L - Spl 90

REGISTERED No. P.-123.

1953

THE INDIAN LAW REPORTS

PATNA SERIES

VOLUME XXXII

REPORTED BY

HIGH COURT, PATNA ... KAMESHWAR DAYAL, B.L. (*Reporter*).
SYED HASAN, B.L. (*Assistant Reporter*).

ALL RIGHTS RESERVED.

PATNA:

PRINTED BY THE SUPERINTENDENT, GOVERNMENT PRINTING, AND PUBLISHED AT THE GOVERNMENT BOOK DEPOT, UNDER THE AUTHORITY OF THE GOVERNOR OF BIHAR.

Priced Publications of the Government of Bihar can be had from—

The Superintendent, Government Printing, Bihar, Gulzarbagh P. O.

IN INDIA

(1) Messrs. Thacker Spink & Co., Calcutta.

(2) Messrs. R. Cambray & Co., 6 and 8-2, Hastings Street, Calcutta.

(3) Messrs. M. C. Sirkar & Sons, 75, Harrison Road, Calcutta.

(4) Messrs. Butterworth & Co., Ltd., 6, Hastings Street, Calcutta.

(5) Mr. K. L. Mathur & Bros., Dewan Mohalla, Patna City.

(6) The Grantha Mandir, Cuttack.

(7) Babu Madan Mohan Singh, Proprietor, Messrs. R. P. Sinha & Brothers Guzr., Patna City.

(8) Messrs. Sampson William & Co., 127-B, The Mall, Cawnpur.

(9) Law Book Company, Post Box no. 4, Albert Road, Allahabad.

(10) Mr. Banwari Lal Jain, 1719, Moti Katra, Agra (Uttar Pradesh).

(11) Messrs. Etwari Sahu & Sons, Mahendru, Patna.

(12) The Managing Director, Western Law House, Station Road, Patna.

(13) Secretary, Dealers Welfare Syndicate, 12, Anantram Lane, Bhagalpur-2

(14) Sri Rabindra Pd., Fatehpur, P. O. Parwalpur, district Patna.

(15) Messrs. Laxmi Trading Company, Padri ki Haveli, Patna City.

IN EUROPE AND AMERICA

The Office of the High Commissioner for India, Public Department, India House, Aldwych, London, W. C. 3.

THE INDIAN LAW REPORTS, PATNA SERIES, VOLUME XXXII.

CORRIGENDA.

Page 11, Short Head-note line 4, *read* " matter " *for* " mater ".

Page 26, line 5, *read* " of " *for* " or ".

Page 40, line 6, *read* " no " *for* " an ".

Page 49, line 16, *read* " various " *for* " varias ".

Page 49, line 20, read " which " for " whch ".

Page 80, foot-note (2) *read* " 74 Ind. App.".

Page 95, line 13, *read* " that " after the word states.

Page 132, foot-note (3) *read* " S. C. " *for* " S. S. ".

Page 149, line 10, *read* " respondents " *for* " respodendents ".

Page 175, line 17, *read* " Bhattacharji " *for* " Bhattaharji ".

Page 548, line 22, *read* " necessary " *for* necessay ".

Page 592, foot-note line 2, *read* " 226 " *for* " 225 ".

Page 756, line 19, *read* " must " *for* " most ".

Page 804, foot-note (4) *read* " 1949 " *for* " 1940 ".

Page 862, line 1, *delete* the words " I had also then signed by name on the bond ".

Page 876, line 7, *read* " text " *for* " tent ".

Page 926, foot-note (1) *read* " A. I. R. (Pat.) 14 F. B." *for* " A. I. R. 14 F. B. ".

Page 957, line 5, *read* " mere " *for* " more ".

Page 1005, line 26, *read* " descendant " *for* " defendant ".

Page 1128, line 6, *read* " the " *for* " theh ".

1953.

HIGH COURT

PATNA.

CHIEF JUSTICE.

The Hon'ble Mr. D. E. Reuben, I.C.S., Barrister-at-Law. (*Up to the 22nd September*, 1953.) (*On leave from 13th July* 1953 *to 5th August* 1953.)

The Hon'ble Mr. S. J. Imam, Barrister-at-Law. (*Acting from 13th July* 1953 *to 5th August* 1953, *and confirmed from the 3rd September*, 1953.)

PUISNE JUDGES.

The Hon'ble Mr. Justice S. K. Das, I.C.S.

The Hon'ble Mr. Justice V. Ramaswami, I.C.S., Barrister-at-Law.

The Hon'ble Mr. Justice J. K. Narayan, M.A., B.L. (*On leave from 26th October* 1953 *to 4th November* 1953.)

The Hon'ble Mr. Justice B. P. Jamuar, Barrister-at-Law.

The Hon'ble Mr. Justice B. N. Rai. (*On leave from 16th February* 1953 *to 26th February* 1953.)

The Hon'ble Mr. Justice C. P. Sinha.

The Hon'ble Mr. Justice K. Ahmad, Barrister-at-Law.

The Hon'ble Mr. Justice S. C. Misra.

The Hon'ble Mr. Justice K. K. Banerji.

The Hon'ble Mr. Justice R. K. Choudhary.

The Hon'ble Mr. Justice Kamla Sahai, Barrister-at-Law.

ADVOCATE-GENERAL.

Mr. Mahabir Prasad, Barrister-at-Law.

VOLUME XXXII

TABLE OF CASES REPORTED.

PAGE.

SUPREME COURT

Gaya Electric Supply Co., Ltd. *v.* State of Bihar 334
Motipur Zamindari Co., Ltd. *v.* State of Bihar 529
R. P. N. Sahi *v.* State of Bihar 375

SUPREME COURT

(*Application for leave to appeal.*)

Basudevanand *v.* R. S. Rastogi 880
N. P. Sukul *v.* R. K. Misra 400

FULL BENCH.

D. N. Singh *v.* State 574

LETTERS PATENT.

C. Kar *v.* D. Satapathy 124

APPELLATE CIVIL.

A. Kumar *v.* Mt. Sanjoga 903
D. S. Debya *v.* Rakhahari 803
Dhanukha *v.* Saudagar 1003
G. P. Missir *v.* A. Majid 348
J. C. Deo Dhabal Deb *v.* Copper Corporation, Ltd. 555
Kali *v.* Tulshi 795
Kameshwar Singh *v.* Ram Janki 1017
Kanak Kumari *v.* C. L. Khattry 662
Lachhuman *v.* Makar 604
M. C. Dutta *v.* Rai M. N. Bose 720
M. K. Khanna *v.* Raja Ram 540
N. Agarwala *v.* M. Rajgarhia 146
Raghubir *v.* Basudevanand 581
Ramdhari *v.* Rambharosa 1138
Ramphal *v.* State 1129
Ramsewak *v.* Ramgir 937
Rohtas Industries, Ltd. *v.* Hume Pipe Co., Ltd. 1057
Sarangdhar *v.* Parvati 983
Sukan *v.* Krishnanand 353
Thakur Pd. *v.* Baleshwar 417

PAGE.

APPELLATE CRIMINAL.

Budhan *v.* State 728
Chetu *v.* State 50
D. Soren *v.* State 1104
J. Lodhin *v.* State 217
King Emperor *v.* S. S. Singh 243
Subrati *v.* State 1093
State of Bihar *v.* S. N. Mandal 451
State (through Chairman, C. Municipality) *v.* Ishri 887

REVISIONAL CIVIL.

Dr. S. Verma *v.* Dr. H. Pd. 392
L. N. Sukhani *v.* K. N. Singh 510
Manorma Dasi *v.* Madanchand 782

CIVIL REVIEW.

Usman *v.* Samawati 507

REVISIONAL CRIMINAL.

D. Shastri *v.* K. B. Sahay 275
Gyani *v.* Dharam 613
K. N. Choudhary *v.* State 640
Langar *v.* Bacha 621
M. Homi *v.* Deputy Commissioner, Singhbhum 490
Nehal Chand *v.* State of Bihar 515
Narain *v.* Ramdhari 427
Nivas *v.* Amar 436
R. N. Sarkar *v.* A. N. Sarkar 303
Ramjee *v.* State 705
S. Lal *v.* State 657
Shaukat Ali *v.* State 653
Sheonarain *v.* Lachmi 433

CRIMINAL REFERENCE.

S. Singh *v.* B. Singh 227
State *v.* A. N. Singh 11

MISCELLANEOUS CRIMINAL.

Ganga *v.* Bhabichhan 407
Karmvir *v.* State 55
Karamvir *v.* State of Bihar 480
Legal Remembrancer *v.* B. B. Das Gupta 1069

PAGE.

MISCELLANEOUS JUDICIAL.

B. Devi *v.* State of Bihar 119
Bengal Immunity Co. *v.* State of Bihar 19
Bijayananda *v.* State 1148
Diamond Coal Co. *v.* State of Bihar 36
M. A. Hasan *v.* State of Bihar 66
M. Prasad P. Deyal *v.* State of Bihar 43
Motipur Zamindary Co. *v.* State of Bihar 71
N. I. Assurance Co. *v.* C. G. I. Tribunal 181
Nazoma Khatoon *v.* Custodian, Evacuee Properties, Bihar ... 630
R. A. Singh *v.* State 708
R. R. Chakravarty *v.* State of Bihar 67
Rajnarain *v.* Chairman, P. A. C. 104
Rambharosa *v.* State of Bihar 592
Ramnath *v.* Sukumari 921
S. M. Umair *v.* R. C. Singh 956
S. M. Zaki *v.* State of Bihar 131
V. N. N. Sinha *v.* Bihar Journals, Ltd. 688

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Commissioner of Income-tax *v.* Kameshwar Singh ... 152, 206
G. M. L. Chakalia *v.* Commissioner of Income-tax 198
H. Chandunmul *v.* Commissioner of Income-tax, B. & O. ... 445
H. Phulchand *v.* Commissioner of Income-tax 201
J. Ram N. Ram *v.* Commissioner of Income-tax 1

REFERENCE UNDER THE BIHAR SALES-TAX ACT.

State of Bihar *v.* R. Jute Mills 173
State of Bihar *v.* T. R. Jain 164

TABLE OF CASES REFERRED TO.

PAGE.

A. M. Malumiar and Company *v.* Finlay Flaming and Company, (1929) I. L. R. 7 Rang. 169, distinguished 515

A. T. Sankaralinga Mudaliar *v.* Narayana Mudaliar, (1922) L. R. 66 Ind. Cas. 615, F. B., relied on 11

Abani Bhusan Chakravarty *v.* Hem Chandra Chakravarty, (1947) A. I. R. (Cal.) 93, not followed 417

Abdul *v.* Kuldip, (1923) I. L. R. 22 Pat. 577, relied on ... 392

Abdul Aziz *v.* Emperor, (1946) A. I. R. (All.) 116, relied on 640

Abdul Aziz *v.* Masum Ali, (1914) I. L. R. 36 All. 268, distinguished 152

Abdul Majid Haji Mahomed *v.* P. R. Nayak, (1951) A. I. R. (Bom.) 440, relied on 131

Abdul Rahim *v.* King Emperor, (1946) 50 Cal. W. N. 692, P. C., relied on 451

Abdul Rahman *v.* D. K. Cassim and Sons (1932) L. R. 60 Ind. App. 76, relied on 880

Agni Kumar Das *v.* Mantazaddin, (1928) I. L. R. 56 Cal. 290, F. B., relied on 227

Akbar Ali *v.* King Emperor, (1927) I. L. R. 7 Pat. 61, S. B., discussed 451

Ameerunnissa Begum *v.* Mahbood Begum, (Civil Appeal no. 63/52 decided on 9th December 1952), relied on ... 375

Amin Lal *v.* Emperor, (1930) A. I. R. (Lah.) 482, relied on ... 424

Amrit Lal Bose, In re. (1917) I. L. R. 44 Cal. 1025, 1046, F. B., relied on 276

Apurba Krishna Mitra *v.* Ram Bahadur, (1936) A. I. R. (Pat.) 191, relied on 1138

Aryalpurath Randupurayil Kunhimayan *v.* Kautilat Cheekaladen Ahmed Kuth Haji, (1909) 2 Ind. Cas. 204, not followed 507

B. Sher Bahadur Singh *v.* Ram Narain Singh, (1945) A. I. R. (Oudh) 1, distinguished 604

Baidyanath Misra *v.* Emperor, (1947) A. I. R. (Pat.) 58, over-ruled 640

Ballabhdas Motiram Gupta *v.* Emperor, (1943) A. I. R. (Bom.) 178, distinguished 490

Baldeo Mushar *v.* King Emperor, (1946) I. L. R. 25 Pat. 391, distinguished 248

Balfour *v.* Balfour, (1919) 2 K. B. 571, relied on 152

PAGE.

Barker *v.* Cleveland, 19 Michigan Reports, 237—8, not followed 662

Basten *v.* Butter, (1860) 7 East 479, relied on 662

Basheshar Nath Khanna & Sons. *v.* Grindley & Co., (1937) A. I. R. (Lah.) 73, dissented from 510

Bechu Sahu *v.* Arjun Sahu, (1917) 3 Pat. L. J. 162, relied on 903

Behari Lal Bhargava, In re., (1940) I. T. R. 9, distinguished 206

Behary Lall Trigunait *v.* Darby, (1894) I. L. R. 21 Cal. 915, not followed 621

Bengal Nagpur Railway Co., Ltd., *v.* Ruttanji Ramji (1937) L. R. 65 Ind. App. 66, relied on 206

Bhalarao *In re.* (1947) A. I. R. (P. C.) 82, explained and distinguished 1104

Bimla Prosad Ray *v.* State of West Bengal, (1951) A. I. R. (Cal.) 258, relied on 956

Biressur Banerjee *v.* Oñooda Churn Banerjee (1865) 3 W. R. 12, relied on 353

Black *v.* Fife Coal Co., Ltd., (1912) A. C. 149, 165, relied on ... 688

Bowman, *In re.*, (1917) App. Cas. 406, relied on 1104

Brahma Nand Misra *v.* Emperor, (1939) A. I. R. (All.) 682, not followed 640

Brij Bhusan *v.* State of Delhi, (1950) A. I. R. (S. C.) 129, explained and distinguished 1104

Brij Pal Singh *v.* Ram Naresh Singh, (1932) A. I. R. (All.) 325, followed 621

British United Shoe Machinery Co., Ltd. *v.* Simon Collier, Ltd., 27 R. P. C. 567, relied on 1057

Bryant and May, Ltd. *v.* United Match Industries, Ltd., (1933) 50 R. P. C. at 18, relied on 515

Capel *v.* Child, (1832) 2 Cr. & J. 558, 579, 580, relied on ... 630

Chamra Meher *v.* State of Orissa, (1951) A. I. R. (Orissa) 179, not followed 640

Chandra Narayan Deo *v.* Ramchandra, (1945) I. L. R. 24 Pat. 541, applied 983

Chhaju Ram *v.* Neki, (1922) L. R. 49 Ind. App. 144, relied on 630

Charles Bright & Co. *v.* Seller, (1904) 1 K. B. D. 6, relied on 630

Chhotu Sao *v.* Bansi Lal, (1943) I. L. R. 22 Pat. 702, relied on 515

Chiranjit Lal *v.* The Union of India, (1950) S. C. R. 869, explained 375

PAGE.

Cockson *v.* Lee, (1854) 23 L. J. Chancery, 473, relied on ... 87

Commissioner of Police, Bombay *v.* Gordhandas Bhanji, (1952) S. C. Rep. 135, relied on 1129

Commissioner of Income-tax, Madras *v.* Karuppiah, (1941) I. L. R. (Mad.) 220, relied on 1

Commissioner of Income-tax *v.* Rani Prayag Kumari Debi, (1940) I. T. R. 25, distinguished 206

D. N. Banerji *v.* P. R. Mukherjee, (1953) S. C. R. 302, distinguished 688

D. R. Shahapura *v.* Commissioner of Income-tax, Bombay, (1946) I. T. R. 781, distinguished 152

Dr. N. B. Khare *v.* The State of Delhi, (1950) S. C. Rep. 519, relied on 921

D. Stephens *v.* Nosibolla, (1951) A. I. R. (S. C.) 196, relied on 11

Daiyeri Tripatty *v.* Subodh Chandra Chowdhury (1942) A. I. R. (Cal.) 575, not followed 303

Dalip Singh *v.* The State of Punjab, (1953) A. I. R. (S. C.) 364, distinguished 1093

Darbeshwari *v.* Raghunath, (1949) I. L. R. 28 Pat. 165, not followed 803

Davis *v.* Hedges, (1871) L. R. 6 Q. B. 687, relied on ... 662

Debi Prasad Singh *v.* Joynath Singh, (1897) L. R. 24 Ind. App. 60, relied on 937

Deonandan *v.* Ramlakan, (1947) I. L. R. 27 Pat. 52, F. B. discussed 574

Devi Dyal *v.* The Crown, (1922) I. L. R., Lah. 45 doubted and not followed 276

Dhondhai Singh *v.* Follet, (1903) I. L. R. 31 Cal. 48 F. B., followed 621

District Board of Ramnad *v.* Mahomed Ibrahim, (1933) A. I. R. (Mad.) 524 distinguished 152

Doe *v.* Bridges, (1831), B. & A. 847, 859, relied on ... 688

Doma Sao Kishun Lal *v.* State of Bihar, (1952) A. I. R. (Pat.) 357, relied on 164

Doraswamy Iyer *v.* Arrunachala, (1936) A. I. R. (Mad.) 135, relied on 152

Dowling *v.* Billington, (1890) R. P. C. 191 relied on ... 1057

Dudgeon *v.* Thomson, (1877) 3 App. Cas. 34,44, relied on ... 1057

PAGE.

Ebrahim Aboobaker v. Custodian-General of Evacuee Property, New Delhi, (1952) A. I. R. (S. C.) 319 relied on ... 131

Emani Lakshminarasu Avadhanulu v. Secretary of State, (1919) A. I. R. (Mad.) 1152, relied on 937

Ebbrey v. Owen, (1851) 6 Exch. 369, relied on 937

Emperor v. Chintaran, (1936) A. I. R. (Nag.) 243, distinguished 490

Emperor v. Dubai, (1942) A. I. R. (Pat.) 427, relied on ... 243

Emperor v. Harish Chandra Bagla, (1945) I. L. R. (All.) 540, relied on 657

Emperor v. Kamal Dattatonya (1943) A. I. R. (Bom.) 153, relied on 11

Emperor v. Kamal Daztataraya, (1943) A. I. R. (Bom.) 304, distinguished 11

Emperor v. Ram Deo alias Sadho, (1942) A. I. R. (Oudh) 443, distinguished 11

Emperor v. Sukhdeo, (1916) A. I. R. (All.) 316, distinguished 11

Ex Parte Stephens, (1876) 3 Ch. D. 659, 660, relied on ... 1129

Faujdar Thakur v. Kasi Chowdhry, (1914) I. L. R. 42 Cal. 612, relied on 11

Firangi Rai v. Emperor, (1933) A. I. R. (Pat.) 189, distinguished 276

Firm of Mohan Lal Hardeo Das v. Commissioner of Income-tax, Bihar and Orissa, (1929) I. L. R. 9 Pat. 172, relied on 164

Fearson, v. Loe, (1878) 9 Ch. D. 48, 65, relied on 1057

George Hudson, Ltd. v. Australian Timber Workers' Union, (1923) 32 C. L. R. 413, relied on 181

Ghafur Ali v. Mt. Kamen, (1930) A. I. R. (Lah.) 354, relied on 348

Ghinua Oraon v. King Emperor, (1917) 3 Pat. L. J. 291, F. B. relied on 243

Girdhari Lal Marwari v. The King Emperor, (1936) 17 Pat. L. T. 667, explained 515

Girish Chandra Majhi v. Girish Chandra Maity, (1951) A. I. R. (Cal.) 574, relied on 956

Gogey v. Emperor, (1945) A. I. R. (Oudh) 20, distinguished 11

Governor-General in Council v. Associated Livestock Farm, Ltd., (1948) A. I. R. (Cal.) 230, distinguished 364

Govind Chandra v. State, (1951) A. I. R. (Orissa) 18, not followed 640

	PAGE.
Gulf Colorado, etc., Co. *v.* Ellis, (1897) 165 U. S. 150, applied	375
Gunanda Dhone *v.* Lala Santi Prakash Nandy, (1925) A. I. R. (Cal.) 613, not followed	303
Halubasia *v.* Rup Kishore, (1921) 62 I. C. 72, relied on ...	662
Hadley *v.* Banendale, (1854) 23 L. J. Ex. 179, relied on ...	662
Harihar Prasad Singh *v.* Mt. Janak Dulari Kuer, (1941) A. I. R. (Pat.) 118, relied on	937
Harinagar Sugar Mills, Ltd., *v.* Skoda (India), Ltd., (1936) 41 Cal. W. N. 563, distinguished	364
Harris *v.* Nickerson, (1873) 8 Q. B. D. 286, distinguished ...	592
Harnath Singh *v.* Maiya Ambika Devi, (1941) A. I. R. (Pat.) 301, relied on	903
Hassan Kassam *v.* Commissioner of Income-tax, (1948) I. T. R. 19 relied on	1
Heman *v.* Darwins, Ltd., (1942) A. C. 356, applied	364
Hemraj *v.* Khemchand, (1943) L. R. 70 Ind. App. 171, relied on	803
House of Lords in Westminister Bank, Ltd., *v.* Riches, (1947) 28 Tax Cas. 159, relied on	206
Howrah Municipality *v.* Barada Prasanna Pain, (1919) 31, Cal. L. J. 127, relied on	887
Hubert Crawford, In re., (1918) I. L. R. 42 Bom., 400, distinguished	490
Indar *v.* Emperor, (1940) A. I. R. (Lah.) 339, not followed ...	640
Income-tax Commissioners for City of London *v.* Gibbs, (1942) App. Cas. 402, relied on	1
In re Article 143, Constitution of India, etc., (1951) A. I. R. (S. C.) 332, explained and followed	104
Jaduprava Mitra *v.* Rai Batabehari, (1947) I. L. R. 26 Pat. 659, reviewed	782,720
Jai Narain *v.* Syed Ali Murtaza, (1951) A. I. R. (Pat.) 190, distinguished	887
Jamuna *v.* Jogendra, (1950) I. L. R. 29 Pat. 581, relied on ...	392
James Shipstone & Sons, Ltd. *v.* Morris (1929), 14 Tax Cas. 431, relied on	1
Janardhan Reddy *v.* State of Hyderabad, (1951) A. I. R. (S. C.) 217, relied on	48
Jaya *v.* Leo Films, (1948) A. I. R. (Mad.) 442, relied on ...	662
Jessie George *v.* Shakuntla, (1950) A. I. R. (E. P.) 225, relied on	510

PAGE.

Jhabu Singh *v.* G. B. Rutherford, (1902) 7 Cal. W. N. 208, not followed 621

Jhaman Mahton *v.* Thakuri Mahton, (1920) 1 Pat. L. T. 369, overruled 621

Jivandas Savchand, *In re*—(1930) A. I. R. (Bom.) 490, F. B. distinguished 303

Joytara Dassee *v.* Mahomed Mobaruck, (1882) I. L. R. 8 Cal. 975, distinguished 353

Jumbunna Coal Mine, No Liability *v.* Victorian Coal Miners' Association, (1908) 6 C. L. R. 309, 332, relied on ... 181

Kanchan Singh *v.* Musammat Jafri Begum, (1911) 10 Ind. Cas. 190, followed 903

Kandan Textile *v.* Industrial Tribunal, (1951) A. I. R. (Mad.) 616, relied on 181

Karali Charan Chatterji *v.* The King, (1949) A. I. R. (Pat.) 196, distinguished 490

Kathi Raning Rawat *v.* State of Saurashtra, (1952) A. I. R. (S. C. R.) 435, relied on 104

Kedarnath Bhattacharji *v.* Gorie Mahomed, (1886) I. L. R. 14 Cal. 64, distinguished 152

Kedar Nath Mahto *v.* Emperor, (1927) I. L. R. 55 Cal. 371, F. B., relied on 451

Khaliquz *v.* Parakh, (1936) 163 I. C. 879, relied on 662

King *v.* North, (1927) 1 K. B. D. 491, relied on 630

Kirit Singh *v.* Mt. Chandra Kali, (1951) I. L. R. 30 Pat. 826, relied on 803

Kunbha *v.* Motichand, (1917) 39 I. C. 121, relied on 662

L. P. E. Pugh *v.* Ashutosh Sen, (1928) L. R. 56 Ind. App. 93, relied on 630

Lachmandas Kewalram Ahuja *v.* State of Bombay, (1952) A. I. R. (S. C. R.) 710, relied on 104

Lachmandas Kewalram *v.* State of Bombay, (1952) A. I. R. (S. C.) 235, discussed and distinguished ... 728

Lachman Singh *v.* The State, (1952) A. I. R. (S. C.) 167, relied on 1093

Laidman *v.* Hearsey, (1885) I. L. R. 7 All. 906, distinguished 276

Lakshmi Narain *v.* Ram Babu, (1953) A. I. R. (All.) 9, relied on 417

PAGE.

Lakshminarain Bhadani *v.* Commissioner of Income-tax, (1951) 20 I. T. R. 594, S. C., relied on 193

Lal Narsingh Pratab, Bahadur Singh *v.* Mohammad Yaqub Khan, (1929) A. I. R. (P. C.) 139, relied on 903

Lilabati Misrain *v.* Bishun Chaubey, (1907) 6 Cal. L. J. 621, relied on 353

Liversidge *v.* Sir John Anderson, (1942) App. Cas. 206, distinguished 921

Logendranath Jha *v.* Shri Polai Lal Biswas, (1951) A. I. R. (S. C.) 316, relied on 11

Lutti Singh *v.* The Bihar Municipality, (1897) 1 Cal. W. N. 402, distinguished 887

M. C. Dutta *v.* Rai M. N. Bose, (1953) I. L. R. 32 Pat. 720, explained and referred to 782

McDonal *v.* Mabee, (1917) 37 S. C. 243, relied on 540

Macleod *v.* Attorney-General for New South Wales, (1891) App. Cas. 455, relied on 540

Maharaja Sirish Chandra Nandy *v.* Rakhalananda Thakur, (1940) L. R. 68 Ind. App. 34, relied on 276

Mahbub Shah *v.* King Emperor, (1945) L. R. 72 Ind. App. 148, relied on 1093

Manager U. C. Bank *v.* Labour Commissioner, (1951) A. I. R. (Mad.) 141, relied on 181

Manglu Sahu *v.* Ramdhani Tamboli, (1928) 9 Pat. L. T. 335, over-ruled 621

Mangtulal *v.* Radha Shyam, (1953) A. I. R. (Pat.) 14, relied on 921

Marconi's Wireless Telegraph Co. *v.* Mullard Radio Valve Co. Ltd., 41 R. P. C. 323, 344, relied on 1057

Ma Sin *v.* Maung Maung Law, (1936) A. I. R. (Rang) 230, discussed and not followed 424

Maung Bya *v.* Maung Kavi Nya, (1925) L. R. 52 Ind. App. 385, relied on 937

Members of the Sasamusa Workers' Union *v.* State of Bihar, (1952) A. I. R. (Pat.) 210, relied on 181

Miner v. Gilmour, (1852) 12 Moo. P. C. 156, relied on ... 937

Miss G. B. Solano *v.* Maharaj Kumari Umeshwari Kuer, (1937) I. L. R. 16 Pat. 500, reviewed 720

Modun Mohan Chowdhry *v.* Ashad Ally Beparee, (1883) I. L. R. 10 Cal. 68, relied on 903

Mohru Lal *v.* Emperor, (1935) I. L. R. 58 All. 644, relied on 303

PAGE.

Moolchand Jothajee *v.* Rashid Jamshed Sons & Co., (1946) A. I. R. (Mad.) 346, discussed 604

Moudel *v.* Steel, (1841) 8 M. & W. 858, 870-871, relied on ... 662

Monro *v.* Bognor Urban Council, (1915) 3 K. B. 167, applied 364

Mt. Daropti *v.* Paras Ram, (1941) A. I. R. (Lah.) 19, discussed and not followed 424

Motipur Zamindari Co. *v.* State of Bihar, (1953) I. L. R. 32 Pst. 71, affirmed 529

Muhammad Heyat *v.* Bhola, (1918) 49 Ind. Cas. 173, relied on 424

Munna Lal *v.* D. P. Singh, (1950) A. I. R. (All.) 455, doubted and not followed 276

Muni Lal *v.* Kishun Prasad, (1948) A. I. R. (All.) 443, relied on 417

Municipal Board, Etawah, *v.* Mt. Ram Sri, (1931) A. I. R. (All.) 670, relied on 353

Musammat Batina Kuer *v.* Raja Ram Pandey, (1925) I. L. R. 5 Pat. 441, relied on 353

N. K. Sarkar *v.* Howrah Municipality, (1921) 22 Cr. L. J. 559, relied on 887

Nakkuda Ali *v.* M. F. De S. Jayratne, (1951) App. 67 relied on 921

Nand Ram *v.* Ram Prasad, (1904), I. L. R. 27 All. 145, dissented from 510

Narain Hazam *v.* Ramdhari Singh (Cr. Rev. no. 641 of 1952 decided on 16th March, 1953) (unreported), discussed and distinguished 728

Narsing Das Modi *v.* Emperor, (1948) A I. R. (Pat.) 110, relied on 657

National Association of Local Government Officers *v.* Bolton Corporation, (1943) A. C. 166, distinguished 688

Nathu Mal *v.* Abdul Haq, (1930) A. I. R. (Lah.) 159, distinguished 11

Nek Mohammad *v.* Province of Bihar, (1948) I. L. R. 27 Pat. 773, F. B., distinguished 921

Niharendu Dutt *v.* Emperor, (1942) A I R. (F. C.) 22, explained and distingushed 1104-

Nisar Ahmad *v.* Emperor, (1945) A I R (All.) 389, relied on 640

PAGE.

Nityananda Roy *v.* Rashbehari Roy, (1953) A. I. R. (Cal.) 456, relied on 803

Nivas Singh *v.* Amar Sao, (1953) A. I. R. (Pat.) 188, relied on 653

Noni Lal Sett *v.* Corporation of Calcutta, (1903) 7 Cal. W. N. 853, relied on 887

Paras Ram *v.* Emperor, (1931) A. I. R. (Lah.) 145, distinguished 11

Pamudarthi Suryanarayana Reddy's *In re*, I. L. R. (1949) Mad. 111, not followed 604

Pasmore *v.* Oswaldtwistle Urban District Council, (1898) A. C. 387, 394, relied on 688

Pharmaceutical Society *v.* The London and Provincial Supply Association, Ltd., (1880) L. R. 5 A. C. 857, discussed ... 529

Phulchand *v.* Natee Mirza, (1942) 199 I. C. 421, not followed 353

Premlall *v.* Sambhoonath, (1895) I. L. R. 222 Cal. 960, relied on 348

Punia *v.* King Emperor, (1945) I. L. R. 24 Pat. 646, distinguished 249

Queen *v.* Commissioners for Special Purposes of the Income-tax, (1888) 21 Q. B. D. 313, relied on 131

Rai Bahadur Dalip Narayan Singh *v.* Srimati Amarbas Kuer, (1937) I. L. R. 16 Pat. 738, distinguished 146

Rai Brij Raj Krishna *v.* S. K. Shaw, (1951) A. I. R. (S. C. R.) 145, relied on 131

Raja Surajpal *v.* Ramgati, (1947) I. L. R. 26 Pat. 353, reviewed 720

Rajkishore Pd. Narain Singh *v.* Mojibul Rahman, (1942) A. I. R. (Pat.) 391, affirmed 782

Raghubir Singh *v.* Court of Wards, Ajmer, (1953) A. I. R. (S. C.) 373, distinguished 921

Raleigh Investment Co., Ltd. *v.* Governor-General in Council, (1947) L. R. 74 Ind. App. 50, relied on 86

Rameshwar Bhartia *v.* The State of Assam, (1952) A. I. R. (S. C.) 405, 408, distinguished 490

Ramchand Manjimal *v.* Govardhandas Vishindas Ratanchand, (1920) L. R. 47 Ind. App. 124, relied on 880

Ramchandra Narayan *v.* Narayan Mahadev, (1886) I. L. R. 11 Bom. 216, relied on 353

Ram Das *v.* Dwarka Das, (1930) A. I. R. (All.) 875, dissented from 510

Ram Ditta *v.* Qadu, (1902) 26 Punjab Record 74, relied on ... 424

PAGE.

Ramji Keshavji *v.* Commissioner of Income-tax, (1945) I. L. R. 105, distinguished 152

Ramnarain *v.* King Emperor, (1924) A. I. R. (All.) 566, relied on 276

Ram Narayan Sukul *v.* Lakhan Sah, Orig. Cr. Misc. Case no. 7/52, followed 407

Ram Padarath Singh *v.* Himar Singh, (1941) I. L. R. 17 Lucknow, 362, relied on 903

Ramphal Sahu *v.* Babu Satdeo Jha, (1940) I. L. R. 19 Pat. 870, F. B. requires reconsideration 795

Rex *v.* Northumberland Compensation Appeal Tribunal—*Ex parte* Shaw, (1952) I. Times L. R. 161, distinguished 86

Romesh Thapper *v.* The State of Madras, (1950) A. I. R. (S. C.) 122, explained and distinguished 1104

Sanna Govappa *v.* Roadda Sanna Govappa, (1929) A. I. R. (Mad.) 482, relied on 903

Sankar Rao Dogaddu C. Rao Jahagirdar *v.* Sambhunath Patil, (1940) A. I. R. (P. C.) 192, distinguished 124

Sant Prasad *v.* State, (1952) A. I. R, (All.) 785, distinguished 407

Sardar Gurdial Singh *v.* Maharaja of Faridkote, (1894) App. Cas. 670, relied on 540

Sayyaparaju Surayya *v.* Nekkanti Anandayya and others, (1951) A. I. R. (Mad.) 525, not followed 604

Schweppes, Ld. *v.* Gibbens, (1905) 22 R. P. C. at 607, relied on 515

Schulze *v.* Bensted, (1915) 7 Tax Cas. 30, relied on 206

Scott *v.* Sampson, (1882) 8 Q. B. D. 491, distinguished ... 276

Secretary of State for India in Council *v.* Debenralal Khan, (1933) I. L. R. 61 Cal. 262, P. C., relied on 353

Secretary of State *v.* Kattari Nagayya Kama Rajendra Ramaswami Kamya Naicker Zmindar of Saptpur, (1938) A. I. R. (Mad.) 180, relied on 937

Secretary of State *v.* Sannidhiraju Subbarayudu, (1932) A. I. R. (P. C.) 46, relied on 937

Seixo *v.* Provezande, (1866) L. R. 1 Ch. 192, relied on ... 515

Sheikh Alimuddin *v.* Sheikh Salim, (1929) 10 Pat. L. T. 207, distinguished 353

Sheo Karan Lall *v.* Emperor, (1947) A. I. R. (Pat.) 191, relied on 657

Sheo Swarup *v.* King Emperor (1934) L. R. 61 Ind. App. 398 at 404, relied on 415

PAGE.

Shiro Kumari Devi *v.* Govind Shaw Tanti, (1877) I. L. R. 2 Cal. 418, distinguished 353

Shiro Sheo Kumar Pandey *v.* K. G. Oak, I.C.S., (1953) Al. L. J. 323, not followed 956

Shukrullah *v.* Rahmat Bibi,, (1947) A. I. R. (All.) 304, not followed 417

Sia Kishori Kuer and others *v.* Bhairvi Nandan Sinha and another, (1952) I. L. R. 31 Pat. 886, discussed 604

Sitaram Hirachand Birla *v.* Yograjsing Shankarsing Parihar, (1953) A. I. R. (Bom.) 293, not followed 956

Skipp *v.* Kelly, (1926) 94 I. C., 331 P. C., relied on ... 662

St. Louis *v.* The Ferry Co., (1870) 11 Wall 423, 430, relied on 540

Standard Coal Co., Ltd. *v.* S. P. Varma, (1952) A. I. R. (Pat.) 56, distinguished 181

State *v.* Hira Dubey, (1952) A. I. R. (Pat.) 135, relied on ... 1093

State *v.* Saidu Khan, (1951) A. I. R. (All.) 21, F. B., relied on 1093

State of Bihar *v.* Shailabala, (1952) I. L. R. 31. Pat. 544, S. C. relied on 1104

State of Madras *v.* V. C. Row, (1952) S. C. Rep. 597, relied on 1104

State of West Bengal *v.* Anwar Ali Sarkar, (1952) A. I. R. (S. C.) 75, discussed, distinguished, relied on 104

Stollmoyer *v.* Trinidad Lake Petroleum Company, Limited, (1918) A. I. R. (P. C.) 60, relied on 937

Sunder Mall's case, *In re.* (1940) I. L. R. 19 Pat. 893 F. B., followed 782

Surendra Nath Das and others *v.* The State of West Bengal, (1951) A. I. R. (Cal.) 396, distinguished 1129

Syed Qasim Razvi *v.* State of Hyderabad, (1935) A. I. R. (S. C.) 156, discussed and distinguished 728

T. C. Tweedie *v.* Pokea Khatun, (1915) A. I. R. (Cal.) 74, relied on 348

Tara Singh Gopi Chand *v.* The State, (1951) A. I. R. (Punj.) 27, explained and distinguished 1104

Tajali Mian *v.* King Emperor, (1927) I. L. R. 7 Pat. 50, not followed 415

The Crown *v.* Hamir Chand, (1902) 14 Punjab Record 39, relied on 424

The Commissioner of Income-tax Burma *v.* N. N. Firm, (1933) I. L. R. 11 Rang. 501, S. B., distinguished 1

PAGE.

