceed against the tenure and (*2*) that he could also proceed against the tenant. While advancing this theory there seems to have been some misapprehension as to what the real nature of the remedy of the landlord was—whether these two kinds of remedies overlapped or whether the landlord could get two distinct decrees with regard to his dues against the tenant. Now, as I have already stated, the case, of *Sailaja Prosad Chatterjee* v. *Gyani Das*(2) has sufficiently met this line of argument. It is said by Mookerjee, J. in that case: "It may be conceded, as was pointed out by this Court in the case of *Fotick Chunder Dey* v. *Foley*(3) and *Surendra Mohan Tagore* v. *Surnomoyi*(4), that a decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; he is under no obligation to proceed in the first instance against the defaulting tenure. This principle, however, is of no assistance to the decree-holders. The real question in the present case is, whether the effect of the purchase by the appellants has been to extinguish their rights under the rent decree. When they took out execution of the money-decree against the tenure, they were bound to notify that they held a decree for rent enforceable against it; if they had not notified the rent charge, they

(1) (1923) I. L. R. 2 Pat. 720.
(2) (1912) 18 Cal. L. J. 29.
(3) (1887) I. L. R. 15 Cal. 492.
(4) (1898) I. L. R. 26 Cal. 103.

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MANOHAR LALL, J.

could not have subsequently pursued the property, in the hands of a bona fide purchaser, for the satisfaction of their dues ". I have no hesitation in holding that the decision in *Sailaja Prosad Chatterjee* v. *Gyani Das*(1) applies to the facts in this case and I would, therefore, dismiss the appeal with costs.

MANOHAR LALL, J.—I entirely agree with the judgment just delivered by my Lord the Chief Justice. The sale proclamation printed at page 11 states that the annual rental of this holding was Rs. 20 besides cess. The holding was sold for a sum of Rs. 40-2-3 which is obviously far below the real value. In those circumstances the landlord cannot be heard to say that, notwithstanding the fact that he (the plaintiff in the present case) purchased the tenure subject to the incumbrance contained in the proclamation (just referred to), the tenant is liable for the arrears, for which the present suit has been instituted, as this would make the landlord a gainer at the expense of the tenant defendant [*see Haradhan Chattoraj* v. *Kartik Chandra Chattopadhya*(2)]. The case of *Sailaja Prosad Chatterjee* v. *Gyani Das*(1) contains an accurate exposition of the law on the subject and concludes the present appeal. The decision of this Court in *Jugal Kishore Narayan Singh* v. *Bhatu Modi*(3), as I pointed out in the course of the argument, assumes that the decree was alive and therefore never attempted to decide the question before us.

J. K.

Appeal dismissed.

(1) (1912) 18 Cal. L. J. 20.

(2) (1902) 6 Cal. W. N. 277.

(3) (1923) I. L. R. 2 Pat. 720.

APPELLATE CIVIL.

1938.

September, 7, 13, 14.

Before Khaja Mohamad Noor and Chatterjee, JJ.

BANSI LAL

v.

MAULAVI MOHAMAD HAFIZ.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *sections* 2(*17*) *and* 60(*1*)(*i*) *as it stood before the amending Act IX of* 1937—*Advocate engaged to conduct a suit on behalf of Government, whether is a "Public Officer" within the meaning of section* 2(*17*)—*remuneration, whether comes within the exception of section* 60(*1*)(*i*)—*fee, already earned, whether attachable at all.*

A debt in order to be attachable need not necessarily have become payable.

A daily fee stipulated to be paid to an advocate becomes due to him after each day's work, and the amount already earned, whether it has become payable or not, is attachable.

An advocate who is engaged on a daily fee of a fixed sum to conduct a civil suit on behalf of the Government is, for the purpose of that case, a "public officer" within the meaning of section 2(*17*) of the Code of Civil Procedure, 1908, and his remuneration is 'salary' coming within the exception contained in clause (*i*) of section 60(*1*) of the Code, as it stood before the amending Act IX of 1937, and is, therefore, liable to be attached only to the extent indicated therein.

Appeal by the decree-holders.

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

B. P. Sinha, for the appellants.

K. Husnain (with him *S. A. Khan, A. Reza, S. M. Saleem, M. Azizullah* and *A. Moin*), for the respondent.

*Appeal from Original Order no. 151 of 1938, from an order of Babu N. K. Choudhury, Subordinate Judge, Patna, dated the 14th July, 1938.

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KHAJA MOHAMAD NOOR, J.—This appeal arises out of an execution proceeding and the facts leading up to it are these:

The appellants hold a decree for a certain sum of money against the respondent who is an Advocate of this Court. The Provincial Government engaged the Advocate to conduct a civil suit at Chaibassa for recovery of public money. His remuneration was fixed at a certain sum as daily fee, which included the remuneration of his clerk also. It was also understood that the fee for a month would be paid if billed for at the end of the month. It is not disputed that the Advocate, judgment-debtor, began working for the Government at Chaibassa in the month of April, 1938, and continued to do so till at least the end of May, or perhaps till some time in June. His remuneration for the month of April amounting to Rs. 1,950 and for the month of May amounting to Rs. 3,120 were payable to him by the officers of the Provincial Government at the close of each of these two months.

On the 17th May the decree-holder appellants executed their decree and asked for attachment of the remuneration of the Advocate which had already become due from the Government and those which were likely to fall due to him. Later on a second application was made some time in June for the attachment of remuneration of May also which had, according to the contention of the decree-holders, become due by them. The attachments were accordingly ordered.

The judgment-debtor raised two objections to the attachment. One was that out of the money due to him from the Government, ten per cent. was the remuneration of his clerk and to that extent it was not the property of the judgment-debtor. Regarding the rest, he relied upon section 60(*1*)(*i*) of the Code of Civil Procedure as it stood prior to the

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BANSI LAL v. MAULAVI MOHAMAD HAFIZ.

KHAJA MOHAMAD NOOR, J.

amendment of 1937, and contended that not more than half of it was attachable.

The learned Subordinate Judge allowed the objections and he withdrew the attachment to the extent of eleven-twentieths of the money due to the judgment-debtor from the Government and maintained the attachment for the rest of it, that is, to the extent of nine-twentieths of the amount.

The decree-holder has preferred this appeal.

The judgment-debtor has also preferred a cross-objection questioning the attachment itself. It will be convenient to dispose of the cross-objection first. Now, the objection that the money due to the judgment-debtor from Government was not attachable at all was not raised before the learned Subordinate Judge, and then the objection itself has no substance. The learned Advocate for the judgment-debtor contended that the judgment-debtor had only an actionable claim against the Government, and it was not attachable. We have seen the letter of Government appointing the judgment-debtor to conduct the case on behalf of the Government. It clearly specifies a certain daily fee payable to him, and also says that it would be convenient if the Advocate submitted his bills for the payment of the money at the end of each month. I have no doubt that after each day's work the daily fee stipulated became due to the judgment-debtor from the Government and that all the daily fees of a month became payable to him at the end of the month. Therefore, there is no question that when the decree-holders applied for attachment on the 17th May, 1938, fees for the month of April were not only due to the judgment-debtor but in fact had become payable and the fees up to the 17th of May were due to the judgment-debtor though they had not become payable till then. A debt for the purpose of being attachable need not necessarily have become payable. For

1933.

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instance, a bond which has not matured and which will become payable after some time is certainly a debt which can be attached and sold and the person who purchases it will be entitled to realise the amount of the bond or the debt when it becomes payable. It is not an uncertain sum, nor merely a right to sue. It is an existing property vested in the judgment-debtor, though the time of its realisation has not come. Take another instance: a person has deposited his money in a bank on twelve months' or two years' notice. The money is not payable by the bank till the time of payment comes, but nevertheless the money is the property of the depositor and is liable to be attached and sold. Therefore, I have no doubt that the remunerations earned by the judgment-debtor till the 16th May were attachable when the application was made on the 17th May and whatever objection could have been raised about the attachment of the remuneration of the subsequent period, which had not been earned and had not become due, the objection is not available to the judgment-debtor, as in the month of June an application for attachment was made and no objection to the attachment was raised on his behalf. The Court rightly or wrongly ordered the attachment of it and the judgment-debtor acquiesced in it. On the whole, I am convinced that there is no merit in the cross-objection.

I now take up the main appeal itself. The learned Advocate for the appellants has contended, first, that the judgment-debtor was not a public officer; and, secondly, that if he was a public officer his remuneration is not exempt under section 60(*1*)(*i*) of the Code of Civil Procedure. He has also contended that ten per cent. allowed for the clerk is excessive.

The first thing to be considered is whether the judgment-debtor, during the time when he was acting for the Government, was a public officer within section 2 of the Code of Civil Procedure. The only

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clause which can be applied is clause (*h*) of section 2(*17*) which runs thus:—

"every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty."

This clause refers to three classes of persons: first, every officer who is in the service of Government —it does not matter whether he is paid or not. As long as he is in the service of the Government, or, in other words, he serves the Government, he is a public officer. In the second category are those who are in the pay of the Government. Here the Legislature has not specified the work which these persons are to perform: that is to say, it has been presumed that when an officer is in the pay of the Government he must have been performing a public duty. In the third category are those who are remunerated by fees or commission and in order that they be held to be public officer it is necessary that the payment should be for the performance of any public duty. In my opinion during the period the judgment-debtor was engaged by the Government to conduct a civil suit, he was in the pay of the Government. An advocate who is engaged to conduct a case on behalf of a client is, for the purpose of that case, in the pay of his client, because he is being paid for the work which he performs for him. Assuming, however, that he did not come within the category of an officer being in the pay of the Government, he certainly came under the third category because he was being paid by fees for performing a public duty. Conduct of a suit on behalf of the Government for the recovery of public money is performing a public duty which an Advocate undertakes. Civil suits by the Government or against the Government are public suits though with some exception the procedure of trial is the same as of suits between two private individuals. Government property is public property and recovering it is in the interest of the public and it is the duty of the Government to recover it from those who are not

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entitled to retain it. A lawyer engaged by the Government to represent it before a Court performs a public duty when he does so. When a Government enforces a claim or refutes a claim it does so on behalf of the public as the Government is a public institution.

The learned Advocate for the appellant contended that the judgment-debtor, though he may be in the pay of the Government and remunerated by fees for performing a public duty, was not a public officer as he was not an officer. The word 'officer' has not been defined in the Code and, therefore, we must apply the dictionary meaning of the word. In Stroud's Judicial Dictionary the word 'officer' is defined as "one who holds an office", and the word 'office' is defined as "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging". The judgment-debtor in this case on his appointment as a lawyer by the Government had to exercise a right of employment in the suit to conduct it on behalf of the Government. He was an officer and a public officer.

The next consideration is whether the emoluments of the judgment-debtor come within the exemptions of clause (*i*) of section 60(*1*) of the Code of Civil Procedure. Clauses (*h*) and (*i*) of section 60(*1*) which exempt the salaries of public officers have been amended by Act IX of 1937. But the amended section has no application in proceedings arising out of a suit instituted before the 1st day of June, 1937. As in this case the suit in which the decree under execution was passed was instituted long before June, 1937, the law applicable will be the law as it stood before the amendment. The two clauses (*h*) and (*i*) as they stood before the amendment must be read together. They ran thus:—

"(*h*) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty;"

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"(*i*) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (*h*) while on duty, to the extent of etc., etc...."

They refer to three kinds of emoluments of a public officer. Clause (*h*) deals with allowances which are given to him while he is not on duty. If this allowance is less than his salary, it is absolutely exempt from attachment. Clause (*i*) deals with two classes of cases. One is the "allowances" which are referred to in sub-clause (*h*) but when they are equal to the salary, and the second refers to the salary itself. These two are attachable to a limited extent, as prescribed in the clause itself. The learned Advocate for the appellants, however, contended that salary does not cover the daily fees which were payable to the judgment-debtor. He contended that salary is what is payable to a permanent or semi-permanent employee, and not the remuneration of a temporary employee engaged on daily fee. One need not refer to the new section 60 of the Code of Civil Procedure which makes the matter clear where the salary for the purposes of clauses (*h*) and (*i*) means the total monthly emolument excluding any allowance which is exempted by Government. I do not wish to take help from this amended section because it is not applicable to the present case. But here again one must have resort to the dictionary meaning of the word 'salary'. Stroud's Judicial Dictionary defines the word 'salary' as "recompence or consideration given unto any man for his pains bestowed upon another man's business". I do not find anything which restricts the word 'salary' to an emolument which is payable monthly or that it refers to the emolument payable to a man who holds a permanent or a semi-permanent employment.

The learned Advocate further contended that clause (*i*) is applicable to the case of those to whom clause (*h*) applies, namely, the salary mentioned in clause (*i*) refers to the salary of one who is entitled to

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get allowances mentioned in clause (*h*). I see no reason to restrict the scope of clause (*i*). Whether a particular officer is entitled to get any allowance while absent from duty is a matter of contract between him and his employer, the Government. Then the exemptions are not in favour of public officers only. They extend to any servant of a railway company or local authority. There may be cases in which under the terms of employment a servant of a railway company or local authority is not entitled to any allowances while absent from duty. No doubt clause (*i*) refers to clause (*h*) but only to avoid repetition of the description of officers whose salaries have been exempted. It does not follow that their salary for the period for which they are on duty is not covered by clause (*i*) of section 60(*1*).

Regarding the fee of the clerk which the learned Subordinate Judge has held to be ten per cent. of the amount payable to the judgment-debtor, he is in my opinion correct. Under the High Court Rules a clerk of an Advocate is entitled to get not less than five per cent. Ten per cent is reasonable and not excessive.

On the whole, I am of opinion that the learned Subordinate Judge had taken the correct view of the case and the appeal must be dismissed.

The result is that the appeal and cross-objection are both dismissed but there will be no order for costs.

The order of temporary attachment passed by the Registrar for the money beyond what has been attached by the Subordinate Judge is vacated.

The attachment to the extent ordered by the learned Subordinate Judge will remain in force.

CHATTERJI, J.—I agree.

S. A. K.

Appeal and Cross-objection dismissed.

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September, 19, 20.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Chatterjee, JJ.

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v.

SRI MAHANT HARIHAR GIR.*

Bihar Money-Lenders Act, 1938 (*Bihar Act III of* 1938), *sections* 16 *and* 17, *whether repugnant to existing Indian law and therefore void—Government of India Act,* 1935 (25 *and* 26 *Geo.* 5 *ch.* 42) *section* 107—*law relating to execution of decree and sale proclamation, whether is a concurrent legislative subject—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rule* 66.

Civil Procedure, which is item no. 4 in the "Concurrent list" of Schedule VII to the Government of India Act, 1935, includes all matters, whether relating to procedure or not, contained in the Code of Civil Procedure on the date of the passing of the said Act. The matter relating to the execution of decrees and sale proclamation which is a matter included in the Code of Civil Procedure is, therefore, a concurrent legislative subject. That being so, the law (relating to execution of decrees and sale proclamation) subsequently enacted by the Provincial Legislature which is contained in sections 16 and 17 of the Bihar Money-Lenders Act, 1938, being repugnant to Order XXI, rule 66, of the Code, as amended by the High Court, which is an existing Indian law, and not having been assented to either by the Governor-General or His Majesty, is void under section 107 of the Government of India Act, 1935.

The object of section 107, sub-sections (*1*) and (*2*), is to make the Governor-General or His Majesty the co-ordinating authority in respect of concurrent legislation to avoid a conflict between a Provincial Act and an existing Indian law or Federal legislation.

Appeal by the judgment-debtor.

*Appeal from Original Order no. 254 of 1938, from an order of Babu J. M. Mukherji, Subordinate Judge, First Court, Gaya, dated the 18th July, 1938.

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

Baldeva Sahay, Advocate-General (with him *Harinandan Singh* and *Brijkishore Prasad Sinha*), for the appellant.

Khurshaid Husnain (with him *Sarjoo Prasad* and *R. J. Bahadur*), for the respondent.

KHAJA MOHAMAD NOOR, J.—This appeal arises out of a proceeding for execution of a mortgage compromise decree.

In Miscellaneous Appeal no. 199 of 1938 (not admitted as yet) which arises out of the same execution proceeding and is by the same appellant, this Court on the 6th July, 1938, ordered that if the judgment-debtor appellant deposited to the credit of the decree-holder a sum of Rs. 100 by the 11th July next, the sale of the mortgaged properties would be adjourned for two months and if within that period he deposited Rs. 6,000 the execution would be stayed. The judgment-debtor appellant deposited Rs. 100 but did not deposit Rs. 6,000. In the meantime a sale proclamation was issued fixing 12th September, 1938, for sale. On 15th July, 1938, came into force certain sections (including sections 16 and 17) of the Bihar Money-Lenders Act of the Provincial Legislature (Act III of 1938). The judgment-debtor raised fresh objections to the execution and asked the court to take steps under this new Act. One of them which alone has been pressed before us was that the court should fix the value of the properties to be sold as enjoined in section 16 of the Act. The learned Subordinate Judge held that it could not be done as the section was applicable only when application for execution of a decree was made after the Act came into force. The objections were rejected and the judgment-debtor has preferred this appeal, and the only point urged is the non-compliance of section 16 of the Money-Lenders Act.

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The learned Advocate-General for the appellant contended that the views of the learned Subordinate Judge as to the applicability of section 16 of the Bihar Money-Lenders Act is erroneous. Its application cannot in its terms be restricted to the execution proceedings started after the Act came into force.

Mr. Khurshaid Husnain for the respondent has supported the order of the learned Subordinate Judge on three grounds: the first is that the section applies only to proceedings which were started or will be started after the Act came into force, namely, the 15th July, 1938, and not to all the pending execution proceedings; the second is that section 16 overrides only the provision contained in any other law or in anything having the force of law, but unlike section 15 it does not override the contracts between the parties or a decree or order already passed and the decree-holder is entitled to proceed to sell the entire property without its being valued by the court beforehand; the third ground is that section 16 of the Act along with section 17 which follows it is void under section 107 of the Government of India Act of 1935, as it is repugnant to a provision of the Code of Civil Procedure, an "existing Indian law", namely, Order XXI, rule 66, as it stood on 1st April, 1937.

As regards the first contention that the section is applicable only to execution proceedings started after the Act came into force, there is no substance in it, though this view was adopted by the learned Subordinate Judge. In my opinion the words

> "When an application is made for the execution of a decree passed in respect of a loan, etc., etc."

mean nothing more than "when a decree specified in the section is under execution". It was contended that steps provided in this section are to be taken immediately after an application is made for the execution of a decree and as the application for execution in this case was made when the Act was not

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in force the steps provided in the section cannot be taken now. This contention, if accepted, will lead us to a number of complications and anomalies. Under the amended Order XXI, rule 22, notice to judgment-debtor is necessary in all cases except when there is an oral application for execution by arrest. It is obvious that unless notice is issued and served upon the judgment-debtor no enquiry about the valuation of the properties can be made. Section 16 of the Money-Lenders Act prescribes procedure for the sale of the property of the judgment-debtor and the procedure to be followed in pending cases, when a new procedure is prescribed by law, will be according to this new rule so far as it is applicable and not according to the old rule. On a reading of the section, it is quite clear to me that in those execution cases which on the 15th July, 1938, were at a stage when the properties were not sold, the sale must be according to the procedure laid down in that section provided of course that the section is not void. Therefore, the view taken by the learned Subordinate Judge was, in my opinion, wrong.

Apart from this the question has been made clear by a declaratory Act of the Provincial Legislature (Act V of 1938) which came into force when this appeal was being heard by us (19th September, 1938). This Act declares [section 3(*2*)] that the provisions of sections 15 to 18 (both inclusive) of the Money-Lenders Act shall apply and shall be deemed to have always applied, to proceedings in executions arising out of suits referred to in sub-section (*1*) of section 3, whether such proceedings were instituted before or after the said sections came into force.

The next contention of the learned Advocate for the respondent has been that section 16 of the Act overrides anything contained in any law or anything having the force of law, but it does not override contracts or previously passed decrees or orders of court. This contention also is, in my opinion, untenable.

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First of all, the learned Advocate has not been able to show us any contract by which the judgment-debtor agreed that his property should be sold without fixing any value for it. What the judgment-debtor agreed at the time of the passing of the compromise decree was that in case he made default in the payment of the instalments fixed therein, the mortgaged properties or sufficient portion thereof would be sold. How the sale was to be effected is a matter of procedure and must be governed by the rules of procedure in force at the time of sale.

Mr. Khurshaid Husnain contended that as the compromise decree did not specify the part sufficient for the satisfaction of the decree, the executing court could not, by virtue of section 16 of the Act which does not override the agreement or the decree, decide what part is to be sold. There is no force in this contention. The decree itself provides that either the entire mortgaged property or a part of it sufficient for the satisfaction of the decree would be sold. This provision does not preclude the court from fixing the value of the property and of its part sufficient for the satisfaction of the decree. In my opinion, therefore, section 16 of the Act does not override any contract between the parties or the decree.

The learned Advocate next contended that this Court on the 6th July, 1938, in M. A. no. 199 of 1938 ordered that the properties of the judgment-debtor would be sold if Rs. 6,000 be not deposited within two months of that date. That order meant that the property would be sold in the manner and according to the procedure under which it was going to be sold before that order. No new procedure could now be applied for sale. This argument also, in my opinion, has no force. If after the order of this Court the legislature has intervened and provided that the property is to be sold only under the procedure prescribed by it, the order of the court will be of no avail in the face of a positive legislative enactment.

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The most serious contention of the learned Advocate for the respondent has been that section 16 of the Money-Lenders Act on account of its being repugnant to a provision of the Code of Civil Procedure as it stood on the 1st April, 1937, is void. This argument requires a careful consideration.

'Civil Procedure' is mentioned in the Concurrent List of the Legislative subjects in Schedule VII of the Government of India Act, 1935. In other words, the Provincial Legislature as well as the Central Legislature can deal with matters relating to it. But the Government of India Act has provided safeguards to avoid conflict between the two legislatures in connection with those matters for which the legislative authority is concurrent, that is to say, for which both the Provincial and the Central Legislatures can pass enactments. Section 107 of the Government of India Act runs thus:—

"If any provision of Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

In other words, this sub-section (*1*) of section 107 says (leaving aside from consideration the Federal legislation to be passed) that when a Provincial Legislature enacts any law in respect of any matter enumerated in the Concurrent Legislative List which is repugnant to the existing Indian law, it will be void to the extent of that repugnancy. There is an exception to this in sub-section (*2*) of the section which provides that in case a bill has been reserved for the assent of the Governor-General or for signification of His Majesty's pleasure and such assent be given, the Provincial legislation, though repugnant to the existing Indian law, will not be void. There is a further proviso that if such assent is given and the Provincial Legislature overrides the existing Indian law, the Federal Legislature will not be able

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to amend it again without the previous sanction of the Governor-General. The object of section 107(*1*) and (*2*) is to make the Governor-General or His Majesty the co-ordinating authority in respect of Concurrent Legislation to avoid conflict between a Provincial Act and an existing Indian law or Federal Legislation.

Mr. Khurshaid Husnain contended that section 16 of the Bihar Money-Lenders Act is repugnant to the Code of Civil Procedure which is the existing Indian law so far as the matter before us is concerned. "Existing Indian law" means any law, ordinance, order, bye-law, rule or regulation, passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation." (Section 311 of the Government of India Act). Therefore, the Code of Civil Procedure, as it stood on the 1st April, 1937, namely, the day on which Part III of the Government of India Act came into force is an existing Indian law.

It is now necessary to examine the provisions of the Code to which section 16 of the Money-Lenders Act is urged to be repugnant, namely Order XXI, rule 66. This rule, as originally enacted by the old Imperial Legislative Council, provides that

> "when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made...."

Then it specified the contents of the sale proclamation and provided that it should be drawn up after notice to the decree-holder and the judgment-debtor and should state the time and place of sale. Among the things which the sale proclamation is to contain is every thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property. It was held that it was incumbent upon the court to ascertain the value of

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the property advertised for sale and put the value in the sale proclamation. Judicial pronouncements went so far as to say that mentioning a grossly inadequate value in the sale proclamation was a material irregularity. This rule was amended by this Court under its rule-making power under section 122 of the Code of Civil Procedure. Notice to decree-holder and judgment-debtor was dispensed with as a notice under rule 22 was provided in every case except in case of oral application for execution by arrest and a provision to the following effect was added :—

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale-proclamation."

The amendment came into force on 1st March, 1936. The effect of this proviso is that the courts are not to estimate the value of the property to be sold and are prohibited from inserting in the sale proclamation any value other than those, if any, mentioned by the decree-holder and the judgment-debtor and if the value given by the parties is inserted, the courts must state that they do not vouch for their accuracy. This was the law, as I have said, on the 1st April, 1937, when the Government of India Act came into force, and as it was a rule framed by a competent authority empowered by the Code itself to frame rules, it was the existing Indian law as defined in section 311 of the Government of India Act.

It was argued on behalf of the appellant that the proviso which came into force on the 1st March, 1936, is not covered by the Concurrent Legislative List and I shall deal with this point later.

Now, it is admitted that the assent to the Bihar Money-Lenders Act was given by the Governor and it was not reserved for the assent of the Governor-General or for the signification of the pleasure of His Majesty. Therefore, its provisions if repugnant to the existing Indian law are void.

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The learned Advocate-General for the appellant has not argued that the proviso to Order XXI, rule 66, as it stood on the 1st April, was not the existing law of India. What he argued was that section 16 of the Bihar Money-Lenders Act was not repugnant to it. He contended that section 16 of the Act makes no mention of inserting any value of the property in the sale proclamation and argued that while proviso to Order XXI, rule 66, prohibits insertion in the sale proclamation the estimate of value other than those mentioned by the decree-holder and judgment-debtor and enjoins the court to mention that it does not vouch for the accuracy of the value mentioned by either, section 16 of the Bihar Money-Lenders Act simply asks the court to fix the value of the property which the decree-holder wants to be sold and also the value of that portion of it the proceeds of which the court considers sufficient to satisfy the decree. This argument would have been of some force if section 16 would have stood by itself and would have been self-contained which it is not. It is followed by section 17 without which it would have been an absolutely useless piece of legislation. By itself it does not describe the purpose for which the court is to use its time in fixing the value not only of the property which the decree-holder wants to sell but also of a portion of it, the proceeds of which the court considers sufficient for satisfying the decree. Then we find that so much importance has been given to the fixing of this value that the order has been made appealable. Then while the main section says that the court shall fix the value of that portion of the property the proceeds of which, in its opinion, is sufficient for the satisfaction of the decree, the proviso says

> "that the court may order the whole property of the judgment-debtor to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably or conveniently be sold in part."