The Dunlop Pneumatic Tyre Co., Ltd. *v.* The Dunlop Motor Co., (1907) App. Cas. 430, distinguished 515

The Englishman, Limited *v.* Lajpat Rai, (1910) I. L. R. 37 Cal. 760, relied on 276

The Queen *v.* The Guardians of the Lewisham Union, (1897) 1 Q. B. D. 498, distinguished 592

Thomas Bear and Sons (India), Ltd. *v.* Prayag Narain, (1940) A. I. R. (P. C.) 86, relied on 515

Tilak, *In re.* (1897) I. L. R. 22 Bom. 528, P. C., explained and distinguished 1164

Towsand *v.* Haworth, *see* 12 Ch. D. 831, relied on 1057

U. P. N. Sinha *v.* Dulhin I. Kuer, (1948) I. L. R. 27 Pat. 610 F. B., commented upon and reviewed 782, 720

V. P. R. V. Chokalingam Chetty *v.* Seethai Acha, (1927) L. R. 55 Ind. App. 7, relied on 1138

Veerappa *v.* Raman & Raman, Ltd., (1952) A. I. R. (S. C.) 192, relied on 43

Wadhawa Singh *v.* Emperor, (1928) A. I. R. (Lah.) 318, not followed 640

William Lyon *v.* The Warden, & Co. of the Fishmongero Company and the Conservators of the River Thamas, (1875-76) L. R. 1 App. Cas. 662, relied on 555

Yick Wo *v.* Peter Hopkins, (1886) 118 U. S. 356, discussed and distinguished 728

INDEX.

PAGE.

ACTS —

of the British Parliament—

1919—5 and 6 Geo. V. Ch. 61. *See* Government of India Act, 1919.

of the State of Bengal—

1885—I. *See* Bengal Ferries Act, 1885.

of the State of Bihar—

1947—III. *See* Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947.

1947—XIX. *See* Bihar Sales Tax Act, 1947.

1948—V. *See* Bihar Prevention of Food Adulteration Act, 1947.

1948—VII. *See* Bihar Panchayat Raj Act, 1947.

1950—XIV. *See* Sathi Lands (Restoration) Act, 1950.

1950—XXX. *See* Bihar Land Reforms Act, 1950.

1951—I. *See* Bihar Hindu Religious Trusts Act, 1951.

of the State of Bihar and Orissa—

1913—II. *See* Orissa Tenancy Act, 1913.

1915—I. *See* Patna Administration Act, 1915.

1922—VII. *See* Bihar and Orissa Muncipal Act, 1922.

of the State of Uttar Pradesh—

1934—XXV. *See* United Provinces Encumbered Estates Act, 1934.

of the Union of India—

1860—XLV. *See* Penal Code, 1860.

1872—I. *See* Evidence Act, 1872.

1872—IX. *See* Contract Act, 1872.

1882—IV. *See* T. P. Act, 1882.

1885—VIII. *See* Bihar Tenancy Act, 1885.

1887—IX. *See* Provincial Small Cause Courts Act, 1887.

1894—I. *See* Land Acquisition Act, 1892.

PAGE.

ACTS—*concld.*

1898—V. *See* Code of Criminal Procedure, 1898.

1908—V. *See* Code of Civil Procedure, 1908.

1911—II. *See* Patents and Designs Act, 1911.

1913—VII. *See* Companies Act, 1913.

1922—XI. *See* Income-tax Act, 1922.

1926—XII. *See* Contempt of Courts Act, 1926.

1930—III. *See* Sale of Goods Act, 1930.

1932—IX. *See* Partnership Act, 1932.

1937—XVIII. *See* Hindu Women's Rights to Property Act, 1937.

1939—IV. *See* Motor Vehicles Act, 1939.

1940—V. *See* Trade Marks Act, 1940.

1940—X. *See* Arbitration Act, 1940.

1940—XV. *See* Excess Profits Tax Act, 1940.

1947—XIV. *See* Industrial Disputes Act, 1947.

1950—IV, *See* Preventive Detention Act, 1950.

1950—XXXI *See* Administration of Evacuee Property Act, 1950.

1951—XLIII. *See* Representation of People Act, 1951.

AD MEDIUM FILUM ACQUAE, *nature of—rule, whether applies to land acquisition proceedings—Land Acquisition Act, 1894, sections 6, 8, 40, 41, riparian owner, whether has right to take sand from the bed of river abutting his property—limitation, suit, whether barred.*

The rule of *ad medium filum acquae* is a rule of presumption depending on the intention of the parties. This rule of presumption is rebuttable one.

There is, however, no room for the application of such a rule in land acquisition proceedings which do not depend on the intention of the parties but on the requirement of the acquiring authority.

In a conveyance to which there are two parties, the question whether it is useless to a vendor to retain an adjoining strip of land forming half the bed of a river may be a very relevant consideration. But that consideration

PAGE.

AD MEDIUM FILUM ACQUAE—*concld.*

cannot arise in a land acquisition proceeding where the acquiring authority acquires such land as he requires, irrespective of any consideration whether it is useful or useless to the person from whom the land is acquired. Such acquisition has to be considered with reference to the provisions of the Land Acquisition Act, 1894.

Held, on a consideration of the provisions of the Land Acquisition Act and the notification published thereunder, that Government did not acquire half the bed of the river.

The ordinary and regular course of nature which is the foundation for a natural riparian right cannot be said to extend to firms and deposited on the bed of the river. Therefore, a riparian owner has not the natural right to take away sand deposited on the bed of the river abutting on his property.

The suit having been instituted within three years of the wrongful removal of the sand was not barred by limitation. *J. C. Deo Dhabal Deb* v. *Copper Corporation, Ltd.* 555

ADMINISTRATION OF EVACUEE PROPERTY ACT, 1950—

1———*Custodian's power and jurisdiction under section 2(d)(i), 'leaves' or 'has left', meaning of—section 2(d)(ii), 'resident', significance of—Act, does not impose unreasonable restriction—Constitution, Article 19(f)—Article 226, application under, maintainability.*

The Administration of Evacuee Property Act, 1950, has conferred upon the Custodian jurisdiction not merely to take charge of and administer evacuee properties but also jurisdiction to finally determine whether a certain person is evacuee and whether a certain property is evacuee property within the meaning of the Act.

Therefore, the Custodian can give himself jurisdiction by wrongly deciding that a certain person was evacuee and the proceeding of the Custodian in such a case cannot be challenged in the High Court under Article 226 of the Constitution of India.

The Administration of Evacuee Property Act does not impose unreasonable restriction upon the right to acquire, hold and dispose of property as vouchsafed under Article 19(*f*) of the Constitution of India.

The words "leaves" or "has left" in section 2(*d*)(*i*) of the Administration of Evacuee Property Act do not mean leaving temporarily or casually. The words do imply some amount of permanent stay or residence outside India but not to the extent of completely abandoning the Indian domicile.

PAGE.

ADMINISTRATION OF EVACUEE PROPERTY ACT, 1950—*concld.*

The word " resident " as used in clause (ii) of section 2(*d*) also contemplates some sort of permanent residence in the Dominion of Pakistan though not necessarily with the conclusive intent of abandoning the Indian domicile. *S. M. Zaki* v. *State of Bihar* 131

2————*section* 2(*d*)(i), '*leaves*' or '*has left*', *meaning of. See* no. 1, *supra* 131

3————*section* 2(*d*)(ii), '*resident*' *significance of. See* no. 1, *supra* 131

4————*section* 26(2), *scope of—an order under the Act, whether can be reviewed—orders passed behind the back of the person whom it affects, effect of Constitution, Article* 226, *scope of—application for writ where other remedy open—applicant, whether entitled to a writ.*

The expression " review " used in section 26(2) of the Administration of Evacuee Property Act, 1950 must be construed not in a grammatical sense but it must be construed to have the same legal meaning as in Order 47, rule 1, of the Code of Civil Procedure, 1908.

Held, therefore, on an application under Article 226 of the Constitution that an order under section 26(2) of the Administration of Evacuee Property Act, 1950 reviewing an order passed under the Act on the same materials on which the order under review was based is without jurisdiction and the applicant is entitled to a *writ* of *certiorari* for quashing the order.

Held, further, that it is a fundamental principle of justice that the party against whom a judgment or order is to operate should have an opportunity of being heard and a breach of this rule affects the jurisdiction of the Court or Tribunal which passes final order.

Held, also, that as a general rule, an application for a *writ* of *certiorari* or prohibition will not lie when there is an alternative procedure by way of appeal or revision provided in the statute. But there is an exception in a case where the want of jurisdiction complained of is based upon violation of some fundamental principle of justice. In such an exceptional case, the existence of a remedy by way of appeal or revision is no answer to an application asking for a *writ* or *certiorari* or prohibition under Article 226 of the Constitution. *Nazma Khatoon* v. *Custodian, Evacuee Properties, Bihar* 630

ADVERSE POSSESSION—*nature of—onus on persons disputing to disprove acquisition of title by adverse possession—adverse possession neither distinctly pleaded nor raised—plaintiff raising the question of acquisition of title by adverse possession in appeal—Evidence Act*, 1872, *section* 110.

PAGE.

ADVERSE POSSESSION—*concld.*

Ordinarily, the principle no doubt holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but the plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the court of appeal when the fact is clear and unmistakable and the defendant is not taken by surprise. What is required is that the possession should be overt, continuous and without concealment for 12 years.

Possession of immovable property is certainly presumptive proof of ownership and the burden of showing that the person in possession is not the owner is on the person who affirms it. That is, possession is evidence of title and anybody impugning that title has to show that his possession arose in some way which has not created any independent title for him. *Sukan* v. *Krishnanand* 353

APPEAL—

1———*abatement of—joint Hindu family—partition—one person dying during pendency of appeal—widow not substituted, whole appeal abates—Hindu Women's Rights to Property Act*, 1937, *section* 3.

R, governed by the *Mitakshara* School of Hindu Law, was a party in a partition suit, *R*, died during the pendency of the appeal and in his place his sons were substituted but not his widow *W*.

Held, that the Hindu Women's Rights to Property Act, 1937, has created a special statutory right in favour of *W*. *W* could claim an interest in the property of *R* and could seek a partition thereof. Therefore *W*'s interest was not represented in the case, *i.e.*, the representation was incomplete and therefore the whole appeal abated. *Dhanukha* v. *Saudagar* 1003

2———*competency of—one respondent not served—appeal against that respondent dismissed—whole appeal incompetent.*

Execution of a partition decree was levied. Execution was resisted on the ground that it was time-barred. The plea of limitation was over-ruled and the aggrieved party preferred an appeal. One of the respondents in the appeal was not served and the appeal stood dismissed against him.

Held, that the whole appeal was incompetent as the respondent against whom the appeal had been dismissed had got the right to execute, and if the appeal were to be allowed there would be two inconsistent orders. *Kali* v. *Tulshi* 795

PAGE.

ARBITRATION ACT, 1940—

1————*whether retrospective—section 32, whether applicable in the matter of an award made before 1940.*

The Arbitration Act, 1940, has no retrospective effect and does not apply to awards made long before the coming into force of that Act.

The bar of section 32 of the Act is not applicable where the award in question was of a period prior to the passing of the Act. *Lachhuman* v. *Makar* 604

2————*section 2(c), word 'court' in, whether includes 'appellate court'—section 21, appellate court, whether may pass order for reference to arbitration.*

The term 'court' in section 2(c) of the Arbitration Act, 1940, must be construed to include an appellate court.

Therefore, the appellate court may also pass an order for reference to arbitration under section 21 of the Act, *Thakur Pd.* v. *Baleshwar* 417

3————*section 21. See* no. 2, *supra* 417

4————*section 34, applicability and scope of — court's power to stay suit, when to be exercised—suit arising out of revision of contract—submission to arbitration limited.*

The legal proceeding which is ought to be stayed under section 34 of the Arbitration Act, 1940 must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement.

Where, however, a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse a stay under the section.

Where the arbitration agreement is broad and comprehensive and embraces any dispute between the parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself.

Where, however, the party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to as it goes along with the other terms of the contract.

Held, that the scope of the arbitration clause in the case was a very narrow one. It only conferred jurisdiction on

PAGE.

ARBITRATION ACT, 1940—*concld.*

the arbitrator on the question of valuation of the undertaking pure and simple and did not say that all dispute arising out of the agreement or in respect of it would be decided by arbitration. Questions in the case related to the breach of contract or its decision which were beyond the submission and, therefore, the suit could not be stayed under section 34 of the Arbitration Act, 1940. *Gaya Electric Supply Co., Ltd.* v. *State of Bihar* 364

BENGAL ALLUVION AND DILUVION REGULATION, 1825—*section* 4(1), *word "tenure" in, significance and scope of—reformation in situ—gains of land from bed of river—gains subject to private property of particular superior landlord—provisions of the regulation, how far applicable.*

The word 'tenure" in clause (1) of section 4 of Regulation XI of 1825 has been used both in relation to the land held by the tenant under a superior landlord as also in relation to an estate held by a superior landlord under the Government. The restriction placed on the interpretation of the clause on the two types of tenures will have different results on the character of the tenure involved.

Where the tenure is an estate held by a superior landlord under the Government, the claim by him on the basis of gain by gradual accession can arise only when the bed of the river is a public domain or public property. In the case of this class of tenure there can be no claim on the basis of gain by gradual accession in case the bed of the river which gives rise to the gain is a private property of any other individual. For in that case the gain must necessarily be a formation on a site which is the property of that individual and that being so that gain will be a part of his property and cannot be said to have become a part of the superior landlord of the riparian estate simply because the gain has got itself acceded to that estate by slow and gradual accretion.

The reason is clear. In such a case the reformation of the land though by slow and gradual accretion shall always be on a side which shall be the property of the one or the either. Or, in other words, the reformation shall always be a case of *reformation in situ* and for that reason in a competition between two titles, namely, the title of the superior landlord of the riparian estate to which the gain has got itself annexed on the basis of the rule of gradual accession and that of the other individual who is the owner of the bed of the river the title of the owner of the bed of the river shall prevail and his title shall not be allowed to be forfeited as a result of the operation of the rule laid in clause (1) of section 4 of the Regulation.

PAGE.

BENGAL ALLUVION AND DILUVION REGULATION, 1825—*concld.*

In this class of cases, therefore, whenever the bed of the river is the private property of an individual or individuals any gain arising out of it cannot be claimed by the superior landlord of a riparian estate only on the footing that the gain has by gradual accession annexed itself to his estate. The gain shall always in that case go to the individual, who owns the bed of the river.

The position will be entirely different when the tenure concerned is not a riparian estate of a superior landlord held under the Government but only a subordinate tenure held by a tenant in the estate to which the land gained by gradual accession has been annexed. In such a case the conflict is originally and essentially between the tenant and the landlord and that conflict can arise only when the land gained by gradual accession, which has been annexed to the land of the tenant, is undisputably a part of the estate of the superior landlord. In case that gain is not a part of the estate of the superior landlord, the tenant cannot raise a claim to it either against his superior landlord, and much less against anybody else.

Once it is found that the land gained had come out from that part of the bed of the river which is the private property of the particular superior landlord, the gain formed on that part shall as a rule go to that landlord and the law of gain by gradual accession as laid down in clause (1) of section 4 of the Regulation shall not come into play. *Kameshwar Singh* v. *Ram Janki* 1017

BENGAL FERRIES ACT, 1885—

1———*State Government, whether has* locus standi *to advise District Magistrate to withdraw settlement of a ferry from public auction and to extend the lease in favour of the previous lessee—District Magistrate's action, whether illegal—intending bidder, whether could apply for a* writ *of* mandamus—*previous lessee, whether a proper party—Constitution, Article* 226.

Under the Bengal Ferries Act, 1885, as also under the rules framed under it, the State Government has no *locus standi* to advise the District Magistrate to withdraw the settlement of the ferry from public auction or to extend the lease in favour of the previous lessee;

Held, that the act of the District Magistrate in withdrawing the settlement of the tolls from the public auction at the instance of the State Government was in breach of statutory duty cast upon him by the Bengal Ferries Act, 1885, and that his further action extending the lease in favour of the previous lessee was also illegal.

Held, further, that an intending bidder had sufficient interest to apply under Article 226, Constitution, and that

PAGE.

BENGAL FERRIES ACT, 1885—*concld.*

the previous lessee in whose favour the lease was extended was a proper party to the application.

Whether a person has a legal right to make an application for the issue of a *writ* of *mandamus* must depend upon the facts of each case. *Rambharosa* v. *State of Bihar* ... 592

2———*Subdivisional Magistrate, whether has authority to make private settlement of a public ferry—a bidder can apply for a* writ *of* mandamus—*formal demand and refusal, whether essential—Constitution, Article* 226.

The Subdivisional Magistrate has no authority under the Bengal Ferries Act, 1885, to make a private settlement of the tolls of a public ferry. Any such settlement is void and *ultra vires.*

Any bidder at the auction has the legal right to apply under Article 226, Constitution, for the issue of a *writ* of *mandamus.*

Held, that in the circumstances, there was no question of formal demand by the petitioner and formal refusal by the Subdivisional Magistrate to enable the former to make an application for a *writ* of *mandamus. Ramphal* v. *State* 1129

BENGAL REGULATION—

1825—XI. *See* Bengal Alluvion and Diluvion Regulation, 1825 1017

BIHAR BUILDING (LEASE, RENT AND EVICTION) CONTROL ACT, 1937 *and its subsequent amendments, whether violate the guarantee provided by the Constitution—section* 11, *meaning of—Constitution of India*, 1950, *Articles* 19(1)(*b*), 226.

The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 and its subsequent amendments do not violate the guarantee provided by Article 19(1)(*b*) of the Constitution so far as the tenants are concerned, and the object of the Act is the protection of tenants by regulating the rent of the building and preventing unreasonable eviction.

Section 11(2) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 must be interpreted to mean that the Controller should be reasonably satisfied that the tenant is liable to be evicted under the provisions of sub-section (1) before he makes the actual order of eviction, and the satisfaction contemplated in section 11(2) of the Act is not a subjective but an objective satisfaction liable to be tested in appeal and revision and hence the restriction imposed by the section is reasonable within the meaning of Article 19(5) of the Constitution;

BIHAR BUILDING (LEASE, RENT AND EVICTION) CONTROL ACT, 1937—*concld.*

Held, that the petitioner was not entitled to any relief 921
Ramnath v. *Sukumari* ... ...

BIHAR COTTON CLOTH AND YARN (CONTROL) ORDER, 1948—*clause* 9(1)—*salesman other than licensee, whether liable for contravention of the clause or condition of the license —salesman selling for higher price and refusing to give receipt.*

Only the licensee is liable for contravention of clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948 or for contravening a term of the license. In no case is the salesman who is not a licensee liable for contravening the above provisions. Such salesman selling for higher price and refusing to grant cash memo. cannot be held liable under the Order. *S. Lal* v. *State* ... 657

BIHAR HINDU RELIGIOUS TRUSTS ACT, 1951—

1———*whether constitutionally valid—Act, whether applied to* kabirpanthis' *trust also—Act, whether confined to private trust and whether capable of improvement—sections* 2, 28, 70—*Constitution, Articles* 14, 19(1)(*f*), 25, 26, 31, *whether violated—Article* 226, *whether proper remedy—Interpretation of Statutes*—intra vires *rule, whether to be adopted*—case-law, *referred to.*

The Bihar Hindu Religious Trusts Act, 1951, is constitutionally valid. It applies to trusts existing for the benefit of the *kabirpanthis* too.

In a matter of this description, the principle to be applied is that the Legislature must not be presumed to exceed its own jurisdiction and if two constructions of a statute are possible, one of which would make it *intra vires* and the other *ultra vires*, the Court must lean to that construction which would make the statute *intra vires*. To put it differently, the language used in section 2(1) of the Act must be read down in such a case so as not to apply to public or charitable trust of a private character.

The power granted to the Bihar State Board of Religious Trusts under the Act are very similar to the powers granted to the District Judge under section 92, Code of Civil Procedure, 1908. The only distinction is that the impugned Act provides a better and more speedy remedy.

The Act may be capable of improvement on certain points but if the provisions of the Act are examined as a whole the restrictions imposed upon the trustee are not unreasonable from procedure or substantive aspect. There is therefore no violation of the guarantee provided under Article 19(1)(*i*) of the Constitution.

PAGE.

BIHAR HINDU RELIGIOUS TRUSTS ACT, 1951—*concld.*

The right of superintendence of public trusts is entirely the right of the sovereign authority and this is all that the Board constituted under the Act does or can do as provided in section 28(1) of the Act. There is no acquisition or requisition of property within the meaning of Article 31 of the Constitution, and so there is no question of violating Article 31.

The impugned Act is not legislation directly interfering with the practice and propagation of religion. On the contrary, the object of the Act is to provide for the better administration of Hindu religious trusts and for the protection and preservation of the properties appertaining to such trusts. There is, therefore, no violation of the guarantee under Article 25 of the Constitution.

The freedom guaranteed under Article 26 of the Constitution to a religious denomination includes, the freedom of denomination to manage its own affairs in the matter of religion but does not include unqualified freedom to administer its property. The right of denomination to administer its propeity is subject to the right of the State to make law for the administration of such property. The impugned Act, does not, therefore, violate the freedom given under Article 26 of the Constitution.

All that is safeguarded is that so long as the religious denomination or a section thereof administers its property in accordance with such law as the State Legislature has passed, that right should not be interfered with.

The contribution made under section 70 of the Act is in the nature of a fee and not in the nature of a tax and the State Legislature was competent to enact this provision.

The guarantee of equal protection under Article 14 of the Constitution is not absolute. The Article does not prohibit legislative classification nor does it prevent the Legislature from enacting special laws to combat special evils. Hence, there was no question of violation of Article 14.

Whether the properties in question belonged to a public or private endowment involved consideration of complicated facts for which a proceeding under Article 226 was not the proper remedy. *Bijayanand* v. *State* ... 1148

2————*sections* 2, 28, 70. *See* no. 1, *supra* 1148

3————*sections* 28, 70, 2. *See* no. 1, *supra* ... 1148

4————*sections* 70, 2, 28. *See* no. 1, *supra* 1148

PAGE.

BIHAR LAND REFORMS ACT, 1950—

1————*whether applicable to properties of religious and charitable natyre.*

The provisions of the Bihar Land Reforms Act, 1950, are applicable to properties held by trustees for religious and charitable purpose. *M. A. Hasan* v. *State of Bihar* 66

2————*whether legislation with respect to entry in the Union List, Constitution—Act, whether applicable to* zamindari *assets of incorporated companies—Companies Act, 1913—companies' assets, both in Bihar and Bengal —Bihar Land Reforms Act, 1950, whether applicable.*

The Bihar Land Reforms Act, 1950, was not a legislation with respect to item 52 or any other entry in the Union List but that it was legislation with respect to item 36 of the State List;

Held, that, on a proper interpretation, the Bihar Land Reforms Act, 1950, is intended to apply to the *zamindari* assets of companies incorporated under the Companies Act, 1913.

Where the companies' *zamindari* estate was situate both in Bihar and Bengal and Government revenue was payable jointly and that the land were held in *patni* lease for which one single rent was paid, *held*, that the Act was applicable and the only question was of apportionment of rent. *Motipur Zamindari Co.* v. *State of Bihar* 71

3————*whether applies to Santal Parganas—trustee of religious trust in Santal Parganas applying for a* writ *under Article 226, Constitution—propriety.*

The provisions of section 3 of Regulation III of 1872 are impliedly repealed by virtue of the enactment contained in clause (5) of the fifth schedule and Article 245 of the Constitution of India, 1950, and, therefore, the Bihar Land Reforms Act, 1950, is validly applicable in view of the provisions of section 1(2) of the Act to all portions of the Santal Parganas which have been declared to be scheduled area;

Held, therefore, that a trustee of a religious and charitable trust situated within the district of Santal Parganas is not entitled to the grant of a *writ* under Article 226 of the Constitution on the ground that the Bihar Land Reforms Act, 1950, is not applicable to the district. *B. Devi* v. *State of Bihar*, (1953) I .L. R. 32 Pat. 119

4————*section 2(o), 'proprietor', whether includes incorporated company holding zamindari estate—section 41.*

PAGE.

BIHAR LAND REFORMS ACT, 1950—*contd.*

whether precludes application of the Act to such estate—nothing repugnant in the subject or context of the Act—Act, whether applies to assets of such company situate both in Bihar and Bengal.

'Proprietor' as defined by section 2(o), Bihar Land Reforms Act, 1950, covers a company.

Upon a notification being issued under section 3, the *zamindari* estate of an incorporated company will vest in the State and the company will cease to have any interest in it. Its only right will be to receive compensation. In case of winding up the liquidator will have to pursue the remedy provided by the Act.

Section 41 of the Act does not necessarily preclude the application of the Act to incorporated companies.

Indeed, there is not only nothing repugnant in the subject or context of the Act which should prevent the inclusion of a company owning estate within the definition of 'proprietor', such inclusion is necessary in order to give full effect to the very object of the Act.

Where a *zamindari* estate of a company was situate both in Bihar and Bengal and Government revenue was payable jointly and that the lands were held in *patni* lease for which one single rent was paid, *held*, that the Bihar Land Reforms Act, 1950, was applicable and the only question was of apportionment of the revenue and the rent. *Motipur Zamindari Co., Ltd.* v. *State of Bihar* ... 529

5————*sections* 3(1), 3(2) 87

6————*section* 4(*d*), *scope of—section, whether applicable to a case where money is secured by a mortgage—compensation money awarded by Central Government—estate notified under section* 3—*mortgagee decree-holder, whether to attach compensation money in execution.*

Section 4(*d*) of the Bihar Land Reforms Act, 1950, is not applicable to a case where money is secured by a mortgage or charge on estates, some of which are notified under section 3 of the Act and the others are not notified. In such a case section 4(*d*) will be a bar to the suit for execution proceedings so far as the vested estates are concerned, but the creditor will be entitled to prosecute the suit or execution proceedings as regards the estates or portion of estates which are not vested in the estate.

Acting under the powers conferred by rule 75A(2), Defence of India Rules the Central Government acquired four villages out of a mortgaged Mahal and granted an award in favour of the proprietor for the compensation money and thereafter the Mahal was notified under

PAGE.

BIHAR LAND REFORMS ACT, 1950—*concld.*

section 3 of the Bihar Land Reforms Act, 1950. The mortgagee in execution of his mortgage decree sought to attach the compensation money;

Held, that section 4(*d*) of the Bihar Land Reforms Act, 1950, was not a bar to the execution and the decree-holder was entitled to execute the decree by attaching the amount of compensation money paid by the Central Government for the four villages of the Mahal. *Raghubir* v. *Basudevanand* 581

7————*section* 24(3) 87

8————*section* 31(2) 87

9————*section* 41. *See* no. 4, *supra* 581

BIHAR PANCHAYAT RAJ ACT, 1947—

1————*section* 57, *delegation of power to stranger for enquiry, whether vitiates decision of the Gram Cutcherry—rules* 58 *and* 59 *under the Act laying down a quorum to constitute a full bench, whether repugnant to section* 67.

A decision of a bench of the Gram Cutcherry is not vitiated by reason of the consideration of a report of a preliminary enquiry made by a stranger provided the bench does not delegate its power of making the final enquiry and receiving such evidence as it considers necessary, under section 59 of the Bihar Panchayat Raj Act, 1947.

Rules 58 and 59 of the Bihar Panchayat Raj Act, 1947 in so far as they lay down a quorum to constitute the full bench and make the decision of the majority of the Punches in session the decision of the full bench do not travel beyond the scope of and are not inconsistent with the words used in section 67 of the Act;

Held, therefore, that an appeal against the decision of the Gram Cutcherry can be heard under section 67 of the Act by twelve Punches of the Gram Cutcherry. *Ganga* v. *Bhabichhan* 407

2————*sections* 57, 59, 62 *and rule* 13(1), *scope of—trial of compoundable offence by Gram Cutcherry—no effort to bring about settlement—trial, whether without jurisdiction—offence under section* 506 *of the Penal Code*, 1860, *whether triable by Gram Cutcherry—panches not nominated by parties within period allowed, sarpanch, whether can nominate—trial by panches so nominated, whether without jurisdiction—Constitution, Articles* 226, 227.

In a case arising out of a compoundable offence, it is the duty of the bench of a Gram Cutcherry under section 58 read with section 59 and rule 13(1) of the Bihar Panchayat Raj Act to bring about an amicable settlement in the first

PAGE.

BIHAR PANCHAYAT RAJ ACT, 1947—*concld.*

instance before it can try the case. It is only on failure to so settle the case that the Gram Cutcherry acquires jurisdiction to proceed with the trial of the case.

Where a bench of the Gram Cutcherry proceeded to try a compoundable offence without making effort to bring about an amicable settlement and convicted the accused;

Held, on an application for *writ* of *certiorari*, that the proceeding was without jurisdiction.

Held, *further*, that a bench of a Gram Cutcherry has jurisdiction under section 62 of the Bihar Panchayat Raj Act, 1947 to try an offence committed under section 506 of the Penal Code subject to this that the bench can pass a sentence which a third class Magistrate can pass.

Held, *also*, that a sarpanch has jurisdiction under section 57(1) of the Bihar Panchayat Raj Act, 1947, to nominate a panch from the panel to be a member of the bench of Gram Cutcherry to try a case if the parties to the case fail to nominate one within the period prescribed for such nomination and the trial by a bench so constituted is not without jurisdiction under section 57 of the Act.

Query:—Whether a judgment of the full bench of a Gram Cutcherry should be signed by all the panches constituting the full bench? *Nivas* v. *Amar* 436

3——————*sections* 59, 62, 57. *See no.* 2, *supra* ... 436

4——————*sections* 62, 59, 57. *See* no. 2, *supra* ... 436

5——————*section* 67. *See* no. 1, *supra* 407

6——————*section* 73(2), *effect of—remand order by Subdivisional officer, whether without jurisdiction—interference by High Court—Constitution, Article* 227.

Where a Subdivisional Magistrate set aside an order of conviction passed by a Gram Cutcherry and remanded the case for retrial;

Held, on an application under Article 227 of the Constitution, that the order of the Subdivisional Magistrate remanding the case to the Gram Cutcherry for retrial was without jurisdiction in view of the provisions contained in section 73(2) of the Bihar Panchayat Raj Act, 1947 and, therefore, the High Court has power to set aside the order. *Sheonarain* v. *Lachmi* 438

7——————*rule* 13(1). *See* no. 2, *supra* 436

BIHAR PREVENTION OF FOOD ADULTERATION ACT, 1947—

1——————*sections* 3(*c*)(*i*), 21—*complaint by Chairman of a municipality whether legal.*

PAGE.

BIHAR PREVENTION OF FOOD ADULTERATION ACT, 1947—*concld.*

Chairman of a municipality is not 'local authority' within the meaning of the Bihar Prevention of Food Adulteration Act, 1947.

Hence, a magistrate has no jurisdiction to take cognizance of a case under the Act on the complaint of the Chairman. *Ramjee* v. *State* 705

2————*section* 21, 3(*e*)(i). *See* no. 1, *supra* ... 705

BIHAR SALES TAX ACT, 1947—

1————*proposed levy of tax on company having their registered office outside Bihar and selling to customers in Bihar—legality of*—writ of prohibition or certiorari, *whether could issue—newly amended section* 2(*c*), 2(*g*) *and newly substituted section* 33, *whether constitutional—Constitution, Articles* 226, 286(2), 254, 304.

A notice under section 13(5), Bihar Sales Tax Act, 1947, was issued on a company having its registered office at Calcutta. By the notice the company was asked to get itself registered as a dealer under the Act and submit a return for purposes of assessment. The company protested whereupon the company was informed that in default of compliance with the terms of the notice best judgment assessment under the Act would be made. The company thereupon applied to the High Court for a *writ* under Article 226 of the Constitution;

Held, that the Sales Tax Officer was undoubtedly acting within his jurisdiction in issuing notice under section 13(5) against the petitioner asking him to apply for registration and submit a return and the party aggrieved was entitled to have his grievances redressed by the appropriate procedure which the machinery of the Act itself provided. Hence, no *writ* of *prohibition or certiorari* could issue.

Held (*i*) that the newly amended sections 2(c) and 2(*g*) and the newly substituted section 33, Bihar Sales Tax Act, 1947, are not in conflict with Article 286(2) of the Constitution;

(*ii*) that the Bihar Sales Tax Act, 1947, is not a law with respect, to sale of goods but is a law imposing tax on sales of goods, and therefore it falls within item 54 of the State List. That being the position Article 254 has no application;

(*iii*) that by virtue of item 52 of the State List the Act has been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-State or *intra-State* trade or commerce. Hence, Article 304 of the Constitution is not contravened; and

(*iv*) that the power of the State to tax extends to all matters within the sovereignty of the State. It is not

PAGE.

BIHAR SALES TAX ACT, 1947—*contd.*

however necessary for the purpose of jurisdiction that the entire transaction of sale should have taken place within the frontiers of the State.

Besides the explanation to Article 286(1)(*a*) of the Constitution expressly confers upon the State the power to tax sale or purchase of goods which are actually delivered for consumption inside the State. *Bengal Immunity Co.* v. *State of Bihar* 19

2————*newly amended section* 2(*c*), *whether constitutional* 19

3————*sections* 2(*d*), 13(2)(*b*), *scope of*, ' *loom hours* ' *whether* ' *goods* ' *within the meaning of—price of* ' *loom hours* ', *whether taxable.*

' Goods ' in the Sales Tax Act, 1947 must be construed to mean only tangible corporeal property and not abstract rights like ' loom hours ' or actionable claims, stocks, shares or securities and therefore ' loom hours ' do not fall within the ambit of the Bihar Sales Tax Act, 1947.

Hence the amount of sale price of ' loom hours ' is not taxable under section 13(2)(*b*) of the Act. *State of Bihar* v. *R. Jute Mills* 178

4————*second* proviso *to section* 2(*g*), *whether unconstitutional—Constitution*, *Article* 286—writ *of* prohibition *or* certiorari, *whether could issue for levy of sales tax on sales outside Bihar—Article* 226.

Even assuming that the Sales Tax Authorities relied upon an *ultra vires* provision of the Bihar Sales Tax Act, 1947, in making an assessment for sales made outside Bihar, the action of the authorities was not without jurisdiction, and the party aggrieved was entitled to have his grievances redressed by the appropriate procedure which the machinery of the Act itself provided. Hence, no *writ* of *prohibition* or *certiorari* could issue in the case.

Query:—Whether the second proviso to section 2(*g*), Bihar Sales Tax Act, 1947, was constitutionally valid? *Diamond Coal Co.* v. *State of Bihar* 36

5————*sections* 13(2)(*b*) *and* 2(*d*) 173

6————*section* 25(1)—*90 days for making an application for reference to High Court, whether to be counted from date of order under section* 24(4)—*omission to do so, whether fatal.*

The period of 90 days prescribed in section 25(1), Bihar Sales Tax Act, 1947, for making an application to the Board of Revenue for referring to the High Court any question of law in a case is to be computed from the passing by the Board of Revenue of any order under section 24(4)

BIHAR SALES TAX ACT, 1947—*concld.*

of the Act and not from the date of the communication of that order to the assessee and the omission to make the reference within that time is fatal to the validity of the reference. *State of Bihar* v. *T. R. Jain* 164

7————*newly substituted section* 33, *whether* ultra vires— 19

BIHAR TENANCY ACT, 1885—

1————*section* 22(2) 720

2————*section* 22(2)—*rent, meaning of* 782

BIHAR AND ORISSA MUNICIPAL ACT, 1922—

1————*section* 19, *rules framed thereunder—rule* 5(1): *whether mandatory—Election Commissioner, whether has jurisdiction to entertain election petition beyond the period of limitation prescribed—Election Commissioner, whether is a 'court' within the meaning of section* 115, *Code of Civil Procedure*, 1908.