The purpose of ascertaining the value of the property has been specified in section 17. There, among

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others, it is provided that except under circumstances mentioned therein the property advertised shall not be sold for a price lower than that specified in the sale proclamation. This clearly enjoins upon the court to mention the value as ascertained by it under section 16 in the sale proclamation. Otherwise, how could the court be told not to sell a property (except under certain circumstances) for a price lower than the price mentioned in the sale proclamation? What is the price mentioned in the sale proclamation to which reference has been made in section 17? Surely not the value given by the decree-holder or the judgment-debtor. The court is not to vouch for the accuracy of either. Therefore, by necessary implication the court is required to mention the value estimated by it in the sale proclamation. Thus while Order XXI, rule 66, of the Code of Civil Procedure, as it stands after the amendment by this Court, provides that the Court shall not enter any estimate of the value of the property in the sale proclamation other than the value, if any, given by the decree-holder and the judgment-debtor and requires it not to vouch for the correctness of either, section 16 read with section 17 of the Act enjoins the Court to estimate the value and mention it in the sale proclamation, such value being of such a binding character that the property cannot be sold for a lesser price except under certain specified circumstances. In other words, the court is to vouch for the absolute correctness of the value as fixed by it. I am clearly of opinion that section 16 which must be read with section 17 is repugnant to Order XXI, rule 66, of the Code of Civil Procedure.

I do not wish to discuss in detail the meaning of "repugnancy". It has been discussed in a number of decided cases. For the purposes of this case, I will construe it very strictly and hold that in order that two provisions of law may be called repugnant to one another they should be so contradictory that it will be impossible to carry out both of them: in other

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words, if one says "do" and the other says "do not". Here we have got two orders given to the courts: one is by the proviso to Order XXI, rule 66, of the Code of Civil Procedure, which asks them not to mention any estimate of value in the sale proclamation except those if any given by the parties and not to vouch for the correctness of any of them; the other is sections 16 and 17 of the Act which order them to fix the value very carefully, make their orders appealable to the higher tribunals and by necessary implication compel them to put the value fixed by them in the sale proclamation and to sell the property only if the price fetched is according to the value fixed by them unless, of course, some other considerations arise. In my opinion it is impossible for the courts to carry out both the orders. They will have to disregard the one or the other.

The framers of the Money-Lenders Act seem to have been cognizant of the fact that the provision for estimating the value of the property was inconsistent with the Code of Civil Procedure as it stands and therefore they have expressly said that

> "notwithstanding anything to the contrary contained in any other law or in anything having the force of law."

The reference is obviously to the Code of Civil Procedure. I do not know of any other law dealing with the procedure for sale of property in execution of decree and estimating its value by the courts. The section, therefore, obviously repeals the provision of Order XXI, rule 66, of the Code as it stands now.

I do not wish to enter into the discussion of the propositions on which a somewhat elaborate argument has been addressed to us by Mr. Khurshaid Husnain that other provisions of section 17 are also repugnant to the Code of Civil Procedure and to other existing Indian Laws. They are not before us and have not been replied to by the learned Advocate-General who appeared for the appellant.

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Mr. Harinandan Singh, who also appeared for the appellant and who replied in the absence of the learned Advocate-General, contended that Order XXI, rule 66, as it stands, came into force in March, 1936, and, therefore, it is not a Concurrent Legislative subject mentioned in List III of Schedule VII of the Government of India Act, because it is not a procedure which was in force on the date when the Government of India Act of 1935 was passed. This argument, in my opinion, is fallacious and is based upon a misreading of item (4) of List III in Schedule VII. This item makes 'civil procedure' a Concurrent Legislative subject. 'Civil Procedure' includes Law of Limitation and all matters included in the Code of Civil Procedure as it stood on the day the Government of India Act was passed. In other words, all matters whether relating to procedure or not included in the Code of Civil Procedure on the date of the passing of the Government of India Act are Concurrent Legislative Subjects. The words "and all matters, etc., etc." enlarge the subjects of Concurrent Legislation by including every matter included in the Code of Civil Procedure on the date of passing of the Government of India Act. The matter in this connection is the procedure to be adopted for the sale of the property of the judgment-debtor, i.e., issue of sale proclamation, etc. This is a matter of 'Civil Procedure' and was included in the Code of Civil Procedure as it stood on the date when the Government of India Act was passed and in that connection the existing Indian law is the law as it stood on the 1st April, 1937.

To sum up my reasons, the matter relating to the execution of decree and sale proclamation was a matter included in the Code of Civil Procedure on the date the Government of India Act was passed. The existing Indian law in this connection is Order XXI, rule 66, of the Code of Civil Procedure, as amended by the High Court and as it stood on the 1st April, 1937. The law subsequently enacted by the

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Provincial Legislature which is contained in sections 16 and 17 of the Bihar Money-Lenders Act is repugnant to it, and, not having been assented to either by the Governor-General or His Majesty, is void. The order of the lower court refusing to fix the value of the properties to be sold must be upheld though on different grounds.

The result is that the appeal is dismissed with costs.

CHATTERJI, J.—I agree.

By the Court.—We certify that this case involves a substantial question of law as to the interpretation of the Government of India Act and is, therefore, a fit one for appeal to the Federal Court.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

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July, 26.

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v.

JAGDAMBA LOAN COMPANY.*

Jharia Water Supply Act, 1914 (*Bihar and Orissa Act III of* 1914), *sections* 58(*b*) *and* 64(*a*)—*notice calling upon receiver of royalty to lodge return if mandatory—assessment without notice under section* 58(*b*), *effect of—Rules framed by local Government under the Act, rules* 4 *and* 5—*notice calling upon mine-owner, etc., to file objection to assessment —prejudice—rules for ascertaining whether provisions of a statute are directory or imperative.*

The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative and in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory.

*Appeal from Appellate Decree no. 965 of 1936, from a decision of W. W. Dalziel, Esq., I.C.S., District Judge of Manbhum, dated the 11th August, 1936, reversing a decision of Babu Haribar Prasad, Subordinate Judge at Dhanbad, dated the 3rd August, 1935.

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When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

Where a notice as required by section 58(*b*) of the Jharia Water Supply Act, 1914, was not served on the assessee but a notice under rule 5 of the Rules framed by the Local Government was served on him informing him of the assessment and calling upon him to file objection, if any, *held*, that the failure to issue the notice under section 58(*b*) did not invalidate the assessment as under the law the assessee is not entitled to be heard as to the assessment.

Held, also that rules 4 and 5 having been complied with, the assessment could not be said to have been made behind the back of the assessee.

Caldow v. *Pixell*(1), relied on.

Appeal by the defendant.

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

P. R. Das and *N. N. Roy*, for the appellant.

S. N. Bose and *J. C. Sinha*, for the respondents.

DHAVLE, J.—This is an appeal by the Jharia Water Board, defendant no. 1. The suit was for a declaration that assessments of royalty cess under the Jharia Water Supply Act, 1914, made by the appellant Board on three sums of money were *ultra vires* and for a permanent injunction against their realisation. The plaintiff, the Jagdamba Loan Company, Limited, admitted receipt of two of these sums, but claimed to have received them only as mortgagee from the owner of the coal lands (represented by the pro forma defendants), the mortgage bond making the mortgagor liable to pay all taxes,

(1) (1877) 2 C. P. D. 562.

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rents, etc., and that the assessments were also illegal because no notice was served upon the plaintiff company under section 58 of the Act. The receipt of the third sum was denied, and the denial was upheld by the trial court; this part of the decision was not challenged in the lower appellate court and does not any longer concern us. As regards the other two sums of money, both the lower courts have held that the Company is not entitled to exemption from assessment because of the mortgage set up by it. The trial court also held that the assessment was not rendered invalid by reason of the failure of the Board to serve the notice under section 58, but the District Judge held that the notice was imperative, with the result that the suit was decreed in respect of these sums also.

The only contention advanced on behalf of the appellant Board is that the notice referred to in section 58 of the Act is for the benefit not of the assessee but of the Board and that the failure to serve it does not render the assessments invalid. It has been contended on behalf of the plaintiff respondent on the other hand that the notice goes to the root of the jurisdiction of the Board to assess, and that, therefore, the two assessments in question were invalid.

Section 56 of the Act imposes a cess on royalties payable by each person who receives royalty from any mine situated within the area to which the Act applies, and section 58(*b*) provides that the Board shall cause a notice to be served on each receiver of royalty requiring him to lodge (in the office of the Board) a return of all royalty received by him. The Act does not seem to make any other provision regarding this notice, but provides in section 61 that when the quantity of coal and coke despatched and the amount of royalties have been ascertained and determined the Board shall cause to be served on the owner of every mine and the receiver of every royalty a

notice showing the amount of tonnage cess or royalty cess respectively.....This offers a curious contrast to the notice which is to be served under section 58(*a*) on each mine-owner requiring him to lodge a return of the quantity of coal and coke despatched from his mine and of the royalties payable in respect of that quantity together with the names of the persons to whom they are payable. Section 59 provides that if this return be not furnished or be untrue or incorrect, the Board shall proceed to ascertain and determine by such ways or means as to them shall seem expedient the quantity of coal and coke despatched from the mine concerned, and for this purpose shall have power to require the production of any register kept by a mine-owner. Under the next section so soon as the Board shall have ascertained and determined under section 59 the quantity of coal and coke despatched, they shall cause to be served upon the owner of such mine a notice informing him of the quantity so ascertained and determined. It will be seen that this notice is different from the notice under section 61 showing the amount of tonnage cess payable, and that the Act does not provide what the mine-owner and the Board are to do upon the issue of the notice under section 60, while as regards the receiver of royalty (as I have already indicated) nothing at all is said after section 58. Section 64(*a*) empowers the local Government to make rules regarding "the manner of assessing and recovering the cesses.....payable under this Act." Rule 3 of these rules enables the Board to require the Deputy Commissioner to furnish lists giving the names of all persons who have received royalty on account of a mine or mines within the area of supply and the amount of royalty received by each such person. Rule 4 provides that the Board shall, by means of such lists when so required and furnished, and of the returns furnished by mine-owners under section 58, and by such other means and ways as to it may seem expedient, ascertain and determine the

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quantity of coal despatched from each mine and the amount of royalty received by each royalty receiver, and shall cause to be served upon each mine-owner and upon each royalty receiver, respectively, a notice informing him of the quantity of coal or the amount of royalty, as the case may be, so ascertained and determined. We next have rule 5 providing that any person upon whom a notice has been served by the Board may, within 15 days from the receipt of such notice, apply to the Board to revise the estimate as set forth therein. The rules thus in some way supply an apparent lacuna in the Act in respect of royalty receivers. But there is nothing in them or in the Act itself to show that the failure to issue a notice under section 58(*b*) will invalidate the assessment. It has been found by the lower courts that the notice under rule 5 was served upon the plaintiff Company and that the company thereupon objected, though unsuccessfully, that being mortgagees in possession they were not liable to pay any royalty cess and that, further, the mortgagor had covenanted with them to pay all taxes, rents, etc. Section 79 provides for an appeal against the assessment of tonnage cess or royalty cess to the Commissioner of the Division, but it is not the case of either party before us that the right of the assessee to apply to the Civil Court is in any way affected by this provision.

Now, as was said by Denman, J. in *Caldow* v. *Pixell*,(1) the rules for ascertaining whether the provisions of a Statute are directory or imperative are very well stated in Maxwell on the Interpretation of Statutes; the scope and object of a Statute are the only guides in determining whether its provisions are directory or imperative, and in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a Statute to be directory or imperative. The learned District Judge thus correctly enough referred

(1) (1877) 2 C. P. D. 562.

to a passage from Maxwell, Chapter XII, Section III, "Imperative or Directory," (7th edition, page 316) which in effect says that the question is in the main governed by considerations of convenience and justice, and that in arriving at a conclusion upon it we are not to impute to the Legislature such intention as would involve "general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect." He also referred to the distinction drawn between cases where the prescriptions of the Act affect the performance of a duty and cases where they relate to a privilege or power. He proceeded to apply to the present case what Maxwell has said about prescriptions which "relate to a privilege or power". In my opinion this was entirely erroneous. The Jharia Water Board is not a Company for earning dividends while carrying on a public utility service, but a public authority created by Statute for the construction and maintenance of waterworks and for the supply of water for domestic purposes to the Jharia coalfields, and financed from a tonnage cess and a royalty cess, which it is empowered to levy, and from water rates which it is empowered to charge. We are thus plainly dealing here with a provision of law which affects not the exercise of a privilege or power but the performance of a duty; and the rule applicable in such cases is thus stated in Maxwell—

"When a public duty is imposed and the Statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."

As illustrations of this rule we may refer to the following passages from the same work which are supported by the cases cited in the foot-notes;

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"To hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors, a conclusion too unreasonable for acceptance."

* * * * *

"The regulations for the conduct of elections under the Ballot Act, 1872, were held to be so far directory only that an election was not invalidated by the non-observance of them unless the non-observance was of a character contrary to the principle of the Act, or might have affected the result of the election."

* * * * *

"The Parochial Assessments Act, 1836 (c. 96), after requiring that every poor rate should set forth a number of particulars given in a form respecting the persons and properties rated and that the church wardens and overseers should sign a declaration at the foot of the form, added that "otherwise the rate shall be of no force". It was held that those last words were confined to the signatures and did not affect the validity of the rate when the other requisites were neglected, because a different construction would have led to inconveniences which the Legislature must be presumed not to have intended. The Public Health Act, 1848 (c. 63), in requiring that rates made under it should be published like a poor rate, was also held directory only on the ground of the great inconvenience which would result from nullifying a rate whenever any of the particulars and forms required were not accurately given and follows."

It is plain from this that the question is not whether injustice will result to the Board if the provision of a notice under section 58(*b*) were to be

regarded as essential and imperative, for, as the learned District Judge himself has remarked, if the Board fails to do so (that is, carrying out the prescribed procedure which there is no difficulty in carrying out), it has only itself to blame. It is also not the question whether the Board is entitled to disregard the provision concerning the notice under section 58, clause (*b*); the law has said that the Board shall issue the notice and it is impossible for the courts to hold that the Board need not issue it. The sole question is whether an assessment made by the Board in disregard of this provision is on that account invalid even if it should be in conformity with all the other requirements of the law, and the answer to this question depends on whether injustice or inconvenience to others who have no control over those exercising the duty would result if the notice were considered essential and imperative. The learned District Judge thought that "it would cause some injustice to the royalty receivers not to insist on the notice, because the result would be that the assessment could be prepared behind their backs and they would be presented with a demand under section 61 without having had any opportunity to be heard as to the assessment." But this overlooks the fact that neither the Act nor the rules entitle the royalty receiver "to be heard as to the assessment", and the circumstance that where, as in the present case, rule 4 has been complied with and the assessee has preferred his objection, it cannot be said that the assessment was made behind his back. To hold that even in such cases the notice under section 58(*b*) is essential and imperative, as we have been asked by the plaintiff respondent to do, would plainly cause injustice and inconvenience to others who have no control over those exercising the duty of assessment, namely, the colliery public who have to pay for the water which the Board has been constituted to supply. The assessee is in such a case not a whit the worse for the failure of the Board to issue the notice under section 58(*b*), for he gets the notice under rule 4

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while the Act does not restrict the Board to any particular source of information as regards the receipt of royalties. Just as section 59 empowers the Board to ascertain and determine, by such ways and means as to it may seem expedient, the quantity of coal and coke despatched, rule 4 authorises the Board to adopt means and ways other than those specified to ascertain and determine the amount of royalty received by each royalty receiver. A breach of section 58(*b*) by itself leaves not the assessee but the public with a tangible grievance; the provision cannot on a consideration of the scheme of the Act and the rules be regarded as enacted for the benefit of the assessee. The function of the Board in making assessments is not judicial or quasi-judicial, but seems to be purely administrative and subject to an appeal to the Commissioner and an ultimate resort to the Civil Court. And even in matters judicial there are breaches which do not go to jurisdiction—*see* section 537, Cr. P. C., section 99, C. P. C., and decisions on jurisdiction mentioned in *Sukh Lal Sheikh* v. *Tara Chand Ta*(1) which was referred to in *Hriday Nath Roy* v. *Ram Chandra Barna Sarma*(2). Had the assessment been a judicial matter I am by no means clear that we could have interfered merely on the ground of want of notice under section 58(*b*), when the notice under Rule 4 was served. The learned advocate for the respondent Company has invited us to regard the notice as essential on the analogy of *Kajari Mal Kalyan Mal of General Gunj, Cawnpore*(3), *Chairman of the Tikari Municipality* v. *Nawab Alam Ara Begum*(4) and *Chairman, Dhanbad Municipality* v. *Janeswar Bhakat*(5); but these cases are easily distinguishable on principle. What was held in the case of *Kajari Mal Kalyan*(3) was that a full 30 days' notice under

(1) (1905) I. L. R. 33 Cal. 68, F. B.
(2) (1920) I. L. R. 48 Cal. 138, F. B.
(3) (1930) A. I. R. (All.) 209.
(4) (1926) 7 Pat. L. T. 804.
(5) (1933) 148 Ind. Cas. 918.

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section 22(*2*) of the Indian Income-Tax Act, 1922, was essential to a valid assessment under section 23(*4*) of the Act; but this was because under the proviso to section 30(*1*) of the Act no appeal lies in respect of such an assessment, while section 67 of the Act bars suits in the Civil Court to set aside or modify any assessment made under the Act. In the case of *Chairman of the Tikari Municipality*(1) it was held that when an application under section 113 of the Bengal Municipal Act, 1884, disputing liability to assessment, made according to law, is not disposed of in the manner provided by law, all subsequent proceedings with regard to assessment and realisation of taxes are *ultra vires*. This was because the Municipality was only empowered to act in conformity with the powers given by the Act, and section 116 of the Act provided that "no objection shall be taken to any assessment or rating in any other manner than in this Act is provided". In the case of *Chairman, Dhanbad Municipality* v. *Janeswar Bhakat*(2) it was held that the imposition of a latrine tax on certain shops was *ultra vires* for breach of section 86(*a*) of the Bihar and Orissa Municipal Act, 1922, which provides that

> "the tax shall be imposed only on holdings containing dwelling houses..... and on holdings containing shops or places of business in which, in the opinion of the Commissioners at a meeting, a latrine, urinal, or a cess-pool is required."

The requirement of the law regarding "the opinion of the commissioners at a meeting" was too plainly imperative on the very wording of the section to admit of any serious argument to the contrary.

In my opinion the learned District Judge was in error in holding that the assessment of the royalty cess was invalid merely because the notice under section 58(*b*) was not issued and that the Court can interfere with it even though there is no dispute about the amount of royalty received or about the quantum of cess payable on it under the law.

(1) (1926) 7 Pat. L. T. 804.
(2) (1933) 148 Ind. Cas. 918.

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The learned advocate for the plaintiff-respondent has urged by way of cross-objection that the two amounts admittedly received by the Company were not liable to be assessed in the hands of the Company as royalty. In support of this contention he has referred to the terms of the mortgage bond whereby on the one hand the mortgaged property is conveyed to the mortgagee inclusive of all rents and royalties payable to the mortgagor from the tenants, and on the other the mortgagor appoints the Managing Director and Manager of the mortgagee Company jointly and severally to be the attorney of the mortgagor to recover, receive, and give effectual discharges for all rents and royalties which may become due and payable to the mortgagor from the tenants, and also stipulates that he, the mortgagor, would pay all taxes, rents, etc. The provision about the appointment of the attorney does not seem to have been understood in the lower appellate court; it is common enough in English mortgages and is designed to save the mortgagee from the liability of accounting on the footing of wilful default as a mortgagee in possession, *see Janki Nath Roy* v. *Syed Asad Reza*(1). But it is unnecessary to pursue that point because, as the learned District Judge has pointed out, the plaintiff company brought suits for the royalties in question in its own name and recovered them in that way; and indeed that was the case of the plaintiff Company itself in paragraph 4 of the plaint. On the pleadings, therefore, the monies have rightly been treated as royalties in the hands of the plaintiff-respondent. The cross-objection, therefore, fails.

I would accordingly allow this appeal, set aside the decree of the District Judge and restore that of the Subordinate Judge. The result would be a decree in favour of the plaintiff in respect of the sum regarding which there has been no dispute in this or the lower appellate court, and a dismissal of the suit in respect of the other two sums. In respect of the former sum the plaintiff Company should get

(1) (1935) I. L. R. 14 Pat. 560.

costs of the trial court, but in respect of the other two sums it should pay costs of all the courts to the appellant Board.

AGARWALA, J.—I agree.

J. K.

Appeal allowed.

Cross-objection dismissed.

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APPELLATE CIVIL.

Before Wort, A.C.J. and Manohar Lal, J.

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Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 68—*personal covenant to repay, whether implies express contract—usufructuary mortgage bond—stipulation as regards mortgagor entering into possession when loan is repaid after due date—absence of condition that mortgagee was to continue in possession on same terms after due date—mortgagee, whether entitled to a decree for mortgage money—construction of documents, rules of.*

The personal covenant to repay the loan contemplated by clause (*a*) of section 68 of the Transfer of Property Act, 1882, refers to an express contract in contradistinction to a contract implied by law.

Where, in a usufructuary mortgage bond, the mortgagor stipulated as follows :—

"When at the end of the month of Jeth, 1336 Fasli, or after the expiry of the due date at the end of the month of Jeth of any year, I, the executant, shall repay the entire peshgi money in cash in lump sum at one time to the aforesaid zerpeshgidar, I shall take back this deed and enter into possession of the ijara property",

* Appeal from Appellate Decree no. 467 of 1936, from a decision of S. K. Das, Esq., I.C.S., District Judge of Saran, dated the 19th of December, 1935, reversing a decision of Babu Brindaban Behari Lal, Munsif of Chapra, dated the 28th of September, 1934.

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and there was no condition in the document that after the expiry of the due date the mortgagee was to remain in possession on the same terms,

Held, on a construction of the document, that the mortgagor had bound himself to repay the loan, within the meaning of section 68(*a*) of the Act, and, therefore, that the mortgagee was entitled to a decree for the mortgage-money.

Chhathi Lal Sah Kalwar v. *Bindeshwari Prasad Sahu*(1) and *Jag Sahu* v. *Musammat Ram Sakhi Kuer*(2), followed.

Ram Narayan Singh v. *Adhindra Nath Mukherji*(3), explained.

Narsingh Partab v. *Mohammad Yaqub*(4), *Kamal Nayan Prasad Sinha* v. *Ram Nayan Sinha*(5) and *Luchmeshar Singh* v. *Dookh Mochan Jha*(6), distinguished.

It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the court must ascertain, as best it can, what the intention of the parties was in accordance with the terms as expressed by them.

Appeal by the plaintiffs.

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

Nawal Kishore Prasad II, for the appellants.

Yasin Yunus, for the respondent.

WORT, A.C.J.—This matter was referred to a Division Bench as the point appeared to me at the time to be one of considerable importance and upon which there were a number of authorities which from one point of view might have been taken as conflicting. In the first place I want to make an observation with regard to the words appearing in the order I made while referring the case to a Divisional Court. I

(1) (1928) I. L. R. 8 Pat. 16.
(2) (1922) 3 Pat. L. T. 332.
(3) (1916) I. L. R. 44 Cal. 388, P. C.
(4) (1929) I. L. R. 4 Luck. 363; L. R. 56 Ind. App. 299.
(5) (1929) 11 Pat. L. T. 74.
(6) (1897) I. L. R. 24 Cal. 677.

stated there as follows: "And if it can be held that there was no implied covenant to repay and that the plaintiff's right to recover the principal depended upon section 68, that is to say, that he was entitled to that relief only in the circumstances that he had been dispossessed, it would mean that although there has been a loan the creditor can never get repayment." I never intended laying down in that judgment that if there was implied agreement to repay the plaintiffs would have the right under section 68 of the Transfer of Property Act to recover the principal. In the judgment which in this case I am about to express it would appear that to decide that point is unnecessary. I have no doubt as to the proper meaning of section 68 of the Transfer of Property Act. The appellant was the usufructuary mortgagee who was in possession of the property as a security for the loan advanced. On the terms of the bond he was to repay himself, so far as interest was concerned, out of the rents and profits. I presume that the reason for that arrangement was that the rents and profits were insufficient to meet more than the interest, but the fact remains that the plaintiff was to recoup himself for the interest only from the rents and profits. Now, it stands to reason that, unless the mortgagee has a right either to sell the property or sue for the mortgage money, the mortgagor would in the circumstances of the case be entitled to keep the money so long as he pleases, indeed to keep it for such period as would bar the plaintiff's (mortgagee's) right to recover the same. The only question that we have to decide in this case is whether the plaintiff-mortgagee is entitled to recover the mortgage money, because for reasons best known to himself he does not ask for a decree for the sale of the mortgaged property.

The matter that falls to be determined is whether on the construction of the deed there is a covenant to repay the mortgage money. Before dealing with that point I would refer to some of the sections of

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the Transfer of Property Act. Section 58(*d*) provides:

"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, or any part of such rents and profits, and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage", etc.

There was an argument addressed to us during the course of the case which cast a doubt as to whether the document before us was a usufructuary mortgage. I think there can be no doubt about the matter from the definition clause of section 58. It is true that Kulwant Sahay, J. in *Chhathi Lal Sah Kalwar* v. *Bindeshwari Prasad Sahu*(1) came to the conclusion, in circumstances not dissimilar to those which we have before us, that the document was not a pure usufructuary mortgage. But it will be seen from a perusal of the judgment in that case that the learned Judge came to that conclusion presumably on the ground that there was no provision enabling the mortgagee to remain in possession after the due date—a provision which seemed to the learned Judge deciding the case contrary to that in clause (*d*) of section 58 of the Act. Section 60 defines the rights and liabilities of mortgagor and no further reference need be made to its provisions excepting perhaps to the following clause:—

"Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

I quote this passage of the section, because it was suggested that the following clause in the deed—

"when at the end of the month of Jeth 1336 Fs. or after the expiry of the due date at the end of the month of Jeth of any year, I, the executant, shall repay the entire peshgi money in cash"

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was a clause enabling or rather entitling the mortgagee to notice before repayment. If that is the proper construction to be placed upon it, such a provision is not contrary to the provisions of section 60. Section 67 provides for a decree for the sale of the mortgaged property. The proviso to the section [proviso (*a*)] reads:

"Nothing in this section shall be deemed to authorise any mortgagee other than..... an usufructuary mortgagee as such to institute a suit for sale."

It is not a proper construction of that section to say that a usufructuary mortgagee is excluded entirely from the operation of the section. Again I refer to that merely by way of explanation of the judgment (to which I was a party) in the case of *Kirti Narayan Singh* v. *Surendra Mohan Singh*(1) where certain words that I used might be construed as meaning that all usufructuary mortgages, in whatever circumstances, were excluded from the operation of the section. No more need be said with regard to the matter, because I have already intimated that the plaintiff does not ask for a decree for sale of the property mortgaged to him. I now come to section 68 which provides:

"The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—(*a*) where the mortgagor binds himself to repay the same,"

and clauses (*b*) and (*c*) give the right to claim the mortgage-money where either the property has been destroyed or security rendered insufficient or where the mortgagee is deprived of his security by default of the mortgagor. Neither of those clauses (*b*) and (*c*) are relevant to this case.

I now refer to the case of *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2). There are certain observations in this case which have been relied upon

(1) (1934) A. I. R. (Pat.) 624.

(2) (1916) I. L. R. 44 Cal. 388, P. C.

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either by one side or the other to which reference will be made later. But I suppose that the importance of the decision lies in the fact that Lord Parker, who delivered the opinion of their Lordships of the Judicial Committee, laid down certain propositions which applied to many classes of case other than the one which they were dealing. Lord Parker in the course of his judgment stated: "In considering this question it must be borne in mind (*i*) that a loan *prima facie* involves such a personal liability; (*ii*) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (*iii*) that the nature and terms of such security may negative any personal liability on the part of the borrower". The learned Law Lord said (previous to the observation just quoted) the following: "The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages", and then the three considerations which I have stated were laid down. I would like to state that the third consideration, namely, 'the nature and terms of such security may negative any personal liability on the part of the borrower' might apply in the case of certain usufructuary mortgagees. One of the usual terms of a usufructuary mortgage is that not only should the mortgagee have the mortgaged property as security for the mortgage-money, but he should repay himself both as regards the interest and the principal out of the rents and profits. That would be, I imagine, a case in which the nature and terms of the security would negative the personal liability of the mortgagor. Lord Parker was dealing with a case, as will be seen from the statement of facts at the commencement of the judgment, in which the mortgagee had gone into possession of a property as security for the mortgage-money and he was to repay himself both as regards the interest and principal

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out of the rents and profits. Secondly, the mortgage deed upon which the plaintiff relied could not be used in evidence as it had not been attested, and their Lordships of the Judicial Committee referred the case back to the appellate court to try certain issues which arose under paragraphs 6 and 7 of the plaint. In paragraphs 6 and 7 of the plaint there were allegations which would raise issues coming under clauses (*b*) and (*c*) of section 68 of the Transfer of Property Act, and on this (as I understand the judgment) Lord Parker stated that the personal liability which was involved in a loan was not displaced by the fact that security was given for the repayment of the loan with interest. It is also to be noted in this connection that Lord Parker makes this observation: "The Board were of opinion that having regard to the nature of the deed of the 14th April, 1896, which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was excluded; and that though the allegations of paragraphs 6 and 7 of the plaint might, if established, give rise to other rights of action, such rights could not be enforced in an action based substantially on a personal liability arising by implication from the terms of the deed itself". It is in those circumstances that the matter went back for the Court to try the question whether the plaintiff had established any right under clauses (*b*) and (*c*) of section 68. Now, it seems to me that it is impossible, as was suggested in the course of the argument and as a basis for a claim, to apply the first principle laid down by Lord Parker to the facts of this case, the first principle being that the loan *prima facie* involves a personal liability. I think Lord Parker (if I may be allowed to say so) meant nothing more by that statement than if the facts were merely that a loan had been made, that a personal liability to repay the loan was involved. But when, as in this case, the relationship between the parties is one of mortgagor and mortgagee, we are, in my judgment,

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governed by the provisions of the Transfer of Property Act. I have said and repeat that the plaintiff makes no claim in this Court under clauses (*b*) and (*c*) for the reason that the Courts below held that he had not been dispossessed as he alleged in his plaint. He is therefore now limited to the first clause of section 68, that is to say, whether the mortgagor binds himself to repay the loan. We have to see, therefore, whether in this case the mortgagor has bound himself to repay the loan. I am clearly of the opinion, whatever rights the usufructuary mortgagee may have, that under section 68 the words which I have just read, on their proper meaning refer, to an express contract in contradistinction to a contract implied by law. The words in the deed which have created difficulty in this case are

> "He should pay the aforesaid annual malikana rent in full to the proprietors of the village every year till the repayment of the said peshgi money on taking receipts from them in the name of me, the executant, through himself. When at the end of the month of Joth 1336 Fasli or after the expiry of the due date at the end of the month of Joth of any year, I, the executant, shall repay the entire peshgi money in cash in one lump sum at one time to the aforesaid zarpeshgidar, I shall take back this deed and enter into possession of the ijara property."

Then the deed provides that the executant

> "shall not put forth any application directly or indirectly to redeem the rehan without making payment of the entire and full amount of peshgi".

There is a decision of Mr. Justice Das, as he then was, in *Kamal Nayan Prasad Sinha* v. *Ram Nayan Prasad Sinha*(1). The question which fell for decision in that case was the same as the one before us. Das, J. had to decide whether the following words of the mortgage were an undertaking by the mortgagor to repay the mortgage-money:

> "I shall take back this patta in the last month of Bhado, 1321 Fasli after paying off the entire zerpeshgi money in one lump sum to the thikadars and take back possession of the lease-hold property."

(1) (1929) 11 Pat. L. T. 74.

What this Court would have decided had a clause of that description been before it, is needless to speculate. Das, J. held that that clause together with the following clause

"In case the zerpeshgi money be not paid in due time by the executant in one lump sum then this patta will remain in force", etc.

did not constitute a covenant by which the mortgagor bound himself to repay the mortgage money. It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms as expressed by them. That is the task before us in this case. Now the argument advanced by Mr. Yunus on behalf of the respondent is that the clause to which I have referred is merely a clause which provides for what usually happens to the mortgaged property when the mortgagor repays the mortgage money. If that is the construction to be placed upon it, it is quite clear that the only possible right that the mortgagee would have would be to bring the property to sale, if such a right exists. I have expressly omitted deciding that question. But apart from other considerations, it would be quite clear, upon the construction sought to be placed upon the words I have quoted, that the mortgagee would have a right to recover the mortgage money. The document must be read as a whole. In the earlier part of the document it is stated that the period for which the loan was granted is "five years commencing from 1332 to 1336". First, therefore, we see that the parties fixed the period for which the loan was granted. The absence of the word 'when' in the second sentence of the passage which I have cited from the deed, would leave no doubt as to the construction of the clause which would read as follows—'at the end of the month of Jeth or after the expiry of the due date, I, the executant, shall repay, etc.' This to me quite clearly appears to be a clause by which the mortgagor

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undertook to repay the mortgage-money, and the provision of what would happen upon repayment would not detract from that construction. The question is therefore whether the word 'when' makes any difference in the circumstances. If the sentence is put in another form or paraphrased—'I shall repay the entire peshgi money in cash in one lump sum at the end of Jeth 1336 Fs. or after the expiry of the due date at the end of the month of Jeth of any year'—it would be capable of one construction only, namely, that the mortgagor had undertaken to repay on that day and then certain things would happen and he would have certain rights such as the return of the property. I cannot see that the arrangement of the sentence as we find it in the official translation makes any difference and in my judgment the expression

> "When at the end of the month of Jeth 1336 Fs. or after the expiry of the due date....., I, the executant, shall repay the entire peshgi money".

is an undertaking to repay the mortgage-money. It would seem impossible to put any other construction on it. That view being taken the mortgagee comes within the provisions of section 68 of the Transfer of Property Act and is entitled to a decree for the mortgage-money.

A large number of cases was discussed during the course of the argument, including the well-known decision in *Narsingh Partab* v. *Mohammad Yaqub*(1). The question there before their Lordships of the Judicial Committee was whether the document before them constituted an anomalous mortgage or not and it seems to me to be an authority which is of no assistance to us in arriving at a conclusion in the present case. I have said and repeat that the only point in this case is whether there was a contract or obligation to repay the mortgage money. I am clearly of the opinion that there was. This being so,

(1) (1929) I. L. R. 4 Luck. 363; L. R. 56 Ind. App. 299.

the plaintiff is entitled to succeed and he is entitled to succeed in this Court.

The appeal, therefore, is allowed with costs.

MANOHAR LALL, J.—I agree, but I wish to add a few words.

The question which falls to be determined in such cases has to be decided upon the construction of the particular zarpeshgi deed [*see Nagar Damodara Shanbhogue* v. *Chandappu Pujary*(1)], always keeping in view, as pointed out by Lord Parker in *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2) "that a loan *prima facie* involves such a personal liability; that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but that the nature and terms of such security may negative any personal liability on the part of the borrower". When I apply these considerations to the bond in question, I have no hesitation in coming to the conclusion that in this case the mortgagor clearly took upon himself the liability to repay the loan, or, in other words, to use the language of section 68(*a*), Surajdeo Sahi bound himself to repay the mortgage-money on the expiration of Jeth, 1336 Fs. The words "due date" are to be found in the clause which begins thus:

"When at the end of the month of Jeth 1336 Fs. or after the expiry of the due date at the end of the month", etc.

I am also impressed by the fact that the zarpeshgi bond was in lieu of interest only and no provision whatever was made in this document for the repayment of the principal unlike the document in *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2). The subject-matter of the zarpeshgi was a small piece of land measuring 1 bigha 14 kathas and 3 dhurs which bore an annual rental of Rs. 5-6-0 which had

(1) (1933) I. L. R. 56 Mad. 892, 896.
(2) (1916) I. L. R. 44 Cal. 388, 400, P. C.

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to be paid by the mortgagee to the superior landlord, and the interest on the amount advanced was stated to be Rs. 36 a year. It is, therefore, obvious that the parties never contemplated that the mortgagee will ever be able to pay himself by remaining in possession of the land. Again there is no condition in the document that after the expiry of the 'due date' the mortgagee will remain in possession on the same terms as he had to remain in possession during the term of five years for which the document was to run although such a term may well be implied in law.

At this stage reference may be made to the decision in *Roy Gowree Sunkur* v. *Baboo Bholee Pershad*(1) where the learned Judges of the Calcutta High Court pointed out that the words in the document (which were somewhat similar except that instead of the word 'when' it was stipulated "that after the expiry of the term it will be competent to me.....") relied upon by the appellant only debarred him from re-entering in the middle of any year in the event of the respondent's occupation continuing after the specified term owing to the default of the appellant to pay off the loan, not that there was any undertaking by the respondent to hold on until it suited the mortgagor to pay off the mortgagee. Applying this to the facts of this case I hold that on a true construction of the zarpeshgi deed the appellant gave no undertaking that he would continue in possession until it suited the mortgagor to pay him.

I wish to deal very shortly with some of the cases of this Court and of the Calcutta High Court which were cited before us. The case of *Jag Sahu* v. *Musammat Ram Sakhi Kuer*(2) is a case which is directly in favour of the view that in the case of a zarpeshgi of the kind we have before us the mortgagee has a right to sue immediately after the 'due date' is over irrespective of whether the mortgagee

(1) (1872) 17 W. R. 211.
(2) (1922) 3 Pat. L. T. 332.

remains in possession of the property after that date. Mr. Justice Das in *Kamal Nayan Prasad Sinha* v. *Ram Nayan Prasad Sinha*(1) sought to distinguish this case on the ground that Coutts, J. in *Jag Sahu's* case(2) had found that the usufructuary mortgagees had been dispossessed of the disputed land by the mortgagors. With great respect to the learned Judge I think that there was an error, because Coutts, J. says definitely (at page 334) that in the case before him the finding of fact of the lower appellate court was that the plaintiff had not been dispossessed, and indeed in noticing the third argument advanced by the appellant before him Coutts, J. says as follows: " the third point urged is, that a due date having been fixed for payment of the mortgage-money under the deed of the 21st of September 1905, the mortgage was not a pure usufructuary mortgage and, therefore, the plaintiffs were entitled to sell immediately after the due date was passed even though he still remained in possession of the property ". The actual decision of Das, J. in *Kamal Nayan's* case(1) may be justified upon the view that the construction placed upon the document in that case was based upon (as the learned Judge says himself) the following important passage which occurs towards the end of the document:

> " In case the zarpeshgi money be not paid in due time by the executant in one lump sum then this patta will remain in force and intact till the repayment of the zarpeshgi money with all conditions set forth therein."

This means to my mind that the parties contemplated that on the expiry of the due date if the money had not been paid by the mortgagor the result would be exactly as if a new zarpeshgi had been executed on the same terms as before. I need not discuss at any great length the case of *Luchmeshar Singh* v. *Dookh Mochan Jha*(3), a case which depended upon its own

(1) (1929) 11 Pat. L. T. 74.
(2) (1922) 3 Pat. L. T. 332.
(3) (1897) I. L. R. 24 Cal. 677.

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facts, namely, upon the construction of the terms of the zarpeshgi in question and, in which the learned Judges held that they could not find a covenant to pay therein. It may be noticed that the case of *Luchmeshar Singh* v. *Dook Mochan Jha*(1) did not consider the tests laid down by Lord Parker in *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2). Their Lordships of the Judicial Committee have laid down in a large number of cases that it is worse than useless to construe the terms of one Will from the terms of another. I venture to adopt the same remark by saying that it would be an unprofitable task to construe the words of one document from those of another. The case of *Chhathi Lal Sah Kalwar* v. *Bindeshwari Prasad Sahu*(3) was decided on the ground that there was no provision in the bond that after the expiry of the term of three years the mortgagee would be entitled to retain possession of the mortgaged property until the repayment of the mortgage amount: in other words, Kulwant Sahay, J. relying upon the remarks of Lord Parker in *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(2) construed the terms of the bond as not negativing the implied covenant to repay the money at the end of the 'due date'.

For these reasons I am in entire agreement with the judgment just delivered by my Lord the Chief Justice.

Appeal allowed.

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(1) (1897) I. L. R. 24 Cal. 677.

(2) (1916) I. L. R. 44 Cal. 388, 400, P. C.

(3) (1928) I. L. R. 8 Pol. 16.

APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

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Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 83 *and* 116—*mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity —default by transferee—cause of action arises when vendor actually damnified—limitation—terminus a quo—donee of other portion of mortgaged property, free of encumbrance, whether entitled to the benefit of the contract.*

Where there is an undertaking by the vendee (or other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be express or implied. In such cases a cause of action arises when the vendor, or any person who is entitled to the benefit of the contract with the vendor, is actually damnified by the sale of the property in the suit by the mortgagee, and limitation under Article 83 or 116 of the Limitation Act runs from the date when he is so damnified.

Tilak Ram v. *Surat Singh*(1), *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Misser*(2) and *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(3), followed.

C, a mortgagor, transferred for value a portion of the mortgaged property and left the consideration money with the transferees for payment to the mortgagee, the transferees undertaking to pay off the mortgage debt. *C* subsequently gifted away (*inter alia*) another portion of the property to his daughter *H*, free of encumbrance. The transferees made

* Appeal from Original Decrees nos. 65 and 59 of 1935, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Patna, dated the 22nd December, 1934.

(1) I. L. R. [1938] All. 500, F. B.

(2) (1929) I. L. R. 8 Pat. 860.

(3) (1930) I. L. R. 10 Pat. 451.

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default in the payment of the mortgage debt as a result of which the entire mortgaged property was sold. *H* then brought a suit claiming the amount of loss which she had suffered on account of the sale of her property and impleaded, amongst others, the transferees as defendants in the action.

Held, that *H* was entitled to the benefit of the contract with the mortgagor.

Isri Prasad Singh v. *Jagat Prasad Singh*(1) and *Ganeshi Lal* v. *Charan Singh*(2), followed.

Appeal no. 59 on behalf of defendant no. 2, and appeal no. 65 on behalf of defendant no. 1.

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

S. N. Roy and *Raj Kishore Prasad*, for the appellant in F. A. 59.

Ray Guru Saran Prasad and *B. C. Sinha*, for the appellant in F. A. 65.

B. C. De, *B. N. Mitter*, *Syed Ali Khan*, *Chaudhury Mathura Prasad*, *Ram Chander Prasad*, *Syed Hasan* and *Ajit Kumar Mitter*, for the respondents.

DHAVLE, J.—These appeals arise out of a suit for the recovery of Rs. 7,222, the amount for which the plaintiff's properties were sold in execution of a mortgage decree. In March, 1919, one Saiyid Badshah Nawab died, leaving (*inter alia*) to his heirs thirty-one properties subject to a mortgage. Shortly before his death the amount of this mortgage was settled at Rs. 61,200 and odd. Saiyid Chhote Nawab, a brother of the mortgagor's, took a one-third interest in the mortgaged properties and in the mortgage debt as one of the heirs. In August, 1920, he sold his share in five of the properties to defendant no. 2 for Rs. 6,581-6-0, which sum was left with the purchaser for payment towards the mortgage debt. In October,

(1) (1937) I. L. R. 16 Pat. 557.
(2) (1930) I. L. R. 52 All. 358; L. R. 57 Ind. App. 189.

1920, he similarly sold one property to defendants 3 and 4 for Rs. 3,000, which amount was to be paid by the purchaser towards the mortgage. The same month he also gave five other properties to defendant no. 5, wife of defendant no. 6, in mokarrari for a consideration of Rs. 4,500 which was left with defendant no. 5 for payment towards the mortgage. In March, 1924, Saiyid Chhote Nawab divided the remaining properties together with his debts among his heirs—one son and three daughters, namely, the plaintiff, defendant no. 1 and defendant no. 8 by tamliknamas under which each daughter was required to pay the debts assigned to her and was also made liable, in case any such debt had to be paid by some other heir, to compensate such heir. In this way defendant no. 1 was liable to pay Rs. 10,818 and odd, the balance of the principal of the mortgage debt due from Saiyid Chhote Nawab after deducting the amounts left with purchasers (*bád minhái zimme kharídárán*) towards Saiyid Chhote Nawab's share of the mortgage debt. The mortgage was sued upon in due course, and a decree obtained against Saiyid Chhote Nawab and his transferees for his share of the mortgage debt in 1926. Under the mortgage decree the properties assigned to defendant no. 1 were to be the properties to be 'first sold in execution, but defendant no. 1 succeeded in obtaining an order that on her depositing Rs. 15,500 her properties were not to be sold. She made the deposit in May, 1928. In June, 1929, the properties transferred to defendants 3 and 4, 5 and 6, and 2 were sold in execution for Rs. 2,025, Rs. 5,025 and Rs. 8,055, respectively. The order passed by the executing court in favour of defendant no. 1 on condition of her depositing Rs. 15,500 had not, however, satisfied defendant no. 1, who endeavoured to obtain a reconsideration of it, and then appealed to the High Court. As a result it was ordered that the mortgagee decree-holder was not to proceed against the properties of defendant no. 1 unless he

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refunded the deposit of Rs. 15,500, but that this was not to affect the right of the plaintiff in the present suit to claim contribution from her. The execution then proceeded, and only came to an end when five properties of the plaintiff's were sold for Rs. 7,222 on the 15th of December, 1932. On the 22nd of December, 1933, plaintiff brought the present suit for the recovery of this money, besides Rs. 1,000 as costs of the execution proceedings, with interest at 1 per cent per mensem. Plaintiff's case was that she had suffered this loss on account of the failure of defendant no. 1 and of defendants 2 to 6 to pay those portions of the mortgage debt that they had undertaken to pay.

The lower court held that defendant no. 5 (with whom goes defendant no. 6) had paid her share to Saiyid Chhote Nawab himself before the execution of the tamliknamas in favour of his daughters, and that defendants 1 to 4 were liable for the loss caused to the plaintiff. The claim of the plaintiff was accordingly decreed rateably against defendant no. 1, defendant no. 2, and defendants 3 and 4, the costs claimed being disallowed together with interest.

Against this decree defendant no. 1 has filed First Appeal no. 65 and defendant no. 2 First Appeal no. 59.

The learned Subordinate Judge had no difficulty in finding privity of contract between the plaintiff and defendant no. 1 on the ground that the tamliknamas in favour of the daughters formed the consideration for one another. This view has not been, as it cannot be, seriously contested. As regards defendant no. 2 also, the liability is clear—see *Isri Prasad Singh* v. *Jagat Prasad Singh*(1) on the footing [approved by their Lordships of the Judical Committee in *Ganeshi Lal* v. *Charan Singh*(2)] that there passed to the plaintiff the benefit of the contract

(1) (1937) I. L. R. 16 Pat. 557.
(2) (1930) I. L. R. 52 All. 358; L. R. 57 Ind. App. 189.

by which the money was to be applied by defendant no. 2, so that the plaintiff could say " I have a contract which frees me from the liability to contribution which the section (section 82 of the Transfer of Property Act) would otherwise impose upon me ".

It has, however, been contended on behalf of defendant no. 2 that the time is long past for enforcing his personal liability for the money left with him by Saiyid Chhote Nawab, and that the vendor's lien for unpaid purchase money is also gone since the property has been sold in the execution proceedings taken by the mortgagee. On behalf of defendant no. 1 also it has been contended that the personal remedy is barred by lapse of time, and that, in any case, the sum of Rs. 15,500 deposited by her was more than sufficient to cover what was due from her.

Taking the last point first, defendant no. 1 has given her calculations in paragraph 6 of her written statement. These calculations are erroneous in two respects. In the first place, they assume that the amount of Rs. 10,818 and odd, for which she became liable, refers to March, 1924, when the tamliknama was executed, and not to March, 1919, when the sum outstanding under the mortgage was settled just before the death of the mortgagor. Secondly, they assume that the sum of Rs. 10,818 and odd was arrived at after deducting not only the amounts left with the purchasers defendants 2, 3 and 4 but also the amount of Rs. 4,500 which the mokarraridar of 1920 was to pay towards the mortgage debt. A reference to the tamliknama of defendant no. 1 (Ex. 1) shows quite clearly that both these assumptions are erroneous. Saiyid Chhote Nawab's one-third share of the mortgage debt, as calculated in March, 1919, was Rs. 20,400-2-9 p., an amount which is only Rs. 9,581-6-0 in excess of the amount allotted to defendant no. 1; and this difference of Rs. 9,581-6-0 is the total of the Rs. 6,581-6-0 due from defendant no. 2 and the Rs. 3,000 due from

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defendants 3 and 4. The tamliknama purports to specify Rs. 10,818-12-9 p. as the principal of the mortgage debt—*besides interest*—after deduction of the amount in deposit with the *purchasers*. That no interest after March, 1919, is included in the amount allotted to defendant no. 1 is further made clear by the fact that in the schedule of debts given in the tamliknama there is one item relating to a hand-note with the specific remark "including interest". Defendant no. 5 was not a purchaser (*kharídár*), but only a mokarraridar, and if the Rs. 4,500 due from her were to be deducted from Saiyid Chhote Nawab's share of the mortgage debt, and interest calculated in the way that defendant no. 1 has done, her liability in March, 1924, works out, not at Rs. 10,818 and odd, but at Rs. 11,169 and odd. That the mokarraridar paid Rs. 4,500 to Saiyid Chhote Nawab before the tamliknamas is established by the evidence of his son Saiyid Muhammad Mehdi, p. w. 1, whose evidence there is no good reason to doubt. It is true that he does not know all the details, but the account that he speaks to, Ex. 2, as worked out by the Diwan of the estate, so far as it shows that Rs. 17,387 and odd was found due at that time on account of the mortgage has been shown by the calculations of Mr. De, who appears for the plaintiff, to be entirely consistent with the exclusion from Saiyid Chhote Nawab's share of the mortgage debt as calculated in March, 1919, of the two sums assigned to defendant no. 2 and defendants 3 and 4 only, without reference to the sum due from the mokarraridar. This supports the story of Saiyid Muhammad Mehdi. It has been pointed out on behalf of defendent no. 1 that it was plaintiff's own case that defendant 5 was also liable to contribute. That did not, however, preclude the lower court from ascertaining how the amount of Rs. 10,818 and odd, allotted to defendant no. 1, was really arrived at, and from distributing the liability for plaintiff's loss among the parties that were really liable. The

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liabilities *inter se* of the transferees from Saiyid Chhote Nawab did not really arise in the mortgage suit, and the finding of the Subordinate Judge in that suit that defendant no. 5 had failed to make out her story of payment to Saiyid Chhote Nawab plainly does not act as *res judicata* in the present suit. Rs. 10,818 and odd must, therefore, be taken as due from defendant no. 1, not from March, 1924, but from March, 1919, for the purpose of the calculation, so that her liability in March, 1924, was Rs. 17,387 and odd and on the 15th May, 1928, was much in excess of the deposit of Rs. 15,500 made by her.

The contentions regarding the personal remedy against defendants 1 and 2 being barred by lapse of time and as against defendant no. 2 regarding the vendor's lien for unpaid purchase money having been extinguished by the mortgage sale are without merit. As the placitum of the recent Full Bench decision of the Allahabad High Court in *Tilak Ram* v. *Surat Singh*(1) puts it, " where there is an undertaking by the vendee (or, it may be added, other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be express or implied. In such cases a cause of action arises when the plaintiff vendor is actually damnified by the sale of the property in the suit by the mortgagee, and, under Article 83 of the Limitation Act, the plaintiff has three years from the time when he is so damnified, but the time is extended to six years by Article 116 as the contract of indemnity was contained in a sale deed in writing registered." This is in substantial accord with the view taken in this Court in *Ram Rachhya Singh Thakur* v. *Raghunath Prasad*

(1) I. L. R. [1938] All. 500, F. B.

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Misser(1) and *Musammat Rajbansi Kuer* v. *Bishundeo Narayan Singh*(2). The present is of course not a suit by the vendor himself, nor is defendant no. 1 a vendee, but only a transferee. It is a suit by a person entitled to the benefit of the contracts with Saiyid Chhote Nawab, and as it was brought a little over a year from the time the plaintiff was actually damnified, it is plainly within time, whether we regard it as governed by the limitation prescribed in Article 83 or Article 116 or 120 of the Limitation Act.