The Election Commissioner is a 'court' within the meaning of section 115, Code of Civil Procedure, 1908, and the High Court is competent to deal with an application in revision against the order of the Election Commissioner constituted under the rules framed by the State Government by virtue of section 19 of the Bihar and Orissa Municipal Act, 1922.

The period of limitation prescribed by rule 5(1) of the rules framed by the Provincial Government under section 19, Bihar and Orissa Municipal Act, 1922, is not merely a directory provision. It is a preliminary condition for the exercise of jurisdiction of the Election Commissioner.

Therefore the Election Commissioner acted beyond his jurisdiction in condoning the delay in entertaining an election petition presented before him beyond the period of 14 days prescribed by rule 5(1). *Dr. S. Verma* v. *Dr. H. Pd.* ... 392

2————*section* 180, *initiation of proceeding, whether barred—section* 875, *applicability and scope of—section* 892.

A continuing offence as contemplated by section 375 of the Bihar and Orissa Municipal Act, 1922, is an offence which is deemed to have been committed from day to day, the last date being the expiration of the period for which licence is required to be taken out. The requisite period of six months referred to in the section must be calculated from the last date of that period on which alone the offence could be deemed to have been committed afresh by a person, violating the provisions of section 180 of the Act:

Held, therefore, that a person against whom a complaint was filed on the 31st of March, 1950, for keeping a pucca platform over a Municipal drain in the year 1949-50 and for not paying the licence fee and not renewing the licence for

PAGE.

BIHAR AND ORISSA MUNICIPAL ACT, 1922—*concld.*

those years was guilty of an offence under section 180(2) of the Bihar and Orissa Municipal Act, 1922, and the prosecution was not barred by time;

Held, further, that pre-existing contractual rights are protected by section 392 of the Act but does not apply to rights which are inconsistent with the Act.

State through Chairman, C. Municipality v. *Ishri* ... 887

3——————*section* 375 887

4——————*section* 392 887

CODE OF CIVIL PROCEDURE, 1908—

1——————*section* 151 *and Order XLI, rule* 33, *scope and applicability of—one of the appellants died—substitution petition dismissed—petition for adding the heirs as party to appeal—heirs, whether can be added—appeal, whether abates as a whole.*

While the provisions of rule 33 of Order XLI of the Code of Civil Procedure, 1908, give wide powers to the Court as to the nature of the decree which it should pass. in terms, the provisions of rule 33 do not empower the Court to add parties where an appeal as a whole has abated.

The abatement of an appeal results in a valuable right accruing to the respondent, and if the court readily added parties which could result in such a valuable right being destroyed it would be acting far beyond what was contemplated in rule 33 of Order XLI of the Code.

Where the petition for substitution in place of one of the deceased appellants was dismissed and a petition for adding the heirs of the deceased appellant party to the appeal was filed;

Held, that the heirs of the deceased appellant could not be added as parties to the appeal either under the provisions of Order XLI, rule 33 or under section 151 of the Code of Civil Procedure, 1908, and the appeal abated as a whole.

It is not permissible to allow the existence of conflicting decrees. One of the tests as to whether an appeal as a whole has abated is that if the appeal succeeds there will be in exitence conflicting decrees.

Different consideration arise between the abatement of a suit and the abatement of an appeal because in a suit if there is an abatement it is before the passing of a decree and the question of conflicting decrees coming into existence does not arise. *Ramdhani* v. *Rambharosa* ... 1138

PAGE.

CODE OF CIVIL PROCEDURE, 1908—*concld.*

2————*Order XI—inspection and production of document.*

See Interpretation of Statute 956

3————*Order XXII* 903

4————*Order XXXIX, rule 1, as amended in 1937—claim case dismissed—claimant's suit for declaration of title—prayer for injunction, whether entertainable.*

A person whose claim under Order XXI, rule 58 of the Code of Civil Procedure, 1908, has been dismissed is not entitled to an order of temporary injunction under Order XXXIX, rule 1 of the Code of Civil Procedure as amended in a suit by him under Order XXI, rule 63 of the Code for declaration of his title to the attached property. *N. Agarwala* v. *M. Rajgaria* 146

5————*Order XL, rule 2* 348

6————*Order XLI, rule 33 and section 151* 1138

7————*Order 47, rule 1—appeal having been dismissed as infructuous—respondent, whether entitled to file a review.*

When an appeal is disposed of as having become infructuous it is not open to a respondent to say that the order passed is an order "made against him" within the meaning of sub-rule (1) of rule 1 of Order 47 of the Code of Civil Procedure, 1908, and that sub-rule (2) of rule 1 of Order 47 of the Code has no application to such a case.

Hence, the review application was not maintainable. *Usman* v. *Samawati* 507

CODE OF CRIMINAL PROCEDURE, 1898—

1————*section 6* 1069

2————*sections 30 and 34, whether offend against Article 14 of the Constitution and are invalid.*

Per REUBEN, C.J. and DAS, J. (SINHA, J., *contra*):—Sections 30 and 34, Code of Criminal Procedure, 1898, do not offend against Article 14 of the Constitution and are not invalid. *Budhan* v. *State* 728

3————*sections 34, 30* 728

4————*section 145, possession of minor declared—minor no party to proceeding—proceeding, whether vitiated—section 148(3)—awarding of costs without holding any enquiry, whether permissible.*

Where in a proceeding under section 145, Code of Criminal Procedure, 1898, the magistrate found that a

PAGE.

CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

minor was in possession through her father-in-law who was impleaded as a party to the proceeding:

Held, that non-joinder of the minor to the proceeding was immaterial as the father-in-law was claiming to be in possession of the property in dispute on behalf of the minor.

On the true interpretation of section 148(3), Code of Criminal Procedure, 1898, as amended in 1923, it would be wrong to hold that for, awarding costs to the successful party an enquiry must always be held regarding the actual costs which have been incurred by him. The section now gives a very wide discretion in the magistrate for the assessment of the amount of costs and the only restriction which it places upon his discretion is that the costs must be reasonable. *Langar* v. *Bacha* 621

———*section* 145, *scope of—recent civil court delivery of possession, whether prohibits the magistrate from taking action under section—law on the subject, summarised—case—law, reviewed—sections* 435, 439.

The question of possession that has to be determined in a proceeding under section 145 of the Code of Criminal Procedure is the question of actual possession with regard to the property in dispute. Actual possession certainly means actual physical possession, that is, the possession of the person who is cultivating the land or growing crops on it irrespective of whether he has any legal right to the land or the title to possess it.

What concerns the magistrate is not the right to possess the subject-matter of dispute but the actual possession thereof on the date when he makes the order under sub-section (1) of section 145. At one time no doubt there was a sharp difference of opinion on the question as to whether a magistrate has jurisdiction to interfere when there is an order of the civil court on the question of possession or when the possession has been delivered to a person under the orders of the civil court. But the view that once there has been a delivery of possession by the civil court the magistrate has no jurisdiction to take action under section 145 of the Code of Criminal Procedure is no more sustainable when the judgment-debtors contend that the peon's report is not correct and that there was no *dakhaldehani* on the spot, then certainly that is a question which has to be investigated, and it is within the province of the magistrate to investigate this question in the proceeding under section 145 of the Code of Criminal Procedure. It is another thing that after the delivery of possession is proved the magistrate has to respect the delivery of possession, but so long as the delivery of possession is not proved, it is absolutely

PAGE.

CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

within the competence of the magistrate to draw up a proceeding under section 145 of the Code in the event of an apprehension of a breach of peace and to investigate whether a *dakhaldehani* was actually effected on the spot or not. A fraudulent service of process is not an unknown thing in this part of the country, and when the judgment-debtors in this case were contending that actually there had been no delivery of possession, this question had to be investigated.

The words " actual possession " as used in section 145(1) of the Code of Criminal Procedure mean actual physical possession, even though wrongful. In other words, a magistrate has complete jurisdiction to interfere even if he finds that a recent trespasser is in actual possession at the time of drawing up proceedings under section 145.

It will be premature for the High Court to interfere before the magistrate has decided the case. If the magistrate's decision is ultimately found to be grossly erroneous, the High Court under the existing sections 435 and 439 of the Code will have the jurisdiction to interfere with it. *S. Singh* v. *B. Singh* 227

6————*sections* 145, 517 *and* 520—*lands attached—sale proceeds of usufruct deposited—application by successful party for payment—other side moving higher court and praying for stay of payment—High Court ultimately ordering stay of payment—sections* 435, 439, 561*A—case-law, discussed.*

Where in a proceeding under section 145, Code of Criminal Procedure, 1898, the lands in dispute were attached and the yields from the lands were sold and deposited in court and on final orders having been passed in the proceeding, the successful party applied for the payment of the said sum to him, and the other party objected and moved the Sessions Judge against the order under section 145 and further prayed for stay of payment of the amount, and the Sessions Judge admitted the main application but held that he had no power to order stay;

Held, that the case was governed by the provisions of sections 517 and 520, Code of Criminal Procedure;

Held, further, that the High Court would exercise powers under section 520 of the Code and give relief to the aggrieved party;

Held, also, that section 145(4) of the Code referred only to immovable property and made no mention of any step to be taken beyond the pendency of the attachment. The money which was retained by the court as the income from the land was not under attachment; and sub-section (8) of the section gives a discretion to the Magistrate to dispose of the sale proceeds in the manner he thought proper. There was no mandatory provision

PAGE.

CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

that the Magistrate was bound to hand over the crop or sale proceeds to a particular party, and since the order under section 145 of the Code was a judicial one and was revisable, sub-section (8) was also likewise revisable. If, therefore, the court would pass a palpably wrong or perverse order under sub-section (8), the superior court would have the authority to rectify it in a suitable manner. *Gyani* v. *Dharam* 613

7——————*section* 148 621

8——————*section* 164 243

9——————*section* 181(2), *applicability--Penal Code*, 1860 (*Act XLV of* 1860), *section* 405, *significance and scope of—jurisdiction to try a case of criminal breach of trust—proper venue—law on the subject, summarised—case-law, reviewed.*

Section 181(2), Code of Criminal Procedure, 1898, is the section which is applicable to a case of criminal misappropriation or criminal breach of trust, and according to this section the offence of criminal misappropriation or criminal breach of trust may be enquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused persons, or the offence was committed.

Section 405 of the Penal Code, 1860, which defines criminal breach of trust, falls into two parts. The first part will apply where it is known that the accused has dishonestly misappropriated or converted to his own use the entrusted property at a particular place, and the jurisdiction to try the accused will be at that place.

Where, however, it cannot be alleged that the misappropriation was actually and definitely committed at any particular place, there the case comes under the second part of section 405, namely, dishonestly disposing of the property in violation of any direction of law or of any legal contract; and in such a case if the legal contract required that the accused should remit or deliver or otherwise dispose of the property at a particular place, then his failure to do so constitutes the offence, and the jurisdiction to try the accused exists at such place.

Where the complainant is not able to know where the misappropriation actually occurred, jurisdiction certainly lies at the place where the property had to be delivered. *R. N. Sarkar* v. *A. N. Sarkar* 303

10——————*section* 250, *Magistrate empowered under section* 30, *whether has power to order compensation.*

When a Magistrate vested with powers under section 30, Code of Criminal Procedure, 1898, tries an accused person

PAGE.

CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

of an offence which is triable by the court of session under column 8 of Schedule II of the Code, he is not empowered under section 250 of the Code to pass an order of compensation. *Narain* v. *Ramdhari* 427

11————*section 276, scope of—injury, constitution of—legality—Patna High Court General Rules and Circular Orders (Criminal), 1916, rule 26—appeal against acquittal —appellate court, whether can examine evidence.*

Fifteen persons whose names were drawn by lots from the list of jurors were summoned to attend court to serve as jurors. Out of the persons summoned only three turned up and of them one was excused to serve on the ground of illness. The Judge then constituted a jury of five persons consisting of the two summoned persons and three others who happened to be present in court and whose names appeared in the list of jurors. Trial was held with the aid of the jury so constituted and ended in acquittal. On an appeal against acquittal the legality of the trial was questioned on the ground that the jury was not properly constituted;

Held, that there was no illegality or irregularity in the constitution of the jury within the meaning of section 276 of the Code of Criminal Procedure, 1898, and rule 26 of the Patna High Court General Rules and Circular Orders (Criminal), 1916;

Held, further, on a consideration of the charges to the jury that there has been misdirection by the Additional Sessions Judge in charging the jury;

Held, also, on a consideration of the evidence in the case that the misdirection by the Additional Sessions Judge in charging the jury has not led to erroneus verdict by the jury.

In an appeal under section 417 of the Code of Criminal Procedure, 1898, the power of the appellate court is the same as in ordinary appeal and, therefore, the High Court can examine the evidence adduced in a case tried by a jury to decide whether the alleged misdirection has led to an erroneous verdict by the jury. In exercising the power of examining the evidence conferred by the Code of Criminal Procedure and before reaching its conclusion upon facts the High Court should and will always give proper weight and consideration to such matters as, (1) the views of the trial judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not, weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. *State of Bihar* v. *S. N. Mandal* 451

PAGE.

CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

12———*section* 401 490

13———*sections* 435, 439, 561*A* 613

14———*sections* 439, 435, 561*A* 613

15———*section* 439(5), *bar of, whether operate—State preferring no appeal against acquittal but moving Sessions Court—Additional Sessions Judge referring matter to the High Court.*

An accused person was acquitted by a magistrate of an offence under section 144, Penal Code. The State preferred a revision before the Sessions Court. The Additional Sessions Judge referred the matter to the High Court for setting aside the order of acquittal;

Held, discharging the reference, that section 439(5), Code of Criminal Procedure, 1898, operated as a bar. *State* v. *A. N. Singh*, (1953) I. L. R. 32 Pat. 11

16———*section* 465, *provisions of, whether imperative—court's duty, pointed out.*

When a court entertains doubt as to the sanity of the accused, the court should not merely put questions to the accused but should try the issue of such unsoundness of mind as a preliminary to the hearing of the evidence on the charge by examining the Civil Surgeon and by taking such evidence as might be adduced or procured. The provisions of section 465, Code of Criminal Procedure, 1898, were obligatory and should not be disregarded. *Chetu* v. *State* 50

17———*section* 476*B*, *appeal under, whether criminal appeal—such appeal whether governed by the provisions of the Code.*

An appeal under section 476B, Code of Criminal Procedure, 1898, from an order passed under section 476 of the Code by a Civil Court must be deemed to be a criminal appeal, and the provisions of the Code of Criminal Procedure, 1898, so far as they are applicable to appeals apply to such an appeal. *D. N. Singh* v. *State* ... 574

18———*section* 491 480

19———*section* 514 490

20———*section* 514 640

21———*sections* 517, 520 613

22———*sections* 520, 517 613

23———*section* 561 *A* 613

COMPANIES ACT, 1913—*See* Bihar Land Reforms Act, 1950, no. 2 71

PAGE.

CONSTITUTION— ... 1104

1——————*Article* 13 375,

2——————*Article* 14 ... ... 104, 728, 1148.

... 1104

3——————*Article* 19(1)(*a*) 921

4——————*Article* 19(1)(*b*) 1148

5——————*Article* 19(1)(*f*) 131

6——————*Article* 19(*f*) 1104,

7——————*Article* 19(2) ... ... 1069.

... 1148

8——————*Article* 25 1148

9——————*Article* 26 1148

10——————*Article* 31. *See no.* 7, *supra* 87

11——————*Article* 31(2) 880

12——————*Article* 132 ... ...

13——————*Article* 133——"*final order*", *meaning of—tests of finality explanation to Article* 132, *whether material—High Court rejecting objection to execution in appeal—order, whether appealable.*

The explanation to Article 132 of the Constitution regarding the meaning of "final order" cannot be applied to the provisions of Article 133 of the Constitution.

The test of finality is whether the order finally disposes of the rights of the parties. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under Article 133 of the Constitution.

Where in an appeal against an order in execution the High Court overruled the objection to the execution;

Held, that the order of the High Court was not a "final order" within the meaning of Article 133 of the Constitution and as such was not appealable. *Basudevanand v. R. S. Rastogi* 880

14——————*Article* 133(1) 400

15——————*Article* 226 ... ... 181, 480, 592, 630, 19, 104, 708, 921, 1148, 1129.

PAGE.

CONSTITUTION—*contd.*

16———————*Article* 226, *prayer for issue of a* writ *in the nature of* mandamus, *whether entertainable—Bihar Land Reforms Act*, 1950, *section* 3(1) *and* 3(2), *not properly complied—names in the notification not properly given—publication, defective—properties of religious and charitable endowment—compensation, how to be given—sections* 32(2), 33 *and* 24(3)—*Constitution, Article* 31(2), *whether violated*....

Where the State Government notified that a religious and charitable trust would vest in the Government under the Bihar Land Reforms Act but the notification did not mention the names of the proper trustees and the trustees applied to the High Court for a *writ* of *mandamus* against the State;

Held, that the trustees are not entitled to a *writ* of *mandamus* or any other *writ* under Article 226 of the Constitution of India, 1950.

The failure of the State Government to mention the correct name of the properties or tenure-holders will not invalidate the notification under section 3(1), Bihar Land Reforms Act, 1950, nor will it prevent the title to the estate or tenure passing to or becoming vested in the State Government under the provision of section 3(1) of the Act.

The publication in the two newspapers referred to in section 3(2) of the Act and the despatch of the copy of the notification by registered post to the proprietor of the estate are not mandatory provisions in the sense that failure to comply with those provisions would invalidate the notification made under section 3(1) of the Act.

In the case of a perpetual premium payable to the trustees of a religious or charitable endowment the compensation officer is bound to make payment in cash.

The Bihar Land Reforms Act has specified in sections 24(3) and 32(2) the principle and manner in which the compensation is to be paid and given in respect to properties of a religious or charatable endowment and, therefore, there is no violation of the guarantee provided by Article 31(2) of the Constitution.

Where a statute is enacted for the purpose of enabling some action to be taken but the statute omits to mention expressly some important detail for the proper and effectual performance of the work which the statute contemplates the Court is at liberty to supply the *casus omissus* and to infer that the statute by implication empowers some details to be carried out and, therefore, section 33(1) of the Bihar Land Reforms Act must be construed to mean that the State Government have authority to make, indeed the State Government are bound to make, *interim* payment of com-

PAGE.

CONSTITUTION—*concld.*

pensation to the trustees equal to the approximate net annual income from the trust properties calculated in accordance with section 23 of the Act. *R. R. Chakravarty v. State of Bihar* 87

17———*Article* 226, *scope of—Regional Transport Authority refusing to renew permit—appeal against the refusal, rejected—application for a* writ *against the State and Transport Authority*—writ, *whether can be issued—Motor Vehicles Act*, 1939.

Where there is illegality or irregularity in the exercise of jurisdiction, the defect, if any, can be corrected according to the procedure established by the law by way of appeal or revision, and where the appellate court has pronounced its decision against the appellant, that matter having been finally decided; it should not be ordinarily re-opened in a proceeding by way of a *writ* under Article 226 of the Constitution of India.

Motor Vehicles Act, 1939 is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation, no one is entitled to a permit as of right even if he satisfy all the prescribed conditions, and the grant of a permit is entirely within the discretion of the Transport Authority and naturally depend on various circumstances to be taken into account by them;

Held, therefore, that a person, whose permit for a private carrier was not renewed by the Regional Transport Authority and an appeal against that order was also rejected by the State Transport Authority, is not entitled to a *writ* under Article 226 of the Constitution of India either against the State or the Transport Authority. *M. Prasad, P. Dayal v. State of Bihar* 43

18———*Articles* 226, 227 ... ...433, 436

19———*Article* 227 956

20———Article 254 19

21———Article 286 19

22———*Article* 286(2) 19

23———Article 304 19

24———Article 311 708

25———*Article* 320 708

CONTRACT ACT—

1———*sections* 73, 74 662

2———*sections* 74, 73 662

CONTEMPT OF COURTS ACT, 1926—*High Court's power to punish for contempt—article criticising magistrate and his prohibitory order—Constitution, Article* 19(2), *whether infringed—*

PAGE.

CONTEMPT OF COURTS ACT, 1926—*concld.*

Subordinate Magistrate passing prohibitory order, whether a court subordinate to the High Court within the meaning of the Contempt of Court Act, 1926—Code of Criminal Procedure, 1898, section 6—case-law, reviewed.

Some of the tests of contempt of court are, (1) of criticism calculated to interfere with the due course of justice or proper administration of law, (2) a criticism intended to create distrust in the popular mind and impair the confidence of the people in the courts of law. These tests have been part of the meaning of the expression " contempt of court " from before the Constitution and are still a part of its meaning—a meaning which the framer of the Constitution must have known when they used the expression " contempt of court " in Article 19(2) of the Constitution, and it is idle to contend that such a connotation imparts any unreasonable restriction on freedom of speech and expression.

The Contempt of Courts Act, 1926, cannot be held to be nugatory on the ground of the absence of definition of the term " contempt of court " in the Contempt of Courts Act.

A Subdivisional Magistrate is a court within the meaning of the Code of Criminal Procedure, 1898, when he passes an order under section 144 of the Code and is subordinate to the High Court within the meaning of the Contempt of Courts Act;

Held, that the article in question amounted to contempt of Court. *Legal Remembrancer, Bihar* v. *B. B. Das Gupta* 1069

COURT-FEE—*whether payable on a claim of equitable set off in the written statement.*

Article 1, Schedule 1, Court-fees Act, 1870, as amended in 1908, applies both to the case of an equitable set off and the case of a legal set off and court-fee is payable by the defendant in a case of either description:

Held, that though a specified sum was roughly mention in the written statement on which set off was claimed, it was an equitable set off. *L. N. Sukhani* v. *K. N. Singh* 510

CRIMINAL TRIAL— ...

1————*bail bond by surety only—accused not appearing—surety's liability—Code of Criminal Procedure, 1898, section 514—Penal Code, 1860, section 174.*

When a bail bond is only taken from the surety, the person for whom that bail bond is executed cannot be directed to pay the penalty or any portion thereof, as he cannot be said to have been guilty of any disobedience within the meaning of section 514 of the Code of Criminal

PAGE

CRIMINAL TRIAL—*contd.*

Procedure, 1898. Failure by an accused, who is legally bound to attend in person or by an agent, so as to attend will render him liable to punishment under the provisions of section 174 of the Penal Code, 1860, and no question of forfeiture of any bond can arise.

When an accused person has been released on bail merely on the undertaking of the surety and a bond is executed by the surety, without the accused having been required to execute a personal bond, it may be that the officer or the court has acted in an irregular manner and the accused should not have been released on bail but that fact cannot in any way affect the liability of the surety who had undertaken to produce the accused before the court on the date or dates mentioned in the bond;

Held, therefore, that the surety was liable to pay the penalty imposed on him under section 514 of the Code of Criminal Procedure. *K. N. Choudhary* v. *State* 640

2———*conviction on circumstantial evidence, whether sustainable—confession, admissibility—legal position explained—conviction for dacoity and murder, legality of—sentence of death, court, whether can impose lesser sentence—Evidence Act*, 1872, *section* 114(*a*)—*Code of Criminal Procedure*, 1898, *section* 164—*Penal Code*, 1860, *sections* 396, 302.

The fundamental principle of circumstantial evidence is that the inculpatory facts must be absolutely incompatible within the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused.

Therefore, in a case in which murder and robbery have been shown to form part of one and the same transaction, a recent and unexplained possession of the stolen property will be presumptive evidence against the prisoner on a charge of robbery and would, similarly, be evidence against him on a charge of murder.

Held, that the confession in the case was admisible and that there was sufficient compliance with the provisions of section 164, Code of Criminal Procedure, 1898.

No form of questions is prescribed by section 164(3) of the Code from which the magistrate must satisfy himself that he believes the confession was made voluntarily.

Where a *dacoit* in the progress of, and in pursuance of, the commission of a dacoity, commits a murder, all of his companions, who are participating in the commission of the dacoity, may be convicted under section 396, Penal Code.

PAGE

CRIMINAL TRIAL—*contd.*

So long as the law enjoins the sentence of death to be the primary sentence it is the business of the court to impose it unless there appears mitigating circumstances, or grounds for the exercise of a judicial discretion in the matter.

PER IMAM, J.—The real purpose of section 164, is two-fold: (1) that the person about to make a confession should be timely warned that he is not bound to make a statement and that if he does, it may be used against him and that he may be convicted on that statement, and (2) to convey to the mind of the person making the statement the fact that his statement must be a voluntary one. *King Emperor* v. *S. S. Singh* 243

3——————*evidence—value of the statements of a child witness.*

The evidence of a child witness should be very closely scrutinised before the same is accepted by a court of law. *J. Lodhin* v. *State* 217

4——————*murder and culpable homicide not amounting to murder—distinction—Penal Code*, 1860, *sections* 34, 302, 304, *applicability and scope of—death caused by the assault of two persons—intention not to kill—no proof as to whose blow proved fatal—accused, whether guilty of murder—one of the two assailants, whether can be convicted....*

It is not always easy to draw a distinction between murder and culpable homicide not amounting to murder.

Where the blows given and intended to be given are sufficient in ordinary course of nature to cause death or are so imminently dangerous that they must in all probability, cause death, the offence is one of murder.

Where, however, the injuries caused and intended to be caused are merely likely to *cause* death, the offence will be culpable homicide not amounting to murder.

Even in respect of this latter offence, there are again two categories—first, where the act by which death is caused is done with the intention of causing such bodily injury as is likely to cause death; and secondly, where the act is done with the knowledge that it may cause death without an intention of causing such bodily injury as is likely to cause death. The distinction between these two categories is not always easy to define, because the distinction depends on the facts of each case, namely, the circumstances in which the assault is made, the weapon used, the violence with which the weapon is used, etc.

Where two persons dealt *danta* blows on a person with the common intention of causing bodily injuries on him and the person died as a result of those injuries but there was no

PAGE.

CRIMINAL TRIAL—*concld.*

proof as to whose blow caused the death and one of the assailants was convicted under section 302 of the Penal Code.

Held, that the accusd was guilty under the second part of section 304 of the Penal Code, 1860, by reason of the application of the principle of joint liability embodied in section 34 of the Code which can be read with the second part of section 304. *Sobrati* v. *State* 1093

5————*surety bond, taken by Government, whether one under the Code of Criminal Procedure*, 1898, *section* 401, *proceeding for forfeiture, whether without jurisdiction—section* 514, *scope of.*

Bonds taken from person who stand surety to a security bond as ordered by the State Government under section 401, Code of Criminal Procedure, 1898, are not bonds of the nature contemplated by section 514 of the Code and a proceeding initiated for their forfeiture under the Code is without jurisdiction.

Section 514 of the Code of Criminal Procedure, 1898, refers to two classes of bonds; firstly, a bond under the Code taken by a Court, and secondly, a bond for appearance before a Court. The first class is subject to two limitations, viz., the bond must be taken by a Court and it must be taken under the Code. Bonds of the second class must be for appearance before a Court. They may be taken by some one other than a Court under the provisions of the Code. *M. Homi* v. *Deputy Commissioner, Singhbhum* ... 490

EVIDENCE—*admission in a previous pleading—value of. See* Hindu Law 983

EVIDENCE ACT, 1872—

1————*section* 34—*books of accounts—entries in—relevancy* 983

2————*sections* 52, 53 54, 55—*prosecution for defamation—accused, whether entitled to put questions to the complainant regarding his reputation—legal position explained—Penal Code*, 1860, *sections* 499, 500.

There is a basic distinction between the fact in issue in a civil action for libel and slander and the fact in issue in a criminal prosecution for defamation, as in a civil action what the plaintiff seeks to do is to compensate himself for loss of his reputation in terms of money. The *quantum* of damage, therefore, must differ from case to case and according to the status of the plaintiff. It is not so in a criminal prosecution. In a criminal prosecution what really matters is the *mens rea* of the accused person.

PAGE.

EVIDENCE ACT, 1872—*contd.*

It is in civil cases, where the question of amount of damages to be awarded to the plaintiff is concerned, that the character of the plaintiff becomes relevant under section 55 of the Evidence Act, 1872, but no such provision has been made in regard to the character of the prosecutor or complainant either in section 55 or sections 52, 53 and 54 of the Act.

Reputation within the meaning of section 499 of the Penal Code, 1860, is not at all a necessary fact to be proved in a charge under section 500 of the Code, hence it is not a fact in issue. Facts in issue on a charge under the section are the necessary ingredients of that section to be established in order to bring the charge home to the accused person.

Therefore, reputation is not a fact in issue either in a case under section 500 of the Penal Code or under the Evidence Act or as a mitigating circumstance.

Hence, in a prosecution under section 500 of the Penal Code, 1860, it is not open to the accused person to put questions to the complainant to show the type of reputation the complainant enjoyed at the relevant date. *D. Shastri v. K. B. Sahay* 276

3——————*sections* 53, 54, 55, 52 276

4——————*sections* 54, 52, 53, 55 276

5——————*sections* 55, 54, 53, 52 276

6——————*sections* 65, 66, *not complied, secondary evidence, whether admissible—Hindu Law—*avyavaharika *debt tests, principles laid down—case-law, reviewed.*

Held, that the provisions of sections 65 and 66, Evidence Act, 1872, not having been complied, the certified copy of the bond was not admissible in evidence.

Obiter.—Where a judgment-debt for costs is challenged as *avyavaharika* the question that arises for determination is as to when the decree for costs was passed. Before the judgment there could be no judgment-debt for costs. It may be that the previous acts of the father in instituting the suit on a false claim was substantially responsible for setting the stage for the passing of the decree for costs. But those acts by themselves, however, immoral or illegal, could not constitute a debt against him in the absence of the pronouncement of the court and much less an *avyavaharika* debt.

Therefore, the immediate act which creates the debt or from which the debt originates, is the judgment. The examination of the nature and character of the debt should be made with reference to that point of time. If it be found that at that point of time there was immediate and

PAGE.

EVIDENCE ACT, 1872—*concld.*

direct act or omission or volition on the part of the father which contributed to the passing of the decree against him, and which act, omission or volition was tainted with a motive for the doing of an illegal or immoral act, the judgment debt for costs may be termed *avyavaharika*. In the absence of any such evidence the debt is not *avyavaharika*. *D. S. Debya* v. *Rakhahari* 803

7————*sections* 66, 65 803

8————*section* 110 353

9————*section* 114(*a*) 243

EXCESS PROFITS TAX ACT, 1940—*schedule* 1, *rule* 1, *significance of—Excess Profits Tax Officer, whether bound to accept computation of income by the Income-tax Officer as the assessee's profits for the charging period.*

Rule 1 of Schedule 1 of the Excess Profits Tax Act, 1940, cannot be interpreted to mean that the Excess Profits Tax Officer was bound in law to accept the computation of income made by the Income-tax Officer for the assessment year as the assessee's profits for the chargeable accounting period. *H. Phulchand* v. *Commissioner of Income-tax* ... 201

GOVERNMENT OF INDIA ACT, 1919 540

HINDU LAW—

1————avyavaharika *debt* 803

2————*joint family—life insurance policy in name of individual member, whether joint family property—Code of Civil Procedure*, 1908, *Order XI—litigant may obtain inspection and production of document—Evidence—admission in a previous pleading, value of—Evidence Act*, 1872, *section* 34—*books of accounts, entries in, relevancy—Practice—minor attaining majority in appeal—amendment not made—decision in suit, whether affected.*

There is no warrant for the proposition that there should be another standard for judging income and expenditure on account of the insurance policies that what has been laid down in the Hindu Law as it is administered by the courts of India at present. The Hindu Law has no doubt been modified or supplemented in certain respects by certain Acts, but there is no special Act with regard to insurance policies as it applies to the Hindus up till now. The criterion still is to consider from what source the money came with which the *premia* were paid.

A life insurance policy is certainly a contract between a person who is called the "Assured" and the Insurance Company, but it cannot be said that an insurance policy cannot be taken for the benefit of the joint family and out of the joint family funds.

PAGE.

HINDU LAW—*concld.*

The essence of a coparcenery under the *Mitakshara* is *unity of ownership* and the ownership is in the whole body of coparceners. No individual member of the family, whilst it remains undivided, can predicate, of the joint and undivided property, that is, that particular member has a definite share in it.

Held, that the life insurance policy in the case belonged to the joint family.

It is open to a litigant to refrain from producing any document which he considers to be irrelevant, and that, if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading was delivered.

Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire.

Certain respondents who were minors attained majority at the appellate stage and the necessary amendment was not made, *held*, that the defect was not fatal to the suit.

Sarangdhar v. *Parvati* 983

HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937—*section* 3 ... 921

INCOME-TAX—*interest by way of damages, whether taxable—accrual of interest on 'advance-tax', whether exempt from assessment—Income-tax Act*, 1922, *section* 18A.

A mill belonging to an assessee was sold. The manager of the mill retained the sale proceeds. The assessee realised the amount with interest by suit;

Held, that the amount of interest realised by way of damages was taxable under the Act;

Held, further, that the amount awarded as interest under section 18A of the Act was not exempt from assessment.

Commissioner of Income-tax v. *Kameshwar Singh* ... 206

INCOME-TAX ACT, 1922—

1——————*section 5A(7) scope of—difference between members of the Tribunal—reference to the President—point of difference not formulated—reference, whether competent—order of the President on such reference; whether without jurisdiction.*

INCOME-TAX ACT, 1922—*contd.*

Where on a difference of opinion between members of the Income-tax Appellate Tribunal the case was referred to the President of the Tribunal for decision without formulating the point or points of difference;

Held, that the reference to the President was incompetent under section 5A(7) of the Income-tax Act, 1922, and the order passed by the President on such reference was without jurisdiction;

Held, further, that when there is difference of opinion between the members of the Tribunal as to the quantum of assessment the President or the third member to whom the case is referred is bound to agree with the opinion of one of the members. *H. Chandunmul* v. *Commissioner of Income-tax, Bihar and Orissa* 445

2———*sections* 16(1)(c), *scope of—assessee agreeing to pay interest accruing from Government securities as donation to a Fund—amount so paid, whether taxable.*

Where an assessee purchased Government securities and agreed to pay the amount of interest that would accrue thereupon to the Viceroy's War Purposes Fund and in pursuance of the agreement paid the amount of interest that accrued in the two assessment years to the Fund and claimed that the amount so paid should be exempted from taxation;

Held, that the third proviso to section 16(1)(c) of the Income-tax Act which must be read in the context of the other two *provisos* of the section must be construed to relate to a settlement or disposition which is legally enforceable and not to a settlement or disposition which cannot be legally enforced. The so called agreement of the assessee to pay interest on the securities as donation to the Viceroy's War Purposes Fund was not a legally enforceable promise and, therefore, the amount paid by the assessee to the Viceroy's War Purposes Fund in the two assessment years is taxable. *Commissioner of Income-tax* v. *Kameshwar Singh* 152

3—*section* 18*A*. *See* Income-tax

4———*section* 25(3)(4), *scope and applicabilty of—a partner severing his connection with firm—rest carrying on business as before—former business, whether discontinued or succeeding the latter—Partnership Act*, 1932, *section* 43—*a firm, whether has its separate juristic existence.* 206

For the application of section 25(4) of the Income-tax Act it is not essential in every case that the successor firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers as belonging to the predecessor firm nor does it mean that

PAGE.

INCOME-TAX ACT, 1922—*concld.*

the successor firm should have taken over all the different business which the predecessor firm carried on. It is sufficient if there is substantial identity or similarity in the nature and extent of the activities carried on between the two firms.

A partnership is not in English law or Indian law a single juristic person and a firm as such has no legal personality or existence. But in the context of the Income-tax Act a firm is regarded as having its separate juristic existence apart from the partners who carry on the business.