It has been urged on behalf of the appellants in the two appeals that the calculations of the lower court are wrong. Before dealing with this point, however, it is convenient to dispose of the plaintiff's cross-objection in the appeal by defendant no. 1. This cross-objection relates to the costs and interest (both prior to the institution of the suit) claimed in the plaint. The amounts were not disputed in the lower court, but the learned Subordinate Judge disallowed the costs on the ground that "defendant no. 1 as well as the decree-holders having contested the plaintiff's prayer for having her properties put up for sale last of all, the plaintiff cannot equitably call upon defendants 1 to 6 only to reimburse her in respect of her said cost". It is said on behalf of defendant no. 1 that she had arrived at an arrangement with the decree-holder to refrain from proceeding against her properties in the first instance on condition she made a deposit; but this was no justification as against the plaintiff whom defendant no. 1 was bound under her tamliknama to save harmless. Plaintiff seeks by her cross-objection to recover from defendant no. 1 her proportionate share of the costs amounting to Rs. 348, and there does not seem to be any reason why she should not have these costs against defendant no. 1. As regards the interest claimed up to the date of institution of the

(1) (1929) I. L. R. 8 Pat. 860.
(2) (1930) I. L. R. 10 Pat. 451.

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suit, the claim cannot be supported on any of the grounds that would appear admissible from *J. H. Pattinson* v. *Srimati Bindhya Debi*(1) and *The Bengal Nagpur Railway* v. *Ruttanji Ramji*(2). That claim, must, therefore, be disallowed.

The only point that remains is the correct calculation of the respective liabilities of defendants 1, 2, 3 and 4. The interest calculated in the lower court seemed to be wrong, at least at one point, and has been checked by the Bar in this Court, with the result that the interest on the sum of Rs. 6,581-6-0 chargeable to defendant no. 2 must, it is now agreed, be taken to be not Rs. 6,588-11-0 but Rs. 7,578-11-0. In the account of defendant no. 1 Rs. 15,500, the amount of her deposit, has been credited to her; but the deposit was made on the 15th of May, 1928, while the account was made up to the 15th of December, 1932, an interval which carried interest at eight annas per cent. per mensem, the rate allowed from the date of the expiry of the period of grace. This interest, it is agreed, amounts to Rs. 3,807-7-0 and must be credited to defendant no. 1. In the account of defendant no. 2 no allowance has been made for the sum of Rs. 8,055 that was realised by the sale of his properties in the execution proceedings. With interest this amount, it is agreed, comes to Rs. 9,746-8-0, a figure which must be credited to defendant no. 2 in his account. There is a similar omission in the account of defendants 3 and 4. Their property was sold in the execution proceeding for Rs. 2,025, to which Rs. 390 and odd must be added as interest, the total being credited to these defendants. The *pro rata* liabilities of the defendants must be worked out in the light of these revised figures. The calculations may be simplified by working out the totals to the nearest rupee, leaving out annas and pies.

(1) (1932) I. L. R. 12 Pat. 216.
(2) (1937) 42 Cal. W. N. 985, P. C.

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Except for these arithmetical modifications the appeals fail. I would dismiss them, but without costs. I would also allow the cross-objection in F. A. 65 in part, as already indicated. The cross-objection in the other appeal, being out of time, was not pressed and must be dismissed.

AGARWALA, J.—I agree.

Appeals dismissed.

Cross-objection in F. A. 65 allowed in part.

Cross-objection in F. A. 59 dismissed.

S. A. K.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Chatterjee, JJ.

SECRETARY OF STATE FOR INDIA

v.

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September, 13.

Land Acquisition Act, 1894 (*Act I of* 1894), *section* 23—*compensation for loss of income, when can be awarded—market value, how to be ascertained.*

The loss of income which is contemplated in the fourth clause of section 23 of the Land Acquisition Act, 1894, is the loss of personal income to the owner of the land. It contemplates a case in which on account of the acquisition of a certain land the value of other properties of the owner has deteriorated or the owner has suffered loss of his own income not derived from the land itself: in such cases the owner is entitled to get compensation over and above what he is to get as the price of the land which has been acquired.

The clause has no application to a case where the loss of income complained of is the loss of the income of the property itself which is being acquired. That loss of income is a

*Appeals from Original decrees nos. 143, 144, 145 and 146 of 1936, from the decision of R. L. Chattarji, Esq., District Judge of Muzaffarpur, dated the 16th May, 1936.

factor to be taken into consideration in fixing the market-value of the land itself which the owner is to get under the first clause of section 23.

In those places where lands are being freely sold and purchased, the prevailing price is a suitable guide in fixing the market-value of the land acquired. But in cases where there have been no transactions whatsoever the market-value must be ascertained by finding out the income which the land was bringing to the owner and then capitalising it on the principle of reinstatement.

Appeals by the opposite party.

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

Baldeva Sahai, Advocate-General and *B. P. Sinha, Goverment Pleader,* for the appellant.

Khurshaid Husnain and *Rai T. N. Sahai,* for the respondent.

KHAJA MOHAMAD NOOR, J.—These four appeals by the Secretary of State for India in Council against the same respondent are from four decrees of the District Judge of Muzaffarpur and arise out of four land acquisition references by the Collector of Champaran. The lands involved in these cases are in villages Bariarpur, Lauthaha and Begumpur in the vicinity of the town of Motihari and were acquired by Government for the construction of courts and other Government buildings.

The learned District Judge has attached a very useful schedule to his judgment giving complete information in respect of every one of these four cases. Case no. 30 of 1935 of his court corresponds to F.A. no. 146 of 1936; case no. 31 of 1935 corresponds to F. A. no. 145 of 1936; and cases nos. 9 and 10 of 1936 correspond to F. A. no. 144 and F. A. no. 143 of 1936. It is not necessary to give in this judgment the details for which the schedule of the judgment of the learned District Judge may be referred to.

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The claim of the respondent for compensation was mainly under the following heads :—

(*1*) Value of land; (*2*) Loss of earnings; (*3*) Price of standing ratoon crop on the date on which the Collector took possession of it; (*4*) Damage for loss on account of field having already been prepared for sugarcane cultivation when possession was taken; and (*5*) Trees and fruits standing on the land.

In F. A. no. 145 of 1936 (Case no. 31 of 1935), the respondent did not claim anything separately for loss of earning though for the value of land he claimed much more than in other three cases. Nor there was any claim for standing crop or damages for loss on account of the field having been prepared for sugarcane cultivation. In F. A. no. 144 of 1936 (Case no. 9 of 1936) no claim was made for items (*3*), (*4*) and (*5*). In F. A. no. 143 of 1936 (Case no. 10 of 1936) in addition to the claims under the above heads claim was made for tube-well structure and pakka well.

The Collector awarded compensation under all the heads claimed except that he did not allow compensation for loss of income and did not allow any compensation for pakka well in F. A. no. 143 of 1936.

The learned District Judge increased the award of the Collector under the heads (*1*), (*3*) and (*4*) in all the cases and under the head (*5*) only in Case no. 10 of 1936 (F. A. no. 143 of 1936) and also allowed to the respondent Rs. 100 per acre as the loss of earning in the three cases in which this claim was made.

The Secretary of State has appealed. Though the appeal is directed against every one of the items in which the award of the Collector has been interfered with, it has been strenuously pressed so far as the compensation for loss of income is concerned.

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It is contended on behalf of the appellant that such compensation is not allowable under the law. The considerations in determining the compensations under the Land Acquisition Act have been specified in section 23 of the Land Acquisition Act. An attempt has been made on behalf of the respondent to bring this compensation for the loss of income under the fourth clause of that section, which runs thus :—

"the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings."

The learned District Judge has held (and I shall come to it in a moment) that the market value of the lands is about Rs. 300 per acre; but except in one case (land of Bariarpur) in which the respondent claimed Rs. 300 per acre and did not claim anything for loss of income, he has allowed for the value of land at the rate claimed by the respondents which was much less than Rs. 300 per acre, i.e., Rs. 150 per acre for Lauthaha land and Rs. 175 for Begumpur lands. For the lands of Bariarpur he allowed at the rate of Rs. 300 per acre as claimed by the respondent. But in respect of the lands of the two villages Lauthaha and Begumpur, as I have said, he allowed compensation for loss of income at the rate of Rs. 100 per acre.

Here it is necessary to mention some facts. It appears that a sugar mill has been established in the vicinity of these lands in the year 1932. The respondent in these cases admittedly hold a very large share in the mill which is run by a joint stock company. Apart from the mill, the respondent has acquired a very large area of land in the vicinity of the mill for the cultivation of sugarcane and out of these lands so acquired by him about 90 acres has been acquired by Government. The respondent contended that on account of the acquisition of these lands by Government he would have to acquire lands

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elsewhere at some distance from the mill and pay cartage for bringing the sugarcane to the mill and thereby he would lose income by the amount of cartage to be paid. The learned District Judge has accepted this contention of the respondent and finding that the loss would be at the rate of Rs. 12-8-0 per acre per annum, he has allowed compensation at eight times of that amount. The reason why he allowed eight times of the annual loss, though not clearly mentioned in the judgment, can be easily inferred from the earlier part of his judgment where he has mentioned that eight sugarcane crops could be had from a field in the course of twenty years and as he fixed the market value of the land at twenty times of annual income he capitalised the loss of income by payment of cartage also on the same basis.

There is no doubt that in allowing this compensation the learned District Judge has erred inasmuch as the loss of income which is contemplated in the fourth clause of section 23 of the Land Acquisition Act is the loss of personal income to the owner of the land. It contemplates a case in which on account of the acquisition of a certain land the value of other properties of the owner has deteriorated or the owner has suffered loss of his own income not derived from the land itself: for instance, if a portion of a person's land is acquired and thereby the frontage of his other property not acquired is destroyed and their value is thus decreased, he is entitled to get compensation for this deterioration of their value: or, if a man is holding his own shop in his own house or is carrying on any professional business, say of a physician or a dentist in his own house, for the loss of income which he will suffer on account of shifting his business elsewhere he is entitled to get compensation over and above what he is to get as the price of the house which has been acquired. But this clause has no application in case the loss of income complained of is the loss of the income of the property itself which is being

acquired. That loss of income is a factor to be taken into consideration in fixing the market value of the land itself which the owner is to get under the first clause of section 23. No authority has been placed before us to show that the owner of a land can get over and above the market value of the land and the statutory compensation, anything for the loss of income of the land itself. The price of land is fixed on the basis that the owner should get full compensation for the loss of the income which he was getting from the land and this compensation is the market value of the land acquired. Therefore, for the land itself the respondent is not entitled to get anything more than the market value of the land and the statutory compensation payable to him under the law. He cannot get the market value of the land and then compensation for the loss of income from the land itself. The cases relied upon by the learned District Judge have no application.

The next question for consideration is the market value of the land. I have said before that the learned District Judge has held that this value is at least Rs. 300 per acre. He has taken three factors into consideration. One is the cost incurred by the respondent in acquiring the land and in making it suitable for sugarcane cultivation. This figure comes to Rs. 192 per acre and is made up of these items :—

	Rs.
Average price paid for the purchase of the land itself	75 per acre.
Cost of levelling and clearing of the land ...	32 per acre.
Cost of manuring and preparing soil for sugarcane cultivation	85 per acre.
Total ...	192 per acre.

It has been urged on behalf of the appellant that the learned District Judge ought not to have taken into consideration Rs. 85 the cost of manuring as it is

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an annual recurring expenditure in producing sugarcane. In my opinion this contention is well founded. There is nothing to show that this was a capital outlay on the land and was independent of the annual expenditure on manuring the land. Therefore, the result is that the cost of the land itself on the face of it comes to Rs. 107 per acre, and this is not disputed by the appellant.

The next item which has been considered by the learned District Judge is the award for the lands in the neighbourhood (to the east of the railway line) which were acquired in 1921 for the construction of a railway siding. This was at the rate of Rs. 250 per acre. It is, however, conceded that the price of the land was then higher and that the lands then acquired were of superior quality.

The third factor considered by the learned District Judge is the probable income from the land in twenty years. He calculated the income on the evidence which seems to have been accepted by both the parties that eight crops can be had in the course of twenty years and after deducting the cost of cultivation and taking into consideration the price of sugarcane, as I have said, he came to the conclusion that the value of the land was Rs. 300 per acre.

The learned Government Pleader contended that the cost of acquisition of the lands and their improvement, i.e., Rs. 107 per acre should be market value. The expression " market value " has not been defined in the Act. In some judicial decisions an attempt has been made to define it by saying that it is a price which a willing purchaser will give to a willing seller. Such a definition is very easy to be put down on paper; but difficulties arise in giving effect to it when one finds, as in this case, no evidence of the price which has been paid or which is likely to be paid by a willing purchaser to a willing seller of lands of equal quality. As has been pointed out in some cases, one cannot find a market for land where lands can be bought or sold

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like goods. Lands are bought and sold by bargaining. Land acquisition operations are carried on at places where for generations there has not been any sale of land whatsoever. The place is such where no one wants to buy land. In these cases market value must be ascertained by finding out the income which the land was bringing to the owner and then capitalising it on the principle of reinstatement. If there have been transactions and lands are being freely sold and freely bought different considerations may arise. There a prevailing price will be a suitable guide in fixing the market value, though consideration will have to be given to the special features of the land. But, as I have said in the present case the only evidence of the sale or purchase of land is that of acquisition of the land for the railway siding and the price paid for the land under acquisition by the respondent and expenses incurred by him in making it fit for sugarcane cultivation. The land of railway siding is admittedly of superior quality and was acquired at the time when the prices were high. Therefore, we have in this case no evidence whatsoever of the prevailing price except the price paid by the respondent himself for the purchase of these lands. There is no evidence of the sale and purchase of lands in which sugarcane is being produced.

Now, I have shown that these lands were acquired and improved for the cultivation of sugarcane. The price of the lands now cannot be only the cost incurred in acquiring and improving them. The price of a finished product is more than the price of the material used in producing it. Then the figure Rs. 107 does not take into consideration the labour and attention which must have been bestowed by the owner in improving the land not to speak of the loss of income during the period when the land was under improvement. Therefore, the factor of the income which the owner was deriving from the land has to be taken into consideration in fixing the market value.

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I have said before that the learned District Judge has held that the income from the land in twenty years is at least Rs. 300 per acre. In this connection, in my opinion, he has erred inasmuch as he has not considered the fact that the sugarcane crops in spite of all human efforts are not likely to be full in each of the eight years he has considered. There is something as vicissitudes of climate, seasonal variation and other factors which govern the produce. Then the market price of sugarcane may vary. Therefore, giving a margin for these factors and circumstances over which one has no control, we must take it that some of these eight years will not be as good as the others and taking into consideration the fact that the cost of acquiring and preparing the land for cultivation of sugarcane on the figures supplied by the respondent himself came to Rs. 107 per acre and also taking into consideration the fact that when the price of land was high a superior land was acquired at the rate of Rs. 250 per acre, I think it will be safe to fix the market value of the land at Rs. 200 per acre in all the cases.

Now, the question is whether in the two cases, i.e., the lands of Lauthaha and Begumpur in which according to the manager of the claimant himself the market value was Rs. 175 and Rs. 150 per acre respectively we shall be justified in allowing the respondent more than what he claimed himself, i.e., Rs. 200 per acre. In this particular case it seems to me perfectly clear that under some misapprehension of law what the respondent ought to have asked to be taken into consideration in fixing the market value of the land he asked separately as compensation for loss of income, which, as I have shown, is a factor to be taken into consideration in fixing the market value. I do not think that the fact that the respondent or his manager under a misapprehension of law claimed under two separate heads what they could have reasonably asked as market value of the land

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should penalise them. It seems to me from the deposition of the manager taken as a whole that what the respondent asked for as market value was what he thought was the value of the land independent of the fact that it was being used for sugarcane cultivation, and for the loss of income from sugarcane crop he wanted to get compensation separately. This confusion of thought is not such to which very serious exception can be taken. To illustrate my point of view, take the case of a land on which a market is held. Strictly speaking, the market value of that land is its value after taking into consideration the particular purpose for which the land was being used. If the owner of the land wants compensation under two heads, making a separate claim for the value of the land independent of the fact that a market was held upon it and claiming separate compensation for the market, he cannot be deprived of full value, because he placed his claim under two heads. Take another instance of an orchard. The market value of an orchard is something more than the value of the land and the value of timber of trees standing thereon taken together. If the owner wants compensation for the land irrespective of the consideration that it is an orchard land and then separately claims compensation for the loss of income from the orchard, he cannot be penalised simply because he claimed under two heads what he ought to have claimed in the head of market value. The fact that the claim under one head was placed somewhat low and a higher claim was made under another head, should not stand in the way of giving full market value to the respondent, i.e., Rs. 200 per acre which I have held to be fair market value in respect of Lauthaha and Begumpur lands also for which the respondent has claimed less as market value.

Regarding other items, i.e., the value of trees, fruits, wells, etc., for which the learned District Judge has increased the award of the Collector, nothing has

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been urged which can justify any interference. Stress was laid on the price of the ratoon crop standing on the land. But, I think the learned District Judge has taken the correct view.

I would, therefore, modify the decrees of the learned District Judge by disallowing the compensation of loss of income and allow the respondent the market value of the land at the uniform rate of Rs. 200 per acre in all the cases. He will get the statutory compensation of fifteen per cent. on this amount. He is also allowed interest under section 28 of the Land Acquisition Act on the amount found due to him in excess of the award of the Collector.

Taking into consideration the success and failure of the parties in the two courts, I would direct that the parties bear their own costs in both the courts.

CHATTERJI, J.—I agree.

Appeals allowed in part.

S. A. K.

PRIVY COUNCIL.

On Appeal from the High Court at Patna.

S. N. BANNERJEE

v.

KUCHWAR LIME AND STONE CO., LTD.

J. C.*
1938.

October, 31.

Contempt of Court—Breach of an injunction—Leave to appeal to His Majesty in Council—Leave granted by High Court under Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 109(*c*)—*competency of appeal—Procedure when contempt is by a party on whom injunction is not binding.*

Government by an order in 1934 purported to forfeit mining leases in certain lands which had been granted to Kuchwar Lime and Stone Co. in 1928 and by a further order

*Present: Lord Wright, Lord Romer, Lord Porter, Sir Shadi Lal and Sir George Rankin.

granted leases of these lands to another Company, Kalyanpur Lime Works, and the latter Company entered upon the lands and began mining operations. Kuchwar Lime and Stone Co. thereupon instituted a suit against the Secretary of State for a declaration that the forfeiture was invalid and for an injunction restraining "the defendant and his servants from interfering with the plaintiffs' lease" and eventually obtained a decree in the High Court granting the declaration and an injunction in the above terms.

Kalyanpur Lime Works, who had not been made parties to the suit and who had stopped work in the land for a time, resumed mining operations after the decree in the High Court.

Kuchwar Lime and Stone Co. petitioned the High Court to commit the managing director and the manager of Kalyanpur Lime Works and the Secretary of State for contempt in disobeying the injunction and the High Court declared all the three persons guilty of contempt and made an order for payment of costs against them and, under section 109(*c*) of the Code of Civil Procedure, gave them leave to appeal to His Majesty in Council and they appealed.

A preliminary objection to the hearing of the appeals was taken on the grounds that (*a*) the contempt was of the nature of a criminal matter and leave could not, therefore, be granted under the Code of Civil Procedure and (*b*) leave should not be granted where penalties have been imposed for contempt.

Held, that leave to appeal was rightly granted.

A committal for contempt for breach of an injunction is not criminal in its nature.

Scott v. *Scott*(1) and *Radha Krishna Das* v. *Rai Krishn Chand*(2), referred to.

It is competent to His Majesty in Council to entertain appeals against orders imposing penalties for contempt. Contempts are quasi-criminal acts and orders punishing them should, generally speaking, be treated as orders in criminal cases.

Ambard v. *Attorney-General for Trinidad*(3), referred to.

Held, on the facts, there was no breach of the injunction by the Secretary of State.

(1) (1913) A. C. 417, 456.
(2) (1901) I. L. R. 23 All. 415; L. R. 28 Ind. App. 182.
(3) (1936) A. C. 322, 329.

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The officers of the Kalyanpur Lime Works were not servants of the Secretary of State and there was no injunction binding on them.

The proper form of application against them would have been for aiding and abetting the Secretary of State in his disobedience. *Wellesley* v. *Mornington*(1), referred to.

Consolidated Appeals (no. 82 of 1937) from an order of the High Court (October 9, 1936).

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

1938, *July* 11. *Pugh, K. C. and McDonnell,* for the respondent in both appeals: The appeals are incompetent. No appeal lies either with or without a certificate where there is a finding by a Court of Record that there has been a contempt of court and the Privy Council will not review the decision. *Surendra Nath Bannerji* v. *The Chief Justice and Judges of the High Court in Bengal*(2).

[LORD WRIGHT: Against that is *Ambard* v. *Attorney-General for Trinidad*(3).]

Proceedings in contempt are quasi-criminal in their nature, leave to appeal could not, therefore, be granted—Letters Patent of the Patna High Court referred to. Leave could not be granted under the Code of Civil Proredure. The order granting leave under section 109(*c*), is in wrong form for there is a difference in procedure in civil and criminal or quasi-criminal cases. The leave not being in proper form, the appeals are incompetent. *Radha Krishna Das* v. *Rai Krishn Chand*(4).

If the appeals were considered as appeals by Special Leave, they would be appeals only as to costs.

[LORD WRIGHT: There was a finding of contempt.]

Pringle, for appellants Banerji and Ghose and *Tucker, K. C. and Wallach,* for the Secretary of State

(1) (1848) 11 Beav. 180, 181; 50 E. R. 785.
(2) (1883) I. L. R. 10 Cal. 109; L. R. 10 Ind. App. 171, 180.
(3) (1936) A. C. 322.
(4) (1901) I. L. R. 23 All. 415; L. R. 28 Ind. App. 182.

propriety of the appeals.

The rest of the arguments were directed to the facts.

The judgment of the Judicial Committee was delivered by—

LORD PORTER.—These are consolidated appeals from an order of the High Court of Judicature at Patna, dated the 9th October, 1936, made on the petition of the Kuchwar Lime and Stone Company (in liquidation), whereby it was ordered that (*1*) the Secretary of State for India in Council, (*2*) S. N. Ghose and (*3*) S. N. Bannerjee had been guilty of contempt and that the Secretary of State should forthwith pay to the petitioners one half of their costs and that the other respondents should also pay to the petitioners one half of their costs and should be jointly and severally liable therefor. Of these persons S. N. Ghose is the managing director of a company called the Kalyanpur Lime Works, Ltd., and S. N. Bannerjee, then manager of that company.

The reason for the petition is to be found in the previous acts and relationship of the parties.

On the 1st April, 1928, the Secretary of State granted to the petitioners two leases; one of the mineral rights in Lower Murli Hill and the other of the surface and mineral rights in Upper Murli Hill for a period of 20 years. The leases contained stipulations against assignments or the transfer of any right or interest thereunder without the previous assent of the Board of Revenue of Bihar and Orissa, and provided that a breach of those stipulations should entail a right of forfeiture by the Government.

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S. G. Bose for the sale to him of their right under the two leases.

On the 6th October the respondents who had acquired the surface rights in Lower Murli Hill, sold those rights to Bose and on the 9th October, 1933, applied to the Collector of Shahabad for permission to assign the lease to him. On the same day Bose started quarrying operations. On the 6th December, 1933, the subdivisional officer of Sasaram, acting under the instructions of his superiors, refused permission to assign and directed Bose to stop work.

On the 20th April, 1934, the Commissioner of the Division informed the respondents' solicitors that the Government had by order, dated the 27th March, 1934, forfeited the leases and the Government formally confirmed the forfeiture on the 18th July, 1934.

Meanwhile S. N. Ghose as managing director of the Kalyanpur Lime Works, Ltd., having heard that the leases were being terminated, wrote to the Collector of Shahabad offering, on behalf of his company, to take leases of the properties. By letter, dated 31st March, 1934, from the Secretary to the Board of Revenue to the Commissioner, a copy of which was forwarded to S. N. Bannerjee as manager of that company, the offer was accepted. On receiving the copy of this letter, the Kalyanpur Company took possession of the quarries in April, 1934, and this action was approved by the Collector in a letter, dated the 13th May, 1934, in which he stated that "having been granted a lease of Lime Stone concession in the Upper and Lower Murli areas you are lawfully entitled to start work on them at once". On the 21st April, 1934, S. N. Bannerjee informed the respondents that the Board of Revenue had sanctioned the leases to the Kalyanpur Company.

Certain disputes arose between that company and Bose as to rights of ingress to and egress from the quarries but the company continued to work the

quarries until the 20th May, 1935, when they temporarily suspended operations.

The events which led up to this suspension were as follows :—

On the 24th September, 1934, the respondents brought a suit in the Court of the Subordinate Judge of Arrah against the Secretary of State for a declaration that their leases had not been validly forfeited and for an injunction to restrain the Secretary, his servants and agents, from granting leases to the Kalyanpur Company or to others and from authorising such person or persons to carry on operations in the Murli Hills and from otherwise interfering with any of the rights of the respondents in respect of the said hills.

The Secretary of State in his defence contended that he had rightly terminated the leases, ejected the respondents and authorised the Kalyanpur Company to enter and work the quarries.

The Subordinate Judge dismissed the suit on the 7th March, 1935 The respondents thereupon appealed to the High Court and on the 25th April, 1935, ex parte obtained an interim injunction against the Secretary of State in the terms set out above.

S. N. Bannerjee received a copy of this injunction on the 20th May, 1935, and work was stopped the next day.

On the 7th February, 1936, the High Court allowed the appeal, held that the two leases had not been validly forfeited and ordered that there should be an injunction restraining the defendant and his servants from interfering with the respondents' leases on the basis of the forfeiture claimed by him in the Government notification of the 18th July, 1933.

From that judgment the Secretary of State appealed to this Board and judgment dismissing his appeal was given on the 19th November, 1937.

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There is no doubt but that all the appellants were, from the date of its pronouncement, aware of the granting of the injunction and its terms.

The Kalyanpur Company asserted that they stopped work not because of the injunction, which they contended was not binding upon them, but because the Government had given them an executive order to do so, but the Government never accepted this position.

Acting, however, on the contention that they were not bound by the injunction, the Kalyanpur Company, resumed quarrying operations on the 2nd March, 1936, and on the next day informed the Chief Inspector of Mines and the Collector that they had done so. The Collector replied on the 16th March, 1936, that they were taking this course at their own risk.

On the 9th March, the respondents' solicitors, having been informed that the Kalyanpur Company had again begun work at the quarries wrote to the Collector pointing out that judgment had been given in their clients' favour by the High Court and requesting that immediate instructions be given prohibiting the Kalyanpur Company from continuing to carry out any operations on the mines and for the restoration of possession to Mr. Bose, the respondents' agent.

On the 18th March, by letter sent to the Collector, to the Commissioner of the Patna Division and to the Chief Secretary to the Government of Bihar and Orissa, the solicitors repeated their protest, stated that the failure to take any steps to prevent the trespass appeared to them to constitute a contempt of Court and added that they would move the Court unless steps were taken by the Government to prevent the Kalyanpur Company from further trespass. After receiving a reply stating that the matter was being considered, they wrote again on the 28th March asking what steps had been taken to stop the working in the mines by the Kalyanpur Company.

This letter crossed one from the Collector of the same date, which may be set out in full since it forms the basis of the complaint against the Secretary of State in the present proceedings.

"GENTLEMEN,

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.

I have the honour to be,

Sir,

Your most obedient servant,

R. A. E. WILLIAMS,

Collector of Shahabad, 28-3-36."

On receipt of this letter the respondents petitioned the High Court at Patna to commit all the appellants for contempt in disobeying the injunction of that Court. By order of the 19th November, 1936, the High Court allowed the application, declared the three appellants guilty of contempt and made the order as to costs hereinbefore set out.

The substantial ground on which the High Court came to its conclusion was (*a*) that by their letter of the 28th March, 1936, the Government had made up their minds to depart from the correct attitude of the Collector and had decided to come out into the open and support the cause of the Kalyanpur Company; (*b*) that the Kalyanpur Company were treated by the Government as lessees and the Government would support their supposed lessees in that attitude and

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(c) that by some means or other the Kalyanpur Company had persuaded the higher authorities in the Government hierarchy to support their possession.

The High Court accordingly held the Government in contempt by direct breach of the injunction by allowing Banerjee and Ghose to work the quarries, and by encouraging them by their support.

As to the other two appellants, admittedly they were the executive authority of the Kalyanpur Company and as such responsible for its actions. The High Court, therefore, on the authority of *Seaward* v. *Paterson*(1) held that as they were aware of the injunction, their presence upon the quarries with the permission of the Government was a setting at nought of the order of the Court and therefore a contempt.

S. N. Ghose and S. N. Bannerjee obtained a certificate that the case was fit for appeal under section 109(c) of Act no. V of 1908 on the 20th April, 1937, and on the same date the Secretary of State obtained a like certificate under the same section. The appeals were afterwards admitted under Order XLV of the Code of Civil Procedure. Later the appeals were consolidated and were heard by the Board as consolidated appeals.

A preliminary objection to their hearing was made by the respondents on the ground that the contempt in both cases or at any rate in the case of Ghose and Bannerjee was of the nature of a criminal matter, that the leave granted was granted under the Civil Procedure Code and inasmuch as it was in the wrong form this Board should hold. on the authority of *Radha Krishna Das* v. *Rai Krishn Chand*(2), that leave had not properly been given.

The objection is purely technical and so far as the Secretary of State is concerned their Lordships think it now sufficiently established that a committal

(1) (1897) 1 Ch. 545.
(2) (1901) L. R. 28 Ind. App. 182; I. L. R. 23 All. 415.

for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code. See *Scott* v. *Scott*(1).

The question whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal has given rise to much controversy—controversy which in the present case this Board does not think it necessary to resolve.

The respondents themselves when petitioning the Court asked the Court to issue notice upon the opposite parties to show cause why they should not be committed for contempt for disobedience of the injunction.

Strictly speaking this was a wrong remedy to ask against Ghose and Bannerjee. The injunction was not binding on them and they had never disobeyed it. The petition should have asked that they be committed for aiding and abetting the Secretary of State in his disobedience. Indeed on the authority of *Wellesley* v. *Mornington*(2) the High Court might well have dismissed the petition against those two appellants and left the petitioners to apply again in proper form. Though the High Court did not do so but treated the petition as if application had been made to commit those appellants for contempt in aiding and abetting the Secretary of State, yet their Lordships do not think the respondents have any cause of complaint if the Court in admitting the appeal treated the case (as the respondents themselves had done) as being a petition for breach of the injunction and gave a certificate as in a civil matter.

(1) (1913) A. C. 417, 456.

(2) (1848) 11 Beav. 180, 181.

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It was further argued that in any case leave to appeal should not have been granted and an appeal should not be admitted in cases where penalties have been imposed for contempt. That very question, has, however, lately been before their Lordships in *Ambard* v. *Attorney General for Trinidad*(1) where Lord Atkin gave it as the clear opinion of the Court that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of Court. In such cases, however, the discretionary power of the Board will no doubt be exercised with great care. Such interferences when they amount to contempt are quasi-criminal acts and orders punishing them should generally speaking be treated as orders in criminal cases.

The learned and noble Lord was then speaking of contempt in criticizing the action of a Court and not of contempt in disobeying an injunction or in aiding and abetting such disobedience but whether or no the rules laid down by Lord Atkin apply to this case their Lordships are of opinion that on the material before them leave was rightly granted.

As to the substantive question of the appeal their Lordships do not find themselves in agreement with the view of the High Court.

So far as the Secretary of State for India is concerned the ground on which liability was imposed was that he and his subordinates had in March, 1936, supported and endorsed the action of the Kalyanpur Company in either continuing in or retaking possession of the quarries at Upper and Lower Murli.

In coming to this conclusion the High Court made it plain that they were influenced and influenced solely by the Collector's letter of the 28th March, 1936. In argument before the Board the Secretary

(1) (1936) A. C. 322, 329.

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of State reserved the question whether the proceedings were properly framed against him, firstly because he was sued in his public capacity as Secretary of State in Council and therefore as a body corporate against whom sequestration might be invoked but no order for contempt could be made, and secondly because in any case he could not be made responsible in contempt for the action of his officials in India.

He was, however, prepared to assume for the purpose of the argument that in a proper case proceedings for contempt could be taken against him.

Making this assumption, however, he contended that no evidence of disobedience to the injunction or of contempt for the order of the Court had been shown.

With this contention their Lordships agree. It is true that the reversion of the surface and mining rights in Upper Murli and of the mining rights in Lower Murli belonged to the Government.

But the surface of Lower Murli belonged to Mr. Bose and the immediate right to possession of the surface of Upper Murli and of the minerals in both belonged to the respondents. It was for the respondents who either had the immediate right to possession or were in possession under the order of the Court and not for the Government who were not in possession to eject the Kalyanpur Company, if ejection was to be effected. Indeed the respondents might at any time have made that company defendants in the original action. The Government was under no duty to act; their duty was to leave those who claimed to be entitled to possession of the soil to take the appropriate measures.

But it is said the Government did act in a manner hostile to the respondents in that they incited the Kalyanpur Company to take or retain possession in defiance of the order of the Court.

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Their Lordships can see no evidence of this either in the letters or in the circumstances of the case. In the first place it is to be noticed that the letter of the 28th March is not written to the Kalyanpur Company, but to the solicitors to the respondents and there is nothing to show that it ever reached the eyes of Ghose or Bannerjee. But even if it had done so in their Lordships' view there is nothing in the letter itself to indicate that the Government were supporting the Kalyanpur Company. The letter is a statement of fact necessitated by the communication to which it was a reply and sets out the considerations which weighed with the Government in deciding to take no action. Their Lordships see no ground for suspecting the motives of the Government officials, much less evidence of a breach of the injunction.

The respondents, however, contended that even if the Secretary of State was not himself guilty of direct disobedience to the injunction which had been granted, yet the other two appellants were guilty of contempt upon the principles set out in *Avery* v. *Andrews*(1) and *Seaward* v. *Paterson*(2). In terms, however, those cases limit the offence of contempt by a person not a party to the injunction to cases where they aid and abet the party enjoined in its breach. Where, as here, that party has not broken the injunction it is impossible to hold that anyone has aided or abetted them in breaking it.

The respondents sought to avoid this difficulty by maintaining that the doing by anyone of an act which was forbidden by the injunction was itself an offence.

Their Lordships can find no authority for so wide a proposition. It is certainly not enunciated or indeed hinted at in the cases referred to nor do they think it is sound in principle.

(1) (1882) 51 L. J. Ch. 414.
(2) (1897) 1 Ch. 545.

The actual wording of the injunction in the present case is " to restrain the defendant and his servants from interfering with the plaintiffs' lease ". Ghose and Bannerjee are not the servants of the Secretary of State and therefore did not do anything forbidden by the injunction.

The utmost which the respondents could say was that the Kalyanpur Company, having derived their supposed interest from the Secretary of State, who had been forbidden to interfere with the respondents' lease, were acting against the spirit if not the letter of the injunction in taking or continuing in possession of the quarries, and were therefore guilty of contempt in interfering with the respondents' lease. The fact, however, that Ghose and Bannerjee claimed on behalf of their company to derive title, rightly or wrongly (and their Lordships will assume wrongly), through the Secretary of State, cannot in their view make them liable for an act not forbidden to them though forbidden to him. The question of the Kalyanpur Company's right to possession, if it is to be tested, must be fought out on an issue properly framed against that company.

In their Lordships' view Ghose and Bannerjee could only be held liable for contempt if they had aided and abetted the Secretary of State in breaking the injunction, and as has been explained above that liability must fail if the petition against the Secretary of State fails.

Though the appeals were consolidated the two questions were in their Lordships' view distinct and it was proper that the first two appellants should be separately represented.

Their Lordships will therefore humbly advise His Majesty that both appeals should be allowed, and the order declaring the appellants guilty of contempt and ordering them to pay costs should be discharged and the respondents ordered to pay the costs of both

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sets of appellants before the Board and in the Courts below.

Solicitors for the appellants, Bannerji and Ghose: *Hy. S. L. Polak and Co.*

Solicitor for the appellant, the Secretary of State: *The Solicitor, India Office.*

Solicitors for the respondent: *Sanderson, Lee and Co.*

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Where an annuitant dies in the interval between the times of payment, his representative would be entitled to recover an apportioned amount within twelve years of the date when the annuity was payable to the deceased annuitant. *Srimati Hemangini Devi* v. *Anil Krishna Banerji* 350

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If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of that contract, the court has been given discretion at the instance of the other party to stay the suit under paragraph 18 of Schedule II to the Code of Civil Procedure, 1908. But if neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute.

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Where, therefore, there was an agreement to refer a certain dispute to arbitrators and one of the parties to the agreement instituted a suit concerning the dispute in disregard of the agreement and the parties went to trial, the defendant taking no steps under paragraph 18 of the second Schedule for the stay of the suit, *held*, that the suit was maintainable. *Secretary of State for India in Council* v. *Surendra Mohan Lahiri* 298

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Civil Procedure, which is item no. 4 in the "Concurrent list" of Schedule VII to the Government of India Act, 1935, includes all matters, whether relating to procedure or not, contained in the Code of Civil Procedure on the date of the passing of the said Act. The matter relating to the execution of decrees and sale proclamation which is a matter included in the Code of Civil Procedure is, therefore, a concurrent legislative subject. That being so, the law

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(relating to execution of decrees and sale proclamation) subsequently enacted by the Provincial Legislature which is contained in sections 16 and 17 of the Bihar Money-Lenders Act, 1938, being repugnant to Order XXI, rule 66, of the Code, as amended by the High Court, which is an existing Indian law, and not having been assented to either by the Governor-General or His Majesty, is void under section 107 of the Government of India Act, 1935.

The object of section 107, sub-sections (*1*) and (*2*), is to make the Governor-General or His Majesty the co-ordinating authority in respect of concurrent legislation to avoid a conflict between a Provincial Act and an existing Indian law or Federal legislation. *Vishwanath Narayan Singh* v. *Sri Mahant Harihar Gir* 714

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1——————*section* 26(*N*), *whether retrospective—transferee of a non-transferable occupancy holding whether affected by sale in execution of a rent decree to which he was not a party.*

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A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of section 65 of the Act; but a decree which has the effect of enforcing a charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of section 148 of the Act. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability when a decree cannot be made enforcing the charge under section 65 of the Act.

If the finding be that the tenant has been ejected by the landlord from a portion of his holding, the tenant would be entitled to suspension of rent until the whole of his holding be restored to him; but when the finding is that the tenant is in possession of the area which he claims and that there has been no ejectment by the landlord, the

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landlord ought not to be deprived of the whole of the rent which the tenant by his defence has admitted to be payable.

Where the plaintiffs instituted a suit for bhaoli rent in respect of two khatas and the defendants pleaded that their holding consisted of other lands as well and that they held the same on a total cash rental of Rs. 42-14-4 and the court held that the suit was for a part of the holding which was held on a cash rental and dismissed it altogether,

Held, (*i*) that the question of area and rental was directly and substantially in issue between the parties in a former suit and actually formed the basis of the decision in that suit and was therefore res judicata.

(*ii*) that the landlord was entitled to a money decree on the admission of the tenant defendant, but as he did not give acquittance in the manner prescribed by section 56 of the Bihar Tenancy Act he was not entitled to damages or interest, and as the tenant was forced to raise the issue of what was the correct area of his holding he was entitled to cost. *Jeonandan Singh* v. *Janki Singh.* 451

3——————*section* 116—*Zirat land—oral lease for one year, whether affected by section* 116 *of the Act—tenant taking oral lease of zirat land for one year, whether can acquire occupancy right.*

A tenant taking an oral lease of zirat land for a definite period of one year cannot acquire occupancy right in view of the provisions of section 116 of the Bihar Tenancy Act.

The words "a term of years" in section 116 of the Act is a generic term. It does not refer to the actual expression of the period in the lease itself. It means merely a period of time which can be measured in years. The true meaning of the expression is that it must be a lease for a definite period, to come to an end at a definite date and nothing more.

A lease for a year certain is not the same as a lease from "year to year"; when the former expression is used whether the landlord takes any steps or not the tenant becomes a trespasser when his lease comes to an end, whereas when the latter expression is used, the tenant has the right to stay for a year certain, and if he does not receive notice from the landlord to quit his tenancy at the end of the year certain, then his tenancy shall extend for another period of one year. *Umashankar Prasad* v. *Kunj Bhari Thakur* 218

4——————*section* 148—*decree which has the effect of enforcing a charge, when can be made—plaint, frame of—section* 65—*money decree, when can be passed. See* no. 2, *supra* 451

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5————*section* 148(*h*)—*assignee of a rent decree, who has not acquired landlord's interest, whether can execute it as a money decree.*

An assignee of a rent decree cannot execute the decree even as a money decree where his assignor had parted with his interest in the zamindari to another person before the assignment. *Kedar Nath* v. *Samru Kazi* 189

6————*section* 174—*certificate of satisfaction by the decree-holder coupled with a deposit of five per cent for the auction purchaser, whether sufficient.*

Where the decree-holder and the judgment-debtor certified to the court that the decree had been satisfied and the judgment-debtor deposited five per cent. of the purchase money for payment to the auction-purchaser in court, *held*, that this was a sufficient compliance of section 174 of the Act and the sale should be set aside. *Sukhoo Sao* v. *Sita Ram Hajjam* 53

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Section 93 of the Cess Act debars a Civil Court from questioning the valuation made by the revenue authorities under the Cess Act, 1880.

A plea by the defendant that he is an occupancy raiyat and not a tenure-holder and that the valuation is wrong is not entertainable by the Civil Court.

The Civil Court has jurisdiction to grant relief where the Cess Department has acted ultra vires and imposed liability for cess on income which is not subject to cess. *Braja Behari Das* v. *Ram Narayan Rai* 436

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A cultivator cannot acquire by korkar occupancy right in lands which are included in the tenancy of another cultivator who has acquired a right of occupancy in it. *Thakur Chandra Mohan Singh* v. *Butu Mian* 210

2——————*section* 67. *See no.* 1, *supra* 210

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CODE OF CIVIL PROCEDURE, 1908.—

1——————*section* 2(*2*) *and Order VII, rule* 11—*Order rejecting memorandum of appeal as insufficiently stamped, whether is appealable as a "decree"—Order VII, rule* 11(*c*), *whether applies to appeals—Court, whether bound to give time to appellant to make up the deficit before rejecting memorandum of appeal.*

An order of rejection of a memorandum of appeal on the ground that it was insufficiently stamped (particularly when it is passed without giving the appellant any time at all to make up the deficit), is a "decree" and is appealable as such.

The provisions of Order VII, rule 11, Code of Civil Procedure, 1908, apply to appeals and, therefore, it is the duty of the court, in cases coming under clause (*c*), to require the appellant to make up the deficiency in court-fee within a time to be fixed by the court before rejecting the memorandum of appeal.

Held, further, that if an insufficiently stamped memorandum of appeal has in fact been accepted by the court by inadvertence, time may be given to the appellant to supply the deficiency. *Bahuria Ram Sawari Kuer* v. *Dulhin Motiraj Kuer* 687

2——————*sections* 2(17) *and* 60(*1*)(*i*) *as it stood before the amending Act IX of* 1927—*Advocate engaged to conduct a suit on behalf of Government, whether is a "Public Officer" within the meaning of section* 2(*17*)—*remuneration, whether comes within the exception of section* 60(*1*)(*i*)—*fee, already earned, whether attachable at all.*

A debt in order to be attachable need not necessarily have become payable.

A daily fee stipulated to be paid to an advocate becomes due to him after each day's work, and the amount already earned, whether it has become payable or not, is attachable.

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

An advocate who is engaged on a daily fee of a fixed sum to conduct a civil suit on behalf of the Government is, for the purpose of that case, a "public officer" within the meaning of section 2(17) of the Code of Civil Procedure, 1908, and his remuneration is 'salary' coming within the exception contained in clause (i) of section 60(1) of the Code, as it stood before the amending Act IX of 1937, and is, therefore, liable to be attached only to the extent indicated therein. *Bansi Lal* v. *Maulavi Mohammed Hafiz* 706

3——————*section* 11—*decision as to rental and area in a rent suit, when operates as res judicata. See* Bihar Tenancy Act, 1885, no. 2 451

4——————*section* 41—*power of the court transferring a decree for execution—decree transferred to another court—transferring court, whether can recall the proceeding. See* Execution, no. 1 617

5——————*section* 47 *and Order XXI, rule* 2—*instalment decree—court, whether entitled to enquire into payments made more than* 90 *days before objection—Limitation Act,* 1908 (*Act IX of* 1908) *Article* 174.

An instalment decree provided that the decree-holder was entitled to execute the decree in case certain payments were not made by the judgment-debtor and in execution it was contended that payments had been made according to the terms of the decree, and so the decree-holder had no right to execute.

Held, that the case was governed by Order XXI, rule 2(3), of the Code and the alleged payments having been made more than 90 days before the objection was filed in court it could not be recognised under Article 174 of the Limitation Act, 1908. *Shaikh Darsan Ali* v. *Suraj Mal* 128

6——————*section* 60(1)(i)—*advocate engaged to conduct a suit on behalf of Government, whether is a "public officer"—remuneration, whether is 'salary' and comes within the exception of section* 60(1)(i). *See no.* 2, *supra* 706

7——————*section* 80—*notice, requisites of—cause of action, statement of.*

Where a notice purporting to be under section 80 of the Code of Civil Procedure among other matters stated as follows:—

"That the Deputy Magistrate purporting to act for the District Magistrate of Monghyr has served a notice upon my client dated the 27th of July, 1933, making a demand of Rs. 2,500-12-6 as an apportioned amount payable by him for upkeep of the additional police force there.

....—.....

"That my client asserts that the assessment of costs against him is illegal and ultra vires and, secondly, the sum assessed is too high".

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and objection was taken that the notice was not proper as all the details had not been given, *held* that the notice did sufficiently comply with the requirements of the section.

To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as damages for breach of contract and damages for negligence. *Srinivas Mull* v. *Secretary of State for India in Council* 345

8——————*section* 109(c)—*contempt of court—breach of an injunction—leave to appeal to His Majesty in Council—leave granted—competency of appeal. See* Contempt of Court 770

9——————*section* 115—*application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—refusal to permit payment of court-fees, whether is a question of jurisdiction. See* no. 10, *infra* 281

10——————*section* 149 *and Order* XXXIII, *rules* 5 *and* 8—*application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—application finally disposed of—court, whether has power to allow plaintiff at a later date to pay court-fees—refusal to permit payment of court-fees, whether is a question of jurisdiction—section* 115.

Application for leave to sue as a pauper does not require two separate orders for its disposal, that is to say, an order refusing leave and a further order rejecting the plaint; but the order refusing leave finally disposes of the whole proceeding.

The power to permit an application to sue in *forma pauperis* to be converted into a plaint by payment of court-fees, which the Court undoubtedly has during the pendency of the application, can be exercised at the time of rejecting the application, that is to say, if in one single order the Court declines leave to sue as a pauper and also gives time for filing court-fees, this would be within the discretion allowed by section 149, Code of Civil Procedure, 1908; but once an order finally disposing of the application for leave has been passed, it is no longer open to the Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed.

Per FAZL ALI, J.—The question whether the court should or should not have allowed the plaintiff to pay the proper court-fee and to treat the suit as having been presented on the date the application to sue as a pauper was filed is not a question of jurisdiction, for the Court has undoubtedly that jurisdiction vested by express provisions in the Code, but is only a question of discretion and the judicial exercise of that discretion.

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Quaere: Whether, in those cases where the Court is asked to exercise its power under section 149 of the Code, the suit should be deemed to have been filed on the date when the application for leave to sue in *forma pauperis* is treated as a plaint or on the date when the application for leave was originally filed? *Lala Mistry* v. *Ganesh Mistry* 281

11——————*section* 151—*appeal dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review—section* 151, *applicability of. See* Review 252

12——————*Order* 1, *rule* 9—*non-joinder of necessary party, whether fatal—suit framed under section* 104-*H of the Bengal Tenancy Act*, 1885 (*Act VIII of* 1885)—*prayer for declaration of defendant's status as that of occupancy tenant—persons recorded as occupancy raiyats not joined as defendants—suit, whether maintainable.*

In a suit framed under the provisions of section 104-H of the Bengal Tenancy Act, 1885, the plaintiff alleged that the status of the defendants, who were entered in the record-of-rights as tenure-holders, was that of occupancy tenants, and the relief claimed was that

"after determining and declaring the correct status of the defendants let a decree be passed in favour of the plantiff as against the defendants settling the proper annual rent payable by the defendant . .....

The plaintiff, however, failed to implead certain persons who, according to his allegation, were merely under-tenants, but who were recorded as occupancy raiyats in the record-of-rights in respect of a portion of the holding.

Held, that the so-called under-tenants were necessary parties to the suit and, therefore, that the suit was not maintainable in their absence. *Maharajadhiraj Sir Kameshwar Singh Bahadur* v. *Bibi Fatma* 150

13——————*Order XXI, rule* 2(3)—*instalment decree—execution to be levied in case of default in payment of instalments—execution—objection by judgment-debtor—payments alleged to have been made more than* 90 *days before objection—court, whether empowered to enquire. See* no. 5, *supra* 128

14——————*Order XXI, rule* 11—*execution by appointment of receiver of certain properties—decree-holder, whether can take out other forms of execution. See* Execution no. 2 ... 248

15——————*Order XXI, rules* 15 *and* 16—*transferee of decree, meaning of—application for execution by real assignee of decree, whether is an application in accordance with law—application under rule* 15, *requisites of. See* Limitation Act, 1908, no. 11 223

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16——*Order XXI, rule 16—preliminary decree for ascertainment of mesne profits, whether is a decree for money—rule 16 of Order XXI, whether applies where the assignee of a preliminary decree for mesne profits applies for execution after the passing of the final decree.*

Held, that Order XXI, rule 16, does not apply to the case of an applicant for execution who after taking an assignment of a decree for ascertainment of mesne profits is substituted in the place of the decree-holder and obtains a final decree in his name.

In order to substantiate an objection under the second proviso to Order XXI, rule 16, it is necessary to show firstly that the decree which was transferred was a money decree and secondly that the transfer took place after the decree sought to be executed had been passed.

It may be questioned whether a decree for ascertainment of mesne profits under the present Code of Civil Procedure is strictly speaking a money decree. *Nandkishore Lal* v. *Chandrika Prasad Singh* 206

17——*Order XXI, rules 58 and 63—transferee from claimant after disposal of claim case and before institution of suit, whether is a necessary party to the suit—transferee impleaded after period of limitation—suit, whether time-barred. See* Limitation Act, 1908, no. 3 ... 588

18——*Order XXI, rule 63, See no. 17, supra* ... 588

19——*Order XXI, rule 66—Bihar Money-Lenders Act, 1938 (Bihar Act III of 1938), sections 16 and 17, whether repugnant to Order XXI, rule 66. See* Bihar Money-Lenders Act, 1938 714

20——*Order XXI, rule 90 and Order XLIII, rule 1(j)—application for setting aside sale—deposit of security—court whether can accept security in landed property—order refusing to accept security in landed property and dismissing the application to set aside the sale, if appealable.*

In an application to set aside a sale under Order XXI, rule 90, the court has a discretion in appropriate cases to accept security in landed property.

An order refusing to accept landed property as security is not appealable, but the consequential order dismissing the application to set aside the sale is appealable. *Balmakund Marwari* v. *Firm Pirthiraj Ganeshdas* ... 107

21——*Order XXI, rule 103, scope of—court, whether required to determine mere possession at the date of the adverse order.*

The view that in a suit framed under Order XXI, rule 103, Code of Civil Procedure, 1908, the court has merely

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to ascertain whether the plaintiff was in possession at the date of the adverse order against him is based on a misconception. In such a suit the plaintiff has to establish the right or title by which the plaintiff claims the present possession of the property. *Syed Abdul Hakim* v. *Mangal Chand* 164

22——*Order XXII, rules 9 and 11—Order XLIII, rule 1 (k)—order refusing to set aside abatement of an appeal, whether appealable.*

Order XLIII, rule 1(*k*), read along with Order XXII, rule 11, makes it clear that an order refusing to set aside an abatement of appeal is appealable. *Mir Wajid Ali* v. *Fagoo Mandal* 84

23——*Order XXXII, rule 4—minor not properly represented by guardian-ad-litem, when can get a declaration that decree is not binding—Court, whether can set aside the whole decree and direct a fresh trial.*

The plaintiffs instituted a suit for a declaration that a mortgage decree on the basis of a mortgage bond executed by their father was not binding on them as they were not properly represented in the suit by the father whose interest was adverse to them. The courts below found that the plaintiffs had a good defence on the ground of family necessity and benefit and accordingly granted the declaration, set aside the whole decree and directed the re-hearing of the mortgage suit.