Where one of the partners of a firm severed his connection with the firm by giving notice to the other partners in accordance with the terms of the partnership deed but the remaining partners continued the business of the firm as before;

Held, that there was not a discontinuance of the business within the meaning of section 25(3) of the Income-tax Act, but that there was succession to the business as contemplated under section 25(4) of the Act. *J. Ram N. Ram* v. *Commissioner of Income-tax* 1

————*section 25A(1) and 25A(2)—proceeding or assessment under section 25A, whether should be commenced by a notice to every member of the family—word "assessment" in clause 25A(2), meaning of.*

It is not necessary that the proceeding for assessment under section 25A should be commenced by a notice to every member of the family. By a process of fiction the Hindu undivided family is deemed to be an existing entity for the purpose of assessment under section 25A even though there had been partition of the members and the Income-tax authorities had passed order under section 25A(1) of the Act. In such a case it is not improper on the part of the Income-tax authorities to issue notice to the *Karta* of the former Hindu undivided family though it had ceased to be undivided and joint.

The word " assessment " in clause 25A(2) is not used in the sense of a proceeding for assessment for imposing liability upon the assessee. The word " assessment " used in this clause means ' computation of income ' or the determination of the amount of tax payable. *G. M. L. Chakalia* v. *Commissioner of Income-tax* 193

————*section 25A(2)* 193

INDUSTRIAL DISPUTES ACT, 1947—

————*object and scope of—Assistant Editor of newspaper, whether a workman within the meaning of the Act—*

PAGE.

INDUSTRIAL DISPUTES ACT, 1947—*concld.*

section 33, whether applicable—such employee, whether has civil right of action—entire scheme of the Act, discussed;

Held, that the petitioner, a senior Assistant Editor of a newspaper, was not a workman within the meaning of the Industrial Disputes Act, 1947, and therefore section 33 of the Act had no application.

The duty imposed on the employer under section 33 of the Act is a duty not owed to the particular employee prejudicially affected, but it is the duty owed to the public. Therefore, the employees affected have no civil right of action for a breach of the statutory obligation imposed by section 33. The remedy for breach of section 33 is the special penalty provided in section 31 of the Act, and the statutory obligation can be inforced only by that special penalty. *V. N. N. Sinha* v. *Bihar Journals, Ltd.* 688

2———*sections 2(k), 19(1), scope and applicability of—'industrial dispute', meaning of—dismissal of an employee of a company—reference to Industrial Tribunal—reference, whether without jurisdiction—Constitution of India, 1950, Article 226.*

Where an industrial company dismissed one of its employees and the Government of India referred the matter to an Industrial Tribunal under section 10(1) of the Industrial Disputes Act, 1947;

Held, that the dispute between the petitioner and the dismissed employee does not fall within the ambit of the expression 'industrial dispute' as defined in section 2(*k*) of the Industrial Disputes Act, 1947, and, therefore, the reference made by the Government of India under section 10(1) of the Act was without jurisdiction and the petitioner was entitled to a *writ* in the nature of *certiorari* for the quashing of the proceedings before the Tribunal.

The Industrial dispute referred to in section 2(*k*) of the Industrial Disputes Act, 1947, must be construed to mean not a dispute between an individual workman and the management but a dispute which though it may originate in an action with regard to an individual workman has developed into a dispute in which the majority of the workmen and the establishment were interested.

The expression "industrial dispute" in the section cannot be construed in a grammatical sense so as to mean any dispute relating to an industrial establishment. The connection of industrial dispute is a conception in the realm of economics. It connotes a dispute between capital and labour organised in a collective sense. *N. I. Assurance Co.* v. *C. G. I. Tribunal* 181

———*section 10(1)* 181

PAGE.

INTERPRETATION OF STATUTE—

1——————*rule of—Representation of People Act*, 1951, *object and scope of—all persons nominated not impleaded as party to an election petition—election petition, whether bad for non-joinder of parties—section* 82, *whether mandatory—order setting aside election on ground of non-joinder, whether without jurisdiction—High Court, whether can interfere—Constitution of India—Article* 227, *High Court's power of superintendence.*

No general rule can be laid down as to whether a provision in a statute is imperative or mere directory.

The mere use of the word " shall " in section 82 of the Representation of People Act, 1951, does not necessarily make the provision imperative, the nature of the provision must depend upon the context and the collocation in which the word " shall " is used, and must be gathered from the intention of the Legislature from the four corners of the Act itself.

Where the language employed in an Act is capable of two interpretations, the Court must always lean to the interpretation which is reasonable one and discard the literal interpretation which does not fit in with the scheme of the Act under consideration.

Though section 82, Representation of People Act, 1951, is couched in mandatory form its provision is merely directory and non-compliance with section 82 does not affect the jurisdiction of the Election Commission or the Election Tribunal to hear and determine the election petition.

That being the position, an Election Tribunal had no jurisdiction to dismiss an election petition on the ground that some of the duly nominated candidates, who had withdrawn their candidatures, were not made parties to the election petition.

The order of the Election Tribunal dismissing the election petition in the case on the ground of non-joinder was without jurisdiction and the High Court exercising its power of superintendence under Article 227 of the Constitution of India set aside that order. *S. M. Umair* v. *R. C. Singh* 956

2——————*See* Constitution, no. 8 1148

JURISDICTION—*decree passed under a provincial Act transferred for execution to a court in another province—transferee court, whether has jurisdiction to execute the decree—United Provinces Encumbered Estates Act*, 1934, *section* 14(7), *scope of—Government of India Act*, 1919, *section* 80*A*.

PAGE.

JURISDICTION—*concld.*

A decree passed by a Special Judge under the provisions of the United Provinces Encumbered Estates Act, 1934, was transferred for execution to a Court outside the province within which the property of the judgment-debtor was situate;

Held, that section 14(7) of the United Provinces Encumbered Estates Act, 1934, cannot be construed to mean that the decree of a Special Judge is deemed to be the decree of a Civil Court of competent jurisdiction even beyond the territorial jurisdiction of the State Legislature and, therefore, the transferee court had no jurisdiction to execute the decree;

Held, further, that the Legislature of the United Provinces has no power under section 80A of the Government of India Act, 1919, to make laws which would have extra-territorial application or which would effect person or property outside the province. *M. K. Khanna* v. *Raja Ram* 546

LAND ACQUISITION ACT, 1894—

1——*sections* 6, 8, 40, 41 555

2——*sections* 8, 6, 40, 41 555

3——*sections* 40, 8, 6, 41 555

4——*sections* 41, 8, 6, 40 555

LANDLORD AND TENANT—*co-sharer landlord purchasing occupancy holding and settling same with another—such settlee becomes tenant of all the co-sharers but he is liable for the settled rent only to the settler landlord—other co-sharer landlords entitled to their share of the original rent from the co-sharer landlord who purchased and made the settlement—Bihar Tenancy Act, 1885, section 22(2)—case-law, reviewed.*

When a co-sharer landlord purchases an occupancy holding and settles that with another person, that person becomes a *raiyat* of all the landlords, but he is liable to pay rent at which the settlement is made with him, only to the purchasing co-sharer landlord who had inducted him on the land, and, so far as the other co-sharer landlords are concerned there is no relationship of landlord and tenant between them and the sub-lessee from the co-sharer purchaser landlord for the purpose of realising rent, and that those other co-sharer landlords are entitled to receive their proportionate share of the original rent from the purchasing co-sharer who holds an intermediate interest in the land and is bound to pay rent to the other co-sharers. *M. C. Dutta* v. *Rai M. N. Bose* 720

MASTER AND SERVANT—*case of compulsory retirement of a Sub-Inspector of Police uder rule 75(d) of the Bihar and*

PAGE.

MASTER AND SERVANT—*concld.*

Orissa Service Code—provisions of Articles 311, 320, *whether applicable—Article* 226, *prayer for the issue of a* writ *under, whether entertainable.*

A case of compulsory retirement contemplated in rule 75(*d*) of the Bihar and Orissa Service Code is not a case of removal or dismissal from service within the meaning of Article 311 of the Constitution of India.

The interpretation of the rule is for the courts of law to decide and the interpretation placed upon it by the Executive Authorities is not binding upon the court.

Held, that the provisions of Article 320 of the Constitution of India were not attracted to the case of the petitioner.

Held, further, that no case for issue of *writ* under Article 226 of the Constitution of India had been made out. *R. A. Singh* v. *State* 708

MOTOR VEHICLES ACT, 1939 43

ORDER—

of the State of Bihar—

1948—*See* Bihar Cotton Cloth and Yarn (Control) Order, 1948 657

ORISSA TENANCY ACT, 1913—

1——*sections* 6, 56, 57, *scope of*—bazyaftidar *raiyat, whether raiyat or tenure-holder—person recorded as* shikmi *raiyat under* bazyaftidar, *whether can acquire permanent* shikmi *right.*

A person recorded in the record-of-rights as *bazyaftidar* raiyat is a raiyat within the definition as given in section 6 of the Orissa Tenancy Act and cannot be regarded as a tenure-holder.

There is nothing in sections 56 and 57 of the Orissa Tenancy Act, 1913, to indicate that an under-raiyat under a *bazyaftidar* can acquire permanent tenancy rights in the lands held by him;

Held, therefore, that a person recorded in the record-of-rights as *shikmi* raiyat under a *bazyaftidar* raiyat is a *shikmi* tenant but has no permanent *shikmi* interest in the lands held by him and cannot acquire such a right by adverse possession. *C. Kar* v. *D. Satapathy* 124

2——*sections* 56, 57, 6 124

3——*sections* 57, 56, 6 124

PAGES.

PATNA ADMINISTRATION ACT, 1915—

1————*sections* 3(1)(*f*) *and* 5, *notification reproducing section, whether delegated legislation—section* 98, *whether inconsistent with Article* 14 *of the Constitution—application for a* writ *under Article* 226 *of the Constitution—maintainability of.*

The provisions contained in sections 3(1)(*f*) and 5 of the Patna Administration Act, 1915, as amended in 1928 and the notification, dated the 25th of April, 1931, and 25th of April, 1951, in pursuance thereof are not delegated legislation and therefore, not void.

Article 14 of the Constitution is designed to protect all persons placed in similar circumstances against legislative discrimination, and if the legislature took care to reasonably classify persons for legislative purposes and if it dealt equally with all persons belonging to a well defined class, the legislation so enacted would not be open to the charge of denial of equal protection on the ground that the law did not apply to other persons and, therefore, section 98 of the Patna Administration Act, 1915, as published in the notification, dated the 25th April, 1931, in its application to the Patna Administration area is not void;

Held, therefore, on an application under Article 226 of the Constitution of India, that a *writ* restraining the Chairman of the Patna Administration Committee from enforcing the provisions contained in the notifications, dated the 25th of April, 1931, and 25th of April, 1951, cannot be granted. *Rajnarain* v. *Chairman, P. A. C.* ... 104

2————*sections* 5, 3 *and* 98 104

3————*sections* 98, 3, 5 104

PATNA HIGH COURT GENERAL RULES AND CIRCULAR ORDERS (CRIMINAL), 1916—*rule* 26 451

PARTNERSHIP ACT, 1932—*section* 43 1

PATENTS AND DESIGNS ACT, 1911—*section* 29(1)—*suit for perpetual injunction—injunction, when can be granted—mere proof of intention to infringe patent, whether justifies injunction.*

In a suit under section 29(1) of the Patents and Designs Act, 1911, for perpetual injunction it is difficult if not impossible for a plaintiff to establish a case of infringement of patents by proving the presence of the patented machines or the products manufactured out of them in the custody of persons alleged to be responsible for the infringement. Even proof of an intention to infringe apart from actual infringement, may justify an

PAGE.

PATENTS AND DESIGNS ACT, 1911—*concld.*

injunction to restrain the infringement provided it is established to the satisfaction of the Court that the alleged infringer was doing some thing which tantamounts to dealing with the patented invention.

A monopoly for the process or for machine includes a monopoly for the articles made by that process or machine. *Rohtas Industries, Ltd.*, v. *Hume Pipe Co., Ltd.* 1057

PENAL CODE, 1860—

1——————*sections* 34, 302, 304 1093

2——————*sections* 124*A*, 153*A whether void—Constitution of India, Articles* 13(1), 19(1)(*a*), 19(2).

Sections 124A and 153A of the Penal Code, 1860, are not void by reasons of Article 13(1) of the Constitution of India, on the ground that they are inconsistent with the fundamental right of freedom of speech and expression guaranteed to all citizens of India under Artcle 19(1)(*a*) of the Constitution; they are saved by clause (2) of Article 19 as it now stands after its amendment by the Constitution (First Amendment) Act, 1951, which is retrospective in operation;

Held, however, that none of the speeches came within the mischief of section 124A or section 158A, Penal Code, 1860. *D. Soren* v. *State* 1104

3——————*sections* 141, 143—*five or more persons sitting together and talking of breaking head of those who would come and demand tax—such assemblage, whether unlawful—"unlawful assembly", explained—Constitution, Article* 226—*interference.*

Where five or more persons meet for deliberation only or to arrange some plans for future action which may be brought into effect individually and not necessarily jointly that would not constitute unlawful assembly.

To constitute an unlawful assembly, the common object of that assembly must be an immediate one to be carried into effect forthwith.

Where five or more persons were sitting and conversing together that they would break the head of those who would demand payment of taxes and that they would keep their party intact;

Held, that there would be no conviction under section 143, Penal Code.

Where an order has been passed by a tribunal which is without jurisdiction altogether as a result of grave

PAGE.

PENAL CODE, 1860—*contd.*

dereliction of duty and flagrant abuse of any fundamental principles of law, the High Court would interfere under Article 226 of the Constitution. *Shaukat Ali* v. *State* ... 653

4——*sections* 143, 141 653

5——*sections* 153*A*, 124*A*. *See* no. 2, *supra* ... 1104

6——*section* 174 640

7——*sections* 302, 304, 34. *See* no. 1, *supra* ... 1193

8——*sections* 302, 396 243

9——*sections* 304, 34, 302. *See* no. 4, *supra* ... 1104

10——*sections* 396, 302 243

11——*section* 405 303

12——*section* 482, *scope and applicability of—person using trade mark resembling that of another—test of deception—question of fact—registration of offending trade mark under Trade Marks Act*, 1940—*effect—persons acting as stockists or selling agents if guilty of abetment.*

In cases under section 482 of the Penal Code, 1860, the question to be determined is whether the alleged false trade mark was likely to deceive the buyers in thinking that they were buying the goods of the actual manufacturer although in fact they were buying goods of some other manufacturer. The test in such cases is not that the trade mark in question is an exact or substantial copy of the trade mark used by the complainant, but whether the imitation of the trade mark of the complainant has been done in a manner likely to cause the trade mark in question to be mistaken for the trade mark of the complainant by the class of persons who generally buy such goods. It would be sufficient for the complainant to show that the trade mark employed by the accused bears such close resemblance to the trade mark employed by him as to be reasonably calculated to deceive the public. It is the totality of impression which is likely to be left in the mind of the probable purchaser that has to be considered. The difference of non-essential points are not important, what is important is the main idea conveyed to the mind of the purchasers by the two trade marks.

The test of comparison of the marks side by side is not a sound one since a purchaser will seldom have the two marks actually before him when he makes his purchase, and marks with many differences may yet have an element of similarity which will cause deception more specially when goods are in practice asked for by a name which denotes the mark or the device on it.

PAGE.

PENAL CODE, 1860—*concld.*

The question whether the case or package was marked in a manner reasonably calculated to deceive the buyers and whether the person who so marked the case or package acted without intent to defraud are questions of fact.

The fact that the offending trade mark has been registered under the Trade Marks Act, 1940, is no answer to the offence of using false trade mark as defined in section 480 of the Penal Code, the real question before the Court being whether the trade mark in question was likely to cause deception.

When *A* had used trade mark similar in colour and design to the trade mark used by *B*, though these two trade marks differed in detail, and where *C* and *D* were the stockists and selling agents of *A*;

Held, that *A* was guilty under section 480, Penal Code and *C* and *D* were not guilty.

The definition of false trade mark in section 480, Penal Code, refers to the marking of goods or the receptacle containing goods with a trade mark and using the case or package or any other receptacle with a mark on it and, therefore, persons acting as selling agents or stockists are not guilty of abetment under section 482/109, Penal Code.

Nehal Chand v. *State of Bihar* 515

13——————*sections* 499, 500 276

14——————*sections* 500, 499 276

PRACTICE AND PROCEDURE—*minor attaining majority in appeal—amendment not made—decision in suit, whether affected* 983

PREVENTIVE DETENTION ACT, 1950—

1——————*sections* 8(3) *and* 9, *as amended, violation of—detention, whether illegal*;

Held, allowing the *detenu's* application for a *writ* of *habeas corpus*, that there was violation of the provisions of sections 8(3) and 9 of the Preventive Detention Act, 1950, as amended inasmuch as the Chairman of the Advisory Board was not duly appointed and the reference was made beyond 30 days of the date of detention. *Karamvir* v. *State* 55

2——————*sections* 9, 8(3) 55

3——————*section* 13(2) *as amended in* 1951, *scope and applicability of—detention of a person held illegal—order passed on same facts thereafter, whether legal—Constitution, Article* 226—*Code of Criminal Procedure*, 1898, *section* 491.

PAGE.

PREVENTIVE DETENTION ACT, 1950—*concld.*

The word 'expiry' in section 13(2) of the Preventive Detention Act, 1950, as amended in 1951 refer to time. A fresh order can only be passed if fresh facts have arisen after the expiry or revocation of the previous order.

An order of detention passed against a person was held illegal by the High Court and he was ordered to be released but in spite of the order of the High Court he was not released. A fresh order of detention was passed against him based on the same facts on which the previous order had been made. On an application for a *writ* questioning the legality of the order;

Held, (*i*) that the order of the High Court declaring previous order of detention illegal did not amount to expiry of the order of detention within the meaning of section 13(2) of the Preventive Detention Act, 1950, as amended in 1951, and, therefore, the second order of detention did not require fresh facts to support the order and the order was legal, (*ii*) that the order of detention was not malafide, and (*iii*) that no relief could, therefore, be granted under Article 226 of the Constitution, 1950, or under section 491 of the Code of Criminal Procedure, 1898. *Karamvir* v. *State of Bihar* 480

PROVINCIAL SMALL CAUSE COURTS ACT, 1887—*Schedule I, Article 8—scope of—suit for a co-sharer's share of rent, whether excepted from the jurisdiction of Small Cause Court—Bihar Tenancy Act, 1885, section 22(2), rent, meaning of.*

The word "rent" used in section 22(2), Bihar Tenancy Act, 1885, means nothing other than "compensation for use and occupation" payable by a purchasing co-sharer to the non-purchasing co-sharer and the amount of that compensation has to be ascertained by calculating the proportionate share of rent that was originally payable by the tenant to the entire body of landlords.

Therefore a suit for recovery of his share of the produce rent instituted by a co-sharer landlord is not a suit for rent so as to be excepted from the cognizance of a small Cause Court. *Manorma Dasi* v. *Madanchand* ... 782

RECEIVER—*order appointing receiver, whether appealable—receiver's remuneration, whether realisable by the execution against person in possession of the property—Code of Civil Procedure, 1908, Order XL, rule 2.*

An order fixing remuneration of a receiver is in the nature of a special order coming within the scope of Order XL, rule 2, Code of Civil Procedure, 1908, and therefore, such an order is not appealable.

Where appeal against an order appointing a receiver is allowed and the receiver is removed he is entitled to

PAGE.

RECEIVER—*concld.*

recover his remuneration for the period he has worked by execution against the party in possession of the property. *G. P. Missir v. A. Majid* 348

REPRESENTATION OF PEOPLE ACT, 1951—

1————*object and scope of* 956

2————*section* 82, *whether mandatory* 956

RIPARIAN OWNERS—*rights of—rights, whether depend on grant or ownership—riparian owners, whether can erect a dam across a stream—riparian lands, what constitutes—natural stream defined.*

It is a mistake to suppose that a natural stream must have its origin in a mountain spring, or that it must flow continuously throughout the year, and must at every single point of its course flow through a clearly defined channel. Even if such a stream does not flow continuously throughout the year it will be regarded as a natural stream.

A river may be fed by the rains directly without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it becomes dry.

The rights of a riparian owner over a natural stream do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturae*. Each riparian owner has the right to use the water provided he does not interfere with the quantity or the quality of the water to which the lower riparian owner is entitled.

In India riparian land must be confined to land which is on the bank of a stream and which extends from the bank to a reasonable depth inland.

When a riparian owner acquires a right by prescription to maintain a *dam* over a stream, it does not obtain a kind of immunity in respect of all other obstruction that may arise in the natural course of things by reason of the existence of the *dam*.

The obstruction caused to the free flow of water in the stream by accumulation of silt owing to existence of a *dam*, amounts to a "nuisance" and the riparian owner who is injured thereby may take steps to avoid it even by going on the other person's land, if only he can do it peacefully. *Ramsewak* v. *Ramgir* 937

SALE OF GOODS ACT, 1930—*section* 59, *scope of—warranty, when may exist—subject matter of sale neither in existence nor ascertained at the time of contract, whether a mere warranty—buyers option to split up claim for*

PAGE.

SALE OF GOODS ACT, 1930—*contd.*

damages—quantum of damages controlled by sections 73, 74, Contract Act, 1872.

A warranty properly so called, can only exist where the subject matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract and is a collateral engagement that the specific thing so sold possesses certain qualities.

Where, however, the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity; and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.

Under section 59 of the Sale of Goods Act, 1930, the buyer has an option either to split up his damages one covering the general damages arising out of the depreciation of the value in the object of sale for the non-compliance of the warranty stipulated in the contract and the necessity of repairing the defect in the objects sold contrary to the terms of the contract or to combine the two damages into one. In that view of the matter, the buyer has apart from the remedy available to him by way of counter-claim two other remedies—(1) he may bring an action for the breach of warranty, (2) or in case he has not paid the price, he may plead the breach of warranty in reduction or extinction of the price in the seller's action, and may also maintain an action or set up a counter-claim for any further damage he may have suffered.

The words of section 59(1)(*a*) of the Act " has set up " do not cover only the case where the action for further damage is subsequent to an action in which the breach of warranty is set up by the buyer in defence. The sequence of action has to surrender itself to the principle of law whereby the circuity of action has to be avoided as far as possible, and, therefore, it is permissible that not having paid the price, the same being due, the purchaser may only recover his special damages, if this be the first action, and show the diminished value when called on to pay the price.

The Act does not include in itself any specific rule as to quantum of damages to be awarded in case of breach of warranty and for that purpose the provisions of section 59 of the Act are controlled in matters of quantum of damages by the provisions laid down in sections 73 and 74 of the Contract Act, 1872.

PAGE.

SALE OF GOODS ACT, 1930—*concld.*

It is the general intention of the law that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed.

Section 74 of the Contract Act is not limited to the case of liquidated damage or pre-estimated damage only. It covers the case of penalty as well. The distinction between liquidated damages and penalty is to be found in this, that the essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party; the essence of liquidated damages is a genuine convented pre-estimate of damage.

Two machines were sold for one lakh and out of it Rs. 75,000 was paid and for the balance it was agreed that in case the vendor failed to put the two machines in satisfactory working order the purchaser would not be liable to pay the balance and the vendor further agreed that in case he failed to instal the machines and put them in working order the vendor would indemnify and pay to the purchaser all losses and damages that the purchaser may be put to or suffer. The machines were installed as agreed but they were not put in working and running order. The purchaser brought a suit against the vendor for recovery of damages. The vendor in defence pleaded a counter-claim for the unpaid balance of the price together with interest and other costs and expenses. On a plea by the plaintiff that the defendant had forfeited the balance under the agreement;

Held, that the term in the contract that the vendor would forfeit the balance of the unpaid price if he failed to instal the machines and put them in satisfactory working order fit for production of articles intended to be produced thereby is a warranty and not a condition and therefore the plaintiff is entitled under section 59 of the Sale of Goods Act, 1930, to set up a claim for damages for the breach of the contract and cannot claim forfeiture of the balance of the unpaid price. *Kanak Kumari* v. *C. L. Khattry* 662

SATHI LANDS (RESTORATION) ACT, 1950—*whether void—Constitution, Article* 14.

In enacting the Sathi Lands (Restoration) Act, 1950, what the legislature has done is to single out two individuals and deny them the right which every Indian citizen possesses to have his rights adjudicated upon by a judicial tribunal in accordance with the law which applies to his case.

The meanest of citizens has a right to access to a court of law for the redress of his grievances and it is of this right that the two individuals have been deprived by the Act.

PAGE.

SATHI LANDS (RESTORATION) ACT, 1950—*concld.*

It is impossible to conceive of a worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed upon any body else and against which even the right of complaint is taken away and hence the Act violates the fundamental rights guaranteed under Article 14 of the Constitution and is, therefore, void.

Held, therefore, that a *writ* under Article 226 of the Constitution in the nature of *mandamum* shall issue directing the Bihar State Government not to take any steps in pursuance of the Sathi Lands (Restoration) Act, 1950, or to interfere in the possession of the lessees in respect of the lease referred to in the Act.

What the equal protection guaranteed under Article 14 of the Constitution aims at is to strike down hostile discrimination or oppression of inequality. As the gurantee applies to all persons similarly situated, it is certainly open to the legislature to classify persons and things to achieve particular legislative objects, but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view. *R. P. N. Sahi* v. *State of Bihar* 375

SUPREME COURT APPEAL—*valuation of subject matter in dispute of the Constitution—Constitution, Article* 133(1), *whether applicable or case governed by the old law—Code of Civil Procedure*, 1908, *section* 110.

Where a suit was filed before the passing of the Constitution and was found in value to be less than Rs. 20,000 but more than Rs. 10,000, *held*, that the application for leave to appeal to the Supreme Court was not incompetent on the ground of valuation. The question of valuation was governed by the old law, i.e., section 110, Code of Civil Procedure, 1908, and not by Article 133(1), Constitution. The Article had no retrospective effect. *N. P. Sukul* v. *R. K. Misra* 400

TRADE MARKS ACT, 1940 515

TRANSFER OF PROPERTY ACT, 1882—*section* 68, *scope of—usufructuary mortgage—mortgagor not in possession—mortgagee not getting possession—suit by mortgagee for possession—maintainability—representative of a deceased, how to be chosen—Code of Civil Procedure*, 1908, *Order XXII.*

The provisions of section 68, Transfer of Property Act, 1882, are designed for the purpose of the indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property, and they are provisions of an enabling nature. These provisions do not preclude a mortgagee who has been disturbed by a person claiming without

PAGE.

TRANSFER OF PROPERTY ACT, 1882—*concld.*

title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession. There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which section 68 of the Act empowers him to claim;

Held, *therefore*, that a usufructuary mortgagee can sue for recovery of the mortgaged property even though his mortgagor was, not in possession of the mortgaged property at the date the mortgage bond was executed.

Where there are two rival claimants to the estate of a deceased, the plaintiff or the decree-holder has to choose the legal representative. One who appears to have the *prima facie* title may be preferred.

The conditions necessary for making the representation effective against the true representative are that the plaintiff or the decree-holder must have acted *bona fide* and the decree obtained must be free from fraud or collusion.
A. Kumar v. *Mt. Sanjoga* 903

UNITED PROVINCES ENCUMBERED ESTATES ACT, 1934 ... 540

NOTES OF CASES AFFIRMED OR REVERSED.

SUPREME COURT DECISIONS.

1. I. L. R. 32 Pat. 364, reverses a decision, dated the 30th March, 1951 of (Ramaswami and Rai, JJ.) in M. A. 19 of 1951. The High Court judgment is reported as (1951) A. I. R. (Pat.) 157.

2. I. L. R. 32 Pat. 375, reverses a decision, dated the 3rd January, 1952 of (Ramaswami and Sarjoo Prosad, JJ.) in M. J. C. 204 of 1950. The High Court judgment is reported as (1952) A. I. R. (Pat.) 194.

3. I. L. R. 32 Pat. 529, affirming a decision, dated the 22nd December, 1952 of (Ramaswami and Sarjoo Prosad, JJ.) in M. J. C. nos. 238 and 242 of 1952. The High Court judgment is reported as I. L. R. 32 Pat 71.

LETTERS PATENT DECISION.

1. I. L. R. 32 Pat. 124, reverses a decision, dated the 21st November, 1946 of B. K. Ray, J., in Second Appeal.

FULL BENCH DECISION.

I. L. R. 32 Pat. 574, discusses I. L. R. 27 Pat. 52, F. B.

THE
INDIAN LAW REPORTS
PATNA SERIES

REFERENCE UNDER THE INCOME TAX ACT, 1922.

1952.

November, 26, 27.

Before Ramaswami and Sarjoo Prosad, JJ.;

J. RAM N. RAM

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (Act XI of 1922), section 25(3) (4), scope and applicability of—a partner severing his connection with firm—rest carrying on business as before—former business, whether discontinued or succeeding the latter—Partnership Act, 1932 (Act IX of 1932), section 43—a firm, whether has its separate juristic existence.

For the application of section 25(4) of the Income-tax Act it is not essential in every case that the successor firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers as belonging to the predecessor firm nor does it mean that the successor firm should have taken over all the different businesses which the predecessor firm carried on. It is sufficient if there is substantial identity or similarity in the nature and extent of the activities carried on between the two firms.

A partnership is not in English law or Indian law a single juristic person and a firm as such has no legal personality or existence. But in the context of the Income-tax Act a firm is regarded as having its separate juristic existence apart from the partners who carry on the business.

Where one of the partners of a firm severed his connection with the firm by giving notice to the other partners in accordance with the terms of the partnership deed but the remaining partners continued the business of the firm as before;

Held, that there was not a discontinuance of the business within the meaning of section 25(3) of the Income-tax Act but that there was succession to the business as contemplated under section 25(4) of the Act.

*Miscellaneous Judicial Case no. 100 of 1949, in the matter of the Income-tax Act XI of 1922.

1952.

J. RAM N. RAM v. COMMISSIONER OF INCOME-TAX.

Hassan Kassam v. *Commissioner of Income-tax*(1), *James Shipstone and Sons, Ltd.* v. *Morris*(2), *Commissioner of Income-tax, Madras* v. *Karuppiah*(3) and *Income-tax Commissioners for City of London* v. *Gibbs*(4), relied on

The Commissioner of Income-tax, Burma v. *N. N. Firm*(5), distinguished.

Reference under section 66(1), Income-tax Act, 1922.

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

Tarkeshwar Pd., *S. V. Nandkeolivar*, *Madan Kishore* and *B. N. Jain*, for the assessee.

Gopal Prasad, for the Department.

RAMASWAMI AND SARJOO PROSAD, JJ.—Under section 66(1) of the Income-tax Act the Appellate Tribunal has referred the following question of law for the determination of the High Court, viz.,

" whether on the facts and in the circumstances of this case the Tribunal was right in holding that there was neither a discontinuance in nor any succession to the appellant's business as contemplated by section 25(3) and section 25(4) of the Income-tax Act ".

The material facts leading up to this reference are not in dispute. The assessee was a firm named Jittanram Nirmalram constituted of four partners, viz., Rai Bahadur Ramchandram, Lakshmi Narain Bhadani, Vishnu Prasad Bhadani and Bhagwandas Bhadani. It is stated that on 9th November, 1942, Bhagwandas gave a notice severing his connection with the firm and commencing a new business of his own known as Nirmalram Hari Prasad. At the time when Bhagwandas gave the notice and severed his connection his share in the profits and assets was computed to be over one and a half lacs which amount

(1) (1948) I. T. R. 19.
(2) (1929) 14 Tax Cas. 413.
(3) (1941) I. L. R. (Mad.) 220.
(4) (1942) App. Cas. 402.
(5) (1938) I. L. R. 11 Rang 501, S. B.

1952.

J. RAM N. RAM v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

was paid to him partly in cash and partly by allotting to him a cloth shop previously carried on by the firm. It is conceded that after 9th November 1942 the firm continued to deal in grain, hardware, sugar, petrol, kerosene oil and also carried on money-lending business as before. The assessee claimed before the Income-tax Department that on account of the circumstance that Bhagwandas had severed his connection with the firm there was a discontinuance of business within the meaning of section 25(4) of the Income-tax Act. This argument was rejected by the Income-tax Officer. The assessee made an appeal to the Appellate Assistant Commissioner and also to the Income-tax Tribunal. His appeal was unsuccessful. At his instance the Appellate Tribunal has referred the question of law which has been formulated above.

When the case first came before the High Court Mr. Jain on behalf of the assessee conceded that he would not press the argument that there was discontinuance of business within the meaning of section 25(3) of the Income-tax Act. But the learned counsel laid stress on the argument that there was succession within the meaning of section 25(4) and the Income-tax authorities have mis-applied the law in refusing to grant relief to the assessee under section 25(4) of the Income-tax Act. The High Court was not however satisfied that the statement of the case was sufficient to enable it to determine the question. For this reason the High Court referred the case back to the Appellate Tribunal to make a further statement on two questions of fact, viz.—

(1) whether the business of the firm Jittanram Nirmalram as constituted before 9th November, 1942, was at any time charged under the provisions of the Income-tax Act of 1918 (Act VII of 1918);

and

(2) whether upon the facts proved the firm Jittanram Nirmalram was dissolved on 9th November, 1942, as a result of the severance of Bhagwandas Bhadani, or, in the alternative, whether there was no dissolution of the partnership but Bhagwandas Bhadani merely retired from being a partner of the firm.

1952.

J. RAM N. RAM v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PRASAD, JJ.

We have now before us the additional statement of the case sent by the Appellate Tribunal and we have heard further arguments on behalf of the assessee and on behalf of the department on the manner in which the question referred to us should be answered.

It was contended by the learned Standing Counsel that there was no case of succession within the meaning of the statute since Bhagwandas Bhadani having severed his connection with the firm was granted the Gaya cloth branch of the business partly in lieu of his share of the assets. The argument was stressed that in order to claim the benefit of section 25(4) there must be a succession to the entire quantum of business. It was pointed out that in the present case there was not only a change in the constitution of partnership but the Gaya cloth branch did not constitute a portion of the business of the assessee firm after Bhagwandas Bhadani severed his connection with it. In support of his argument learned counsel relied upon *In Re: The Commissioner of Income-tax, Burma* v. *N. N. Firm*(1) in which it was held by the Rangoon High Court that one person succeeds another person in carrying on a business, profession, or vocation, when he succeeds his predecessor in carrying on the business as a whole and where a business was split up and thereafter another person carried on part of the business he did not succeed his predecessor in carrying on the business within section 26(2) of the Income-tax Act. The principle of that case cannot however be applied to the present case for the material facts are different. In the Rangoon case it was found not merely that the business was split up but also that there was no continuity in carrying on the business. It was actually found by the Income-tax authorities that there was an actual cessation of business for sometime before the new firm commenced to function. Upon these facts the Rangoon High Court was obviously right in concluding that there was no case of succession made out

(1) (1933) I. L. R. 11 Rang. 501, S. B.

within the meaning of section 26(2) of the Income-tax Act. In the present case, however, it is not alleged on behalf of the department that there was no continuity in carrying on the business. For the application of section 26(2) or section 25(4) it is not essential in every case that the successor firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers as belonging to the predecessor firm nor does it mean that the successor firm should have taken over all the different businesses which the predecessor firm had carried on. In our opinion it is sufficient if there is substantial identity or similarity in the nature and extent of the activities carried on between the two firms. This principle is supported by a decision of this Court in *Hassan Kassam* v. *Commissioner of Income-tax*(1) in which there was evidence to show that some of the assets and liabilities of the old firm were retained by one of the partners Kassam Manji and fresh capital was introduced by the sons into the new partnership firm. The same business was however carried on at the same place by a successor firm. In view of this circumstance the High Court rejected the argument that there was any alteration in the identity of the business or that there was no succession to the business which was being carried on by the deceased Kassam Manji under the old partnership. The same matter is put clearly by Rowlatt, J., in an English case *James Shipstone and Sons, Ltd.* v. *Morris*(2): "Another point Mr. Latter laid some stress on was this. He said you cannot be successor to a part of a trade. He cited Mr. Justice Bray's remarks in a case in the "Law Times", the name of which I forget for the moment. I think that is quite sound when you get two parts of a trade, as an omnibus business separate from a tramway business, as it may very well be, but I do not think it means that if what is succeeded to is not the same extent of trade or

(1) (1948) I. T. R. 19.
(2) (1929) 14 Tax. Cas. 418.

1952.