Held, that on the findings of fact that they had a good defence and that they were not properly represented in the suit the plaintiffs were entitled to the declaration that the decree was not binding on them, but the court had no jurisdiction to set aside the whole decree in the mortgage suit and order a rehearing of the mortgage suit. *Chitradhar Narain Das* v. *Khidar Thakur* ... 286

24——*Order XXXIII, rules 5 and 8—application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—application finally disposed of—court, whether has power to allow plaintiff at a later date to pay court-fees. See* no.10, *supra* 281

25——*Order XXXIV, rules 5 and 6—mortgaged property directed to be sold by the decree no longer available—mortgagee, whether entitled to a personal decree.*

The conditions under which a personal decree under Order XXXIV, rule 6, Code of Civil Procedure, 1908, may be asked for are satisfied if the properties directed by the mortgage decree to be sold are no longer available.

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In a mortgage suit by a puisne mortgagee a final decree for sale was passed under Order XXXIV, rule 5, Code of Civil Procedure, 1908, but in the meantime another decree was obtained by a prior mortgagee in execution of which bulk of the mortgaged properties were sold in satisfaction of the debt due to the prior mortgagee. Thereafter the puisne mortgagee executed his decree and the remaining property not affected by the prior mortgage decree was sold for a sum which was not sufficient to pay off the decretal amount. Thereupon the puisne mortgagee applied for a personal decree under Order XXXIV, rule 6:

Held, that the puisne mortgagee was entitled to a personal decree.

Held, further, that the failure on the part of the puisne mortgagee to redeem the prior mortgage did not debar him from asking for a personal decree. *Makhan Sahu* v. *Musammat Bibi Kamrun Nisa* 538

26——————*Order XXXVIII, rule 5—application for attachment before judgment—ingredients necessary for an order for attachment before judgment.*

Before the provisions of Order XXXVIII, rule 5, can come into play the court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the object of obstructing the plaintiff, if he won the suit, in executing the decree, and that mere allegations were of no avail but the facts must be positively proved by satisfactory evidence. *Bodanand Rai* v. *Nabu Kumar Singh* ... 89

27——————*Order XLI, rule 1 and Order XLIII, rule 1—Order rejecting memorandum of appeal as not properly drawn up, whether appealable.*

Where the Judge, being of opinion that the memorandum of appeal presented before him was argumentative and not in accordance with the provisions of Order XLI, rule 1, of the Code of Civil Procedure, called upon the appellant to remove the defect and on his failure to do so rejected the same, *held*, that the order was not appealable as it did not finally dispose of the rights of the parties. It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal is appealable. *Ramdhari Ahir* v. *Khedu Ahir* 245

28——————*Order XLI, rule 19—appeal dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review—Order XLI, rule 19, applicability of. See* Review ... 252

29——————*Order XLIII, rule 1—order rejecting memorandum of appeal as not properly drawn up, whether appealable. See* no. 27, *supra* 245

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30——————*Order XLIII, rule 1(j)—application for setting aside sale—order refusing to accept security in landed property and dismissing the application for setting aside sale, whether appealable. See* no. 20, *supra* 107

31——————*Order XLIII, rule 1(k)—order refusing to set aside abatement of appeal, whether appealable. See* no. 22, *supra* 84

32——————*Order XLVII, rule 1—appeal dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review. See* Review 252

33——————*Schedule* II, *paragraphs* 18 *and* 22—*agreement to refer dispute to arbitration—suit instituted in disregard of the agreement—no application for stay under paragraph* 18—*suit, whether maintainable—court, jurisdiction of, to pronounce judgment—Specific Relief Act,* 1877 (*Act* 1 *of* 1877), *section* 21, *repeal of. See* Arbitration 293

CODE OF CRIMINAL PROCEDURE, 1898.—

1——————*section* 103—*search-witness, whether is under an obligation to sign search-list—refusal to sign, whether punishable as an offence—Penal Code,* 1860 (*Act XLV of* 1860), *section* 187—" *assistance* ", *whether* ejusdem generis—*statute, rules of construction of.*

Per VARMA and MANOHAR LAL, JJ. (CHATTERJI, J. *contra*). There is nothing in section 103 of the Code of Criminal Procedure, 1898, which makes it obligatory on the person witnessing a search to sign the search-list. By clause (5) of the section, what is made penal is only the refusal without reasonable cause to attend and witness a search and not the refusal to sign the search-list.

The word " assistance " in the first part of section 187, Penal Code, 1860, is *ejusdem generis* with the various forms of assistance specified in the latter part of the section; the " assistance " demanded must have some direct personal relation to the execution of the duty by the public officer.

The signing of the search-list required by section 103 of the Code of Criminal Procedure, 1898, is an independent duty imposed on the witness.

Therefore, the refusal by a search-witness to sign the search-list cannot by itself be deemed to be an offence punishable under section 187 of the Penal Code, 1860.

Per curiam: In order to bring about and materialise the obligation imposed by section 103 of the Code of Criminal Procedure, 1898, an order in writing by the officer concerned is necessary, but where no such written order is issued, no person is bound by law to render assistance to

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the officer in making the search, and if a person omits to do so, he commits no offence under section 187 of the Penal Code, 1860.

Per MANOHAR LAL, J.—It would be adding to the language of the statute to interpret the words " witness the search " in section 103 as meaning " witness the search and to sign the search-list ".

The Court is bound to adopt the true construction of the statute aided by the meaning of the words deliberately adopted by the Legislature irrespective of the consequences that it may have on an assumed policy of the legislature or on its unexpressed intention.

Where a search has been conducted under section 103 of the Code of Criminal Procedure, 1898, evidence can be given regarding the things and regarding the places in which they were found irrespective of the evidence of the list which the law directs to be drawn up relating to the particulars of the property found and the provisions of the Evidence Act, 1872, do not prevent the adoption of this course.

Refusing to sign the search-list is not refusing to assist a public servant in the discharge of his public duties within the meaning of section 187 of the Penal Code, 1860.

Per CHATTERJI, J.—The duty of signing a search-list imposed on the search witnesses by section 103(*2*) of the Code of Criminal Procedure, 1898, is not an independent duty and is covered by the word " assistance " used in section 187 of the Penal Code, 1860.

A person, who has become bound by an order in writing issued by the officer concerned under the last part of clause (*1*) of section 103 to become search-witness, is also under an obligation to sign the search-list that may be prepared and if he refuses to do so, he is guilty of refusing to render assistance within the meaning of section 187. *Ram Prasad, In the matter of* 632

2——————*section* 133—*public nuisance—magistrate whether can prohibit a trade which is a nuisance—prescriptive right.*

Section 133 of the Code of Criminal Procedure empowers a Magistrate to prohibit the carrying on of a business which is dangerous to the health of the community in a particular locality, if he finds it to be a nuisance.

No length of enjoyment can legalise a public nuisance involving actual danger to the health of the community. *Maksood Ali* v. *President, Union Board* 669

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

3——————*section* 162—*admission made by party, how far admissible—admission by accused, not amounting to confession, if admissible—Evidence Act,* 1872 (*Act I of* 1872), *section* 73—*legality of comparison of handwriting by Judge.*

Admissions by a party to litigation whether civil or criminal differ fundamentally from previous statement made by a witness. An admission is direct evidence of the relevant fact admitted. A previous statement by a witness is not direct evidence of the fact stated by the witness, but is material which may be used either to corroborate the oral testimony of the witness or it may be put to him in cross-examination for the purpose of destroying his credit. It cannot be used to supplement that oral testimony, that is to say, a previous statement of fact by a witness cannot be tendered as evidence in direct proof of the fact stated. The evidence upon which the court is to consider the material allegation of fact must be the evidence in court. This fundamental distinction cannot be ignored. An admission by a party (or accused) although in itself evidence of the fact admitted may be attacked on the ground that the party or accused has not made the admission. He may also reduce or destroy its weight as evidence by producing evidence to show that the true facts are contrary to admission. It will then be for the tribunal to weigh the evidence afforded by the admission and the evidence produced at the trial by the defence.

Section 162 of the Code has no reference whatever to statements made by accused person, but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses.

An accused against whom a previous statement by him is tendered in evidence is entitled to have the whole statement placed before the court. If that statement taken as a whole amounts to a confession the whole statement must be excluded. It is not permissible to place a part of statement as a mere admission or series of admissions and to omit merely the strictly confessional part of it.

Where the accused while in custody stated to the investigating officer that the deceased had come to his house on the evening of the 21st of March and that he had slept in one of the outhouse rooms during the night and objection was taken that the statement was not admissible, *held* that the statement did not contain any admission of the offence charged, nor indeed of any offence and as such was admissible in evidence.

Held, also that the statement that the deceased left the house of the accused on the evening of the 22nd March being a statement in favour of the accused was inadmissible in evidence.

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In the absence of any conflict of evidence on the point a Judge is entitled to compare the signature in question with the admitted signature and to form an opinion as a result of his comparison.

Per MANOHAR LAL, J.—The true rule to decide whether the statement by the accused to the Police Officer is admissible or not is that each case must be decided as it arises with reference to the question whether the particular statement, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession.

The only test to decide whether a statement is a confession or not is to see whether the accused stated that he has done certain things which amount to an offence and thereby accusing himself of committing an offence.

Section 162 of the Code must be read along with sections 160 and 161. The marginal notes to these sections show that they refer to the examination of witnesses by the police when called upon to make an investigation under Chapter XIV. (The investigation must necessarily be regarding the allegations made against some persons known or unknown of an offence having been committed by that person or by an unknown person and this is also borne out by the language employed in these two sections.)

The question of the admissibility of the statement of an accused is governed by the general provisions of the Evidence Act. *Pakala Narayana Swamy* v. *King-Emperor* 15

———*sections* 162 *and* 537—*summons case—accused, whether entitled to copies of statements before police—refusal to grant copies, whether vitiates the trial—section* 537, *whether can be called in aid by prosecution.*

Where the accused in a trial for an offence under section 182 of the Penal Code applied for copies of statements made by witnesses before the police but the Magistrate rejected the prayer and the trial proceeded and the accused were convicted;

Held, in revision, that as the accused had a statutory right under section 162 of the Code of Criminal Procedure to be furnished with a copy of the statements of witnesses for the prosecution before the police, the refusal to grant copies vitiated the trial.

Held, also that section 162 applied to summons as well as warrant cases.

Section 537 of the Code of Criminal Procedure cannot be called into aid by the prosecution because unless the statements of the witnesses before the police have been furnished to the accused or have been sent by the Court

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itself it is impossible to say if the accused has or has not been prejudiced. *Dinanath Sahay* v. *King-Emperor* ... 622

5——————*sections* 195 *and* 476—*obstruction to attachment—sanction to prosecute, when necessary—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 143 *and* 186—*several offences committed in course of same transaction—sanction necessary in regard to some—prosecution in regard to others, whether requires sanction.*

Where the petitioners were convicted under section 143 of the Penal Code for being members of an unlawful assembly with the object of rescuing cattle attached by a Civil Court peon and it was contended in revision that the conviction was bad in law as there was no sanction of the court which issued the writ of attachment, held, that no sanction was necessary.

If in course of the same transaction a number of offences are committed, some requiring sanction for prosecution of some authority or the other, and others not requiring sanction, it is not necessary that the prosecution for such offences which do not require such sanction should depend upon the obtaining of the sanction for prosecution of those offences which required such sanction. The law requires that for the prosecution of a particular offence sanction of the court should be obtained; but it does not say that if in course of the commission of an offence which requires sanction for prosecution other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these latter offences unless the court sanctions the prosecution of the former. *Sheo Ahir* v. *King-Emperor* 680

6——————*section* 476. *See* no. 5, *supra* 680

7——————*sections* 476 *and* 476*B*—*order directing prosecution passed by an appellate court under section* 476*B*, *if appealable.*

An order passed on appeal under section 476*B* of the Code of Criminal Procedure, 1898, is not appealable. *Kesharinandan Ramani* v. *King-Emperor* 9

8——————*section* 537—*refusal to grant copies of statements of witnesses before Police, whether vitiates trial—section* 537, *whether can be called in aid by prosecution. See* Code of Criminal Procedure, 1898, no. 4, *supra* 622

CONFESSION—*accused in custody of village chaukidar—temporary absence of chaukidar leaving the accused in the custody of another person, whether terminates police custody—confession made to such third person during chaukidar's temporary absence, whether admissible. See* Evidence Act, 1872, no. 1 369

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CONSTRUCTION OF DOCUMENTS—*rules of. See* Transfer of Property Act, 1882, no. 6 737

CONTEMPT OF COURT—*Breach of an injunction—Leave to appeal to His Majesty in Council—Leave granted by High Court under Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 109(c)—*Competency of appeal—Procedure—When contempt is by a party on whom injunction is not binding.*

Government by an order in 1934 purported to forfeit mining leases in certain lands which had been granted to Kuchwar Lime and Stone Co. in 1928 and by a further order granted leases of these lands to another company, Kalyanpur Lime Works, and the latter company entered upon the lands and began mining operations. Kuchwar Lime and Stone Co. thereupon instituted a suit against the Secretary of State for a declaration that the forfeiture was invalid and for an injunction restraining " the defendant and his servants from interfering with the plaintiffs' lease " and eventually obtained a decree in the High Court granting the declaration and an injunction in the above terms.

Kalyanpur Lime Works, who had not been made parties to the suit and who had stopped work in the lands for a time, resumed mining operations after the decree in the High Court.

Kuchwar Lime and Stone Company petitioned the High Court to commit the managing director and the manager of Kalyanpur Lime Works and the Secretary of State for contempt in disobeying the injunction and the High Court declared all the three persons guilty of contempt and made an order for payment of costs against them and, under section 109(c) of the Code of Civil Procedure, gave them leave to appeal to His Majesty in Council and they appealed.

A preliminary objection to the hearing of the appeals was taken on the grounds that (*a*) the contempt was of the nature of a criminal matter and leave could not therefore be granted under the Code of Civil Procedure and (*b*) leave should not be granted when penalties have been imposed for contempt.

Held, that leave to appeal was rightly granted.

A committal for contempt for breach of an injunction is not criminal in its nature.

It is competent to His Majesty in Council to entertain appeals against orders imposing penalties for contempt. Contempts are quasi-criminal acts and orders punishing them should, generally speaking, be treated as orders in criminal cases.

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CONTEMPT OF COURT—*concld.*

Held, on the facts, there was no breach of the injunction by the Secretary of State.

The officers of the Kalyanpur Lime Works were not servants of the Secretary of State and there was no injunction binding on them.

The proper form of application against them would have been for aiding and abetting the Secretary of State in his disobedience.

S. N. Banerjee v. *Kuchwar Lime and Stone Company, Limited* 770

CONTRACT.—

1——————*construction—transfer of interest in immovable property.*

A contract under which the lessees of a quarry appoint a person as their local agent with liberty to quarry, burn, manufacture and sell lime and stone from the lands on his own account without being liable to the lessees for any of the profits or loss thereof is not a sub-lease but is a transfer of an interest in immovable property and where the interest transferred is of the value of more than Rs. 100, registration is necessary to make it effective. *The Secretary of State* v. *Kuchwar Lime and Stone Company, Limited* 69

2——————*privity of—mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity—donee of other portion of mortgaged property, free of encumbrance, whether is entitled to the benefit of the contract. See* Limitation Act, 1908, no. 5 751

CONTRACT ACT, 1872.—

1——————*section 48—suit for rent against some only of the tenants, whether maintainable. See* Landlord and Tenant, no. 8 662

2——————*section 23—contract to support a woman who had been a mistress, whether is void as being immoral—past service rendered by promisee, even if immoral, whether constitutes good consideration for a contract to compensate.*

An agreement to support a woman who had been a mistress is not void as being immoral or opposed to public policy.

The consideration in the case of a contract to enter into the relationship of protector and mistress (which is doubtless void as being immoral) should not be confused with the consideration and object in the case of a contract to compensate a woman afterwards for an injury done to

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CONTRACT ACT, 1872—*concld.*

her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with the protector; such past consideration under the Indian law is a perfectly good consideration for a contract to compensate. *Godfrey* v. *Musammat Parbati Paluni* 308

3——————*section* 124—*suit for damages for loss occasioned by non-payment of consideration to third party as stipulated in ijara deed executed in favour of the plaintiff by defendant—contract of indemnity not made out—plaintiff entitled to damages for breach of contract—resulting damages, whether can be awarded. See* Limitation Act, 1908, no. 6 338

COURT-FEES ACT, 1870.—

1——————*section* 19-*D and Schedule* 1, *article* 11—*co-parcener of joint Hindu family, whether is a "trustee" for other co-parceners—joint family property, whether can be treated as trust property—co-parceners applying for letters of administration in respect of joint family property, whether liable to pay court-fee.*

A co-parcener of a joint Hindu family interested to the extent of an undivided share in the whole of the property of the joint family is not a trustee for the other co-parceners.

Where, therefore, on the death of a co-parcener the surviving members of the family apply for letters of administration in respect of the joint family property (whether it is necessary for them to apply or not), they are liable to pay the proper court-fee according to article 11 of Schedule 1 of the Court-Fees Act, 1870. Section 19-D of the Act does not in any way exempt from payment of court-fee letters of administration obtained by a member of a joint family in respect of property which he gets by survivorship. *Rama Prasad Gupta* v. *The Collector of Shahabad* 542

2——————*Schedule* 1, *article* 4 *and* 5—*application dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review—court-fee, whether payable under articles* 4 *and* 5. *See* Review 252

3——————*Schedule* E, *article* 11. *See* no. 1, *supra*, ... 542

COURT OF WARDS ACT, 1879—*section* 51—*assumption of superintendence during pendency of suit—necessity for reconstituting suit—absence of formal order reconstituting suit—effect.*

A suit against a proprietor becomes defective upon his becoming a ward of the Court of Wards during the pendency of the suit and the suit should be reconstituted to satisfy

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COURT OF WARDS ACT, 1879—*concld.*
section 51 of the Bengal Court of Wards Act. A proper formal order to that effect should be made, but, if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void a decree on a compromise arrived at by the parties. *Raja Braja Sunder Deb* v. *Raja Rajendra Narayan Bhanj Deo* ... ...

DOWER—*minor wife, whether competent to relinquish the whole or a part of her dower or change its character. See* Muhammadan Law 303

ESTATES PARTITION ACT, 1897—*section 99, scope of—tenancy, when and by whom can be avoided. See* Landlord and Tenant, no. 2 143

ESTOPPEL—*representation by landlord—tenant led to believe that he had a permanent tenancy—building erected—estoppel. See* Landlord and Tenant, no. 4 358

EVIDENCE ACT, 1872.—
1——————*section 26—confession to Police Officer—village chaukidar, whether is a Police Officer—confession made during the temporary absence of village chaukidar, if admissible.*

The village chaukidar having arrested the accused, tied her in a peg and leaving her in the custody of another person left for the police-station. This man untied the accused and she made the confession to him.

Held, that the village chaukidar appointed under the Village Administration Act of 1872 is a police officer within the meaning of section 26 of the Evidence Act, 1872.

Held, also that the temporary absence of the chaukidar leaving the accused in the custody of another person did not terminate his custody.

The policy of the Legislature appears to be that any statement in the nature of a confession made by an accused while under the custody and control of a police officer should be excluded from evidence. This is no doubt a wholesome policy and this policy would be defeated if it were that the section is not to apply when the arrest by the police officer has been illegal. Whether the arrest is legal or illegal the mischief which section 26 is intended to avert remains all the same.

Per DHAVLE, J.—Little, if any, importance would be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends. *King-Emperor* v. *Musammat Jagia* 369

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EVIDENCE ACT, 1872—*concld.*

2——————*section 27—admission by accused person not amounting to confession, while in custody of Police Officer, whether admissible in evidence. See* Code of Criminal Procedure, 1898, no. 3 15

3——————*section 73—comparison of handwriting by Judge, legality of. See* Code of Criminal Procedure, 1898, no. 3 ... 15

4——————*section 92—sale—title to vended property, when passes—intention of parties, how is to be proved—terms unambiguous—recital as to passing of consideration, whether differs from strictly contractual part. See* Sale 318

EXECUTION.—

1——————*decree transferred to another court for execution—application to recall the proceedings, whether is a step-in-aid of execution—powers of the court transferring a decree for execution—Limitation Act,* 1908 (*Act IX of* 1908), *Article* 182—*Code of Civil Procedure,* 1908 (*Act V of* 1908), *section* 41.

A court when it transfers a decree for execution does not thereby altogether lose control over the decree and is quite competent to recall it. Therefore, an application made to the court transferring the decree to recall the execution proceedings is a step-in-aid of execution made in accordance with law before the proper court. *Dwarkadas Gobindram Firm* v. *Saligram Rekhraj Firm* 617

2——————*execution by appointment of receiver of certain properties—decree-holder, whether can take out other forms of execution—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XX, rule* 11 *estoppel.*

Where by consent of parties a Receiver was appointed of certain properties of the judgment-debtor and the decree-holder thereafter wanted to attach and sell other properties of the judgment-debtor, *held*, that there was no question of estoppel and that the decree-holder was entitled in law to take out any or all the forms of execution which the Code of Civil Procedure entitled him to pursue. *Raja Shyam Sunder Singh* v. *Dhirendra Nath Chandra* ... 248

GENERAL CLAUSES ACT, 1897—*section* 10—*time for payment in pursuance of compromise decree, whether can be extended on the ground of last day being a holiday.*

Where the appellant a judgment-debtor sought to take advantage of the provisions of section 10 of the General Clauses Act and contended that the last date for payment of a certain instalment decree based on a compromise having expired on a date on which the court was closed, he was entitled to pay the money on the next open day.

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GENERAL CLAUSES ACT, 1897—*concld.*

Held, (i) that a compromise decree was nothing more than a contract between the parties and that time was of the essence of the contract.

(ii) Section 10 of the General Clauses Act applied to cases where the act is allowed or ordered to be done by an Act of the Legislature. *Ram Kinkar Singh* v. *Srimati Kamal Basini Devi* 191

GHATWALI TENURE—*Kunjora ghatwali—hereditary and perpetual—Birbhum Ghatwali Regulation*, 1814, (*Beng. Reg. XXIX of* 1814), *section 5—Sonthal Parganas Rural Police Regulation*, 1910 (*Beng. Reg. IV of* 1910), *sections* 6, 7 *and* 8—*customary* muchalka *executed by ghatwal—government, right of, to dismiss a ghatwal for default in payment of chaukidari dues—customary right of ruling power to dismiss for breach of the terms of* muchalka—*dismissal of ghatwal for non-payment of chaukidari dues, whether involves forfeiture of the tenure—heir, right of, to be appointed as a ghatwal—question of fitness ordinarily rests with the executive authorities—Civil Court, when can interfere with the decision of executive authorities.*

Plaintiff first party was the holder of the Kunjora ghatwali governed by the Birbhum Ghatwali Regulation XXIX of 1814. This ghatwali, which was permanent and descendible from generation to generation, was subject to the payment of fixed and established rent to the Zamindar and the performance of certain duties for the maintenance of the public peace and for supporting the police. The plaintiff first party succeeded to the ghatwali in 1904 on executing a *muchalka* (agreement) in the customary and ancient form which, inter alia, provided as follows:—

"Further I shall continue to comply with the order, which will be issued by Government from time to time without any objection. and I shall make no delay in complying with the laws and orders that will be passed on me. The ghatwali mahal is settled with me on the said jama on these aforesaid terms. If I violate the terms I shall be dismissed from the ghatwali and shall pay a fine of Rs. 1,000

By Regulation IV of 1910 the mode of performing a part of the duties of the ghatwal in supporting the police was altered in the manner prescribed by sections 6, 7 and 8 of the Regulation, that is to say, the Government itself determined the pay of the choukidars employed in each village in this ghatwali and fixed the amount required for their salaries and equipments and the ghatwal was made liable to pay the amount so determined. The plaintiff first party was, however, dismissed by Government on account of his persistent default in carrying out the statutory obligation to pay the chaukidari dues. The claim of his son (plaintiff second party) to succeed his father was rejected by the Executive authorities, and defendant first party was appointed to succeed as ghatwal. The plaintiffs brought the present action for a declaration that the

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GHATWALI TENURE—*contd.*

dismissal of the plaintiff first party was ultra vires and, in the alternative, for a declaration that the plaintiff second party was of right entitled to be appointed ghatwal in place of his father.

Held, (i) that when the Government has by a statute commuted a part of the duty of the ghatwal into a money demand, the amount and the mode of realisation whereof are specifically fixed by statute, the only remedy which the Government has is to realise these dues in the manner provided in section 8(3) of Regulation IV of 1910 and the non-payment of these dues by the ghatwal cannot give it any right to dismiss him from his office;

(ii) that the provisions of section 5 of Regulation XXIX of 1814, entitling the Government to dismiss a ghatwal for non-payment of arrears of rent, are not incorporated in the later Regulation of 1910 by necessary implication;

(iii) that the ruling power, however, always has a customary right as a necessary incident of a ghatwali tenure, to dismiss a ghatwal for misconduct or for non-payment of his dues which are, as a matter of ancient and customary form, enumerated in the *muchalka*, and that the failure of the ghatwal to obey the statutory duty of paying up the chaukidari dues amounted to a clear violation of the terms of the *muchalka* entitling the Government to dismiss the ghatwal.

Per MANOHAR LALL, J. (CHATTERJI, J. *contra*) :—A hereditary ghatwali tenure cannot be taken away from a family merely because the incumbent at any time misconducts himself or proves unfit to discharge his duties so long as there is some other member of the family fit for the post. In each case it must be decided whether the misconduct of an incumbent involves the forfeiture in the person of that incumbent only or in the persons of the entire family by applying the doctrine of anticipatory repudiation. An instance of this kind would be where the ghatwal says, as if on behalf of the entire family, that they are not the ghatwals at all and refuses to perform the services which are the necessary incidents of the tenure.

But where the ghatwali is hereditary and perpetual the son (or other heir) has a recognised right to be appointed a ghatwal in place of his father, provided only that he is fit to discharge his duties and meet his obligations.

The decision of fitness for the post of ghatwal ordinarily rests with the Executive authorities subject to this important reservation that if the Executive has simply made a pretence of dealing with the question of the fitness

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of the ghatwal who claims to be recognised as the next ghatwal and declares him unfit in an arbitrary manner or in a manner which the law would not recognise, then the Civil Courts are free to interfere.

But where it is impossible to say that the Executive did not reasonably consider the hereditary claims of an heir to be appointed as a ghatwal or that the exercise of discretion by the Executive was arbitrary or pretended, the Civil Court cannot interfere.

Per CHATTERJI, J.—When a ghatwal is dismissed from his office by the Government for a breach of the conditions on which he holds the tenure, though impressed with hereditary character, his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider fit.

Ordinarily the Government should consider and respect the hereditary claim of the next heir of the dismissed ghatwal, but he cannot force such claim upon the Government.

The court, in any case, cannot do anything beyond giving a declaration as to the right of a claimant to be appointed a ghatwal, but such a declaration should not be granted as it would be infructuous, if the executive authorities, for reasons of their own, ultimately choose not to act upon that declaration. *Jogendra Narain Singh* v. *Radha Prasad Singh* 898

GOVERNMENT OF INDIA ACT, 1935.—

1——————*section* 107—*law relating to execution of decrees, and sale proclamation, whether is a concurrent legislative subject—Bihar Money-lenders Act*, 1938 (*Bihar Act III of* 1938), *sections* 16 *and* 17, *whether repugnant to existing Indian Law and therefore void. See* Bihar Money-lenders Act, 1938 714

2——————*sections* 220 *and* 222—*Letters Patent of the Patna High Court, clause* 2—*Chief Justice, death of—office remaining vacant—High Court, constitution of, whether affected during the period of vacancy—appointment by Governor-General, effect of.*

When a Chief Justice dies the office does not die with him but still continues. It only remains vacant until it is filled up.

During the interval, therefore, the constitution of the High Court remains unbroken and unchanged.

The only effect of the vacancy in the office of the Chief Justice, so long as it continues, is that there will be nobody to perform his duties unless, under section

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GOVERNMENT OF INDIA ACT, 1935—*concld.*

222(*1*) of the Government of India Act, 1935, the Governor-General appoints some one of the other Judges to do the same.

Per MANOHAR LALL, J.—Even if it be assumed that it is obligatory upon the Governor-General to appoint some Judge of the High Court to perform the duties of the Chief Justice on his death, the time within which he is required to make such appointment is left entirely to his discretion. The delay in making the appointment in such a case does not alter the constitution of the High Court nor does the promptitude in appointing a Judge to perform the duties of the Chief Justice fill up the vacancy which can only be done by His Majesty. *King-Emperor* v. *Sohrai Koeri* 574

GUARDIANS AND WARDS ACT, 1890—*necessity of amendment for proper and effective control of guardians. See* Transfer of Property Act, 1882, no. 3 460

HINDU LAW—

1——————*legal necessity—antecedent debt, what constitutes—benefit to family—acquiring fresh property by mortgaging ancestral property, whether beneficial to family —amendment of plaint, whether should be allowed after claim is barred by limitation.*

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

Where the karta and one adult member of a joint Hindu family entered into a *sudbharna* transaction as mortgagees on the 19th of November, but, not having ready money with them, they simultaneously agreed to execute, in payment of the consideration money, a simple mortgage bond in favour of the mortgagors and eventually did execute it on the 3rd of December, hypothecating ancestral property.

Held, that there was no dissociation in fact between the two transactions, and, therefore, that the mortgage by the family was not based on antecedent debt.

The right of allowing an amendment of the plaint, although a matter of discretion, should not be exercised (unless there are very special circumstances) where the party affected thereby has acquired a valuable right.

An amendment might well be allowed if the application to make it is presented at a time when, failing leave to amend, it would have been still open to the plaintiffs to ask the court's permission for the suit to be witbdrawn with leave to sue again, that remedy not yet being dead. But where the application is made after the claim is

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HINDU LAW—*contd.*

barred by limitation, then although there is still a discretion in the court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it.

Per WORT, J.—(Rowland, J. *dubitante*): Although no precise definition of what is a benefit to the joint family estate can be given, it is well established that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate.

Per ROWLAND, J.—It is a doubtful proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property of the estate for the purpose. The transaction must be judged not by its actual result but what might have been expected to be its result at the time it was entered into. *Ram Karan Thakur* v. *Baldeo Thakur* 168

2——————*legal necessity, what constitutes—"necessity" and "benefit to estate", whether controvertible terms—karta, limitation on the power of—alienation for acquiring new property, how far binds the family—test—money borrowed by karta for family necessity on a hundi or promissory note—other members, whether are liable to be sued on the instrument—Negotiable Instruments Act,* 1881 (*Act XXVI of* 1881), *section* 28.

The karta of a joint Hindu family being merely a manager and not an absolute owner, the Hindu Law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law-givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family.

The only reasonable limitation which can be imposed on the karta is that he must act with prudence and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager will thus not be allowed to enter into any transaction which may be speculative or fraught with risks or which may involve a possibility of loss to the family and the court will not encourage him either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent person will not sacrifice a certain and stable income in favour of the mere prospect of a better income.

But in certain exceptional circumstances the court may uphold the alienation of a part of the joint family property by a karta for the acquisition of new property as, for example, where all the adult members of the joint

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HINDU LAW—*contd.*

family with the knowledge available to them and possessing all the necessary information about the means and requirement of the family were convinced that the proposed purchase of the new property was for the benefit of the estate, the property alienated was of no particular utility to the family and where by the acquisition of the new property the family was able to acquire proprietary interest which had the effect of converting them from mere tenants liable to pay a heavy rent to the landlord into landlords themselves.

Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a defensive nature, but must be proved to be such as a prudent owner would have carried out in the interest of the family with the knowledge available to him at the time.

Where money is borrowed on a hundi or promissory note by a manager for the benefit or necessity of the joint Hindu family, the other members of the family are liable to be sued on the instrument.

Hindu Law does not recognise any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note or a bill of exchange and its liability when the debt is contracted otherwise. Under that law all that is necessary to make all the members of the family liable is that the debt should have been contracted for family necessity or for the benefit of the family. There is nothing in the Negotiable Instruments Act which should preclude a Court from applying the principles of Hindu law to a suit based on negotiable instruments. *Baijnath Prasad* v. *Binda Prasad Singh* ... 549

3——————*marriage—gandharva form—minor, whether competent to contract—custom of delivering immature children to be made concubines, whether can be upheld in a court of law.*

A minor girl is incompetent to contract a marriage in *gandharva* form which means a union by mutual exchange of garlands as she is incapable of giving the necessary consent which is essential in such a union.

A custom of delivering immature children to be made concubines is a diabolical one and invalid and cannot be upheld in a court of law. *Bamdeb Das* v. *Raja Brajasunder Deb* 134

4——————*mortgage of joint family property—legal necessity—Karta, power of, to embark on a new business for the benefit of family—test.*

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HINDU LAW—*concld.*

A mortgage of joint family property to finance a venture embarked on by the manager of a joint family for the benefit of the family (and not for his own benefit only) is binding on the members of the family, whether they in fact profited by the venture or not, provided it was of such a nature as a prudent manager would undertake and funds were in fact required to finance it. *Chhotey Lal Chaudhury* v. *Rai Bahadur Dalip Narain Singh* 386

5——*partition—expression of intention to separate—matter of proof—filing of plaint, whether mere evidence of intention.*

Under the Hindu Law the expression of an intention to separate effects severance of the joint status; but the expression of the intention has to be proved in a court of justice by evidence.

The evidence may consist of a notice, as in *Girja Bai's* case, or of the filing of a plaint claiming partition, as in *Kawal Nain's* case, or it may take some other form; but it is no more than the evidence of the intention to separate.

Where the final court of fact is not prepared, in the circumstances of the case, to look upon the filing of a plaint by a co-parcener as a clear indication of his intention to separate, the High Court cannot interfere with this finding of fact in second appeal. *Joala Prasad Singh* v. *Musammat Chanderjot Kuer* 430

6——*widow—deed in favour of reversioner renouncing her claim in property and giving up possession, whether is to be stamped as a gift or as a release. See* Stamp Act, 1899, no. 1 95

INCOME-TAX ACT, 1922—

1——*section* 10—*assessee, if entitled to deduction on account of loss by theft.*

An assessee is not entitled to deduction on account of loss by theft under section 10 of the Income-tax Act, 1922. *Mulchand Hira Lal* v. *Commissioner of Income-tax, Bihar and Orissa* 102

2——*section* 63—*service of notice on firm, whether sufficient in law*

Where the members of a joint Hindu family carried on the family business, under the name of two members who were dead and notices under the Income-tax Act were issued in the name of the firm and served on the karta of the family, *held*, that it was a sufficient compliance with the provisions of the section. *Sonu Lal* v. *Commissioner of Income-tax, Bihar and Orissa* 187

INTERPRETATION OF STATUTE—

1——*rules of construction. See* Code of Criminal Procedure, 1898, no. 1 632

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INTERPRETATION OF STATUTE—*concld*

2——————*rules for ascertaining whether provisions of a statute are directory or imperative. See* Jharia Water Supply Act, 1914 726

JHARIA WATER SUPPLY ACT, 1914—*sections* 58(*b*) *and* 64(*b*)—*notice calling upon receiver of royalty to lodge return, if mandatory—assessment without notice under section* 58(*b*), *effect of—Rules framed by local Government under the Act—rules* 4 *and* 5—*notice calling upon mine owner, etc., to file objection to assessment—prejudice—rules for ascertaining whether provisions of a statute are directory or imperative.*

The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative and in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory.

When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

Where a notice as required by section 58(*b*) of the Jharia Water Supply Act, 1914, was not served on the assessee but a notice under rule 5 of the Rules framed by the Local Government was served on him informing him of the assessment and calling upon him to file objection, if any, *held*, that the failure to issue the notice under section 58(*b*) did not invalidate the assessment as under the law the assessee is not entitled to be heard as to the assessment.

Held, also that rules 4 and 5 having been complied with the assessment could not be said to have been made behind the back of the assessee. *Jharia Water Board* v. *Jagdamba Loan Company* 726

JURISDICTION—

1——————*cess—liability imposed on income not subject to cess—Civil Court, jurisdiction of, to grant relief. See* Cess Act, 1880 436

2——————*ghatwali tenure—dismissal of ghatwal—competency of successor decided by executive authorities—Civil Court, jurisdiction of, to interfere with the decision. See* Ghatwali Tenure 898

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LAND ACQUISITION ACT, 1894—*section 23—compensation for loss of income, when can be awarded—market value, how to be ascertained.*

The loss of income which is contemplated in the fourth clause of section 23 of the Land Acquisition Act, 1894, is the loss of personal income to the owner of the land. It contemplates a case in which on account of the acquisition of a certain land the value of other properties of the owner has deteriorated or the owner has suffered loss of his own income not derived from the land itself: in such cases the owner is entitled to get compensation over and above what he is to get as the price of the land which has been acquired.

The clause has no application to a case where the loss of income complained of is the loss of the income of the property itself which is being acquired. That loss of income is a factor to be taken into consideration in fixing the market value of the land itself which the owner is to get under the first clause of section 23.

In those places where lands are being freely sold and purchased, the prevailing price is a suitable guide in fixing the market value of the land acquired. But in cases where there have been no transactions whatsoever the market value must be ascertained by finding out the income which the land was bringing to the owner and then capitalising it on the principle of reinstatement. *Secretary of State for India* v. *Rawat Mull Nopany* ... 760

LANDLORD AND TENANT—

1——————*appraisement, mode of—onus—proof necessary to entitle the landlord to succeed in a suit for produce rent.*

In a suit for produce rent the burden initially lies upon the plaintiff to prove his claim.

Before a record of appraisement can be treated as in itself evidence on which liability may be imputed, it should be proved that the appraisement was made with proper formality, that the raiyat was not merely present but actually was a party to the proceedings and that he signified his assent to the appraisement by signing the record; or that appraisement was made by a *salis* to whose appointment in that capacity the raiyat consented, or that points of difference were determined by some customary mode of arbitration. Otherwise, to entitle the landlord to a decree for the amount described in the papers, it must be proved not merely that the appraisement was made, but that the appraisement was correct; that is to say, the person who made the appraisement must prove not merely that he wrote down on a piece of paper a certain number of maunds and seers, but that this was the correct estimate of the outturn. *Pratap Narain Jha* v. *Ramasray Pershad Chaudhury* 120

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LANDLORD AND TENANT—*contd.*

2——————*co-sharer mortgaging his proprietary share to another co-sharer—mortgagor cultivating certain plots on payment of produce rent to mortgagee—twelve years' continuous possession—co-sharer mortgagor, whether acquires occupancy rights—Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *sections* 20 *and* 21—*partition—plots in cultivating possession of mortgagor allotted to mortgagee—mortgagee or his representative, whether entitled to eject mortgagor or his transferee.*

R a co-sharer landlord along with others gave certain shares in a village in usufructuary mortgage to *A* another co-sharer landlord and thereafter continued to cultivate specific plots of land which were in his possession from before and to divide half the produce to *A*. *R* subsequently sold his right in the land to *D* and *A* accepted *D* as tenant and received his share of the produce from him. *A* subsequently assigned his mortgage interest to another person who also accepted the produce from *D*. Thereafter there was a partition and the plots held by *D* were allotted to the patti of *A*.

Held, that *D* had acquired the status of a tenant and in course of time he had acquired occupancy right and could not be ejected.

Held, also that the representatives of *A* were estopped and could in no circumstance eject *D*.

Obiter: In the application of section 99 of the Estates Partition Act it is clear that some distinction is to be drawn between occupancy rights which are the creation of statute, and the rights of a lessee or tenure-holder which are the result of a contract between a single co-sharer and the person in possession. *Raja Ram Rai* v. *Niranjan Rai* 143

3——————*general law as to abatement of rent on the ground of diluvion, whether applies to the Santal Parganas—Santal Parganas Settlement Regulations*, 1872 (*Regulation III of* 1872), *section* 3(2)—*Santal Parganas Act*, 1855 (*Act XXXVII of* 1855), *section* 2—*Bengal, Agra and Assam Civil Courts Act*, 1887 (*Act XII of* 1887), *section* 37(2).

The general law that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated, applies also to the Santal Parganas where the tenancy is governed by the Santal Parganas Regulations.

Held, also, that the failure of the tenant to establish a contract to that effect can in no way prevent his getting the relief to which he may be entitled under the general law. *Fauzi Lal Kurmi* v. *Srimati Dhana Kumari Devi* ... 530

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LANDLORD AND TENANT—*concld.*

4——————*landlord, when entitled to a decree for money on tenant's admission—no ejectment by landlord—tenant, whether entitled to suspension of rent—failure to grant acquittance, whether deprives the landlord of damages or interest—decision as to area and rental in a rent suit, when operates as res judicata. See* Bihar Tenancy Act, 1885, no. 2, *supra* 451

5——————*lease for homestead or residential purposes granted before the passing of the Transfer of Property Act,* 1882 (*Act IV of* 1882), *whether is transferable.*

A lease of land taken for homestead or residential purposes granted before the Transfer of Property Act, 1882, was passed and which is not governed by the Bihar Tenancy Act is not transferable without the consent of the landlord. The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidents of the tenancy.

If there had been a representation by the landlord which led the tenant to believe that he had a permanent tenancy and he erected the building there might be an estoppel. *Bansi Singh* v. *Chakradhar Prashad* ... 358

6——————*sale in execution of rent decree—notification of arrears for subsequent period in sale proclamation, effect of—landlord auction-purchaser, how for affected by the notification—suit for rent for those years, whether maintainable.*

Where in a sale proclamation it was notified that the arrears of rent for subsequent years were an incumbrance, *held*, that the auction-purchaser purchased the holding subject to the incumbrance. A landlord auction-purchaser was in no better position than a stranger purchaser and, therefore, he was debarred from bringing a suit for rent for those years. *Nripendra Nath Chatterjee* v. *Kuldip Misra* ... 694

7——————*settlement of land by receiver appointed by court, how far binding. See* Receiver 594

8——————*suit for rent against some of the tenants, whether maintainable—Contract Act,* 1872 (*Act IX of* 1872), *section* 43.

Where the landlord sued some of the tenants for the whole rent of a holding and it was contended that the action was not maintainable,

Held, that in view of the law as laid down in section 43 of the Contract Act, the suit was maintainable. *Manbodh Bhagat* v. *Jaswant Kumar Singh* 662

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LEASE—

1——————*lease for homestead or residential purposes granted before the passing of the Transfer of Property Act, 1882, whether transferable without landlord's consent. See* Landlord and Tenant, no. 5 358

2——————*mortgage by assignment by the lessee—mortgagee, whether liable for the rent reserved—Transfer of Property Act,* 1882 (*Act IV of* 1882), *section* 58(*c*)—*Transfer of Property (Amendment) Act,* 1929 (*Act XX of* 1929)—*mortgage by assignment not strictly coming within the definition of " English mortgage ", whether is effective—lessee covenanting to pay rent on behalf of himself and his assigns—mortgagee taking possession of leasehold property with express knowledge of covenant—privity of contract, whether exists between mortgagee and landlord.*

In India, a lessee mortgaging his interest by assignment as contemplated by section 58(*c*) of the Transfer of Property Act, 1882, passes the whole of the interest to the mortgagee and the latter (certainly when in possession) is liable for the rent reserved in the lease.

The law on this point remains unaltered by the Transfer of Property (Amendment) Act XX of 1929.

Section 58 of the Transfer of Property Act, 1882, does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage.

Where the lessee covenants on behalf of himself and his assigns to pay the rent to the landlord and the mortgagee from the lessee takes possession of the land under the mortgage with the express knowledge of the mortgagor's covenant, there is a privity of contract between the mortgagee and the landlord and the former is liable to pay the rent reserved; the fact that the mortgagor has covenanted with the mortgagee to pay the rent to the landlord and has actually paid the rent for a period of time is *immaterial. Raja Shiva Prasad Singh* v. *Tom Smith* 499

LEGAL PRACTITIONERS ACT, 1879.—

1——————*sections* 13 *and* 14—*professional misconduct—Mukhtar not depositing money entrusted to him in court of Certificate Officer—Deputy Commissioner, whether can draw up proceeding under the Act.*

It is within the competence of a court before whom a pleader practises to draw up proceedings under the Legal Practitioners Act for any professional misconduct committed by the pleader in connection with any instruction which he received from his client generally or in connection with a particular matter.

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LEGAL PRACTITIONERS ACT, 1879—*concld.*

Therefore, the Deputy Commissioner had full jurisdiction to take proceedings under the Legal Practitioners Act against a Mukhtar who did not deposit the money entrusted to him by a client for deposit in the court of the Certificate Officer. *Akhouri Banwari Prasad, Mukhtar, In re* 96

2——————*sections* 13 *and* 14—*proceedings drawn up and evidence recorded by Judge-in-charge record room—pleader found not guilty of misconduct—District Judge's disagreement with finding—proceedings forwarded to High Court for action—proceedings, whether ultra vires—pleader entering record room without permission of Judge-in-charge—conduct improper—Judge-in-charge, duties of.*

The Judge-in-charge of a record room drew up proceedings against a pleader, for entering the record room and making his signature on a vakalatnama without the permission of the Judge-in-charge, and called upon him to show cause why his conduct should not be reported to the High Court. The pleader showed cause and the Judge having recorded the evidence came to the conclusion that there was no ground for any action. The District Judge, however, disagreed with his finding and submitted the record to the High Court for appropriate action.

Held. (*i*) that the proceedings were ultra vires as the District Judge had no jurisdiction either to forward the proceedings which were never initiated by him, or to act on the evidence which was never recorded by him.

(*ii*) that the District Judge could have drawn up fresh proceedings against the pleader and then after giving notice to the pleader he should have recorded himself all evidence and after adjudicating thereon he could report the matter to the High Court.

(*iii*) that likewise it was open to the High Court on reference to draw up fresh proceedings against the pleader and then after giving notice to him and hearing his defence, if any, to dispose of the matter.

It is highly improper for any pleader to force his way into the record room without the permission of the Judge-in-charge.

Observations on the duty of the Judge-in-charge to see that the orders of the District Judge forbidding any member of the public or pleader to enter into the record room are strictly obeyed. *Karuna Kant Prasad, Pleader, In re* 261

LETTERS OF ADMINISTRATION—*joint Hindu family—co-parceners applying for letters of administration in respect of joint family property, whether liable to pay court-fee. See* Court-Fees Act, 1870, no. 1 542

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LETTERS PATENT OF THE PATNA HIGH COURT—*clause 2—Chief Justice, death of—office remaining vacant—High Court, constitution of, whether affected during the period of vacancy. See* Government of India Act, 1935, no. 2 ... 574

LIMITATION.—

1——————*mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity—default by transferee—cause of action arises when mortgagor actually damnified—limitation—terminus a quo. See* Limitation Act, 1908, no. 5 751

2——————*vacancy in tenancy held by headman in Chota Nagpur—right to apply for determination of successor. See* Chota Nagpur Tenancy Act, 1908, no. 3 110

LIMITATION ACT, 1908.—

1——————*section 5—mistaken advice given by legal practitioner, how far constitutes sufficient cause "—refusal by lower appellate court to extend time—High Court, when can interfere in second appeal—subordinate courts, duty of, to pronounce opinion on all important points in appealable cases.*

An honest mistake on the part of a litigant caused by an erroneous advice given to him by a competent lawyer, after a reasonable care, is a " sufficient cause " entitling the litigant to the benefit of section 5 of the Limitation Act, 1908.

Where, upon a consideration of the facts, the lower appellate court is not satisfied that the appellant has reason to come beyond the time fixed by law, the refusal to extend time is final; but where, upon the facts found, the discretion is not judicially exercised so that the refusal to extend time is based upon the court misdirecting itself on a point of law, the High Court can interfere in second appeal.

Observations on the duty of the subordinate Courts to pronounce their opinion on all the important points in appealable cases.

Per DHAVLE, J.—The true rule about mistaken advice from a legal practitioner must be taken to be that the circumstances of each particular case should be examined to see whether such advice gives rise to sufficient cause within section 5 of the Limitation Act.

Questions of law and of fact are sometimes difficult to disentangle, but the proper legal effect of a proved fact is essentially a question of law.

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LIMITATION ACT, 1908—*contd.*

The facts on which the discretion under section 5 is exercised must be distinguished from the question whether in law they amount to sufficient cause within the section. *Nrisingha Charan Nandy Choudhury* v. *Trigunand Jha Khowaro* 507

2——————*section* 10—*annuity payable under a Will, suit to recover—limitation. See* Annuity 350

3——————*section* 22—*transferee from claimant after disposal of claim case and before institution of suit under Order XXI, rule* 63, *whether a necessary party to that suit—transferee impleaded after period of limitation—suit, whether time-barred—Code of Civil Procedure,* 1908 *(Act V of* 1908), *Order XXI, rules* 58 *and* 63—*Transfer of Property Act,* 1882 *(Act IV of* 1882), *section* 53—*suit by unsuccessful creditor for himself alone under Order XXI, rule* 63, *on the ground that transfer was fraudulent, if maintainable.*

P having obtained a money decree against *D*, proceeded to attach his house on the 23rd April, 1932, *C* preferred a claim under Order XXI, rule 58, on the ground that the house had been conveyed to him by *D* and the claim was allowed on the 20th November, 1933. On the 11th September, 1934, *C* conveyed the house to *L*. On 6th October, 1934, *P* instituted the present suit under Order XXI, rule 63, for a declaration that the deed set up by *C* was a fraudulent one. *L* was made a party to the suit on the 15th May, 1935. The District Judge found that the conveyances by *D* in favour of *C* and by *C* in favour of *L* were without consideration and were never intended to pass any title and they did not confer any title on them.

Held, that a suit brought under Order XXI, rule 63, is a mere continuation of the proceedings in the claim petition and therefore *L* the purchaser was an alienee *pendente lite* and was not a necessary party to the suit.

Held, also, that the transfer being void, *L* was not a necessary party to the suit and as such section 22 (*1*) had no application and the suit was not barred by limitation.

Held, also, that a creditor who avails himself of the provisions of Order XXI, rule 63, can sue on his own behalf for having the alienation in favour of the claimant declared void without mentioning any other creditors or their debts and section 53 of the Transfer of Property Act has no application to such a case. *Musammat Bas Kuer* v. *The Gaya Municipality* 588

4——————*Article* 11—*suit against an order rejecting objection under section* 24 *of the Public Demands Recovery Act,*

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LIMITATION ACT, 1908—*contd.*

1914 (*B. and O. Act IV of* 1914), *whether governed by article* 11 *of the Limitation Act.*

L filed a certificate against *D* and got a notice under section 7 of the Public Demands Recovery Act, 1914, issued against him. *P* in execution of a money decree applied for the attachment and sale of certain properties belonging to *D* and other members of his family and *L* filed an objection, the Munsif directed the sale of the properties sought to be sold subject to the charge under the certificate. *P* purchased the properties and thereafter filed an objection in the certificate court that the certificate-debtor had no interest left in the property, but the objection was overruled. *P* subsequently applied for delivery of possession, but on the objection of *L* who had in the meantime purchased the property and got possession, was unsuccessful. *P* filed the present suit.

Held, that the suit having been instituted more than one year after the order rejecting the objection under section 24 of the Public Demands Recovery Act, 1914, was barred under section 25 of the Public Demands Recovery Act read with article 11 of the Limitation Act. *Jamuna Sonar* v. *Atma Ram Ojha* 446

5——————*Articles* 83 *and* 116—*mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity—default by transferee—cause of action arises when vendor actually damnified—limitation—terminus a quo—donee of other portion of mortgaged property, free of encumbrance, whether entitled to the benefit of the contract.*

Where there is an undertaking by the vendee (or other transferee) to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense there is a contract of indemnity, which may be express or implied. In such cases a cause of action arises when the vendor, or any person who is entitled to the benefit of the contract with the vendor, is actually damnified by the sale of the property in the suit by the mortgagee, and limitation under Article 83 or 116 of the Limitation Act runs from the date when he is so damnified.