I. RAM
v.
COMMISSIONER OF INCOME-TAX,
RAMASWAMI AND SARJOO PRASAD, JJ.

even does not include a particular line of customers, it necessarily follows that there cannot be a successor to the trade, looking at it broadly. There must be two businesses, one left and the other taken. It does not mean to say you have only taken part of the business in the sense that what you have got is not quite so extensive as what went before". Coming to the facts of the present case the Appellate Tribunal has found that apart from the circumstance that Bhagwandas Bhadani was allotted the Gaya cloth branch the old business of Jittanram Nirmalram had continued retaining its good will and the balance of its assets and its own activities. To quote the language of the Appellate Tribunal

> "there had been no break in or discontinuance in the business of the firm".

The Income-tax Appellate Tribunal's order dated the 23rd February, 1948, also shows that in spite of the fact that Bhagwandas severed his connection with the firm the old business had continued on retaining its goodwill and the balance of its assets and its manifold activities in grain, hardware, sugar, petrol and kerosene oil and also its money-lending business. Upon the facts found by the Tribunal and reiterated in the statement of the case we think that there was substantial identity of the business which was carried on by the predecessor firm and by the newly constituted firm after Bhagwandas Bhadani had severed his connection. The argument of the learned Standing Counsel on this point must fail.

But the question formulated by the Tribunal cannot be answered in favour of the assessee until there is a further finding that the successor firm is a "different person" within the meaning of section 25(4) of the Income-tax Act. The material part of the section states:

> "Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), carrying on any business profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is

succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period.....".

It is also necessary to consider the provisions of section 26(2) in this context. Section 26(2) states:

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year".

On this question the additional statement submitted by the Appellate Tribunal contains a finding that the firm of Jittanram Nirmalram was not dissolved on 9th November 1942 but Bhagwandas Bhadani merely retired being a partner. On the basis of this finding it was argued by the learned Standing Counsel that there was no break or discontinuance in the existence of the firm Jittanram Nirmalram and there was no case of succession within the meaning of section 25(4) or section 26(2) of the Income-tax Act. The argument cannot possibly be accepted for in reaching the finding that the firm was not dissolved on 9th November 1942 the Appellate Tribunal has committed an error of law. On behalf of the assessee our attention was drawn to the notice given by Bhagwandas Bhadani, printed at page 1 of the paper book. From this notice it appears that there was a clause in the deed of partnership which empowered each of the partners to exercise the right of dissolving partnership at will. In accordance with this clause Bhagwandas Bhadani exercised his right of dissolving partnership on the Diwali day of Sambat 1999 corresponding to 8th November, 1942. Section 43(1) of the Partnership Act states that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. Section 43(2) provides that the firm is dissolved as from the date mentioned in the notice as the date of dissolution

1952.

J. RAM N. RAM v. COMMISSIONER OF INCOME-TAX

RAMASWAMI AND SARJOO PRASAD, JJ.

or, if no date is mentioned, as from the date of the communication of the notice. Applying the section it is clear that in the present case the partnership was dissolved when Bhagwandas Bhadani gave notice and that the date of dissolution was 8th November, 1942. It was nevertheless contended by the learned Standing Counsel that even after the dissolution of the partnership all the partners with the exception of Bhagwandas Bhadani carried on the same old business retaining its goodwill and the balance of its assets and its own activities. Learned Standing Counsel based the argument on the finding of the Appellate Tribunal that there was no break or discontinuance of the business of the firm. The contention is that the newly registered firm of partners to the exclusion of Bhagwandas Bhadani was not a different entity but the same old entity continued and there was no warrant for the application of section 25(4) of the Income-tax Act. The case therefore resolves itself into the question whether the newly constituted firm consisting of Ramchandram, Lakshmi Narain Bhadani and Vishnu Prasad Bhadani was a different entity to that of the old firm which consisted of these partners and also Bhagwandas Bhadani. It is true that the Appellate Tribunal has found that the old business continued retaining its goodwill and the balance of its assets and the activities of the new firm were in grain, hardware, sugar, petrol, kerosene oil and money-lending business just as the old firm continued its activities. It is also true as the learned Standing Counsel pointed out that the new firm carried on the business in the name of the old firm, viz., Jittanram Nirmalram. But these considerations are not very material in deciding whether the new firm was an entity different in character from that of the predecessor firm Jittanram Nirmalram. As already observed the old firm of Jittanram Nirmalram stood dissolved from 9th November 1942 as a result of the notice given by Bhagwandas Bhadani. The new firm consisting of the remaining partners must have been registered on a subsequent date

1952.

J. RAM N. RAM v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

and though it was named Jittanram Nirmalram it must be held to be a " different person " since a new partnership of three persons is a different entity from a dissolved partnership of four persons though three of the partners may be common. It is necessary to remember in this connection that a partnership is not in English law or in Indian law a single juristic person and a firm as such has no legal personality or existence. The partners merely carry on the business both as principals and as agents for each other within the scope of the partnership business. A firm's name is a mere expression and not a legal entity although for procedure and convenience it may be used for the sake of suing and being sued. But in the context of the Income-tax Act a partnership as such is a distinct legal entity. Section 3 which deals with charge of income-tax states that income-tax shall be charged for any year.....in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually. Reference should also be made to section 48 which mentions

" any individual, Hindu undivided family, company, local authority, firm or other association of persons or any partner of a firm or member of an association individuallly ".

Section 55 which is the charging section as regards super-tax makes reference to any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons, not being a registered firm, or the partners of the firm or members of the association individually. On the examination of these provisions it is clear that for the purpose of income-tax a firm is regarded as having its separate juristic existence apart from the partners who carry on the business. This view finds support from the decision of the Madras High Court in *Commissioner of Income-tax, Madras* v. *Karuppiah*(1) in which a

(1) I. L. R. (1941) Mad. 220.

1952.

J. RAM
N. RAM
v.
COMMISSIONER OF INCOME-TAX

RAMASWAMI AND SARJOO PROSAD, JJ.

partner carried on business of partnership after the dissolution and it was contended on his behalf that there was succession to the business within the meaning of section 26(2) of the Income-tax Act. The contention was accepted by the High Court and it was held that for the purpose of assessment of income-tax, a firm and its partners were different persons, and a person who carried on a business as sole owner after dissolution of partnership did so as a different person from the firm. The same principle is laid down in *Income-tax Commissioners for City of London* v. *Gibbs*(1) in which the question arose whether partnership of four stock-brokers who took in a fifth partner, ceased to carry on business and was succeeded by the partnership of five within the meaning of sub-rule (1) of rule 9, schedule D to the Income-tax Act, 1918, which provided that if a person charged under schedule D ceased within the year of assessment to carry on the trade in respect of which the assessment was made and was succeeded by another person, the commissioners shall adjust the assessment as directed. It was held by the House of Lords reversing the decision of the Court of Appeal that though in English law a partnership was not a single juristic person, the scheme of the Income-tax legislation treated the partnership as a legal entity for the purpose of assessing revenue and there was succession to the business within the meaning of rule 9, sub-rules (1) and (2). Applying the principle of these authorities it is clear that in the present case there has been succession to the business within the ambit of section 25(4) of the Income-tax Act and the argument on behalf of the assessee on this part of the case must prevail.

For the reasons we have expressed we hold that the Tribunal was right in holding that there was not a discontinuance of the business but that the Tribunal was not right in holding that there was no succession

(1) (1942) A. C. 402.

to the petitioner's business as contemplated under section 25(4) of the Income-tax Act.

The reference is accordingly answered in favour of the assessee. But since the question of discontinuance has been answered in favour of the department there will be no order as to costs. The assessee is entitled to withdraw the amount of Rs. 100 which he has deposited with the Appellate Tribunal.

Reference answered.

S. H.

CRIMINAL REFERENCE.

Before Narayan and Ahmad, JJ.

STATE

v.

A. N. SINGH.*

1952.

December, 2, 8.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 439(5), *bar of, whether operates—State preferring no appeal against acquittal but moving Sessions Court—Additional Sessions Judge referring mater to the High Court.*

Accused persons were acquitted by a magistrate of an offence under section 144, Penal Code. The State preferred a revision before the Sessions Court. The Additional Sessions Judge referred the matter to the High Court for setting aside the order of acquittal;

Held, discharging the reference, that section 439(5), Code of Criminal Procedure, 1898, operated as a bar.

Emperor v. *Sukhdeo*(1), *Nathu Mal* v. *Abdul Haq*(2), *Paras Ram* v. *Emperor*(3), *Emperor* v. *Ram Deo alias Sadho*(4),

*Criminal Reference no. 4 of 1952, reference made by Mr. Ram Jivan Sinha, Third Additional Sessions Judge, Patna, in his letter no. 12, dated the 21st December, 1951 /3rd January, 1952.

(1) (1916) A. I. R. (All.) 316.
(2) (1930) A. I. R. (Lah.) 159.
(3) (1931) A. I. R. (Lah.) 145.
(4) (1942) A. I. R. (Oudh) 443.

1952.

STATE v. A. N. SINGH.

Gogey v. *Emperor*(1) and *Emperor* v. *Kamal Dattatraya Sohoni*(2), distinguished.

Emperor v. *Jamunadas Nathji Shah*(3), *Faujdar Thakur* v. *Kasi Chowdhury*(4) *A. T. Sankaralinga* v. *Narayana Mudaliar*(5), *D. Stephens* v. *Nosibolla*(6) and *Logendranath Jha* v. *Shri Polai Lal Biswas*(7), relied on.

Criminal reference by the Additional Sessions Judge, Patna.

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

Standing Counsel, for the reference,

Ramanandan Sinha and *L. M. Sharan*, against the reference.

NARAYAN, J.—This is a reference by the Third Additional Sessions Judge, Patna, recommending that an order of acquittal passed by Mr. S. M. Ozair, Judicial Magistrate, Dinapur, in a case under section 144 of the Penal Code be set aside.

The occurrence giving rise to the case had taken place on 11th May, 1950, at a place called Bikram Hat near Bikram police-station. Several persons were found shouting and brandishing their weapons, and on hearing the shouts the officer in charge of the Bikram police-station went to the spot and ordered them to disperse. This order was disobeyed, and the ring-leaders were arrested. Fourteen persons were put on trial under section 144 of the Penal Code, and on 27th December 1950 a petition was filed by the Assistant Public Prosecutor praying that the case be split up and there be two separate trials each directed against one set of accused persons who formed one party. This

(1) (1945) A. I. R. (Oudh.) 20.
(2) (1943) A. I. R. (Bom.) 304.
(3) (1937) A. I. R. (Bom.) 153.
(4) (1914) I. L. R. 42 Cal. 612.
(5) (1922) 69 Ind. Cas. 615, F. B.
(6) (1951) A. I. R. (S. C.) 196.
(7) (1951) A. I. R. (S. C.) 316.

application was rejected by the learned magistrate. But on 6th April, 1951, the learned magistrate acquitted the accused persons on the ground that their joint trial was illegal. The learned Sessions Judge has recommended that the order of acquittal be set aside, firstly, on the ground that the learned magistrate should not have rejected the Assistant Public Prosecutor's prayer for the splitting of the case into two parts on the 27th December, 1950, and, secondly, on the ground that there is no finding by the learned magistrate to the effect that the accused are not guilty.

It is true that though the learned magistrate refused to accede to the prayer of the Assistant Public Prosecutor for splitting up the case in December 1950, in April 1951 he acquitted the accused persons on the ground that a joint trial of all of them was not permissible. The question which arises for our consideration, therefore, is whether in the circumstances this is a fit case in which we should exercise our revisional jurisdiction. Before I discuss the question of law which has been canvassed before us, I should like to point out that the State have not been quite vigilant so far as this case is concerned. If the order dated 27th December 1950 was not a proper order, and *prima facie* it does appear that that order was not a proper order, then it was certainly open to the State to move the higher Courts against that order. Even against the final order which was passed by the learned magistrate on 6th April 1951 the Sessions Judge could not be moved by the State before 3rd August 1951. I have already stated that the occurrence had taken place on 11th May 1950. Though several persons arrayed on two opposite sides had been seen brandishing weapons in Bikram Hat, there was no assault, and therefore the only section of the Penal Code under which those persons were prosecuted was section 144. If the State was very keen for bringing to book the persons who had constituted the unlawful assembly, they should have acted quite promptly, and apart from what I have

1952.

STATE v. A. N. SINGH.

NARAYAN, J.

pointed out above, it was open to the State to file an appeal against the acquittal that was recorded by the learned magistrate on 6th April 1951. No appeal was preferred by the State, and there was considerable delay in moving the learned Sessions Judge against the order of acquittal. Because there was no appeal preferred against the order of acquittal, sub-section (5) of section 439 would come into operation, and this sub-section lays down that where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The learned Standing Counsel submitted a fair argument in the case, and he conceded that the State being a party it ought to have appealed against the order of acquittal passed by the learned magistrate on 6th April 1951. But the learned Standing Counsel submitted that sub-section (5) would not operate as a bar in this case because there has been a reference or a recommendation by the Additional Sessions Judge. In my opinion, it makes no difference if our revisional jurisdiction has to be exercised on a reference made by the learned Additional Sessions Judge. Sub-section (5) will operate as a bar even if the State instead of coming to this Court direct has come through the Additional Sessions Judge and on a reference made by him. It is needless to point out that the Sessions Judge makes a reference to the High Court only to enable it to exercise its powers of revision. And if there is a legal bar to the exercise of the powers of revision by this Court, then the reference by the Sessions Judge recommending the exercise of the powers of revision will not remove that legal bar. In fact, the Sessions Judge could himself have rejected the application in revision filed before him on the ground that because an appeal lies and no appeal had been brought he could not recommend to the High Court for the exercise of its revisional powers. But, even if this was not done, it seems

manifest that simply because of a reference, the High Court cannot, inspite of the provision contained in sub-section (5) of section 439, exercise its revisional powers in a case in which an appeal lay but was not brought. It is to be noted that it is not a third party who is moving this Court by way of revision, but it is the State itself which was aggrieved by the order of acquittal passed by the learned magistrate on 6th April 1951. The learned Standing Counsel has cited some decisions in support of his view that when it is a case of reference the High Court can exercise its revisional powers inspite of sub-section (5) of section 439. One of the cases cited by the learned Counsel is the case of *Emperor* v. *Sukhdeo*(1) in which one Sukhdeo had been ordered by a magistrate to furnish security to be of good behaviour under section 112 of the Code of Criminal Procedure. The order was an appealable order, but Sukhdeo had preferred no appeal against that order. He submitted to the order and offered a security bond executed by two persons who were willing to stand surety for him. The magistrate refused to accept those two persons as sureties, and Sukhdeo then applied to the Sessions Judge asking him to examine the record and, if necessary, to invoke the interference of the High Court. It was then that the learned Sessions Judge examined the records, and on examination of the record he found that the proceedings before the magistrate had been altogether irregular and that Sukhdeo had been bound down without any enquiry. On these facts a Single Judge of the Allahabad High Court thought that an interference was necessary. I do not think this ruling can be cited as an authority in this case before us in support of the contention that sub-section (5) will not be taken to be a bar whenever there is a reference by the Sessions Judge. Two cases of the Lahore High Court were also cited by the learned Standing Counsel, and they are

(1) (1916) A. I. R. (All.) 316.

1952.

STATE v. A. N. SINGH.

NARAYAN, J.

Nathu Mal v. *Abdul Haq*(1) and *Paras Ram* v. *Emperor*(2). In the latter case the petition of revision had been filed by a third person who was an Advocate, and so far as the former case is concerned it is not clear who had moved the Sessions Judge. The learned Standing Counsel, however, cited a case of the Oudh Chief Court, *Emperor* v. *Ram Deo alias Sadho*(3) which, in his opinion, was a direct case in point. This is also a decision by a Single Judge, and though sub-section (5) of section 439 was referred to in this case, I say with the greatest respect, that its implications were not fully considered. Even from the Oudh Chief Court there is a later decision reported in *Gogey* v. *Emperor*(4) where it was distinctly pointed out that when the Sessions Judge makes a reference to the High Court to exercise its powers of revision, the provisions of sub-section (5) must be applied if they are found applicable. The view taken in this later Oudh case does not support the view of the learned Standing Counsel, and if I am permitted to say so, it does not also support the view taken in the other Oudh case decided by Agarwal J. The learned Standing Counsel also referred to a Bombay decision which was a Division Bench decision reported in *Emperor* v. *Kamal Dattatraya Sohoni*(5). In this case there is no discussion as to the applicability or otherwise of sub-section (5) of section 439, there being only a general observation to the effect that there are good many instances in which applications in revision, made on behalf of a party who has not appealed, have been entertained, and that on that principle the application before their Lordships should be entertained. Here, as I have already pointed out, it is the party (the party in this case being the State) which is moving this Court to exercise its revisional jurisdiction. This

(1) (1930) A. I. R. (Lah.) 159.
(2) (1931) A. I. R. (Lah.) 145.
(3) (1942) A. I. R. (Oudh) 443.
(4) (1945) A. I. R. (Oudh) 20.
(5) (1943) A. I. R. (Bom.) 304.

Bombay decision also does not, therefore, really support the contention urged before us by the learned Standing Counsel. On the other hand, there are several Division Bench decisions which have laid down not only that the revisional powers should be sparingly exercised but that section 439(5) is a bar to the party, who had the right of appeal, moving the High Court in revision. In *Emperor* v. *Jamnadas Nathji Shah*(1) their Lordships of the Bombay High Court relying on section 439(5) of the Code of Criminal Procedure held that the revisional power of the Court could not be exercised, even though there had been an illegal conviction of the accused by a second-class magistrate who had no jurisdiction in the matter. In *Faujdar Thakur* v. *Kasi Chowdhury*(2) Jenkins, C. J., pointed out that the pronouncements of the High Courts of Madras, Bombay and Allahabad consistently support the view that as a general rule it is expedient not to interfere, in revision at the instance of a private person, with an acquittal after trial by the proper tribunal, and that an application for that purpose should be discouraged on public grounds. His Lordship did observe that though the Court has jurisdiction to interfere on revision with an acquittal, this jurisdiction should be exercised sparingly and only when it is urgently demanded in the interests of public justice. I have already pointed out that in this case the State was not quite prompt in taking action against the orders of the magistrate which were considered illegal. And the occurrence, if it can at all be called an occurrence, was of a very simple nature. Probably, because of the petty nature of this occurrence the State was not prompt in taking action and in moving against the orders of the learned magistrate which it now regards as illegal and improper. In this Calcutta case there had been a difference of opinion between Jenkins C. J. and Teunon J., and the matter came for consideration before Fletcher J., who observed that the

(1) (1937) A. I. R. (Bom.) 153.
(2) (1914) I. L. R. 42 Cal. 612.

1952.

STATE v. A. N. SINGH.

NARAYAN, J.

rule laid down by Jenkins C. J., and in several other cases by other High Courts is founded on grounds of public interest and convenience and ought to be adhered to. This Calcutta case was followed by a Full Bench of the Madras High Court reported in *A. T. Sankaralinga Mudaliar* v. *Narayana Mudaliar*(1), and the observation of Jenkins C. J., was quoted with approval. We have now got two decisions of the Supreme Court which, in my opinion, fully solve the question which has been raised before us. In *D. Stephens* v. *Nosibolla*(2) their Lordships laid down that the revisional jurisdiction conferred on the High Court under section 439 is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government had a right of appeal under section 417, and that such revisional jurisdiction should be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. His Lordship Chandrasekhara Aiyar J., further observed that this jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. The other decision of the Supreme Court is reported in *Logendranath Jha* v. *Shri Polai Lal Biswas*(3) in which their Lordships laid down that though sub-section (1) of section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a Court of Appeal by section 423, sub-section (4) of section 439 specifically excludes the power to convert a finding of acquittal into one of conviction. Though this is a direct decision only with regard to sub-section (4) of section 439 of the Code of Criminal Procedure, I think the view expressed by their Lordships is equally applicable to a case which comes within the purview of sub-section (5) of section

(1) (1922) 68 Ind. Cas. 615, F. B.
(2) (1951) A. I. R. (S. C.) 196.
(3) (1951) A. I. R. (S. C.) 316.

439 of the Code of Criminal Procedure. Sub-section (4) says that nothing in this section applies to an entry made under section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction. The word ' shall ' is especially to be noted. And while sub-section (4) is in these terms, sub-section (5) is in the following terms :

1952.

STATE v. A. N. SINGH.

NARAYAN, J.

" Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. "

In this sub-section also the word ' shall ' has been used, and I think there is ample justification for the view that if this Court cannot exercise its powers under section 439 for converting a finding of acquittal into one of conviction, it cannot also by way of revision interfere with an order of acquittal, if no appeal is brought by the State. On the principles indicated by their Lordships in the case of *Logendranath Jha*(1), sub-section (5) must be treated as a bar to the exercise of the revisional power by this Court in this particular case when the State did not prefer any appeal against the order of acquittal passed by the learned magistrate. In the circumtsances, I am of the opinion that this reference must be discharged.

AHMAD, J.—I agree.

Reference discharged.

K. D.

MISCELLANEOUS JUDICIAL.

1952.

November, 18, 19, 20, 21, 24, 26, December, 4.

Before Ramaswami and Sarjoo Prosad, JJ.,

BENGAL IMMUNITY CO.

v.

STATE OF BIHAR.*

Bihar Sales-tax Act, 1947 (*Bihar Act XIX of* 1947). *proposed levy of tax on company having their registered*

*Miscellaneous Judicial Case no. 241 of 1952, in the matter of an application under Article 226 of the Constitution of India.

(1) 1951) A. I. R. (S. C.) 316.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

office outside Bihar and selling to customers' in Bihar, legality of—writ *of* prohibition *or* certiorari, *whether could issue*—*newly amended section* 2(c), 2(g) *and newly substituted section* 33, *whether constitutional*—*Constitution, Articles* 226, 286(2), 254, 304.

A notice under section 13(5), Bihar Sales-tax Act, 1947 was issued on a company having its registered office at Calcutta. By the notice the company was asked to get itself registered as a dealer under the Act and submit a return for purposes of assessment. The company protested whereupon the company was informed that in default of compliance with the terms of the notice best judgment assessment under the Act would be made. The company thereupon applied to the High Court for a *writ* under Article 226 of the Constitution,

Held, that the sales-tax officer was undoubtedly acting within his jurisdiction in issuing notice under section 13(5) against the petitioner asking him to apply for registration and submit a return and the party aggrieved was entitled to have his grievances redressed by the appropriate procedure which the machinery of the Act itself provided. Hence, no *writ* of *prohibition* or *certiorari* could issue.

Kodak, Ltd. v. *Robert Clark*(1), referred to.

Held, (*i*) that the newly amended section 2(*c*) and 2(*g*) and the newly substituted section 33, Bihar Sales-tax Act, 1947 are not in conflict with Article 286(2) of the Constitution.

Citizens Insurance Co. of Canada v. *William Parsons and Queen Insurance Co.* v. *William Parsons*(2), *Welton* v. *Missouri*(3) and *McGoldrick* v. *Berwind-White Coal Mining Co.*(4), referred to.

(*ii*) that the Bihar Sales-tax Act, 1947, is not a law with respect of sale of goods but is a law imposing tax on sale of goods and therefore, it falls within Item 54 of the State List. That being the position Article 254 has no application,

(*iii*) that by virtue of Item 52 of the State List the Act has been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-state or *intra*-state trade

(1) (1903) 4 Tax. Cas. 549.
(2) (1881) 7 A. C. 96, 109.
(3) (1876) 91 U. S. 275.
(4) (1940) 309 U. S. 33.

or commerce. Hence Article 304 of the Constitution is not contravened.

O. Gilpin, Ltd. v. *Commissioner for Road Transport and Tramways*(1), referred to.

and (*iv*) that the power of the State to tax extends to all matters within the sovereignty of the State. It is not, however, necessary for the purpose of jurisdiction that the entire transaction of sale should have taken place within the frontiers of the State.

Wallace Brothers and Co., Ltd. v. *Commissioner of Income-tax Bombay City and Bombay Suburban district*(2), *Wadia* v. *Commissioner of Income-tax, Bombay*(3) and *State of Wisconsin* v. *J. C. Penney Co.*(4), referred to.

Besides the explanation to Article 286(1)(*a*) of the Constitution expressly confers upon the State the power to tax sale or purchase of goods which are actually delivered for consumption inside the State.

Application under Article 226 of the Constitution of India.

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

Dr. N. C. Sen Gupta, B. C. De, Ajit Kumar Dutta, and *Sudhir Chandra Ghosh,* for the petitioner.

Government Pleader and *L. M. Sharma,* for the opposite party.

RAMASWAMI, J.—In this case the petitioner has obtained a rule calling upon the State of Bihar and the other respondents to show cause why a *writ* in the nature of *prohibition* or *certiorari* should not be issued for quashing the proceedings instituted against the petitioner for assessment of sales tax. Cause was shown against the rule by the Government Pleader on behalf of the State of Bihar and the other respondents to whom notice of the rule was directed to be given.

(1) (1935) 52 C. L. R. 189.
(2) (1948) L. R. 75 Ind. App. 86.
(3) (1948) F. C. R. 121.
(4) (1940) 311 U. S. 435.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

The petitioner, the Bengal Immunity Company, Limited, is a corporate body with its registered office at 153, Dharmatala Street, Calcutta. The petitioner carries on the business of manufacturing and selling vaccines, sera and biological products. The petitioner conducts an extensive sale of the manufactured goods not only in West Bengal but in other parts of the Union of India. The goods are despatched from Calcutta by rail, steamer or air against orders which are sent to Calcutta by various customers. The petitioner has no agent or office in the State of Bihar. It is stated in the affidavit that the petitioner is not a resident of Bihar nor does the petitioner carry on business as dealer within the territorial limits of Bihar. The petitioner alleges that on 18th December, 1951, the Superintendent of Commercial Taxes sent a notice under section 13(5) of the Bihar Sales Tax Act.

"calling upon the petitioner to apply for registration and submit a return showing turnover for the period 26th January, 1950, to 30th September, 1951".

The petitioner remonstrated saying that there is no liability to pay tax under the provisions of the Bihar Sales Tax Act and the petitioner cannot be lawfully required to be registered as dealer. But the Superintendent of Sales Tax rejected the contention and required the petitioner to comply with the terms of the notice previously sent. On 28th May, 1952, the petitioner was informed that in case of default assessment will be made by the sales tax officer to the best of his judgment in accordance with the provisions of section 13(5) of the Act. It is submitted on behalf of the petitioner that the State of Bihar has no jurisdiction to impose sales tax on persons residing outside Bihar, that the provisions of the Bihar Sales Tax Act are inconsistent with the Constitution of India and that the order of the Superintendent of Commercial Taxes calling upon the petitioner to file a return and to get itself registered as dealer was illegal and without jurisdiction. The petitioner therefore asks for a *writ* in the nature of *certiorari* or *prohibition* to quash the

proceedings instituted by the Superintendent of Commercial Taxes for assessment of sales tax.

The first question which arises is whether in the state of facts disclosed in the petitioner's affidavit a *writ* under Article 226 of the Constitution may be properly issued. It was pointed out by the Government Pleader that only a notice under section 13(5) has been issued, and that no order of assessment upon the petitioner has been made by the sales tax authorities. The Government Pleader stated that the facts have not been investigated by the taxing authorities and the liability of the petitioner has not been determined. It was argued on behalf of the respondents that in issuing notices under section 13(5) the Superintendent of Commercial Taxes was acting within the ambit of his jurisdiction and the High Court cannot control his proceedings by issue of a *writ*. Now section 13(5) states

"If upon information which has come into his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless wilfully failed to apply for registration, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer.....".

It was contended on behalf of the petitioner that he was not liable to pay tax under the Act, and that he cannot be asked to apply for registration or submit his return. It was argued that the Superintendent of Commercial Taxes committed an error of jurisdiction in holding that the petitioner was liable to pay tax. In my opinion this argument proceeds on a misconception. In the present case the test of jurisdiction is whether the Sales Tax Officer had power to investigate and not whether his determination on a question of fact or law is right or wrong. It is not alleged on petitioner's behalf that there was no information which had come into the possession of the Sales Tax Officer or that he acted *mala fide* without any such information. Section 13(5) not merely confers a power on the Sales Tax Officer to investigate but the section imposes a duty upon the Sales Tax Officer to make assessment

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI J.

after giving reasonable notice. The section states that if the Commissioner is satisfied that any dealer is liable to pay tax, he shall after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from the dealer. The section presupposes that the Sales Tax Officer has power to satisfy himself and when he has power to do that he has power to investigate into the matter which comes before him and to form a conclusion one way or the other. It is manifest that the section expressly confers on the Sales Tax Officer jurisdiction to investigate for himself the facts before making the order of assessment. In my opinion the Sales Tax Officer was undoubtedly acting within his jurisdiction in issuing notice under section 13(5) against the petitioner asking him to apply for registration and submit a return. It was contended for the petitioner that the Sales Tax Officer was erroneous in law in holding that the petitioner was liable to pay tax. But that decision was one within the ambit of the jurisdiction of the Sales Tax Officer and should he make any assessment under section 13(5) against the petitioner the Act provides a right of appeal whereby any error of law may be corrected by the appellate authorities prescribed under the Act. It is manifest that sections 24 and 25 of the Act furnish a complete and effective machinery for appeal and revision against assessment made under the Act. In a similar case *Kodak, Ltd.*, v. *Robert Clark*(1). Kodak, Limited, applied for a writ of prohibition against the General Commissioners of Taxes on the ground that the profits of the Eastman Kodak, Ltd., Rochester ought not to be assessed as the English Company's profits, and that the assessment was not warranted by any jurisdiction conferred by any statute relating to income-tax. The application was rejected by the Court of Appeal. At page 572 the Master of the Rolls states: "Now what is it that the General Commissioners of Taxes have to ascertain? Surely they had to ascertain what

(1) (1903) 4 Tax. Cas. 549.

trade a tax payer who is assessable to income tax is carrying on, and to do this it is within the jurisdiction of the Commissioners to ascertain what is the connection between the Kodak Company in this country and the Rochester business in America. This is what the Commissioners are doing, and I agree with the King's Bench Division that the assertion that the Commissioners have gone, or are going, wrong in determining this question gives no ground for prohibition ".

In the present case, therefore, I hold that there is no warrant for issuing a writ under Article 226 of the Constitution on the facts disclosed in the petitioner's affidavit. But since the merits of the case have been fully argued in the course of the hearing it is right that I should indicate my views on the other important issues in the case.

The main question is whether sections 2(*c*) and 2(*g*) and section 4 of the Bihar Sales Tax Act are constitutionally valid and operative.

The Bihar Sales Tax Act is entitled as an Act

" to provide for levy of a tax on the sale of goods in Bihar ".

Section 4 which is the charging section states:

" Subject to the provisions of sections 5, 6, 7 and 8 and with effect from the commencement of this Act, every dealer whose gross turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax, under this Act on sales which have taken place in Bihar after the date of such commencement ".

Section 2(*c*) as it originally stood defines " dealer " to mean

" any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family, and any society, club or association which sells or supplies goods to its members ".

The section was amended by Bihar Act XVII of 1950 and as a result of the amendment the word " Bihar "

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

was omitted from the sub-section. Section 2(*g*) states:

"'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer or property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale.:

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar".

The section was amended by Bihar Act VII of 1951, as a result of which the second proviso of section 2(*g*) was omitted and to the said clause as so amended the following Explanation was added:

"The sale of any goods actually delivered in Bihar as a direct result of such sale for the purpose of consumption in Bihar shall be deemed for the purpose of this Act to have taken place in Bihar, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale, passed in another State".

It is material to state that as a result of the Adaptation of Laws (Third Amendment) Order, dated the 4th April, 1951, a new section 33 was incorporated to the following effect:

"33. (1) Notwithstanding anything contained in this Act,—

(*a*) a tax on the sale or purchase of goods shall not be imposed under this Act—

(*i*) where such sale or purchase takes place outside the State of Bihar; or

(*ii*) where such sale or purchase takes place in the course of import of the goods into; or export of the goods out of, the territory of India;

(*b*) a tax on the sale or purchase of any goods shall not, after the 31st day of March, 1951, be imposed where such sale or purchase, takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The Explanation to clause (1) of article 286 of the Constitution shall apply for the interpretation of sub-clause (*i*) of clause (*a*) of sub-section (1)",

The contention of Dr. Sen Gupta is that section 2(*c*) and the new explanation added to section 2(*g*) of the Act are void and inoperative since they violate Article 286(2) of the Constitution. The objection of the learned counsel is that the impugned sections authorise imposition of tax on the sale or purchase of goods in the course of inter-State trade and commerce and was therefore void and illegal to that extent. The argument is based upon Article 286(2) of the Constitution which states:

"Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce".

It was pointed out by the learned counsel that the petitioner was a manufacturer of vaccine and biological products with its head-office located at Calcutta, that the petitioner sold goods to various persons of Bihar, that the goods were despatched from Calcutta and after crossing the inter-state border the goods were delivered to various persons in Bihar. It was argued that the petitioner was engaged in inter-state trade or commerce and the State of Bihar had no authority to impose tax on the goods of the petitioner.

In my opinion the argument is attractive but wholly unsound. Section 33 of the newly amended Act only reproduces the explanation which is set out in Article 286(1) of the Constitution. It is necessary in this context to set out the provisions of Article 286 in full:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce.....".

The problem in this case is what is the right construction to be placed on the general language of clause (2) of this article. Let us take a concrete example. A trader sends goods from State A to State B for the purpose of consumption in State B. The contract of sale is effected in State A and title passes in State A but goods are actually delivered in State B for consumption in that State. There is movement of goods across the inter-state border, and if the sale takes place at any stage of this movement, article 286(2) of the Constitution would prohibit State B or State A from imposing a tax on the sale. Since the sale has taken place outside the State border, the case would also fall under article 286(1)(*a*) which prohibits State B from taxing such a sale. But the Explanation states that notwithstanding the fact that title has passed and sale has taken place in State A, the sale or purchase should be deemed to have been effected in State B in which the goods have been actually delivered for the purpose of consumption. It follows that State B would have jurisdiction to impose a tax on such sale. It is therefore manifest that if article 286(2) is construed in a full and unqualified sense the explanation to article 286(1) would become nugatory and of no effect. This would be contrary to all canon of sound construction. In order to obviate such result it is necessary that the two parts of the article must be read together and the language of the one must be interpreted and where necessary be modified by the other. The principle is stated by the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons and Queen Insurance Co.* v. *Parsons*(1). "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In those cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent,

(1) (1881) 7 A. C. 96, 109.

authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them". The principle of construction is that from a large general class must be excepted a particular class which forms a branch or subdivision of the larger class. If no such exception is made the danger would be that the more general class will absorb or override the particular class. In the present case Article 286(2) refers to inter-State trade or commerce which is a conception of general scope. In *Welton* v. *Missouri*(1) Field, J. said: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States". On the contrary, the explanation to Article 286(1)(*a*) relates to a small category of sale of goods in which the property passes in State A and the goods are actually delivered as a direct result of the sale and for the purpose of consumption in State B. The transactions within the scope of the explanation are manifestly of a particular or a smaller class. Applying the principle of construction already formulated it is manifest that the phrase "sale or purchase in the course of trade or commerce" in Article 286(2) must be construed so as to exclude the particular class of sales or purchase described in the explanation to Article 286(1). If this conclusion is right it follows that the newly amended sections 2(*c*)

(1) (1876) 91 U. S. 275.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

and 2(*g*) and the newly substituted section 33 of the Bihar Sales Tax Act are not in conflict with Article 286(2) of the Constitution.

The language of the explanation to Article 286(1) is significant. It applies only when the goods are actually delivered for the purpose of consumption in the State. It corresponds to what is called in American Legislation a "Use tax". As regards the legislative authority of the State to impose such a tax, the constitutional position in America is different and the American decisions are not of much assistance, for the Commerce Clause has been utilised as an instrument for assertion of national power as opposed to local State interest in the American constitutional scheme. The power of the State to tax is also subject to Due Process Clause of the Fourteenth Amendment. Even so the Supreme Court has sustained State legislation taxing "use" of property which has just been moved in inter-state commerce or imposing property tax on goods at the conclusion of the inter-state journey. In *McGoldrick* v. *Berwind-White Coal Mining Co.*(1) it was held by the Supreme Court that the New York City tax laid upon the Pennsylvania Corporation as regards sale of coal for consumption in New York City did not infringe the Commerce Clause of the Federal Constitution. In the course of his opinion Mr. Justice Stone said: "But it was not the purpose of the Commerce Clause to relieve those engaged in inter-state commerce of their just share of State tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. Not all State taxation is to be condemned because, in some manner, it has an effect upon commerce between the States, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect inter-state commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress".