C, a mortgagor, transferred for value a portion of the mortgaged property and left the consideration money with the transferees for payment to the mortgagee, the transferees undertaking to pay off the mortgage debt. *C* subsequently gifted away (*inter alia*) another portion of

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LIMITATION ACT, 1908—*contd.*

the property to his daughter *H*, free of encumbrance. The transferees made default in the payment of the mortgage debt as a result of which the entire mortgaged property was sold. *H* then brought a suit claiming the amount of loss which she had suffered on account of the sale of her property and impleaded, amongst others, the transferees as defendants in the action.

Held, that *H* was entitled to the benefit of the contract with the mortgagor.

Musammat Mehdatunnissa Begum v. *Musammat Halimatunnissa Begum* 751

6——————*Schedule I, articles 83 and 116—suit for damages for loss occasioned by non-payment of consideration to third party as stipulated—limitation—proper article applicable—cause of action, when accrues—contract of indemnity—Contract Act*, 1872 (*Act IX of* 1872), *section* 124—*rule of common law.*

The plaintiffs executed an ijara deed in favour of the defendants for a certain sum, who undertook to pay off previous mortgages in favour of third parties. The defendants did not pay and the mortgagees put the mortgaged properties to sale.

Held, that the plaintiffs had failed to make out a case of a contract of indemnity either express or implied within the meaning of section 124 or any other section of the Contract Act and that the ordinary rule of common law applied, and the plaintiffs were entitled to damages for breach of contract, and not any resulting or collateral damages occasioned thereby. Consequently limitation ran from the time when the contract was broken and not from the time at which any damage was sustained by the plaintiff.

Held, also, that article 83 of the Limitation Act which relates to contract of indemnity did not apply and the case was governed by article 116. *Keshwar Sao* v. *Guni Singh* 838

7——————*Article* 115—*suit on implied contract, whether governed by Article* 115—*suit by municipality on oral contract, whether maintainable—Bihar and Orissa Municipal Act*, 1922 (*Bihar and Orissa Act VII of* 1922), *section* 64.

Where the municipality sued a farmer of a market for the recovery of a certain sum of money which he had agreed to pay orally in consideration of his right to collect tolls, *held*, that in view of the provisions of section 64 of the Bihar and Orissa Municipal Act the municipality was not entitled to sue, the contract being not under seal.

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LIMITATION ACT, 1908—*concld.*

Held, that treating the case as a suit for enforcing an obligation under an implied contract the suit was barred under article 115 of the Limitation Act. *Ganesh Prasad Sah* v. *Sheikh Jawad Husain* 277

8——*Article* 116. *See* no. 5, *supra* 751

9——*Article* 116. *See* no. 8, *supra* 338

10——*Article* 123—*annuity payable under a Will, suit to recover—limitation—proper article applicable. See* Annuity 350

11——*Article* 182—*application for execution by the real assignee of a decree whether is an application in accordance with law—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rules* 15 *and* 16—*transferee of decree, meaning of—application under rule* 15, *requisites of.*

A obtained a decree for possession and mesne profits in 1920 and thereafter he assigned 7-annas interest in the same in favour of *N* who took the assignment in the name of *M*. The amount of mesne profits was ascertained and a final decree was passed in 1923. In 1925 *A* and *N* applied for execution of the decree, but the execution was struck off as *M* claimed that he was the real assignee and the parties were referred to get the matter determined by a suit. *N* got the declaration that he was the real transferee, and thereafter in 1935 an application was filed for execution and the judgment-debtor asserted that the application for execution of the year 1925 was not in accordance with law and therefore the present application for execution of 1935 was barred by limitation.

Held, that the transferee under a deed of assignment referred to in rule 16 of Order XXI was the person named in the deed and not the real transferee.

Held, also that in view of the express provision of the law, Order XXI, rule 16, the mere fact that a declaration was made that *N* was the real transferee did not entitle him to levy execution.

Held, also that the application for execution made in 1925 could not be taken as an application under Order XXI, rule 15, as it was not stated therein that it was for the benefit of the applicant and the other person entitled to the decree. *Shaikh Mohammad Anas* v. *Bhupendra Prasad Shukul* 223

12——*Article* 182—*decree transferred to another court for execution—application to recall proceedings, whether is a step-in-aid of execution. See* Execution no. 1 ... 617

MAJORITY ACT, 1875—*section* 2—*minor wife, whether competent to relinquish the whole or part of her dower or change its character—matter, whether governed by personal law. See* Muhammadan Law 808

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MESNE PROFITS—*preliminary decree for ascertainment of mesne profits, whether is a decree for money. See* Code of Civil Procedure, 1908, no. 16 207

MINOR.—

1——————*minor not properly represented by guardian-ad-litem, when entitled to get a declaration as to decree not being binding—court, whether can set aside the whole decree and direct a fresh trial. See* Code of Civil Procedure, 1908, no. 23 236

2——————*whether bound to institute a suit for avoiding a transaction—declaration of intention to repudiate, whether sufficient. See* Transfer of Property Act, 1882, no. 3 ... 460

MONOPOLY—*contract to collect hides within a landlord's zamindari, if enforceable in law.*

A contract by which the defendant got the exclusive right to collect hides of dead animals within the plaintiff's zamindari is of the nature of a monopoly and is unenforceable. *Maharajadhiraja Sir Kameshwar Singh* v. *Md. Yasin Khan* 255

MORTGAGE.—

1——————*prior mortgagee also holding a subsequent mortgage impleaded as a puisne mortgagee—suit on basis of prior mortgage, when barred by res judicata.*

D brought a mortgage suit and impleaded *P* as a subsequent mortgagee in the suit and having obtained a mortgage decree dispossessed the plaintiff who had an usufructuary mortgage of a prior date. *P* had in his written statement pleaded that he was a prior and not a subsequent mortgagee but no adjudication was made. *P* thereafter brought the present suit and prayed for a mortgage decree in respect of the sudbharna money and it was contended that the decree in the mortgage suit was res judicata.

Held, that in order to sustain the plea of res judicata it was necessary for the plaintiff in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to allege a distinct case in their plaint in derogation of the priority and this not having been done the suit was not barred. *Shaikh Tahir Hussain* v. *Syed Basirul Haque* 180

2——————*subrogation—purchaser of equity of redemption—arrangement with mortgagor by which portion of purchase money retained by purchaser for payment of prior mortgage—purchaser, whether entitled to benefit of subrogation—intention to keep alive to be presumed.*

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MORTGAGE—*concld.*

Where a purchaser of the equity of redemption pays off a prior mortgage under an arrangement with the mortgagor by which a portion of the purchase money was left in the hands of the purchaser for such payment, *held*, that, in the absence of any indication of a contrary intention, the purchaser must be presumed to have kept alive the mortgage, so as to entitle him to the benefit of subrogation as against subsequent encumbrancers. *Abu Muhammad Mian* v. *Babu Deodutt* 154

3——————*subrogation—purchaser paying previous mortgagees which he had undertaken to pay, whether entitled to subrogation. See* Transfer of Property Act, 1882, no. 6 ... 666

4——————*mortgage by assignment by lease—mortgagee, whether liable for the rent reserved—mortgage by assignment not strictly coming within the definition of "English mortgage", whether is effective. See* Lease no. 2 499

5——————*usufructuary mortgage bond—stipulation as regards mortgagor entering into possession when loan is repaid after due date—absence of condition that mortgagee was to continue in possession on same terms after due date—mortgagee, whether entitled to a decree for mortgage money. See* Transfer of Property Act, 1882, no. 5 ... 737

6——————*mortgagor transferring a portion of mortgaged property—transferee undertaking to pay off mortgage debt existing on the property—contract of indemnity—default by transferee—cause of action arises when mortgagor actually damnified—limitation—terminus a quo—donee of other portion of mortgaged property, free of encumbrance, whether is entitled to the benfit of the contract. See* Limitation Act, 1908, no. 5 751

MUHAMMADAN LAW—*dower—minor wife, whether competent to relinquish the whole or a part of her dower or to change its character—matter, whether governed by personal law—Majority Act,* 1875 (Act IX of 1875), *section* 2.

Once a marriage has been performed and the dower is settled, a wife who (although a major according to the personal law of the lady) is a minor under the Majority Act, 1875, is not competent to relinquish the whole or a part of her dower or to change its character. *Najmunnissa Begum* v. *Maulavi Sirajuddin Ahmad Khan* 303

NEGOTIABLE INSTRUMENTS ACT, 1881—*section* 28—*joint Hindu family—money borrowed by karta for family necessity on a hundi or promissory note—other members, whether are liable to be sued on the instrument. See* Hindu Law, no. 2 549

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ORISSA TENANCY ACT, 1913.—

1——————*sections 31 and 250—" maximum fee ", meaning of—amount of mutation fee payable under section 31, how is to be determined.*

When the court has to find what is the proper amount of mutation fee which can be recovered under section 250(*e*) of the Orissa Tenancy Act, 1913, a customary amount proved by evidence to be such as would be sufficient to prove a long established and binding custom of the estate, would be the amount properly payable under section 31(*1*) of the Act, provided that it did not exceed 25 per cent. of the purchase money. But if the evidence falls short of that and it is proved that the landlord and tenants had been in the habit for some years before 1913 of making and obtaining mutation of names on payment of a certain recognised proportion of the purchase money, that amount which was regarded as reasonable by the parties in 1913 should properly be regarded as reasonable after the passing of the Act.

The words " maximum fee " indicate that it is not necessary in any case that the fee shall be 25 per cent. as the proper fee, but in no case should the court allow more than 25 per cent. *Raja Ramchandra Deb* v. *Fakir Paikara* 325

2——————*section 250. See no. 1, supra* 325

PARTITION SUIT—*appeal against final decree is like a second appeal—question of law and principle can only be considered —practice.*

A first appeal to the High Court from the final decree of the Subordinate Judge, in a partition suit, is really in the nature of a second appeal in which only questions of law and principle can be considered. It is impossible for the High Court to go down to the area in question, inspect the land, hear the various objections and review the decision of the commissioner on facts. The power to review the decision of the commissioner on facts is for the Subordinate Judge and his view of the fact ought to be final as a first appellate decision on facts. *Jugeshwar Singh* v. *Rijhan Singh* 81

PAUPER—*application to sue in forma pauperis rejected—Court, when is empowered to permit payment of Court-fee—application finally disposed of—Court, whether has power to allow plaintiff at a later date to pay court-fees. See* Code of Civil Procedure, 1908, no. 10 281

PENAL CODE, 1860—

1——————*section 99—right of private defence.*

The right of private defence can be exercised only in special circumstances and with the restrictions imposed by section 99 of the Penal Code. The important considerations

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PENAL CODE, 1860—*concld.*

which always arise in order to determine whether the action of the accused is covered by the right of private defence are, firstly, what is the nature of the apprehended danger and, secondly, whether there was time to have recourse to the Police authorities, always remembering that when both the parties are determined to fight and to go up to the land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappears.

The natural tendency of the law of all civilised states is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be safely applied to a country like India. If a person prefers to use force in order to protect his property when he can, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Penal Code, no matter what the intention of the person may be.

The mere fact that one party came on the field first would not justify him to have resort to force. *Satnarain Das* v. *King-Emperor* 607

2——————*section* 143 *and* 186—*unlawful assembly and obstruction to attachment—sanction to prosecute, when necessary. See* Code of Criminal Procedure, 1898, no. 5 680

3——————*section* 187—"*assistance*", *whether ejusdem generis—refusal to sign search-list, whether constitutes an offence punishable under the section. See* Code of Criminal Procedure, 1898, no. 1 632

4——————*section* 215—*persons suspected of theft, whether can be convicted of offence under section* 215—*saving clause, import and meaning of—onus.*

A person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under section 215 of the Penal Code, 1860.

The saving clause in section 215 is in the nature of an exception, and once the elements of an offence under that section have been established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on the defence, particularly where there has been a spontaneous demand of money by the accused in circumstances indicating an intention not to bring the offender to justice. *Ramanand Teli* v. *King-Emperor* ... 677

PRACTICE—

1——————*decision of a Division Bench, binding nature of. See* Receiver 594

2——————*Subordinate Courts, duty of, to pronounce opinion on all important points in appealable cases. See* Limitation Act, 1908 no. 1 507

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PRELIMINARY DECREE—*decree for ascertainment of mesne profits, whether is a decree for money. See* Code of Civil Procedure, 1908, no. 16 206

PROMISSORY NOTE—

1——————*joint Hindu family—money borrowed by karta for family necessity on a hundi or promissory note—other members, whether are liable to be sued on the instrument. See* Hindu Law, no. 1 549

2——————*suit based on—payee's name not mentioned in handnote—plaintiff, whether entitled to prove original loan aliunde—amendment of plaint after limitation, effect of.*

A plaintiff is entitled to recover on the original loan when his claim on a handnote fails (either because the payee is not mentioned therein or because the handnote is not admissible in evidence) provided that a proper case has been made out in the plaint or the plaint has been amended to state the facts necessary to support the claim.

The circumstance that an amendment of the plaint may have the effect of depriving the defendant of the benefit of the plea of limitation is one of the circumstances, and a most important one, which has to be considered by a Court before permitting an amendment of the plaint. It is only in exceptional cases that the court will allow the plaintiff to amend his plaint in such a way as to deprive the defendant of the plea of limitation, but when once the court has exercised its discretion judicially, and the amendment has been allowed, the amendment dates back to the presentation of the plaint, and, if that date is within the period of limitation prescribed for the particular relief which the plaintiff seeks by the amendment, the suit must be held to be within time. *Mahanth Kesho Das* v. *Hari Kishun Das* 268

PROVINCIAL INSOLVENCY ACT, 1920—

1——————*sections 50 and 75—debtor, whether can appeal against an order holding that certain debts had been proved by the creditors.*

Held, on a construction of section 50 read with section 75 of the Provincial Insolvency Act, that a debtor is entitled to appeal against the order of the District Court declaring that certain debts had been proved by the creditors. *Makhan Lal Govindram* v. *Bhagwan Singh Mistri* 201

2——————*section 75—debtor, whether can appeal against an order holding that certain debts had been proved by the creditors. See no. 1, supra* 201

PUBLIC DEMANDS RECOVERY ACT, 1914—*section 24—order rejecting an objection under section 24—suit, whether governed by article 11 of the Limitation Act,* 1908. *See* Limitation Act, 1908, no. 4 446

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RAILWAYS, ACT, 1890—*sections 55 and 56—sale of goods by private treaty instead of public auction—Railway Company whether protected.*

Charges due on a consignment of goods were not paid and the Railway Company sold the goods by private treaty. In a suit by the consignee against the Railway Company for damages for conversion,

Held, that the Railway Company not having sold the goods by public auction as prescribed by sections 55 and 56 of the Indian Railways Act were not protected. *The Secretary of State* v. *Sunderji Shivji and Co.* 58

RAILWAY COMPANY—*sale of goods by private treaty instead of public auction—Railway Company, whether protected. See* Railways Act, 1890 58

RECEIVER—*settlement of land by receiver appointed by court, how far binding—decision of a Division Bench, binding nature of.*

A Receiver appointed by the Court is a landlord for the time being within the meaning of the Bihar Tenancy Act, and therefore a settlement made by him bona fide in the interest of the estate in the ordinary course of management and not so as to prejudice the rights of the landlords is binding on them.

If a Judge does not agree with the decision of a Division Bench it is his duty as a matter of constitution to refer the matter to a larger Bench. *Mahanth Mahabir Das* v. *Udit Narain Verma* 594

REGULATIONS—

1814—XXIX *See* Birbhum Ghatwali Regulation, 1814.

1872—III. *See* Santal Parganas Settlement Regulation, 1872.

1910—IV. *See* Sonthal Parganas Rural Police Regulation, 1910. ...

RENT—*general law as to abatement of rent on the ground of diluvion, whether applies to the Santal Parganas. See* Landlord and Tenant, no. 3 530

RENT SUIT—

1——————*appraisement, mode of—onus—proof necessary to entitle the landlord to succeed in a suit for produce rent. See* Landlord and Tenant, no. 1 120

2——————*sale in execution of rent decree—notification of arrears for subsequent years in sale proclamation, effect of —landlord auction-purchaser, how far affected by the notification—suit for rent for those years, whether maintainable. See* Landlord and Tenant, no. 6 691

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RENT SUIT—*concld.*

3——————*suit against some only of the tenants, whether maintainable. See* Landlord and Tenant, no. 7 ... 662

RES JUDICATA—

1——————*action on mortgage—prior mortgagee also holding a subsequent mortgage impleaded as a puisne mortgagee—suit on the basis of prior mortgage, when barred by res judicata. See* Mortgage, no. 1 180

2——————*decision as to rental and area in a rent suit, when operates as res judicata. See* Bihar Tenancy Act, 1885, no. 2 451

REVIEW—*appeal dismissed for non-payment of printing cost—application for restoration, whether is to be treated as an application for review—Code of Civil Procedure,* 1908 *(Act V of* 1908*), section* 151 *and Order XLI, rule* 19*, applicability of—Court-fee payable, what should be—Court-fees Act,* 1870 *(Act VII of* 1870*), Schedule* 1*, articles* 4 *and* 5.

An application for restoration of an appeal dismissed for non-payment of printing cost is to be treated as an applicaion for review and must be stamped as such under articles 4 and 5 of Schedule 1 of the Court-fees Act, 1870. *Singheshwar Prasad Mahton* v. *Mowar Ram Bahadur Singh* 252

SALE—*title to vended property, when passes—intention of parties, how is to be proved—terms unambiguous—external evidence, whether admissible—recital as to passing of consideration, whether differs from strictly contractual part—Evidence Act,* 1872 *(Act I of* 1872*), section* 92.

In a contract of sale the strictly contractual part, as for instance, the arrangement between the parties as to when the property shall pass, is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose, as mentioned in section 92 of the Evidence Act, 1872, of contradicting, varying, adding to, or substracting from its terms; in this respect it differs from the recital of fact, that is to say, the passing of consideration, which is not a matter of contract but a matter of fact. In the latter case, there is nothing in section 92 which prevents a person from adducing evidence for the purpose of showing that the recital was untrue.

If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was; but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties. *Radhamohan Thakur* v. *Bipin Behari Mitra* ... 318

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SANTAL PARGANAS ACT, 1855—*section 2—general law as to abatement of rent on the ground of diluvion, whether applies to the Santal Parganas. See* Landlord and Tenant, no. 3 530

SANTAL PARGANAS SETTLEMENT REGULATION, 1872—*section 3(2)—general law as to abatement of rent on the ground of diluvion, whether applies to the Santal Parganas. See* Landlord and Tenant, no. 3 530

SONTHAL PARGANAS RURAL POLICE REGULATION, 1910—*sections 6, 7 and 8—Government, right of, to dismiss a ghatwal for default in payment of chaukidari dues. See* Ghatwali Tenure 898

SERVICE TENURE—*chaukidari land, whether liable to be resumed by zamindar—land assigned for public purposes—zamindar accustomed to demand private services—such services no longer rendered by chaukidar—land, whether liable to be resumed on this ground.*

A zamindar is not ordinarily entitled to resume chaukidari lands, because chaukidars have public duties to perform, and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes.

Even if a zamindar has been accustomed to demand certain private services from the chaukidar, he would not be entitled to resume the chaukidari land merely because those private services are no longer rendered, so long as the holder of the land is the chaukidar of the village. *Bhagi Malik v. Satyabadi Ota* 315

STAMP ACT, 1899.—

1——————*articles 35, 55—deed of release executed by Hindu widow giving up possession, whether comes under Article 33 or Article 55.*

A deed executed by a Hindu widow holding a life-interest in favour of the next heir, renouncing her claim in the property and giving up possession is to be stamped as a gift under Article 33 and not as a release under Article 55 of the Stamp Act. The value is to be the present value of the life-estate. *Khetramoni Debya, in re* 95

2——————*article 55. See no. 1, supra* 95

TRANSFER OF PROPERTY ACT, 1882.—

1——————*lease for homestead or residential purposes granted before the passing of the Act, whether transferable without landlord's consent. See* landlord and Tenant, no. 5 ... 358

2——————*section 53—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XXI, rules 58 and 63—claim of transferee from judgment-debtor upheld—suit by unsuccessful creditor on his behalf alone, whether maintainable. See* Limitation Act, 1908, no. 3 588

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TRANSFER OF PROPERTY ACT, 1882—*contd.*

3——————*section 53A, whether retrospective—section, whether applies to agreements made prior to April, 1930—Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), sections 16 and 63—minor, whether bound to institute a suit for avoiding a transaction—declaration of intention to repudiate, whether sufficient—Guardians and Wards Act, 1890 (Act VIII of 1890)—legislature, duty of, to make drastic changes in the Act for proper and effective control of guardians.*

Section 53A of the Transfer of Property Act, 1882 (introduced by Act XX of 1929), is not retrospective in operation, and does not, therefore, apply to an agreement made prior to the 1st of April, 1930, the date of the coming into force of the amending Act.

Unless there is something in the language, context or object of an Act showing a contrary intention, the duty and practice of Courts of Justice is to presume that the legislature enacts prospectively and not retrospectively.

Per MANOHAR LALL, J.—It is not necessary that a minor should institute a suit on coming of age to avoid a transaction entered into by the guardian on his behalf, or that some other guardian or next friend of the minor should institute a suit for that purpose. The minor can repudiate the transaction in a variety of ways, for instance, by dealing with or transferring the very property which has been dealt with by the guardian on his behalf and which transaction he does not choose to ratify.

In a case where section 53A of the Transfer of Property Act, 1882, is sought to be invoked in defence of a lessee who has entered in possession upon the footing of an unregistered contract for lease, the lessee cannot be allowed to resist the action where the contract for lease is of a date anterior to the 1st April, 1930.

Observations on the duty of the legislature to intervene and make some drastic changes in the Guardians and Wards Act, 1890, so that proper supervision and control may be exercised over the guardians in the real and effective interest of the minor. *Jagdamba Prasad Lalla* v. *Anadi Nath Roy*, 460

4——————*section 58(c)—mortgage by assignment by the lessee—mortgagee, whether liable for the rent reserved—mortgage by assignment not strictly coming within the definition of "English mortgage", whether is effective. See* Lease, no. 2 499

5——————*section 68—personal covenant to repay, whether implies express contract—usufructuary mortgage bond—stipulation as regards mortgagor entering into possession*

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TRANSFER OF PROPERTY ACT, 1882—*concld.*

when loan is repaid after due date—absence of condition that mortgagee was to continue in possession on same terms after due date—mortgagee, whether entitled to a decree for mortgage money—construction of documents, rules of.

The personal covenant to repay the loan contemplated by clause (*a*) of section 68 of the Transfer of Property Act, 1882, refers to an express contract in contradistinction to a contract implied by law.

Where, in a usufructuary mortgage bond, the mortgagor stipulated as follows:

"When at the end of the month of Jeth, 1336 Fasli or after the expiry of the due date at the end of the month of Jeth of any year, I, the executant, shall repay the entire peshgi money in cash in lump sum at one time to the aforesaid at pesgidar, I shall take back this deed and enter into possession of the Ijara property".

and there was no condition in the document that after the expiry of the due date the mortgagee was to remain in possession on the same terms.

Held, on a construction of the document, that the mortgagor had bound himself to repay the loan, within the meaning of section 68(*a*) of the Act, and, therefore, that the mortgagee was entitled to a decree for the mortgage money.

It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the court must ascertain, as best it can, what the intention of the parties was in accordance with the terms as expressed by them. *Raj Kumar Bharthi* v. *Surajdeo Sahi* 737

6————*section 92—subrogation—purchaser paying previous mortgagees which he had undertaken to pay, if entitled to subrogation—express covenant.*

T and others conveyed their 16 annas share to *D* and left the consideration for payment to the mortgagees. He, however, did not disclose one other mortgage and the mortgagee sued. *D* pleaded subrogation.

Held, that in the absence of an express covenant in the sale deed by the mortgagor giving him the right of subrogation he was not entitled to the relief by way of subrogation under section 92 of the Transfer of Property Act. *Rai Bahadur Bansidhar Dhandhania* v. *Kairoo Mandar* ... 666

TRANSFER OF PROPERTY (AMENDMENT) ACT, 1920.—

1————*mortgage by assignment by the lessee—mortgagee, whether liable for the rent reserved—Transfer of Property Act, 1882 (Act IV of 1882), section 58(c)—law, whether altered by the amending Act.* See Lease, no. 2 ... 499

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TRANSFER OF PROPERTY (AMENDMENT) ACT, 1920—*concld.*
2——————*sections* 16 *and* 63—*Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 53*A*, *whether retrospective. See* Transfer of Property Act, 1882, no. 3 460

WILL—*annuity payable under a Will, suit to recover—limitation—Limitation Act*, 1908 (*Act IX of* 1908), *section* 10 *and Schedule I, article* 123. *See* Annuity 350

WORKMEN'S COMPENSATION ACT, 1923—*sections* 10 *and* 30—*amount awarded as compensation to two workmen, whether can be consolidated for purposes of valuation of appeal—"instituted", meaning of—ignorance of law, whether is a sufficient cause within the meaning of the proviso to section* 10.

The Commissioner acting under the Workmen's Compensation Act awarded Rs. 231-1-7 compensation for an accident to *M* and Rs. 462-3-2 to *B*. In both the cases the claim was made more than six months after the accident, but the Commissioner took the view that the workmen being of the coolie class could not be expected to know the rules, and accordingly entertained the claim. The employer appealed to the High Court;

Held, that the total amount of compensation allowed was immaterial and that rights of one workman could not be governed by the conditions and circumstances of the case of the other workman and therefore the appeal against *M* who was awarded compensation below Rs. 300 was incompetent.

Held, also that the word 'instituted' was not synonymous with the word 'made'. The word 'instituted' is an act referable to the making or filing formally before the appropriate court of a claim for compensation.

Held, also that the Commissioner could not excuse the delay on account of the ignorance of law on the part of the workmen. *Abdul Matin* v. *Bidesi Rajwar* 658

VILLAGE CHAUKIDAR—*chaukidar, whether is a Police Officer within the meaning of section* 26 *of the Evidence Act*, 1872. *See* Evidence Act, 1872, no. 1 369

ZIRAT—*oral lease for one year—tenant, whether can acquire occupancy right in zirat. See* Bihar Tenancy Act, 1885, no. 3 218

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