(1) (1940) 309 U. S. 33.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

It was next objected that the impugned sections of the Sales Tax Act were invalid since they are repugnant to the Sale of Goods Act and the assent of the President has not been taken under Article 254 of the Constitution. The argument is founded on Article 254(1) of the Constitution which states

> " If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void ".

In my opinion the argument proceeds upon misconception. The Bihar Sales Tax Act is in pith and substance not a law with respect to sale of goods but is a law imposing taxation on sale of goods. The Act is entitled as an Act to provide for the levy of a tax on the sale of goods in Bihar. The preamble recites that it is necessary to make an addition to the revenues of Bihar and for that purpose to impose a tax on sale of goods in Bihar. The main provisions of the Act are designed to carry out the purpose stated in the preamble. It is manifest that the legislation falls entirely within Item 54 of the State List, viz., taxes on the sale or purchase of goods other than newspapers. It follows that Article 254 has no application to the present case though the Act may incidentally trench to a certain extent upon Items 7 and 8 in the Concurrent List. The case falls within the *ratio* of *Megh Raj* v. *Allah Rakhia*(1) in which the Judicial Committee held that section 107 of the Government of India Act, 1935, had no application in a case where the province could show, as it did in that case, that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by List III of the Concurrent List. In that case it was argued that the Punjab

(1) (1947) L. R. 74 Ind. App. 12.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

Restitution of Mortgaged Lands Act, 1938, was invalid in that a number of its provisions were in fact legislation on matters falling within List III, namely, Items 7, 8 and 10 of that List. It was held by the Judicial Committee that the impugned Act which dealt with mortgages on agricultural lands was legislation falling entirely within Item 21 of the Provincial Legislative List, that is, land or any interest in land and, therefore, no question of repugnancy could arise by reason of the fact that the Act might encroach to a certain extent upon the items in the Concurrent Legislative List, viz., Items 7, 8 and 10. The argument of Dr. Sen Gupta on this part of the case must, therefore fail.

I pass on to consider the argument that there is conflict between the impugned Act and Article 304 of the Constitution. It was contended by Dr. Sen Gupta that the impugned provisions of the Bihar Sales Tax Act impose restrictions on the freedom of trade and commerce within the meaning of Article 304(*b*), that the Act was not valid since previous sanction of the President had not been obtained to the introduction of the Bill in the State legislature. In my opinion the argument of the learned counsel is not correct. Article 304 occurs in Part XIII of the Constitution which is entitled

"Trade, Commerce and Intercourse within the territory of India".

Article 301 states that

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

Article 304(*b*) empowers the legislature of a State to enact legislation imposing reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The proviso stipulates that no bill or amendment for the purposes of clause (*b*) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. But neither Article 301 nor Article 304 has any relevance

in the context of the present case. The Bihar Sales Tax Act makes no discrimination between the goods imported and the goods produced or manufactured in the State. The Act is in its true nature and character—in its "pith and substance"—not legislation with respect to freedom of trade or commerce but it is legislation enacted by the State Legislature by virtue of the power conferred by Item 52 of the State List. How can it be then said that the legislation falls within the ambit of Part XIII of the Constitution? The Act professes to be an Act imposing tax on the sale of goods in Bihar. It does not profess to directly tax articles in inter-state trade and commerce. The acts and the transactions on which it directly operates are not inter-state commercial dealings or inter-state transportation. The operation of the Act in no way depends on the inter-state or intra-state nature of the sale transaction. The Act does not differentiate between inter-state sales and intra-state sales. The statute has manifestly been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-state or intra-state trade and commerce. It is difficult therefore to accept the argument that the Act contravenes in any way Article 304 of the Constitution. This opinion is supported by the *ratio* of the Australian case *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways*(1) in which it was held that the provisions of the State Transport Act, 1931 and the charge imposed under section 37 did not contravene section 92 of the Constitution as interfering with the freedom of trade, commerce and intercourse among the States.

Learned counsel next submitted that the impugned sections of the Bihar Sales Tax Act were invalid since they were extra territorial in operation. It was contended that the Act imposed tax with respect to transactions concluded in West Bengal, and that the State legislature had no power to impose a tax of this nature. It was argued that under Article 254

(1) (1935) 52 C. L. R. 189.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR. RAMASWAMI, J.

of the Constitution the Bihar legislature was competent to make a law only for the territory of Bihar. In my opinion the argument proceeds upon misconception. It is true that the petitioner is resident of Calcutta but jurisdiction to tax does not depend on the residence or domicile of the assessee. On the contrary the power of the State to tax extends to all matters properly within the sovereignty of the State. The jurisdiction to tax exists not only in regard to persons or property but also as regards the business done within the State. It is not however necessary for the purpose of jurisdiction that the entire transaction of sale should have taken place within the frontiers of the State. On the other hand, the fact that the goods are delivered in Bihar for consumption constitutes a sufficient *nexus* or territorial connection which confers jurisdiction upon the Bihar legislature to impose the tax. This opinion is supported by the decision of the Judicial Committee in *Wallace Brothers and Co., Ltd.* v. *Commissioner of Income-tax, Bombay City and Bombay Suburban district*(1) in which a company incorporated in England having its registered office there was carrying on business in India. The Income-tax authorities in India imposed a tax on the company not merely with respect to the income received in India but also with respect to the income received in England. It was held by the Judicial Committee that the major portion of the income of the company was derived from British India and there was hence territorial connection sufficient to justify the company being treated as at home in British India and so properly subject to the jurisdiction of the Indian legislature. A similar principle is enunciated in *Wadia* v. *Commissioner of Income-tax, Bombay*(2) in which the Gwalior Durbar was advancing large sums on mortgage of debentures over property in British India. The question was whether interest received by the Durbar at Gwalior was assessable to income-tax. It was contended that section

(1) (1948) L. R. 75 Ind. App. 86.
(2) (1948) F. C. R. 121.

42(1) of the Income-tax Act under which the assessment was sought to be made was extra-territorial in its operation and therefore *ultra vires* of the Indian Legislature. It was held by the majority that on the facts there was sufficient connection to clothe the Indian Legislature with competence to impose the tax. Reference may also be made to the recent American case *State of Wisconsin* v. *J. C. Penny Co.*(1) in which the Supreme Court upheld the validity of a tax imposed by Wisconsin State on dividend declared by a foreign corporation licensed to do business in Wisconsin. In the course of his opinion Mr. Justice Frankfurter said: "The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a State does not destroy the *nexus* between such a tax and transactions within a State for which the tax is an exaction". In view of these authorities it is manifest that the constitutional objection raised by the learned counsel must fail. It is also important to notice that the explanation to Article 286(1)(*a*) of the Constitution expressly confers upon the State the power to tax sale or purchase of goods which are actually delivered for consumption inside the State.

1952.

BENGAL IMMUNITY CO. v. STATE OF BIHAR.

RAMASWAMI, J.

For the reasons I have expressed I am of opinion that this application is without merit and must be dismissed with costs. Hearing fee five gold mohars.

SARJOO PROSAD, J.—I agree.

Application dismissed.

K. D.

(1) (1940) 311 U. S. 435.

MISCELLANEOUS JUDICIAL.

1952.

November, 18, 19, 20, 21, 24, 26. December, 9.

Before Ramaswami and Sarjoo Prosad, JJ.

DIAMOND COAL COMPANY

v.

STATE OF BIHAR.*

Bihar Sales Tax Act, 1947 (*Bihar Act XIX of* 1947), *second* proviso *to section* 2(*g*), *whether unconstitutional—Constitution, Article* 286—writ *of* prohibition *or* certiorari, *whether could issue for levy of sales-tax on sales outside Bihar—Article* 226.

Even assuming that the Sales-tax Authorities relied upon an *ultra vires* provision of the Bihar Sales-Tax Act, 1947, in making an assessment for sales made outside Bihar, the action of the authorities was not without jurisdiction, and the party aggrieved was entitled to have his grievances redressed by the appropriate procedure which the machinery of the Act itself provided. Hence, no *writ* of *prohibition* or *certiorari* could issue in the case.

Raleigh Investment Co., Ltd. v. *Governor-General in Council*(1), relied on.

Rex v. *Northumberland Compensation Appeal Tribunal—Ex-parte Shaw*(2), distinguished.

Commissioner of Income-tax, Punjab v. *Tribune Trust*(3) and *Veerappa Pillai* v. *Raman and Raman, Ltd.*(4), referred to.

QUERY.—Whether the second proviso to section 2(*g*), Bihar Sales-tax Act, 1947, was constitutionally valid?

Application under Article 226 of the Constitution of India.

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

* Miscellaneous Judicial Case no. 74 of 1952, in the matter of an application under Article 226 of the Constitution of India.

(1) (1947) L. R. 74 Ind. App. 50.
(2) (1952) 1 Times L. R. 161.
(3) (1947) L. R. 74 Ind. App. 306.
(4) (1952) S. C. J. 261.

1952.

DIAMOND COAL CO. v. STATE OF BIHAR.

S. C. Banerji, B. C. Ghosh and *A. K. Choudhury*, for the petitioner.

Government Pleader and *L. M. Sharma*, for the opposite party.

RAMASWAMI, J.—In this case the petitioner has obtained a rule calling upon the State of Bihar and the other respondents to show cause why a *writ* in the nature of *prohibition* should not be issued restraining them from levying or realising tax on sale and purchase of coal outside the State of Bihar.

The petitioner is Diamond Coal Company, Limited, which is a joint stock company having its registered office at Jharia in the district of Manbhum. The petitioner carries on trade in coal in the various States of India. During the year 1949-50 the petitioner's gross turnover on sale of coal was estimated to be a sum of Rs. 6,11,717-2-9. After allowing for sales to registered dealers and a rebate of 2 per cent. the taxable turnover was determined by the Sales-tax authorities to be Rs. 5,98,467. The petitioner claimed that he had sold coal outside Bihar to the value of Rs. 55,862-3-6. The petitioner demanded that this amount should be exempted from sales-tax. On 30th October 1951, the Assistant Superintendent of Sales-tax rejected the claim holding that the petitioner was liable to pay tax even on the quantity of coal sold outside Bihar. The petitioner alleges that he was illegally made liable to pay sales-tax of Rs. 790-1-0 in excess of what he is really liable to pay.

In support of the rule, Mr. Basant Chandra Ghosh referred to section 2(*g*) of the Bihar Sales Tax Act of 1947. Section 2(*g*) defines " Sale " as follows:

" ' Sale ' means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price be deemed to be a sale:

1952.

DIAMOND COAL CO. v. STATE OF BIHAR.

RAMASWAMI, J.

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made be deemed for the purposes of this Act to have taken place in Bihar ".

The Act was amended by Bihar Act VII of 1951 and as a result the second proviso to clause (*g*) of section 2 was omitted and to the said clause as so amended, the following explanation was added:

" *Explanation*.—The sale of any goods actually delivered in Bihar as a direct result of such sale for the purpose of consumption in Bihar shall be deemed for the purpose of this Act to have taken place in Bihar, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale, passed in another State ".

The argument of the petitioner is that after the date when the Constitution came into force the second proviso was void and inoperative as it was in conflict with Article 286(1) of the Constitution. Article 286(1) states:

" No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—(*a*) outside the State; or (*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India."

The case of the petitioner is based on the Explanation to Article 286(1) which is to the following effect:

" For the purposes of sub-clause (*a*) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State ".

The first question is whether upon the facts stated in the affidavit the High Court may properly issue a *writ* of *prohibition* under Article 226 of the Constitution. The respondents contended in the first place that the second proviso to section 2(*g*) was not unconstitutional or void. The respondents contended secondly that even on the assumption that the section was *ultra vires* there was no basis for the argument that the Sales-tax authorities acted in excess of their jurisdiction. It was argued that an assessment made

under the machinery provided by the Sales-tax Act even if based on a provision held to be *ultra vires* was not in excess of jurisdiction. In other words, the fact that the Commissioner relied upon an *ultra vires* provision of the statute did not make the assessment a nullity. In my opinion the argument of the learned Government Pleader is correct. It is conceded in this case that the petitioner is a registered dealer under the Bihar Sales-tax Act and that he carries on trade in coal. It is also conceded that the petitioner submitted his return of sales-tax. The assessment was made under section 13 by the Commissioner upon the basis of the petitioner's return. It is manifest upon these facts that the preliminary conditions required by section 13 are satisfied, and the Commissioner had jurisdiction under section 13 to make assessment. In fact the section imposes on him the duty to make assessment of the sales-tax. If the assessment is made under the machinery of the Sales-tax Act, the assessment is manifestly made in exercise of the Commissioner's jurisdiction. The circumstance that the Commissioner has relied upon an *ultra vires* provision of the statute in making the assessment, will not invalidate the assessment like an order of a Court lacking jurisdiction. The argument was stressed on behalf of the petitioner that second proviso to section 2(*g*) was *ultra vires* of the Constitution and the petitioner ought to have been allowed a remission of sales-tax with respect to the quantity of coal sold outside the State of Bihar. Assuming though not affirming that the second proviso to section 2(*g*) is in conflict with the Constitution, the inference does not by any means follow that the assessment made by the Commissioner is void and without jurisdiction. If the Commissioner had relied upon an *ultra vires* provision of the Sales-tax Act in making the assessment such reliance is not an excess of jurisdiction but a mistake of law made in the course of exercise of jurisdiction. This view is supported by the principle enunciated by the Judicial Committee in *Raleigh Investment Co., Ltd.* v.

1952.

DIAMOND COAL CO. v. STATE OF BIHAR.

RAMASWAMI, J.

Governor-General in Council(1) and *Commissioner of Punjab* v. *Tribune Trust*(2).

It was nevertheless contended on behalf of the petitioner that a *writ* of *certiorari* could be granted for an error of law apparent on the face of the record even if the taxing authorities had committed an error of jurisdiction. Mr. Basant Chandra Ghosh strongly relied on *Rex* v. *Northumberland Compensation Appeal Tribunal—Ex parte Shaw*(3), in which it was held by the Court of Appeal that the King's Bench had jurisdiction to quash by *certiorari* the decision of an inferior tribunal where there was error of law on the face of the record and that *certiorari* could be granted notwithstanding that an inferior tribunal had not acted without or in excess of its jurisdiction. But all the Judges constituting the Court held that a *writ* of *certiorari* was available in such a case only if the order of the tribunal was a "speaking order". It is not necessary to decide for the purpose of this case whether a *writ* of *certiorari* under Article 226 of the Constitution can properly be granted for a mere error of law committed by an inferior tribunal. For I consider that the petitioner has a complete and equally efficacious alternative remedy by way of appeal and revision to the authorities constituted under the machinery of the Sales Tax Act. Section 24 states that any dealer objecting to an order of assessment may, in the prescribed manner, appeal to the prescribed authority against such assessment. Section 24(4) enacts that the Commissioner may, upon application or of his own motion, revise any order passed under the Act and the Board of Revenue may, in like manner, revise any order passed by the Commissioner. If the petitioner is still dissatisfied he may ask the Board of Revenue to state a case to the High Court referring any question of law arising out of the order of assessment. If his request is refused he may apply

(1) (1947) L. R. 74 Ind. App. 50.
(2) (1947) L. R. 74 Ind. App. 306.
(3) (1952) 1 Times L. R. 161.

1952.

DIAMOND COAL CO. v. STATE OF BIHAR.

RAMASWAMI, J.

to the High Court for an order requiring a case to be stated and to be referred to the High Court (*see* section 25 of the Act). It is manifest that the statute provides effective and appropriate machinery for the review of any assessment on ground of law including any question as to the constitutional validity of any taxing provision in the statute. In the light of these considerations I think it will be improper in the present case to grant a *writ* under Article 226 of the Constitution prohibiting the sales tax authorities from imposing or realising tax to which the petitioner has taken objection. The principle applicable has been recently stated by the Supreme Court in *Veerappa Pillai* v. *Raman and Raman, Ltd.*(1). In that case the Madras High Court had quashed certain proceedings of the Regional Transport Authority and the Central Traffic Board, Madras, and an order of the State of Madras directing issue of permits to the petitioner. The High Court took the view that the procedure laid down in the Act was not followed and that the order of Central Traffic Board was most unsatisfactory. The Supreme Court allowed the appeal and set aside the order of the High Court granting the *writ*. The Supreme Court based its decision on the ground that the Act itself provided a complete and precise scheme for regulating the issue of permits and there was a regular hierarchy of administrative bodies established to deal with the regulation of Transport by means of motor vehicles. The Supreme Court emphasised that the remedies for the redress of grievances or the correction of errors were found in the statute itself and it was to these remedies that resort must generally be had. At page 267 the Supreme Court states: " Such *writs* as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to

(1) (1952) S. C. J. 261.

1952.

DIAMOND COAL CO. v. STATE OF BIHAR.

RAMASWAMI, J.

exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made ".

Applying the principle to the present case I think that there is no warrant for issue of a *writ* of *prohibition* or *certiorari* to the respondents restraining them from assessing or collecting sales tax from the petitioner.

As the application must fail on the preliminary question, it is, I think, not proper to express any opinion on the other question whether the second proviso to section 2(*g*) of the Sales Tax Act was constitutionally valid or whether that provision was in conflict with Article 286 of the Constitution.

In my opinion this application must be dismissed with costs. Hearing fee five gold mohars.

SARJOO PROSAD, J.—I entirely agree. The interpretation of Article 286(1) of the Constitution, and, in particular the explanation appended thereto has presented to me no small measure of difficulty. The Sales Tax Officer purported to assess the petitioner in regard to the item complained of on the hypothesis that Article 286(2) of the Constitution read with the Sales Tax Continuance Order, 1950, promulgated by the President of India had no application to the case, and the tax on the sale of goods could continue to be levied until the 31st day of March, 1951. Mr. Ghosh, however, contends that the case is nevertheless governed by clause 1(*a*) of Article 286, and as such exempt from taxation because the State could not impose a tax on sale or purchase of goods which had taken place outside the

State. He further claims that the explanation to clause (1)(*a*) of the Article is of no avail to the taxing authorities because although the sale of the goods may have taken place in Bihar, the goods were actually delivered for the purpose of consumption outside the State, and, therefore, those goods would be deemed to have been sold not in the State of Bihar but outside that State. There is undoubtedly *prima facie* much force in the contention of Mr. Ghosh, and Article 286 requires very careful examination. The matter will have to be decided at one stage or another either by the Revenue Authorities themselves or by this Court on an appropriate reference made for that purpose. As at present advised, I do not consider it necessary to deal with this problem, as I am also of the view that even assuming for the sake of argument that the Sales Tax Authorities relied upon an *ultra vires* provision of the Sales Tax Act in making the assessment, the action of the authorities was not without jurisdiction, and the party aggrieved is entitled to have his grievances redressed by the appropriate procedure which the machinery of the Act itself provides. This view, as my learned brother has rightly held, is fortified by the decision of the Judicial Committee in *Raleigh Investment Co., Ltd.* v. *Governor-General in Council*(1).

Application dismissed.

K. D.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sarjoo Prosad, JJ.,

1952.

November, 27, 28. *December,* 9.

M. PRASAD P. DEYAL

v.

STATE OF BIHAR.*

Constitution of India, 1950, Article 226, scope of—Regional Transport Authority refusing to renew permit—appeal against the refusal, rejected application for a writ

* Miscellaneous Judicial Case no. 63 of 1951, application under Article 226 of the Constitution of India.

(1) (1947) L. R. 74 Ind. App. 50.

1952.

M. PRASAD P. DEYAL v. STATE OF BIHAR.

against the State and Transport Authority—writ, *whether can be issued—Motor Vehicles Act*, 1939 (*Act IV of* 1939).

Where there is illegality or irregularity in the exercise of jurisdiction, the defect, if any, can be corrected according to the procedure established by the law, by way of appeal or revision, and where the appellate court has pronounced its decision against the appellant, that matter having been finally decided, it should not be ordinarily re-opened in a proceeding by way of a *writ* under Article 226 of the Constitution of India.

Motor Vehicles Act, 1939 is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation, no one is entitled to a permit as of right even if he satisfy all the prescribed conditions, and the grant of a permit is entirely within the discretion of the Transport Authorities and naturally depend on various circumstances to be taken into account by them,

Held, therefore, that a person, whose permit for a private carrier was not renewed by the Regional Transport Authority and an appeal against that order was also rejected by the State Transport Authority, is not entitled to a *writ* under Article 226 of the Constitution of India either against the State or the Transport Authority.

Janardhan Reddy v. *State of Hydrabad*(1) and *Veerappa* v. *Raman* and *Raman, Ltd.*(2), relied on.

Application under Article 226 of the Constitution of India.

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

T. K. Prasad, for the petitioner.

Government Pleader, for the State.

SARJOO PROSAD, J.—This application under Article 226 of the Constitution is directed against the State of Bihar, the Bihar State Transport Authority, and the Chota Nagpur Regional

(1) (1951) A. I. R. (S. C.) 217.
(2) (1952) A. I. R. (S. C.) 192.

1952.

M. PRASAD
P. DEYAL
v.
STATE OF BIHAR.

SARJOO PROSAD, J.

Transport Authority (hereinafter called Regional Authority) all of whom are the respondents to this application.

The material facts are that the petitioner is a firm running a joint family business in foodgrains, sugar, cement, cloth, etc. For the purpose of carrying on business in the various commodities the petitioner obtained from the Regional Authority permit no. 21(1) for a private carrier BRM 1341. The permit was granted by the Regional Authority on the 18th of December, 1944, and the nature of the goods to be carried as specified in the permit was "transporting goods for their business." The permit appears to have been last renewed on the 9th of February, 1948, for a period of three years and was due to expire on the 18th December, 1950. In the meantime the Regional Authority on the 19th July, 1950, required certain information from the petitioner which the latter supplied on the 24th of July, 1950. In September, 1950, the petitioner applied to the Regional Authority for renewal of the permit on deposit of the necessary fees. The Authority again required certain information from the petitioner regarding his business and the income-tax paid by him, and by a letter, dated the 25th of September, 1950, the petitioner supplied the information required. But the Regional Authority on the 30th of September, 1950, rejected the petitioner's application for renewal of his permit without assigning any reason whatsoever.

It appears from an extract copy of the proceedings of the meeting of the Regional Authority held on the date in question that the petitioner's application for renewal of the permit was considered along with a number of other applications, and the only order passed in respect of BRM 1341 was "Heard. Rejected". The petitioner then on the 4th of October, 1950, filed a petition for a copy of the order passed on his application for renewal but he failed

1952.

M. PRASAD P. DEYAL v. STATE OF BIHAR.

SARJOO PRASAD, J.

to obtain the same; nor did the Regional Authority communicate to him in writing its reasons for refusing to renew his permit. The petitioner then sent a letter on the 10th of October, 1950, to the Authority aforesaid stating the above facts to which the latter vouchsafed a reply. In this reply it was observed that the renewal of the permit was refused because the Regional Authority did not consider the grant of the permit "essential". It further directed the petitioner to surrender his permit, both Parts A and B, for immediate cancellation. The petitioner then presented an appeal to the State Transport Authority. This appeal was eventually heard on the 9th of January, 1951, and the State Authority rejected the appeal observing as follows:—

"Admitted and heard. The Board does not see any strong ground to interfere with the orders of the R. T. A. Rejected."

On the above facts the petitioner has moved for a *writ* of *certiorari* for quashing the above orders. The main contention of the petitioner is that the Regional Authority in refusing to renew the permit acted in excess of the jurisdiction conferred on it by the law. To be able to appreciate the point, it is necessary to refer to some of the relevant provisions of the Motor Vehicles Act, 1939 (Act IV of 1939). Section 52 of the Act provides for an application for a private carrier's permit and mentions the particulars which are to be specified in that application; namely, the type and carrying capacity of the vehicle; the nature of the goods which the applicant expects normally to carry in connection with his trade and business; the area for which the permit is required; and any other particular which may be prescribed. Section 53 lays down the procedure to be observed by the Regional Authority in considering an application for a private carrier's permit. The Regional Authority, in deciding whether to grant or refuse such a permit, should have regard to two factors; (1) the condition of the roads to be used by the vehicle or vehicles in respect of which the application is made,

1952.

M. PRASAD P. DEVAL v. STATE OF BIHAR.

SARJOO PROSAD, J.

and (2) the fact that the vehicle or vehicles for which the permit is required will not be used except in connection with the business of the applicant. It is also open to the said Authority to impose conditions in granting the permit and specify those conditions in the permit itself in relation to the description of goods which may be carried, or the area in which the permit should operate and also in regard to some other matters. The contention is that the order in question does not state any reasons for refusing to grant the permit in question, and there is nothing to show that the factors which had to be considered by the Regional Authority were not amply met by the petitioner. On the contrary, it asserts that it had given all the information required by the Regional Authority in order to satisfy the requirements of the law. Section 57 describes the procedure in applying for and granting permits, and sub-section (7) enjoins that when a Regional Transport Authority refuses an application for a permit of any kind, it shall give to the applicant in writing its reasons for the refusal. It is urged that in the order itself, no such reasons have been given, but when the petitioner wrote to the Regional Authority, it was informed that the Authority did not consider the grant of a permit "essential". According to the learned Counsel, there is nothing in the law to justify the refusal of a permit or the renewal thereof on this ground. This, the petitioner submits, was wholly without jurisdiction, inasmuch as the renewal of the permit could not be refused on a ground unwarranted by the law. Section 58 shows that the considerations which apply to an application for the grant or refusal of a permit also apply to the renewal thereof. This is clear from section 58(2) wherein it is enacted that a permit may be renewed on an application made and disposed of as if it were an application for a permit. It is true that the order of the Regional Authority is quite unhelpful and does not convey any impression as to why the renewal of

1952.

M. PRASAD P. DEYAL v. STATE OF BIHAR.

SARJOO PROSAD, J.

the permit was refused. The petitioner had been running the truck in connection with its business ever since 1944 for which the Regional Authority had issued a permit to it; and it is somewhat incomprehensible that the renewal of the permit which should ordinarily have been made and granted in due course, as it had been done on earlier occasions, should have been declined on the present occasion. The statement in reply to the petitioner that the renewal of the permit was not considered "essential" does not advance the matter any further and throw any adequate light on the reasons for the refusal. Indeed section 53 lays down only two main considerations which ought to weigh in the refusal or grant of a permit, namely, the condition of the road or roads and the fact that the vehicle would not be used save in connection with the applicant's business. I have serious misgivings about the correctness of the order passed by the Regional Transport Authority, and I wish the Authorities concerned had paid greater attention to the claim of the petitioner which *prima facie* appears to be just and well-founded.

The Act, however, provided a right of appeal against the order of the Regional Authority, and the petitioner had the advantage of preferring an appeal which was heard and dismissed by the State Transport Authority. The State Authority was of the view that it did not see any strong ground for interference. There is no complaint that the petitioner was not allowed to be heard in the matter. It is true that these Transport Authorities are bodies exercising quasi-judicial functions and have to act within the framework of the Law in deciding matters which are placed before them and which affect valuable rights of parties; but when the appellate body has dealt with the matter on merits, it is perhaps too late now for this Court to interfere by a *writ* of *certiorari* to quash the orders of those Authorities. There is nothing to show that the appellate authority acted without

jurisdiction, or in violaton of fundamental principles of justice. It may be conceded that the Regional Transport Authority did not act in a legal or regular manner in deciding the question of renewal of the permit; but, as it has been repeatedly pointed out, there is a basic difference between want of jurisdiction and illegal and irregular exercise of jurisdiction. Where there is illegality or irregularity in the exercise of jurisdiction, the defect, if any, can be corrected according to the procedure established by the law by way of appeal or revision; and where the appellate court has pronounced its decision against the petitioner, the matter having been finally decided, it should not be ordinarily re-opened in a proceeding by way of a *writ*. This view is supported by various authoritative decisions: see, for instance, *Janardhan Reddy* v. *State of Hydrabad*(1). A case more in point is the decision of Chandrasekhara Aivar, J., in *Veerappa* v. *Raman and Raman, Ltd.*(2). This was a case which arose out of a proceeding for grant of permit under the Motor Vehicles Act. The High Court under Article 226 of the Constitution interfered with the orders of the Transport Authorities, and the matter was taken up on appeal to the Supreme Court by special leave. It was held that the *writs* referred to in Article 226 of the Constitution were obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals, or bodies or officers acted wholly without jurisdiction or in excess thereof or in violation of the principles of natural justice, and however extensive that jurisdiction may be, it was not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned. It was also held that the Motor Vehicles Act was a statute which created new rights and liabilities and prescribed an elaborate procedure for their regulation; no one was entitled to a permit as of right even

(1) (1951) A. I. R. (S.C.) 217.
(2) (1952) A. I. R. (S. C.) 192.

1952.

M. PRASAD P. DEYAL v. STATE OF BIHAR.

SARJOO PROSAD, J.

if he satisfied all the prescribed conditions, and the grant of a permit was entirely within the discretion of the Transport Authorities and naturally depended on various circumstances to be taken into account by them.

In view of what has been stated above, I cannot entertain the submission of the petitioner and do not find myself sufficiently persuaded to interfere with the decision of the Transport Authorities in the present case. I accordingly discharge the rule obtained by the petitioner. There will be, however, no order for costs of this application as *prima facie* the orders of the Transport Authorities leave much to be desired.

RAMASWAMI, J.—I agree.

S. H.

Rule discharged.

APPELLATE CRIMINAL.

1952.

December, 9.

Before Narayan and Ahmad, JJ.,

CHETU

v.

STATE.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 465, *provisions of, whether imperative—court's duty, pointed out.*

When a court entertains doubt as to the sanity of the accused, the court should not merely put questions to the

* Criminal Appeal no. 423 of 1951, from a decision of Mr. B. Sharan, Sessions Judge of Monghyr, dated the 26th July, 1951.

accused but should try the issue of such unsoundness of mind as a preliminary to the hearing of the evidence on the charge by examining the Civil Surgeon and by taking such evidence as might be adduced or procured. The provisions of section 465, Code of Criminal Procedure, 1898, were obligatory and should not be disregarded.

Santosh Singh v. *The Crown*(1), *Shib Das Kundu* v. *Emperor*(2), *Bharat Patra* v. *The King Emperor*(3) and *Jhabbu* v. *Emperor*(4), referred to.

Appeal by the accused person.

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

Biseshwar Prasad Sinha, for the appellant.

K. P. Varma, for the State.

NARAYAN, J.—This is an appeal by one Chetu Mushar who has been convicted under section 302 of the Penal Code by the learned Sessions Judge of Monghyr for the murder of his wife Musammat Sarbatia and sentenced to transportation for life.

The short case put forward by the prosecution was that at about 10 A.M., on the 15th of January, 1951, Musammat Sarbatia shouted in her room that she had been killed. She ran out of the room but fell down in the angan. The accused, however, followed her from the room with a blood-stained tengari in his hand. Rameshwar (p. w. 2) who also lived in the same angan raised an alarm, and then his brother Dhaneshwar (p. w. 1) came to the angan and found Musammat Sarbatia fallen on the ground. The accused was standing there with the tengari in his hand. Rameshwar and Dhaneshwar then snatched the tengari from his hand and took him to the house of one Bishwanath who directed Rameshwar to bring the chaukidar. The village chaukidar then came to the house of the accused and after having been told about the occurrence went

(1) (1926) I. L. R. 7 Lah. 315.
(2) (1924) I. L. R. 51 Cal. 584.
(3) (1926) 44 Cal. L. J. 285.
(4) (1920) A. I. R. (All) 354.

1952.

CHETU v. STATE.

NARAYAN, J.

to the thana and lodged the first information. The Sub-Inspector after recording the first information report took up the investigation and after the investigation was complete, he submitted charge-sheet against the accused.

We find that the trial held by the learned Sessions Judge in this case is completely vitiated, because the allegation as to the unsoundness of mind of this appellant was not investigated, and the provisions of section 465 of the Code were not complied with. It appears from the order-sheet of the learned Sessions Judge that during the cross-examination of the first witness Dhaneshwar Mushar it transpired that the accused was insane and that his insanity had continued up till the day of the trial. The learned Sessions Judge observed that the trial could not proceed if he was insane even on that day, and he further noted in the order-sheet that after having put certain questions to the accused he was not able " to understand fully as to whether he was insane or sane at present ". He, therefore, directed that the accused should be placed under medical observation, and the Civil Surgeon of Monghyr was asked to report about the sanity of the accused. The order of the learned Sessions Judge in this connection runs as follows:

> " It is, therefore, necessary to have him placed under medical observation with a view to understand his mental condition at present. If the Civil Surgeon, under whose observation the accused will be placed for a week, certifies that he is at present insane, then an inquiry is to be made under section 468 Cr. P. C. The Civil Surgeon will please keep the accused under his observation for a week or more, as he thinks necessary and report whether at present his mental condition is such as to make him unfit to follow the proceedings in this Court. The trial is adjourned to 16th May 1951. P. Ws. and assessors to re-attend on that date and they have been so directed."

In the deposition of p. w. 1 who had made a clear statement to the effect that the mind of the accused had been deranged ever since he lost his son about two years back and that he had remained a *pagal* after his son's death up till the date he was deposing in this case, the

learned Sessions Judge has made the following note: 1952.

" At this stage the Court put a few questions to the accused in order to understand if he can follow the proceeding. Not being satisfied after putting a few questions the accused is put under the observation of the Local Civil Surgeon and the case is adjourned to 16th May 1951 "

CHETU v. STATE. NARAYAN, J.

Not only P. W. 1 but also P. W. 2 had deposed before the Court that the accused had been mentally deranged ever since he lost his son. It is this witness who had gone to the chaukidar, and he has stated that he had told the chaukidar as well that the accused was not mentally sound. These are the two witnesses on whom the prosecution mainly relies for the purpose of establishing the charge under section 302 against the accused, and both of them have made very clear statements to the effect that the accused had been mentally deranged ever since he lost his son and that he was mad even up till the date of the trial. Besides these two witnesses there is one other witness, P. W. 11 a chaukidar, who also says that since the death of his son the accused used to laugh and that sometimes he did not work. From the notes made by the learned Sessions Judge in the order-sheet as well as in the deposition of P. W. 1, it is manifest that he was in doubt as to the sanity of the accused. If he entertained any doubt as to the sanity of the accused, then he ought to have followed the procedure laid down in section 465 of the Code of Criminal Procedure. Though a report was called from the Civil Surgeon, that report is not on the record, and in fact if the learned Sessions Judge wanted to rely on the opinion of the Civil Surgeon, he ought to have examined him as a witness. In the case of *Santokh Singh* v. *The Crown*(1) their Lordships of the Lahore High Court took exception to the learned Sessions Judge using the deposition of the Civil Surgeon in the committing Court when the Civil Surgeon had not been examined at the trial. In this case there is not even a deposition of the Civil Surgeon which might have been recorded in the committing Court relating to the question of sanity or otherwise of

(1) (1926) I. L. R. 7 Lah. 315.

1952.

CHETU v. STATE.

NARAYAN, J.

the accused. There are several decisions which have laid down that when a Court entertains doubt as to the sanity of the accused, the Court should not merely put questions to the accused but should try the issue of such unsoundness of mind by examining the Civil Surgeon and by taking such evidence as might be adduced or procured. In *Shib Das Kundu* v. *Emperor*(1) a Division Bench of the Calcutta High Court did not approve of the charge to the jury in which it was said that it was for the defence to satisfy the Court with regard to the capacity of the accused to stand his trial. In *Bharat Patra* v. *The King Emperor*(2) their Lordships have said that the moment the question of the insanity of the accused is raised it becomes incumbent on the learned Sessions Judge to put to the jury as a preliminary issue to be tried by them as to whether or not they are satisfied that the accused is a person of unsound mind. In *Jhabbu* v. *Emperor*(3) the Counsel who represented the accused had prayed to the Sessions Judge that evidence might be taken on the question of the sanity or otherwise of the accused in view of certain materials indicating that the accused had been in custody before the commission of the alleged offence as a lunatic. Their Lordships observed that the provisions of section 465 were obligatory on the Court and that as a preliminary to the hearing of evidence on the charge, the learned Sessions Judge should first of all have tried the plain issue whether or not the accused person as he stood before the Court was of unsound mind and consequently incapable of making his defence. Their Lordships regarded the entire proceedings as vitiated because the question of soundness or unsoundness of his mind had not been tried as a preliminary issue. This, in my opinion, is a much stronger case in which the procedure laid down by section 465 should have been carried out, inasmuch as, as I have already pointed out, both the witnesses on whose evidence the prosecution relies for

(1) (1924) I. L. R. 51 Cal. 584.
(2) (1926) 44 Cal. L. J. 285.
(3) (1920) A. I. R. (All.) 354.

1952.

CHETU v. STATE.

NARAYAN, J.

bringing home to the accused the charge under section 302, Penal Code, have stated that the accused had been insane ever since the death of his son about two years back and that he is insane even now. It is difficult to conceive of a stronger case in which the procedure laid down by section 465 should be carried out, and it is regrettable that the learned Sessions Judge has rejected the plea of insanity raised by the accused even without examining the Civil Surgeon and without his report being placed on the record as a legal evidence in the case. This trial, therefore, stands vitiated, and the case has to be sent back for a retrial.

The conviction and the sentence passed on the accused are set aside, and the learned Sessions Judge is directed to hold a fresh trial according to law which should commence with the procedure required by section 465 of the Criminal Procedure Code to be followed by a formal finding as to the capacity of the accused for making his defence. The accused will remain in detention and under medical observation until the fresh trial is held or until the result shown by the evidence in the enquiry under section 465, Criminal Procedure Code.

AHMAD, J.—I agree.

K. D.

Re-trial ordered.

MISCELLANEOUS CRIMINAL.

Before Narayan and Ahmad, JJ.,

1952.

December, 2, 19.

KARAMVIR

v.

STATE.*

Preventive Detention Act, 1950 (Act IV of 1950), sections 8(3) and 9, as amended, violation of—detention, whether illegal—case-law, referred to,

* Criminal Miscellaneous no. 351 of 1952 and Criminal Miscellaneous no. 403 of 1952, in the matter of an application for a writ of *habeas corpus*.

1952.

KARAMVIR v. STATE.

Held, allowing the *detenu's* application for a *writ* of *habeas corpus* that there was violation of the provisions of sections 8(3) and (9) of the Preventive Detention Act, 1950 as amended inasmuch as the Chairman of the Advisory Board was not duly appointed and the reference was made beyond 30 days of the date of detention.

Application for a *writ* of *habeas corpus*.

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

B. C. Ghosh, Ras Behari Singh, Birendra Prasad Sinha and *Sheo Kumar Singh*, for the petitioner.

Advocate-General, for the State.

NARAYAN, J.—This is an application by one Karamvir Singh for a *writ* of *habeas corpus* against his detention in the Hazaribagh Central Jail under an order of the Governor dated 20th September 1952. He was arrested on 22nd September 1952, and the grounds for his detention were served on him on 26th September 1952. The only contention urged before us on his behalf is that his detention is illegal, inasmuch as on account of the omission of the State Government to appoint one of the members of the Advisory Board as a Chairman, there was no proper Advisory Board constituted for considering his representation till 7th November 1952. In order to appreciate the substance behind this contention it is necessary to point out that the provision in the Preventive Detention Act (Act no. IV of 1950) for the constitution of the Advisory Board was that the Board shall consist of two persons who are, or have been, or are qualified to be appointed as Judges of a High Court. There was an amendment of sub-section (2) of section 8 of the Act of 1950 which provided for the constitution of the Advisory Board, by Act no. IV of 1951, and the result of this amendment was that the Board was to constitute of three persons, instead of two, no alteration having been made with regard to the qualification provided in the old Act for the appointment of the members of the

Board. By Act LXI of 1952 another sub-section was added to section 8 which runs as follows:—

"(3) The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a Judge of a High Court to be its Chairman, and in the case of a Part C State the appointment to the Advisory Board, of any person who is a Judge of the High Court of a Part A State or a Part B State shall be with the previous approval of the State Government concerned:

Provided that nothing in this sub-section shall affect the power of any Advisory Board constituted before the commencement of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under section 9 pending before it at such commencement."

We thus find that after this amendment one of the three members constituting the Board must be a person who is or has been a Judge of a High Court, and it is this member of the Board who has to be appointed its Chairman. This amending Act came into force on 30th September 1952 by virtue of a notification issued on 15th September 1952, and it cannot be disputed that any Board constituted after 30th September 1952 of less than three members or without a Chairman of the qualification mentioned in the added sub-section, namely sub-section (3), will not be a Board validly constituted. But, there is a proviso attached to sub-section (3) which empowers the old Advisory Board, that is the Advisory Board constituted before the commencement of the amending Act of 1952, to dispose of any reference under section 9 pending before it at the time of the commencement of the amending Act of 1952. The representation in this case was submitted by the detenu on 9th October 1952, and the reference to the Advisory Board was made on 13th October 1952. According to section 9 of the Preventive Detention Act, the Government has to place before the Advisory Board constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order within thirty days from the date of detention. The Government could, therefore, make a reference to the Advisory Board in this case up till 22nd October 1952 or 23rd October 1952. The reference, as already pointed out,

1952.

KARAMVIR v. STATE.

NARAYAN, J.

having been made on 13th October 1952 must be deemed to be a reference made within the prescribed time. But the unfortunate omission is that though Act LXI of 1952 by which sub-section (3) was inserted in the old Act came into force on 30th September 1952, no Chairman of the Board was appointed before 6th November 1952. By notification no. 11142, dated 6th November 1952 the Governor of Bihar appointed the Hon'ble Mr. Justice V. Ramaswami, one of the members of the Board, as its Chairman. The learned Advocate-General could not but concede that there was no proper Board constituted in accordance with the provisions of Act LXI of 1952, until 6th November 1952 when the notification appointing the Hon'ble Mr. Justice Ramaswami as the Chairman was issued by the Government of Bihar. But he relied on the proviso to sub-section (3) according to which the old Board could dispose of any reference pending before it at the time when the second amendment by Act LXI of 1952 came into force. The learned Advocate-General had, however, to concede further that the old Board could not dispose of this reference. There was no pending reference on 30th September 1952, and the Board which was without a Chairman until 6th November 1952 could not dispose of this reference made on 13th October 1952, that is about a fortnight after Act LXI of 1952 had come into force. But the submission of the learned Advocate-General was that there was no bar to the old Board receiving the reference and the representation on 13th October 1952 and 9th October, 1952, respectively. In my opinion, the contention of the learned Advocate-General to the effect that though the Board could not dispose of this reference before 6th November 1952 it could receive the reference is a contention which must be repelled without the least hesitation. The words used in the proviso are "to dispose of" and not to receive, and section 9 provides for reference to a Board constituted by the Government under the entire section 8 and not only under sub-section (2) of section 8. The Advisory

1952.

KARAMVIR v. STATE.

NARAYAN, J.

Board had to be constituted under section 8 as it stands after the amendment which had come into force on 30th September 1952 and not only under sub-section (2) of section 8. The import of the words " under section 8 " in section 9 is unmistakable, and it would offend against all well-recognized canons of construction to read in section 9 the words " sub-section (2) of section 8 " in place of " section 8 ". We cannot import anything in section 9 which it does not contain, and according to section 9 the Advisory Board must be a Board constituted under section 8 which includes sub-sections (1), (2) and (3), the last of which provides for the appointment of a Chairman who is, or has been a Judge of a High Court. The tribunal whose duty it is to interpret a statute must endeavour to find out what, according to the well-recognized rules and principles of construction, the statute means, and if the meaning of the statute is made clear, it has to be applied in its strictest possible sense. And if a particular statute is found to be ambiguous, that is susceptible of two meanings, one leading to the invasion of the liberty of the subject and the other not, the latter has to be preferred on the ground that there is always the presumption that it is not the ordinary intention of a legislature to interfere with the liberty of the subject. There is, however, in this case no question of ambiguity, the words of the statute being clear and unmistakable. The effect of the amendment is as if the words therein had been inserted in the original Act, and the original Act must now be read as it reads at the present time. This is the view which was taken by their Lordships of the Judicial Committee in *Keshoram Poddar* v. *Nundo Lal Mallick*(1). The Supreme Court in *Shamrao V.*

(1) (1927) L. R. 54 Ind. App. 152.

1952.

KARAMVIR v. STATE.

NARAYAN, J.

Parulekar v. *District Magistrate, thana Bombay*(1) observed as follows:—

"The construction of an Act which has been amended is now governed by technical rules and we must first be clear regarding the proper canons of construction. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. This is the rule in England: *see* Craies on Statute Law, 5th Edition, page 207; it is the law in America: *see* Crawford on Statutory Construction, page 110."

It is therefore manifest that the Board which could dispose of this reference on 13th October 1952 is the Board constituted under the Act as it stands after the amendment which has been incorporated in it as a result of Act no. LXI of 1952. We have now to look to the clauses in the later Act and not to the clauses in the former Act. The position, therefore, is that on 13th October 1952 the reference could be made only to a Board which had a Chairman, and if no Chairman had been appointed before 6th November 1952, then there was no valid Board constituted under the Act until 6th November 1952. I have already said that the provisions of sections 8 and 9 (as they stand after the amendment) completely militate against the view put forward by the learned Advocate-General.

The next question which arises is whether the detention can be regarded as valid in law because the reference was disposed of by the new Board with the Hon'ble Mr. Justice Ramaswami as its Chairman on 14th November 1952. The learned Advocate-General,

(1) (1952) A. I. R. (S. C.) 324.

though he made a passing reference to Article 22 of the Constitution of India, did not contend with any seriousness that the detention of this applicant should be held to be legal and valid, because the reference was disposed of by a validly constituted Board on 14th November 1952. What is required is that the appropriate Government has within thirty days from the date of detention to place before the Advisory Board the grounds on which the order has been made and the representation, if any, made by the person affected by the order. This provision of law cannot be deemed to have been complied with in this case, inasmuch as the reference could be made only up till 22nd October 1952 or 23rd October 1952. It was not open to the Government to make the reference after the expiry of thirty days from the date of the detention, and because there was no valid Board constituted before 6th November 1952 there was no reference to a Board within thirty days from the date of the detention. The reference was no doubt disposed of within ten weeks from the date of detention as required by section 10, but the reference was not made within thirty days from the date of detention as required by section 9. It would not be sound to contend, and fortunately it has not been contended before us, that the detention would be valid for a period of three months irrespective of what was done in connection with the reference and that the detention should be held to be valid because the Advisory Board disposed of the reference on 14th November 1952 and reported that the detention was justified. The reference being a reference to a Board which had not been validly constituted was no reference in the eye of law, and there can be no such argument in this case that the reference made on 13th October 1952 could be disposed of after 6th November 1952 when the Board had been constituted according to law, inasmuch as there was no compliance with section 9, according to which the reference has to be made within thirty days from the date of detention. On account of non-compliance with section 9 the

1952.

KARAMVIR v. STATE.

NARAYAN, J.

detention has to be regarded as illegal an
do not think I should cite authorities to
view that the detention cannot be regarc
and legal if the executive Governmen
"cared to follow with extreme precision
the process which is to procure" tha
Brett L. J. in the well-known case of *Th*
Dale and *R. W. Enraghts*(1), observed as

"I desire to state that, although in
consider that irregularity a matter of
should be of the same opinion if it were c
of form, because, as I said before, I take
general rule that the courts at Westminis
allow any individual in this kingdom to
imprisonment of another, unless he ta
follow with extreme precision every for
step in the process which is to procure th
ment. I consider this to be a wholesome ar
and to be in accordance with the great d
English Courts have always had to
liberty of every one of Her Majesty's sub

Cotton, L. J. agreed with Brett, L. J
the following observation:—

"I quite agree with Brett, L. J.
persons take upon themselves to cause anc
imprisoned, they must strictly follow
under which they are assuming to act, an
not, the person imprisoned may be
although the particulars in which they ha
follow those powers may be matters of
Here, however, the departure from
procedure is not, in my opinion, a mere
form, but is a matter of substance."

The observation of Brett, L. J. was
Full Bench of this Court in *Muratpatwa*
of Bihar(2), and their Lordships pointed ou

(1) (1881) 6 Q. B. D. 376.
(2) (1947) I. L. R. 26 Pat. 628 F, B,

is no general rule of law that in a statute a condition subsequent to the doing authorised thereby is always to be construed as directory only. Their Lordships quoted Lord Campbell's observation in *Liverpool Borough Bank* v. *Turner*(1) to the effect that it is the duty of a Court of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. I need not repeat that there was no submission before us on behalf of the State to the effect that the provisions with regard to the making of the reference and the disposal of the reference in the Act are merely directory. These provisions having been made in an Act which is justified under the Constitution should be deemed to be included within the Constitution itself, and every bit of procedure prescribed in the Act has to be strictly followed. As was pointed out by the Privy Council in *Eshugbayi Eleko* v. *Officer administering the Government of Nigeria*(2), the executive can only act in pursuance of the powers given to them by the law, and in accordance with the British jurisprudence no member of the executive can interfere with the liberty or the property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. There are several authorities to the effect that while disposing of applications for writs, such as, mandamus and habeas corpus, the Court has to be on guard that the proper procedure has been maintained and that the liberty of the subject has not been arbitrarily interfered with. If on account of a callous indifference, inefficiency or slackness on the part of the officers of the executive Government there is found to be an illegal detention, an interference by the judicial tribunal will be justified. If the officers of the executive Government

(1) (1861) 30 L. J. Ch. 379.
(2) (1931) A. C. 662.

1952.

KARAMVIR v. STATE.

NARAYAN, J.

did not care to issue the notification before 6th November 1952, that is certainly a very sad mistake. His Lordship the Chief Justice of the Supreme Court in the case of *A. K. Gopalan* v. *The State of Madras*(1) said that Articles 22(1) and 22(2) prescribe limitations on the right given by Article 21 and that if the procedure mentioned in those Articles is followed the arrest and detention contemplated by Articles 22(1) and 22(2), although they infringe the personal liberty of the individual, will be legal. Article 22 has been styled as a complete code by itself and the procedural safeguards as laid down in the Article or in laws promulgated on the strength of the Constitution cannot be whittled down. If the legislature, therefore, has prescribed a procedure by a validly enacted law, such procedure in the case of Preventive Detention has to be strictly followed. The Parliament has been expressly given power under the Constitution to lay down the procedure with regard to the reference to an Advisory Board, and the provisions of the Act laying down the procedure cannot be disregarded. We have to give effect to the language used, and, as has been pointed out in several cases, in construing enacted words, it is no part of our business to consider the policy involved or the results which would follow by giving effect to the language used. The detention of a person, in any event, is tantamount to an imprisonment and neither a detention nor an imprisonment can be justified unless it is strictly in accordance with law. As was pointed out by Fazl Ali, J., in the case of *A. K. Gopalan*(1) the provision being in the nature of a safeguard, the Court must naturally lean towards the interpretation which is favourable to the subject and which is also in accord with the object in view. I should like to reproduce here certain passages from Cooley's Constitutional Limitations:

"Sir William Blackstone says, personal liberty consists in the power of locomotion, of changing

(1) (1950) 1 S. C. R. 88.

situation, or moving one's persons to whatsoever place one'e own inclination may direct, without imprisonment or restraint, unless by due course of law. It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty. Indeed, in organized society, liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protections against the lawless acts of others..... The working of our complex system, full of checks and restraints on legislative, executive, and judicial power, is favourable to liberty and justice. Those checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury."

There are checks and restraints in this Act as well, which cannot be disregarded. The relief contemplated by the statute cannot be denied to the persons intended to be relieved, and for non-compliance with the provisions of section 9, the detention must be regarded as illegal. A Bench of this Court in *Sunirmal Dutta* v. *Province of Bihar*(1) held that on account of the failure to comply with the provisions of sub-sections (4) and (5) of section 4 of the Public Ordinance, 1949, the detention of the petitioner before their Lordships was illegal. Sub-section (4) of section 4 was in these terms :—

"Advisory council shall, after considering the materials placed before it and, if necessary, after calling for such further information from the Provincial Government or from the person concerned, as it may deem necessary, submit, *within three weeks* of its receiving the materials and further information, a report to the Provincial Government."

Likewise, the detention of this present petitioner is illegal, because the stringent provisions of

(1) (1950) I. L. R. 29 Pat. 293.

1952.

KARAMVIR v. STATE.

sections 8 and 9, which are in the nature of statutory safeguards provided by the Act have not been complied with.

NARAYAN, J.

In the result, therefore, I would allow this application and direct that the detenu Karamvir Singh be released forthwith.

AHMAD, J.—I agree.

Application allowed.

K. D.

MISCELLANEOUS JUDICIAL.

1952.

December, 8, 22.

Before Ramaswami and Sarjoo Prosad, JJ.,

M. A. HASAN

v.

STATE OF BIHAR.*

Bihar Land Reforms Act, 1950 (*Bihar Act XXX of* 1950), *whether applicable to properties of religious and charitable nature.*

The provisions of the Bihar Land Reforms Act, 1950, are applicable to properties held by trustees for religious and charitable purpose.

Meghraj v. *Allah Rakhia*(1) and *Motipur Zamindari Co., Ltd.* v. *State of Bihar*(2), referred to.

Applications under Articles 26 (*b*) and 226, Constitution.

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

Janeshwar Prasad Singh and *M. Rahman*, for the petitioners.

* Miscellaneous Judicial Case nos. 250 and 251 of 1952, in the matter of an application under Articles 26(*b*), and 226 of the Constitution.

(1) (1947) L. R. 74 Ind. App. 12.
(2) (1953) I. L. R. 32 Pat. 71.

1952.

M. A. HASAN v. STATE OF BIHAR.

Lalnarain Sinha and *Bajrang Sahai*, for the State of Bihar.

RAMASWAMI, J.—In these applications which have been heard together the same question of law is involved, namely, whether the provisions of the Bihar Land Reforms Act, 1950, are applicable to properties held by trustees for religious and charitable purpose.

In Miscellaneous Judicial Case no. 250 the petitioner Molvi Abdul Hasan is the Mutawalli of Saifgunj Wakf Estate and Manshahi Wakf Estate. It is stated in the affidavit that

" the Saifganj Wakf Estate was dedicated to the Almighty "

by a registered Wakfnama dated the 11th July, 1914. The Manshahi Wakf Estate was similarly created by another registered document in the year 1934. It is alleged that on 22nd May, 1952, the Government of Bihar in exercise of the powers conferred by section 3 of the Bihar Land Reforms Act notified that the two wakf estates have become vested in and passed to the State of Bihar. The petitioner asserts that the State Government has no authority to acquire the properties vested in trustees for a religious or charitable purpose and that the notification with respect to the two estates is illegal and without jurisdiction. The petitioner prays for a *writ* in the nature of *mandamus* commanding the State Government not to interfere with the possession or the management of the petitioner over the estates in question.

In Miscellaneous Judicial Case no. 251 the material facts are of similar character.

It was submitted by the learned counsel on behalf of the petitioners that on a proper construction the Bihar Land Reforms Act cannot be applied to properties held for a religious or charitable purpose. Learned counsel referred to section 3(1) of the Act which authorises the State Government to declare by

1952.

M. A. HASAN v. STATE OF BIHAR.

RAMASWAMI, J.

notification that the estates or tenures specified in the notification have become vested in the State. Section 2(*o*) defines 'proprietor' to mean a person holding in trust or owning for his own benefit an estate or part of an estate. It was argued by the learned counsel that the mutawalli of a wakf estate was not a trustee in the technical sense but he was only a manager. In support of this argument learned counsel referred to *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(1) in which it was observed by Mr. Ameer Ali who pronounced the opinion of the Judicial Committee that a mutawalli has no right in the property belonging to the wakf; that the property was not legally vested in him and that he was not a 'trustee' in the technical sense. It is true that according to Mohammadan Law once it is declared that a particular property is wakf, the right of the wakif is extinguished and the ownership is transferred to the Almighty though the manager of the wakf is mutawalli or curator. In this connection learned counsel also relied upon section 1 of the Trust Act which states that nothing contained in that Act would affect the rules of Mohammadan law as to wakf. But the argument of the learned counsel proceeds upon a misconception. The question in the present case is not whether the mutawalli of a wakf is a trustee in the strict sense of English law. The question is, on the contrary, whether the Bihar Land Refoms Act applies to the properties held by mutawallis of a wakf for a charitable or religious purpose. The answer to the question is furnished by the Act itself. Section 2(*o*) defines a 'proprietor' to mean a person holding in trust or owning for his own benefit an estate or part of an estate. Section 2(*s*) defines 'trust' to mean any express or constructive trust created or existing for a public purpose of a charitable or religious nature and a *Hindu*, *Muslim*, *Christian*, *Buddhist* or any other religious or charitable endowment. It is

(1) (1921) L. R. 48 Ind. App. 302.

manifest that the Legislature intended that for the purpose of the Bihar Land Reforms Act the word 'trust' should include a Muslim religious or charitable endowment. On this branch of his argument the learned counsel referred to the proviso to section 4(*f*) which prohibits the Collector from taking charge of an institution, religious or secular, of any trust, or to interfere with the right of a trustee to apply the trust money to the objects of the trust. Learned counsel argued on the basis of this provision that the Act was not intended to apply to religious or charitable trust. But the proviso to section 4(*f*) must be read in the context of other important provisions of the Act. I have already referred to sections 2(*o*) and 2(*s*). It is further important to note that section 24(3) provides that in the case of a religious or charitable trust the compensation payable should be assessed as a perpetual annuity equal to the net income of the properties. On the examination of these important provisions it is clear that the Bihar Land Reforms Act applies to the zamindary assets vested in the trustees for religious or charitable purpose and that the Legislature has sufficiently manifested its intention on this point. The argument of the learned counsel must therefore fail.

It was then submitted for the petitioners that the Bihar Legislature had no authority to legislate for wakf estates. Learned counsel pointed out that the subject-matter of wakf estates would fall within entry nos. 10 and 28 of the Concurrent List. Entry no. 10 relates to 'Trust and Trustees'. Entry no. 28 relates to 'Charities and charitable institutions. charitable and religious endowments and religious institutions'. Learned counsel was however unable to point out how the provisions of the Bihar Land Reforms Act are repugnant to the provisions of any Union law with respect to item nos. 10 and 28 of the Concurrent List. Even if there is such a repugnancy between the provisions of the Bihar Land Reforms

1952.

M. A. HASAN v. STATE OF BIHAR.

RAMASWAMI, J.

Act and the provisions of the Union law, the argument of the petitioners must be rejected as unsound. Tested by its true nature and character, in other words, its 'pith and substance', it is obvious that the Bihar Land Reforms Act falls within item 36 of the State list, viz.,

"Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of list III".

The legislation is not substantially or primarily with respect to entry no. 10 or entry no. 28 in the Concurrent List. If this view is correct, the case would fall within the ambit of the principle enunciated by the Judicial Committee in *Megh Raj* v. *Allah Rakhia*[1] in which it was held that where the Province was acting wholly within its power under the Provincial List and was not relying on any power conferred on it by the Concurrent List, the doctrine of repugnancy had no application. A similar argument was addressed by Mr. P. R. Das in Miscellaneous Judicial Case nos. 242 and 238 of 1952 of which judgment is pronounced today and for the reasons elaborately set forth in the judgment of that case I am of opinion that the Bihar Land Reforms Act is constitutionally valid even though some of its provisions may trench incidentally on certain matters reserved for the Union Parliament.

In my opinion both these applications must be dismissed with costs. Hearing fee five gold mohars in each case.

SARJOO PROSAD, J.—I entirely agree.

Applications dismissed.

K. D.

(1) (1947) L. R. 74 Ind. App. 12.
* See (1952) I. L. R. 32 Pat. 71.

MISCELLANEOUS JUDICIAL.

1952.

December, 10, 11, 22.

Before Ramaswami and Sarjoo Prosad, JJ

MOTIPUR ZAMINDARI CO.

v.

STATE OF BIHAR.*

Bihar Land Reforms Act, 1950 (*Bihar Act XXX of* 1950), *whether legislation with respect to entry in the Union List, Constitution—Act, whether applicable to* zamindari *assets of incorporated companies—Companies Act*, 1913 (*Act VII of* 1913)—*companies' assets, both in Bihar and Bengal, Bihar Land Reforms Act*, 1950, *whether applicable—case-law, discussed.*

The Bihar Land Reforms Act, 1950, was not legislation with respect to item 52 or any other entry in the Union List but that it was legislation with respect to item 36 of the State List;

Held, that, on a proper interpretation, the Bihar Land Reforms Act, 1950, is intended to apply to the *zamindari* assets of companies incorporated under the Companies Act, 1913.

Where the companies' *zamindari* estate was situate both in Bihar and Bengal and Government Revenue was payable jointly and that the lands were held in *patni* leases for which one single rent was paid, *held*, that the Act was applicable and the only question was of apportionment of rent.

Applications under Article 226, Constitution.

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

P. R. Das and *L. K. Chaudhury* (in both) and *J. C. Sinha* (only in no. 242), for the petitioners.

Government Pleader and *Bajrang Sahai*, for the opposite party.

RAMASWAMI, J.—In these two applications which have been heard together an important question of law arises, viz., whether the Bihar Land Reforms Act is upon its true construction intended to apply

* Miscelloneous Judicial Case nos. 242 and 238 of 1952, in the matter of an application under Article 226 of the Constitution.

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

to the *zamindari* estate of companies incorporated under the Companies Act of 1913.

In Miscellaneous Judicial Case no. 242 the petitioner is an incorporated company called Raja Janakinath Roy and Narendranath Roy & Co., Ltd. The company was registered in the year 1933 and its head-office is located at Calcutta. One of the objects of the company was to own and deal in *zamindari* land and house properties in the States of Bengal and Bihar. It is alleged on petitioner's behalf that on 6th November 1951, the State of Bihar acting under its authority under section 3 (1) of the Bihar Land Reforms Act issued a notification declaring that the proprietary estates of the petitioner have passed to and become vested in the State of Bihar. On 6th June, 1952, the State Government issued notice to the petitioner under section 4 (*g*) of the Act requiring that the possession of the properties should be given to the Collector on the date specified in the notice. The petitioner was also ordered under section 40 of the Act to produce documents, papers and registers relating to the *zamindari* estate. It is contended on behalf of the petitioner that on its proper construction the Bihar Land Reforms Act did not operate on the *zamindari* properties of the incorporated companies. The petitioner submits that the notification issued by the State Government under section 3 (1) and the notices issued under sections 4 (*g*) and 40 of the Act were illegal, void, and without jurisdiction. The petitioner therefore prays that a *writ* in the nature of *mandamus* should be issued to the State of Bihar recommending it not to take possession of the zamindari estates owned by the petitioners.

In Miscellaneous Judicial Case no. 238, the material facts are similar. In this case the petitioner is Motipur Zamindari Company, Ltd., which has its registered office at Motipur within the State of Bihar. The notification under section 3 (1) was issued by the State Government on the 25th September, 1950,

declaring that the properties of the petitioner had vested in the State of Bihar. There is an additional ground mentioned in the petitioner's affidavit, viz., that the petitioner is a subsidiary of the Motipur Sugar Factory, Ltd., to which the petitioner supplies sugarcane; that if the State acquires the zamindari estate of the petitioner the production of sugar in the Motipur Sugar Factory will be seriously affected. It is said that the control of Sugar Industry has been declared by Parliament by law to be expedient in the public interest. It is alleged that Sugar industry falls under item 52 of the Union List and the zamindari properties of the petitioner cannot be acquired under the Bihar Land Reforms Act.

The main question to be determined is whether upon a proper interpretation, the Bihar Land Reforms Act is intended to apply to companies incorporated under the Companies Act (Act VII of 1913).

The argument presented on behalf of the petitioners is that the State Legislature has no authority to legislate with respect to trading corporations or with non-trading corporations whose objects are not confined to one State. Mr. P. R. Das referred to entry nos. 43, 44 and 45 of List I. Entry no. 43 relates to

"Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies."

Entry no. 44 is:

"Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities."

Entry no. 45 relates to "banking". Learned counsel, also referred to entry no. 32 in List II which relates to:

"Incorporation, regulation and winding up of corporations other than those specified in List I."

It was contended by the learned counsel that if the impugned Act operated on the zamindari assets of

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

incorporated companies the State Legislature would be invading the Union field, that it would be legislating on subjects expressly forbidden to it and expressly reserved to Union Legislature. In such a case the learned counsel maintained that there would be usurpation of legislative power of the Union under items 43, 44 and 45 of List I. Proceeding to elaborate this agrument Mr. P. R. Das referred to the principle that if two constructions of a statute are possible, the Court must favour such a construction as to make the operation of the Act *intra vires*. It was contended that the language used in the Bihar Land Reforms Act must be read down so as not to apply to companies incorporated under the Companies Act. The principle is that no intention can be imputed to the Legislature that it will exceed its own jurisdiction. On the contrary, the Court must presume that the Legislature in enacting the statute was dealing with things or persons within its own jurisdiction. Mr. P. R. Das relied upon *Macleod* v. *Attorney-General for New South Wales*(1), in which the Legislature of New South Wales had enacted a law providing that "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years". The appellant, who had during the lifetime of his wife married another woman in the United States of America, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be *ultra vires*. The Judicial Committee observed that if the statute was construed as it stood and upon the bare words, any person, married to any other person, who married a second

(1) (1891) A. C. 455.

time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. At page 457, Lord Halsbury states: "That seems to their Lordships, to be an impossible construction of the statute, the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words "Whosoever being married" means "Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales' ". And again at page 459: "It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony". The principle applies to all law-making bodies with limited powers. In *D'Emden* v. *Pedder*(1), the High Court of Australia held that there was no justification for assuming that a State Parliament

(1) (1904) 1 C. L. R. 91.

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth: "It is, in our opinion, a sound principle of construction that Act of a sovereign legislature, and indeed of subordinate legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative.....It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or in the more restricted sense according to the general scope and object of the enactment". Mr. P. R. Das, also relied upon the decision of the Federal Court in *In Re The Hindu Women's Rights to Property Act*(1), in which it was held that the word 'property' in the Hindu Women's Rights to Property Act must be construed as referring to property other than agricultural land. It was observed that when a Legislature with limited and restricted powers makes use in an Act of a word of such wide and general import as 'property', the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other.

The argument of Mr. P. R. Das is attractive but the agrument has hardly any relevance in the context of the present case. It is true enough to state as a general proposition that a Legislature must not be presumed to exceed its own jurisdiction and if two constructions of a statute are possible, one of which would make it *intra vires* and the other *ultra vires*, the Court must lean to that construction which would make the statute *intra vires*. But the whole argument of Mr. P. R. Das is built upon the underlying assumption that if the Bihar Land Reforms Act applied to incorporated companies, the Bihar Legislature would be acting in excess of its legislative powers. The question is whether the assumption is valid. Is it correct to state that if the Bihar Land

(1) (1941) F. C. R. 12.

Reforms Act applied to the zamindari assets of the incorporated companies, the statute would be unconstitutional and beyond the ambit of the power of the State Legislature? In this connection learned counsel referred to the provisions of the Companies Act, namely, sections 169, 170, 171A, 178, 179(*b*), 179(*c*) and 194. All the sections relate to the winding up by Court of the business of incorporated companies. Learned counsel referred to section 162 which states that a company may be wound up by the Court in certain circumstances specified in the section. It was argued by learned counsel that if the zamindari estate is acquired by the Government and bonds are given as compensation payable in forty annual instalments it will be impossible for the High Court to wind up any company. Reference was also made by learned counsel to section 4(*d*) of the Land Reforms Act which states that no suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenure-holder, the payment of which is secured by a mortgage or is a charge on such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped. Learned counsel maintained that section 4 (*d*) was in conflict with section 166 of the Companies Act which entitled a secured creditor to make an application for winding up of a company. Again, section 4 (*e*) of the Bihar Land Reforms Act states that:

> "no such estate or tenure shall be liable to attachment or sale under the processes of any Court and any order of attachment passed in respect of such estate or tenure before the date of vesting shall cease to be in force."

It was argued for the petitioner that this provision was in coflict with the provisions of the Companies Act which state that all the assets of a company are liable to be sold in course of liquidation proceedings. Learned counsel then referred to section 14 of the Act:

1952.

MOTIPUR ZAMINDARI Co. v. STATE OF BIHAR.

RAMASWAMI, J.

"Every creditor, whose debt is secured by the mortgage of, or is a charge on, any estate or tenure or part thereof vested in the State under section 3 may, within six months of date of such vesting..... notify in the prescribed manner his claim in writing to a Claims Officer to be appointed by the State Government for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim."

It was argued by the learned counsel that this section made it impossible for any liquidation proceedings to be initiated in the High Court. Learned counsel maintained that even if such liquidation proceedings are started there would be conflict of jurisdiction between High Court and the State Government and that it must be presumed that there was no intention on the part of the State Legislature in making the enactment that there should be such a conflict.

It is not necessary to analyse in detail the argument of the learned counsel on this point. Assuming but without affirming that there is a conflict between the Bihar Land Reforms Act and certain sections of the Companies Act relating to winding up of companies there would still be no basis for the argument that the Act is unconstitutional and void. The assumption underlying the argument on behalf of the petitioners is that the Act is legislation with respect to trading corporations falling within items 40, 43 and 45 of the Union List. But this assumption is unsound. Merely because the Act affects the zamindari assets of the companies it is not correct to argue that the Act is legislation 'with respect to' companies or trading corporations. The problem in this case is the problem of characterisation. In other words, the question must be asked what is the subject-matter of legislation in its "pith and substance" or in its true nature and character. We must find what is the primary matter dealt with in order to ascertain the class of subject to which it belongs. Is the Bihar Land Reforms Act a law substantially with respect to acquisitioning land, or is it a law substantially with respect to trading corporations? In

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

Huddart Parker v. *Moorehead*(1), Higgins, J. observed: "Now, how are we to determine what is the subject of any law, or any legislation, when two or more things that might be subjects of legislation are mentioned in it? The mere fact of mentioning corporations in these sections 5 and 8 does not necessarily make them a law "with respect to"—on the subject of—corporations. If a Licensing Act provides that the Licensing Court shall not transfer the license of a wife to her husband unless the husband be approved by the Court as a holder of a license, we should not call it legislation "with respect to" marriage or marital relations. If an Act provides that every marriage shall be celebrated in the presence of two witnesses of full age, and shall be registered, we should not call it legislation "with respect to" witnesses, or "with respect to ' infancy, or "with respect to" registration. The first is a law "with respect to" dealing in intoxicating liquors; the second is a law 'with respect to' marriage". In the recent *Bank Nationalisation Case*(2), Latham, C. J., said: "It is not enough that a law should refer to the subject-matter or apply to the subject matter; for example, income-tax laws apply to clergymen and to hotel-keepers as members of the public; but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or to banking".

In the present case what is the subject-matter of the legislation in its true nature and character? The Act is entitled as Bihar Land Reforms Act, 1950. The preamble states that it is expedient to provide for the transference to the State of the interests of the proprietors and tenure-holders in land and of the mortgagees and lessees of such interests, and to provide

(1) (1909) 8 C. L. R. 330, 410.
(2) 76 C. L. R. 1.

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

for the constitution of a land Commission for the State of Bihar with powers to advise the State Government on the agrarian policy to be pursued. The main provisions of the Act are designed to carry out the purpose stated in the preamble. It is manifest that the legislation falls entirely within item 36 of the State List, viz.:

"Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III."

In fact the question was much debated in *Kameshwar Singh* v. *State of Bihar*(1) in which the Full Bench held that the Bihar Land Reforms Act was covered by entry 36 of List II of the Constitution. In appeal the Supreme Court affirmed this view holding that the pith and substance of the legislation was transference of ownership of estates to State Government and falls within the ambit of legislative head entry no. 36 of List II.

Since the Act deals in pith and substance with item 36 of the State List the Act would be constitutionally valid though it incidentally trenches on matters reserved for Union Legislature. It is not a material consideration in such a case to what extent the Union field is invaded by the impugned statute. In *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Ltd.*(2), the Judicial Committee had to consider the Bengal Money Lenders Act, 1940. The Act undoubtedly restricted the rights of the holders of promissory notes to recover interest beyond a certain rate, and to that extent the legislation could be regarded as legislation in respect of items 28 and 38 in the Federal Legislative List. But the Judicial Committee held that the Act was in pith and substance an Act dealing with money lending within entry 23 in the Provincial Legislative List, and that the Act was *intra vires* and valid. At page 44 Lord Porter observed: "No doubt where they come in conflict list I has priority over lists III and II and

(1) (1951) A. I. R. (Pat.) 91, F. B,
(2) (1947) L. R. Ind. App. 28.

list III has priority over list II, but the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the provincial legislature from dealing with any matter which may incidentally affect any item in its list, or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view". The question of conflict between lists II and III arose directly in another case, namely, *Megh Raj* v. *Allah Rakhia*(1), in which it was held that section 107 of the Government of India Act had no application in a case where the Province could show, as it did in that case, that it was acting wholly within its powers under the .....Provincial List, and was not relying on any power conferred on it by List III of the Concurrent List. In that case it was argued that the Punjab Restitution of Mortgaged Lands Act, 1938, was invalid in that a number of its provisions were in fact legislation on matters falling within list III, namely, items 7, 8 and 10 of that list. The Judicial Committee, however, held that the impugned Act which dealt with mortgages on agricultural lands was legislation falling entirely within item 21 of the Provincial Legislative List, that is, land or any interest in land and, therefore, no question of repugnancy could arise by reason of the fact that the Act might trench to a certain extent upon the items in the Concurrent Legislative List. The whole argument in that case turned upon the effect of sections 100 and 107 of the Government of India Act. At page 22 Lord Wright observed: "It follows that in their Lordships' judgment there is not sufficient ground for holding that the impugned Act, or any part of it, was invalid. As a whole it fell within the powers given to the province by items 2 and 21 of list II, without any necessity to invoke any powers

(1) (1947) L. R. 74 Ind. App. 12.

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

from the Concurrent List, list III. Accordingly, questions of repugnancy under section 107 of the Constitution Act do not arise and need not be considered here". These cases demonstrate the principle that if the subject-matter of State legislation falls as a whole within a particular item in the State List then the legislation is valid and no question of invalidity can arise even if the legislation trenches incidentally upon the items in the Union List. In the present case even if the Bihar Land Reforms Act trenches to some extent on the provisions of the Companies Act of 1913, the legislation would be valid since the State Legislature was acting wholly within its powers under the State Legislative List. The argument of Mr. P. R. Das on this part of the case must fail.

The next branch of the argument on behalf of the petitioner is that even if the Bihar Legislature could validly legislate for acquiring the zamindari estates of the incorporated companies, the Bihar Legislature has not manifested any such intention in enacting the Bihar Land Reforms Act. In support of this contention Mr. P. R. Das referred to section 3 (1) which states that:

"the State Government may, from time to time, by notification, declare that the estates or tenures of proprietor or tenure-holder, specified in the notification have passed to and become vested in the State."

Learned counsel referred to section 2 (*o*) which defines 'proprietor' to mean:

"a person holding in trust or owning for his own benefit an estate or part of an estate.....where a proprietor is a minor or of unsound mind or an idiot, his guardian, committee or other legal curator."

Learned counsel pointed out that the Act does not in express terms apply to companies incorporated under the Companies Act. Learned counsel conceded that under section 4(40) of the Bihar General Clauses Act a 'person' shall be interpreted to:

"include any company or association or body of individuals, whether incorporated or not."

unless there is anything repugnant in the subject or context. The argument on behalf of the petitioners is that there are important provisions of the Act which indicate that the Legislature did not intend that companies should be affected. Learned counsel referred to section 14 of the Act and contended that if section 14 applied to companies, liquidation proceedings would become impossible. This in itself is no sound reason for holding that the Act does not apply to incorporated companies. Reference was also made to section 39 which grants protection to trustees of religious or charitable endowments. Learned counsel pointed out that section 39 did not make provision for directors of companies. But the obvious reason is that the trustees are under legal obligation to apply the proceeds of a particular property for the purpose of beneficiaries. The directors are under no such obligation though they stand in certain respects in a fiduciary position with shareholders. Reference was also made to section 41 which states that:

> "If any person wilfully fails or neglects to comply with any lawful order passed under this Act..... he shall, on conviction by a magistrate, be punishable with imprisonment or with fine or with both."

Mr. P. R. Das argued that if a company wilfully failed or neglected to comply with any lawful order passed under the Act the company cannot be punished with imprisonment or sent to jail. But the argument has no substance for section 41 refers to *any person* who wilfully fails or neglects to comply with any lawful order passed under the Act. The 'person' mentioned in section 41 may not necessarily be the proprietor of the estate but may be some one connected with its management. If the director or manager of a company wilfully fails or neglects to comply with a lawful order there is no insuperable difficulty in holding that he would certainly be liable to be punished with imprisonment or fine under the provisions of section 41. The argument of Mr. P. R. Das on this aspect of the case is hardly tenable. On the contrary, there are important considerations to suggest that the Legislature intended the Act

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI, J.

to apply to the zamindari assets of the incorporated companies. In the first place the Bihar General Clauses Act states that 'person' shall include a company or association or body of individuals, whether incorporated or not. There is nothing repugnant in the scheme or in the context of the act in accepting this meaning. On the other hand, the policy of the Act will be achieved only if this meaning is accepted. As pointed out by Mahajan, J. in *State of Bihar* v. *Kameshwar Singh*(1), the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community. The purpose of the Act is to prevent the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, the object is the nationalization of land by breaking up concentration of big blocks in the hands of the zamindars. It cannot, therefore be supposed that the Legislature contemplated that companies should be exempted from the operation of the Act. Otherwise it would be very easy on the part of the zamindars to defeat the purpose of the Act by creating fictitious companies and transferring the zamindari assets to such companies. The construction for which Mr. P. R. Das contends is against the whole scheme and policy of the Bihar Land Reforms Act. It is a sound rule of interpretation that statute must be so construed as to prevent the mischief and to advance the remedy according to the true intent of the makers of the statute. It is apposite in this connection to quote the language of Lord Justice Denning in *Seaford Court Estates, Ltd.* v. *Asher*(2): "It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the

(1) (1952) A. I. R. (S. C.), 252.
(2) (1949) 2 K. B. 481.

draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature. That was clearly laid down by the Resolution of the Judges in Haydon's Case which is set out by Lord Coke in the third volume of his Reports (pt. 3, 7b)".

My conclusion is that upon a proper interpretation, the Bihar Land Reforms Act is intended to apply to the zamindari assets of incorporated companies.

Two other points were urged on behalf of the petitioners. It was said in the first place that the zamindari estate of the petitioner was situated both in Purnea district of Bihar and in Malda district of West Bengal. It was stated that the touzis covered by the notifications, viz., 22/1, 22/2, 38/1 and 38/2, are of Purnea Collectorate. The land in Purnea covers an area of 135,357 acres and the land in Malda covers an area of 127,068 acres. The learned Government Pleader submitted that the notification referred only to the land which was situated within the territorial limits of Bihar. It is true that the Government revenue is payable by the petitioner jointly for the lands in Purnea and in Malda. The question merely resolves itself into one of apportionment and there is no warrant for holding that the notifications are for this reason invalid. The second point urged is that the zamindari has been let out in patni leases. It was argued by the learned counsel

1952.

MOTIPUR ZAMINDARI CO. v. STATE OF BIHAR.

RAMASWAMI J.

that all the lands in Malda are covered by patni lease, that each patni was in respect of land in both Malda and Purnea and that one single rent was paid by each tenant jointly for the land in Purnea and in Malda. It was argued that the Act cannot apply to such a case. There is no substance in this argument for the question is of apportionment of rent payable by the holders of the patni lease. There is no valid reason for holding that the zamindari assets of the petitioners cannot be acquired under the Bihar Land Reforms Act.

In Miscellaneous Judicial Case no. 238 an additional argument was addressed that the Bihar Land Reforms Act encroached to some extent on item 52 of the Union List since the control of sugar industry had been declared by Union Parliament to be in public interest. For the reasons I have already given I am of opinion that the Bihar Land Reforms Act is not legislation with respect to item 52 or any other entry in the Union List but that it is legislation with respect to item 36 of the State List and the constitutional objection raised on behalf of the petitioners must fail.

For the reasons, I have attempted to state, I think that both these applications must be dismissed with costs. Hearing fee ten gold mohars in each case.

SARJOO PROSAD, J.—I entirely agree and have nothing useful to add.

Applications dismissed.

K. D.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sarjoo Prosad, JJ.

R. R. CHAKRAVARTY

v.

STATE OF BIHAR.*

1952.

December, 2, 16.

Constitution—Article 226, *prayer for issue of a* writ *in the nature of* mandamus, *whether entertainable—Bihar Land Reforms Act,* 1950 (*Bihar Act XXX of* 1950), *section* 3(1) *and* 3(2) *not properly complied—names in the notification not properly given—publication, defective—properties of religious and charitable endowment—compensation, how to be given—sections* 32(2) *and* 24(3)—*Constitution, Article* 31(2), *whether violated.*

Where the State Government notified that a religious and charitable trust would vest in the Government under the Bihar Land Reforms Act but the notification did not mention the names of the proper trustees and the trustees applied to the High Court for a *writ* of *mandamus* against the State,

Held, that the trustees are not entitled to a *writ* of *mandamus* or any other *writ* under Article 226 of the Constitution of India, 1950.

The failure of the State Government to mention the correct name of the proprietors or tenure-holders will not invalidate the notification under section 3(1), Bihar Land Reforms Act, 1950, nor will it prevent the title to the estate or tenure passing to or becoming vested in the State Government under the provision of section 3(1) of the Act.

The publication in the two newspapers referred to in section 3(2) of the Act and the despatch of the copy of the notification by registered post to the proprietor of the estate are not mandatory provisions in the sense that failure to comply with those provisions would invalidate the notification made under section 3(1) of the Act.

In the case of a perpetual premium payable to the trustees of a religious or charitable endowment the compensation officer is bound to make payment in cash.

* Miscellaneous Judicial Case no. 344 of 1952, in the matter of an application under Article 226 of the Constitution of India.

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

The Bihar Land Reforms Act has specified in sections 24(3) and 32(2) the principle and manner in which the compensation is to be paid and given in respect to properties of a religious or charitable endowment and, therefore, there is no violation of the guarantee provided by Article 31(2) of the Constitution.

Where a statute is enacted for the purpose of enabling some action to be taken but the statute omits to mention expressly some important detail for the proper and effectual performance of the work which the statute contemplates the Court is at liberty to supply the *casus omissus* and to infer that the statute by implication empowers some details to be carried out and, therefore, section 33(1) of the Bihar Land Reforms Act must be construed to mean that the State Government have authority to make, indeed the State Government are bound to make, *interim* payment of compensation to the trustees equal to the approximate net annual income from the trust properties calculated in accordance with section 23 of the Act.

Cockson v. *Lee*(1), relied on.

Application under Article 226 of the Constitution.

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

Dr. N. C. Sengupta, B. C. De and *S. C. Ghosh*, for the petitioners.

Government Pleader, for the opposite-party.

RAMASWAMI, J.—In this case a rule has been granted calling upon the State of Bihar and the other respondents to show cause why a *writ* in the nature of *mandamus* should not be issued restraining them from taking possession of certain estates notified under the Bihar Land Reforms Act.

The petitioners are Trustees of an estate called the Brojabala Trust Estate created by Maharani Padma Sundari Debi of Hetampur in the district of Birbhum. The trust deed was executed on the 14th Falgoon 1301 Bengal Sambat, corresponding to 27th

(1) (1854) 23 L. J. Chancery, 473.

February, 1895. The petitioners along with *pro forma* respondents Suranjan Chakravarty, Pinaik Bhusan Deb Ray and Sachindra Mohan Roy are also Trustees of the Ramranjan Trust Estate created by the late Maharaja Ramranjan Chakravarty of Hetampur. The deed of trust was executed on the 27th Sraban 1294 Bengal Sambat, corresponding to the 11th August, 1887. By the trust deed of the Brojabala Trust Estate properties were vested in the Trustees for certain charitable and religious purposes. There was provision for the maintenance of a college at Hetampur, for the worship of the deity Sri Sri Gouranga Mahaprabhu installed in a public temple at Hetampur and for establishing a Sanskrit tole. The Ramranjan Trust deed similarly provided for the maintenance of a High English School at Hetampur, for the sebapuja of a deity Sri Sri Radha Ballav Jeo in a public temple at Hetampur, and for maintenance of a charitable dispensary at Hetampur. On 30th May, 1952, the Government of Bihar notified that the estates described in the schedule attached to the petition which form the subject-matter of the two trusts were vested in the State under the provisions of the Bihar Land Reforms Act of 1950. It was alleged on behalf of the petitioners that the notification was defective since the proper trustees were not mentioned with respect to touzi nos. 554, 556, 609, 31/BBI, 175/12 and the tenures appertaining to touzi no. 551. On the contrary, the trustees actually mentioned—Kumar Niranjan Chakravarty, Kumar Biswaranjan Chakravarty, Raja Satya Niranjan Chakravarty, Maharaj Kumar Mahimaranjan Chakravarty and Maharaj Kumar Kamala Niranjan Chakravarty—were all dead long past. As regards touzi no. 551R appertaining to 9 annas 2 gandas 3 krants notified in notification no. 77-LR/ZAN the names of all the trustees were not specified. With respect to touzi nos. 175/12, 175/3, 177/6 and 177/7 it was alleged on behalf of the petitioners that they were touzis of Birbhum Collectorate in West Bengal and were not in the jurisdiction of the State of Bihar. It was also alleged that the Collector proclaimed by beat of drum

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

that the residences belonging to the Trustees of Brojabala Trust in Jamtara and Dumka would be taken over by the State. The petitioners assert that the residences are not included within the touzi notified but they are properties held by the trustees as tenants under other touzis belonging to other proprietors.

In support of this rule Dr. Sengupta contended in the first place that the notifications issued by the Government of the State did not correctly mention the names of the trustees and the title to the estates notified could not, therefore, pass to or vest in the State under the provisions of section 3(1) of the Bihar Land Reforms Act. Learned counsel pointed out that with respect to touzis 554, 556, 609, 31/BBI, 175/12 and tenures appertaining to touzi no. 551 the notification was made in the names of the trustees who were dead long ago. As regards touzi no. 551R appertaining to 9 annas 2 gandas 3 krants share the names of the proprietors mentioned in the relevant column did not specify all the trustees. Learned counsel mentioned in particular that the name of Suranjan Chakravarty was not included. It was contended that the State Government had no jurisdiction to acquire the estates unless they correctly mentioned the names of the proprietors in the notification. The argument is that it is a condition precedent to the vesting of title that the State Government should correctly specify the name of the proprietors or tenure-holders in the notification. In my opinion the argument of the learned counsel is not valid. The question turns on the true interpretation of section 3(1) of the Act. Section 3(1) states that the State Government

> " may from time to time, by notification, declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State ".

The section does not require that the Government should give notice to the proprietors before the Government issue notification. The section does not stipulate that Government should conduct a judicial enquiry into the question as to who is the proprietor

of the estate which is to be notified. The section nowhere expressly states that the correct specification of the proprietor's name is a condition precedent to the jurisdiction of the State. If the correct mention of the proprietor's name is a condition of vesting there is no reason why the legislature should not have expressly said so. In my opinion the identity of the estate is the only relevant matter to be investigated on the question whether the title of the estate has passed to and become vested in the Government. It is not a relevant consideration whether the name of the proprietor or tenure-holder has been correctly specified in the notification. In other words, the mention of the proprietor's name in the notification is merely descriptive. It is not a condition of jurisdiction. Even if the name of a wrong proprietor is mentioned in the notification the title to the estate will pass and become vested in the Government so long as the identity of the estate is clear enough. There is no warrant for reading into section 3(1) an implied condition precedent that that Government should correctly specify the name of the proprietors in the notification. There are other considerations which support the construction of section 3(1) which I have taken. Section 32(4) states that where there is a dispute about the interest of the proprietor or tenure-holder in an estate pending on the 21st March, 1948, in a Court, whether in any suit, appeal or other proceeding, and "was undisposed of *at the date of vesting*," the Court shall, on the application of any party to such a suit, appeal or proceeding filed within sixty days of the *date of vesting*, stay all further proceedings in respect thereof and refer all matters in dispute to a Tribunal appointed by the State Government in this behalf. This section is important and throws light on the manner in which section 3(1) ought to be construed. Section 32(4) contemplates that at the time when the State Government issues notification there might be a dispute about the interest of proprietor or tenure-holder in the estate. Even so, the section states that title to the estate or tenure would vest in the State

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

Government but the dispute would be referred to a Tribunal and the amount of compensation would be determined in accordance with the award of the Tribunal. The legislature has, therefore, manifested its intention that irrespective of the dispute as to the proprietory title a notification under section 3(1) may be issued with respect to the estate and upon the making of such notification the title to the estate will pass to and become vested in the Government. On behalf of the petitioners Dr. Sengupta referred to section 3(2) which states that the notification shall be published in the official gazette and in at least two newspapers having circulation in the State of Bihar. The sub-section further requires that a copy of the notification shall be sent by registered post to the proprietor of the estate recorded in the general register of revenue-paying or revenue-free lands maintained under the Land Registration Act. It was maintained by the learned counsel that unless the notification is published in the manner specified in the section and unless a copy of the notification is sent by registered post to the proprietor concerned the title to the estate will not vest in the State Government as enacted in section 3(1). It was argued that in the present case the living trustees were not correctly named in the notification and notice to the actual trustees has not been given. I do not think that the argument of the learned counsel is correct. In my opinion the publication in the two newspapers referred to in section 3(2) and the despatch of the copy of the notification by registered post to the proprietor of the estate are not mandatory provisions in the sense that failure to comply with those provisions would invalidate the notification made under section 3(1). The provision as to the publication and posting of the notification to the proprietor is merely directory. It cannot have been the intention of the legislature that the validity of the notification issued under section 3(1) should depend upon the subsequent action of the authorities in publication and posting of the notification. The provision enacted in section 3(2) is merely intended

for the purpose of giving information to the proprietors concerned. This view is supported by the phrasing of section 3(1) which states that the State Government may, from time to time by notification, declare that

" the estates or tenures of a proprietor or tenure-holder, specified in the notification, *have passed to and become vested* in the State ".

The phrase " have passed to and become vested " grammatically construed must mean that on the date the notification is issued the title to the estate becomes vested in the State Government irrespective of any question as to the publication and posting contemplated in section 3(2). It is also important to notice that section 2(*h*) defines " *date of vesting* " to mean in relation to an estate or tenure vested in the State, the date of publication in the official gazette of the notification under sub-section (*i*) of section 3 in respect of such estate or tenure. Section 3(3) is also important. It enacts that the publication and posting of such notification where such notification is sent by post, in the manner provided in sub-section (2) shall be conclusive evidence of the notice of the declaration to such proprietors whose interests are affected. The provision of section 3(3) that mere constructive notice is sufficient is an additional reason for holding that the provision of section 3(2) with respect to the publication in two newspapers and the posting of the notification is merely directory. In the light of these considerations I am of opinion that it is not incumbent upon the State Government to mention in the notification under section 3(1) the correct name of the proprietor or the tenure-holder. The failure of the State Government to mention the correct name of the proprietors or tenure-holders will not invalidate the notification under section 3(1) nor will it prevent the title to the estate or tenure passing to or becoming vested in the State Government under the provision of section 3(1).

The question was next debated whether the State Government have authority under the Bihar Land Reforms Act to notify the properties belonging to a

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

religious or charitable trust. The argument of Dr. Sengupta is that the Act makes no provision for the payment of compensation to the trustees of a religious or charitable endowment. Reference was made to Article 31 of the Constitution of India which states that no property shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given. Dr. Sengupta referred to section 24(3) of the Bihar Land Reforms Act which provides that in the case of a religious or charitable trust the compensation payable would be assessed as a perpetual annuity equal to the net income. Section 23 indicates in what manner the net income of the proprietor or tenure-holder should be computed for the purpose of preparing Compensation Assessment-roll. Dr. Sengupta, however, complained that there was no section in the Act which provides in what manner the compensation is to be paid to the trustees of a religious or charitable endowment. On behalf of the respondents the learned Government Pleader replied that section 32(2) clearly provides that the amount of compensation shall be paid in cash or in bonds or partly in cash and partly in bonds. Dr. Sengupta, however, argued that section 32(2) had no application to the trustees of a religious or charitable endowment. Counsel pointed out that according to section 32(2) the compensation should be paid in cash or in bonds. Learned counsel contended that in the case of perpetual annuity payable to the trustees there was no question of any payment in bond and that section 32(2) could not therefore apply to trustees of a charitable or religious endowment. In my opinion the argument of Dr. Sengupta proceeds on a misconception. Section 23(1) clearly states that for the purpose of preparing Compensation Assessment-roll the net income of the proprietor or tenure-holder shall be computed after making the

deductions specified in the section. Section 24(3) enacts that in the case where the net income has been dedicated exclusively to charitable or religious purposes, the compensation payable shall be assessed as a perpetual annuity equal to the net income. Section 26 provides for the preliminary publication of the Compensation Assessment-roll. Section 28 requires that the Compensation Assessment-roll shall be finally published in the manner prescribed and every entry in the roll so finally published shall be final and conclusive evidence of the matter referred to in such entry and also of the nature of the interest of a proprietor or tenure-holder. Section 32(1) states the Compensation Officer shall proceed to make payment to the proprietors or tenure-holders shown in the Compensation Assessment-roll as finally published all the compensation payable to them in terms of the said roll. Section 32(2) enacts that the amount of compensation so payable in terms of Compensation Assessment-roll as finally published shall be paid in cash or in bonds and partly in cash and partly in bonds. Section 32(3) further provides that the Compensation Officer shall in the prescribed manner tender payment of the compensation as payable in cash or in bonds to the persons entitled thereto according to the Compensation Assessment-roll as finally published. Upon an examination of these sections it is manifest that section 32(2) applies to the payment of compensation to the trustees of a charitable or religious endowment to whom a perpetual annuity is payable as provided in section 24(3). Dr. Sengupta argued that section 32(2) said that the compensation shall be payable in cash or in bonds and that payment by bonds was not appropriate in the case of a perpetual annuity payable to the trustees. But section 32(2) confers a discretion on the compensation officer to pay the amount of compensation in cash or alternatively in bond. If section 32(2) is read in the context of section 24(3) it is obvious that as regards payment of perpetual annuity to the trustees the Compensation Officer is required to make payment in cash and not in bonds. If section 32(2) is so construed there is no

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

foundation for the argument that the Act makes no provision for payment of the compensation in the case of a religious or charitable trust. It is true that section 32(2) does not expressly state that in the case of a religious or charitable endowment the compensation officer ought to make payment of perpetual annuity in cash. But it is a sound rule of construction that a statutory provision should be construed in the context of the whole Act. Reading therefore section 32(2) along with section 24(3) it is manifest that in the case of a perpetual premium payable to trustees of a religious or charitable endowment the Compensation Officer is bound to make payment in cash.

It follows that the statute has specified the principle and the manner in which compensation is to be determined and given with respect to properties of a religious or charitable endowment. There is no violation of the guarantee of Article 31(2) of the Constitution and the argument presented by Dr. Sengupta must fail.

It was next contended on behalf of the petitioners that there was no provision in the Act for making *ad interim* payments to the trustees of a religious or charitable endowment. Learned counsel made reference to section 33 which states that after the date of vesting and before the date of payment of the compensation under section 32(2) *ad interim* payments may be made six-monthly to the outgoing proprietor or tenure-holder of an estate. There is a table annexed to section 33(1) which states what is the measure of the *interim* compensation payable:—

(*a*) Where the approximate amount of compensation, to be calculated by the Collector in the prescribed manner, does not exceed Rs. 50,000.	3 per centum per annum of such approximate amount of compensation.
(*b*) Where the approximate amount of compensation, to be calculated in the prescribed manner by the Collector, exceeds Rs. 50,000.	2½ per centum per annum of such approximate amount of compensation, subject to the maximum of Rs. 62,500 per annum.

It was contended on behalf of the petitioners that section 33 was not applicable to the case of a religious or charitable endowment since the table only makes provision for *ad interim* payments in the case of proprietors to whom a lump sum compensation is payable. It was argued by Dr. Sengupta that there was a *casus omissus* and the legislature has forgotten the case of a religious or charitable trust while enacting section 33. I do not think the argument is valid. For in my opinion the language of section 33(1) is wide enough to include payment of *interim* compensation to the trustees of the endowments. The table attached to section 33(1) is merely illustrative. I have already shown that section 32(2) contemplates payment of compensation to trustees of endowments. Section 24(3) expressly provides for payment of perpetual annuity equal to net income in such a case. It is not possible to suppose that the legislature did not intend that *interim* payments should not be made in the case of trustees of a religious or charitable endowment. In this connection section 4(*f*) is important. It states that the Collector shall take charge of an estate or tenure which had vested in the State provided that nothing contained in the clause shall be deemed to authorise the Collector to take charge of any institution, religious or secular, of any trust or any building connected therewith or to interfere with the right of a trustee to apply the trust money to the objects of the trust. It is conceivable that there might be a long interval of time between the date of vesting and the date when compensation is assessed and paid under section 32(2) of the Act. How are the trustees of a religious or charitable trusts to perform their duties during the *interim* period? In the present case, for instance, it is alleged that worship of deities is performed and a school and a college are maintained by the trustees. It is further stated that a dispensary is maintained out of the income of the endowment. Payments are also made for performing the worship of deities in Vrindaban. If no *interim* payment is made to the trustees it is manifest that the charitable and religious institutions would suffer,

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

and the trustees would be prevented from applying the trust money for the purpose of maintenance and upkeep of the objects of the trust. Section 4(*f*) prohibits such a course on the part of the Collector. It is true that the proviso is expressed in negative language but reading section 33(1) of the Act in the context of section 4(*f*) it must be held as a matter of necessary implication that if the State Government take charge of the estate of a religious or charitable endowment it is incumbent on its part to make *interim* provision for the upkeep and maintenance of all the objects of the trust. The section ought to be interpreted *ut res magis valeat quam pereat*. In other words, section 33(1) must be construed to mean that the State Government have authority to make—indeed the State Government are bound to make—*interim* payment of compensation to the trustees equal to the approximate net annual income from the trust properties calculated in accordance with section 23 of the Act.

In a case of this description the principle to be applied is well-known. If the statute is enacted for the purpose of enabling some action to be taken but the statute omits to mention expressly some important detail essential for the proper and effectual performance of the work which the statute contemplates the Court is at liberty to supply the *casus omissus* and to infer that the statute by implication empowers some details to be carried out. For instance, in *Cockson* v. *Lee*(1), a private Act vested certain land in trustees for the purpose of enabling them to sell the land for building purposes but the Act contained no express provision empowering the trustees to expend any portion of the purchase-money in making roads. In these circumstances the Court held that having regard to the object of the Act, viz., sale of the property as building land such power ought to be implied. At page 475 Lord Chancellor states: "The object of the Act of Parliament was that this property should be sold for building purposes. Now, in point of fact,

(1) (1854) 23 L. J. Chancery 473.

the Act of Parliament did not contain that which Acts of Parliament of a similar nature generally do contain, namely, power to apply a portion of the purchase-money immediately in the making of roads, and giving facilities for putting the property in a state in which it is capable of being sold and immediately used for building purposes. It did not do that expressly. It is said that the Act was drawn by a very eminent conveyancer, but we have nothing to do with that; we must take it as we find it, and one very natural question is whether—though it does not in terms do it, it does not do it by implication,—we must not infer that, from the powers given, the legislature considered that they had given the power which is contended for, or whether, directing something to be done, they must not be considered by necessary implication to have empowered that to be done which was necessary in order to accomplish the ultimate object ".

Two other matters were raised in the course of the argument. Dr. Sengupta said in the first place that touzi nos. 175/12, 175/3, 177/6, 177/7 and 186 appertain to no estate in Bihar but they were touzis of Birbhum Collectorate in West Bengal. It was argued by the learned counsel that the Bihar Government had no jurisdiction to notify these estates. The argument cannot be sustained. It is conceded by the learned counsel that the lands which these estates comprise lie partly in Bihar and the notification in question covers only the area within the territorial limits of Bihar. Section 2(*i*) of the Act defines ' estate ' to mean any land included under one entry in any of the general register of revenue-paying lands and revenue-free lands, prepared and maintained under the law for the time being in force by the Collector of a district. It is important to notice that section 2(*i*) defines ' estate ' to mean ' a share in or part of an estate '. Since the land lies within the territorial limits of Bihar it is manifest that the State Government had jurisdiction to make notification with respect to the estate. Dr. Sengupta referred to the definition of ' Collector ' in section 2(*e*) which

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

RAMASWAMI, J.

states that 'Collector' includes any officer not below the rank of a Deputy Collector appointed by the State Government to discharge the functions of a Collector under this Act. It is obvious that the definition does not exclude the Collector of a district outside Bihar. Section 2(*e*) obviously refers to officers appointed for the purpose of administering the provisions of the Land Reforms Act. Section 2(*e*) has no relevance while considering the question as to the meaning of an 'estate' and as to whether the Government had jurisdiction to notify the estate under section 3(1) of the Act. In my opinion the Government had jurisdiction to notify the touzis of Birbhum Collectorate in so far as the land appertaining to touzis falls within the territorial limits of Bihar. Another point was raised by Dr. Sengupta. Counsel referred to paragraph 11(*b*) of his application and said that the Collector had proclaimed by beat of drum that the two residences belonging to the Trustees of Brojabala Trust in Jamtara and Dumka would be taken possession of. No written order of the Collector is produced on behalf of the petitioners. There is no material to show that there was any written order of the Collector under section 4 requiring the petitioners to deliver possession of the houses in question. The allegation of the petitioners is also vague. No description of the residences is given. The plot numbers and boundaries are not specified and it is not said in which touzi and under which proprietor the properties are held by the petitioners as tenants. In view of the vagueness of the allegation it is not possible to say whether the allegation is well-founded or whether the petitioners are entitled to any relief.

For the reasons I have expressed I think that the petitioners are not entitled to the grant of a mandamus or any other writ against the State of Bihar and the other respondents. I would accordingly dismiss this application. There will be no order as to costs.

SARJOO PROSAD, J.—I find myself in general agreement with the decision just pronounced. When

1952.

R. R. CHAKRAVARTI v. STATE OF BIHAR.

SARJOO PROSAD, J.

I issued rule in some of these cases concerning " trust " estates, I felt no doubt in my mind that on a proper notification under section 3(1) of the Bihar Land Reforms Act even " trust " estates would vest in Government. This conclusion inevitably follows from a perusal of section 4(*f*) with sections 24(3) and 39 of the Act. The prohibition contained in the proviso to clause (*f*) of section 4 would be unnecessary if the intention was not to vest a " trust " estate in Government; nor would it be necessary to provide for compensation by way of a " perpetual annuity " equal to the net income of the estate in the case of a religious or charitable trust.

But the question which merited serious consideration is what was to happen to the " trust " after the " trust " estate had vested in Government. Section 4(*f*) definitely provided that nothing contained in the Act should be deemed to authorise the Collector " to take charge of any institution religious or secular, of any trust or any building connected therewith or to interfere with the right of a trustee to apply the trust money to the objects of the trust ". The Act, however, appears to have made no specific provision for interim payments to the trustee. The legislation is somewhat inartistically drafted and even in this case I have felt difficulties in the interpretation of section 3(1) as also the other sections contained in Chapter VI of the Act, in regard to payment of compensation in relation to " trust " estates. Legislation of this kind may well furnish a fruitful field for dialectical exploration but are more often than not the tragedy of judicial adventures. In dealing with another such legislation inartistically drafted I remarked relying upon a passage in Maxwell on Interpretation of Statutes that " where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or absolute intractibility of the language used. The rules of grammar yield readily in such cases to those of common sense ": *Atma Ram Budhia*

1952.

R. R. CHAKRAVARTY v. STATE OF BIHAR.

SARJOO PROSAD, J.

v. *State of Bihar*(1). With a view, therefore to give full effect to the mandatory provision contained in section 4(*f*) of this Act, it should and must be held that iterim compensation shall also be payable to the trustee on the basis of the principle laid down in section 23(4) of the Act, otherwise the objects of the trust would suffer and the proviso to section 4(*f*) would defeat its purpose. The complaint also is that there is no specific provision in the Act laying down the manner in which compensation is to be paid to the trustees of a religious or charitable endowment. Apparently, there is some seeming justification for the complaint but on a close scrutiny of the relevant sections of the Act there can be no doubt that section 32(2) must be read in the light of section 24(3) and then it would be fairly obvious that the Compensation Officer is required to pay to the trustees of a religious or charitable trust the perpetual annuity in cash and not in bond.

Turning now to the other important question whether the failure to specify correctly the name of the proprietor under section 3(1) of the Act vitiates the entire notification and prevents the vesting of the estate in Government, I am exactly of the same view as my learned brother, though initially I was inclined to a different course. I agree that the mention of the proprietor's name in the notification is merely descriptive and not a condition precedent to the vesting of the estate. The essential thing is the identity of the property or estate which should be properly specified. There are sound reasons for that inference. Firstly, the vesting of the estate depends not upon the publication of the notification as required by sub-section (2) of section 3 but upon the declaration contained in the notification. Secondly, sub-section (2) requires that a copy of the notification should be sent under registered post to the proprietor recorded in the Land Registration records. Now the proprietor so recorded may be dead or perhaps may have been

(1) (1952) I. L. R. 31 Pat. 493, S. B.

wrongly recorded and there may be a dispute pending, yet Government may have no information about the real owner. Could it be then reasonably assumed that the incorrect mention of the name of the proprietor in the notification or in the registered notice affected the validity of the notification or the vesting of the estate? Thirdly, under section 32(4) the Act provides that where there is a dispute pending about the interest of a proprietor or tenure-holder and such dispute was undisposed of at the date of vesting, the whole matter in dispute shall be referred to a tribunal in this behalf. It is, therefore, evident that the dispute as to the proprietary interest does not affect the vesting; and yet by virtue of section 4(*a*) the estate or tenure vested " absolutely in the State free from all encumbrances ". All these considerations converge on the issue that the mention of the words " proprietor or tenure-holder " with reference to estates or tenures in section 3(1) of the Act is merely descriptive and indeed even superfluous. If, therefore, the notification correctly specifies the estate or tenure, it is quite sufficient to vest the same in the State Government.

The other points arising in the case have been amply considered in the judgment of my learned brother and I do not propose to add anything to the discussion.

I, therefore, agree that the application should fail and the rule should be discharged.

Rule discharged.

S. H.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sarjoo Prosad, JJ.

RAJNARAIN

v.

CHAIRMAN, P. A. C.*

1952.

December, 3, 4, 22.

Patna Administration Act, 1915 (Bihar and Orissa Act I of 1915), sections 3(1)(f) and 5, notifications reproducing section, whether delegated legislation—section 98, whether inconsistent with Article 14 of the Constitution—application for a writ under Article 226 of the Constitution—maintainability of.

The provisions contained in sections 3(1)(*f*) and 5 of the Patna Administration Act, 1915, as amended in 1928 and the notifications dated the 25th April, 1931, and 25th of April, 1951, in pursuance thereof are not delegated legislation and therefore, not void.

In re Art. 143, Constitution of India, etc.(1), explained and followed.

Article 14 of the Constitution is designed to protect all persons placed in similar circumstances against legislative discrimination, and if the legislature took care to reasonably classify persons for legislative purposes and if it dealt equally with all persons belonging to a well defined class, the legislation so enacted would not be open to the charge of denial of equal protection on the ground that the law did not apply to other persons and, therefore, section 98 of the Patna Administration Act, 1915, as published in the notification dated the 25th of April, 1931, in its application to the Patna Administration area is not void.

The State of West Bengal v. *Anwar Ali Sarkar*(2), *Kathi Raning Rawat* v. *State of Saurashtra*(3) and *Lachmandas Kewalram Ahuja* v. *State of Bombay*(4), relied on.

* Miscellaneous Judicial Case no. 78 of 1952, in the matter of an application under Article 226 of the Constitution of India.

(1) (1951) A. I. R. (S. C.) 332.
(2) 1952) S. C. R. 284.
(3) (1952) S. C. R. 435.
(4) (1952) S. C. R. 710.

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

Held, therefore, on an application under Article 226 of the Constitution of India, that a *writ* restraining the Chairman of the Patna Administration Committee from enforcing the provisions contained in the notifications, dated the 25th of April, 1931, and 25th of April, 1951, cannot be granted.

Application under Article 226 of the Constitution.

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

B. C. Ghosh, N. Chatterji and *A. C. Mitra*, for the petitioner.

Advocate-General and *Mr. Krishna Prakash Simha*, for the opposite-party.

SARJOO PROSAD, J.—This is an application under Article 226 of the Constitution by one Rajnarain Singh, who styles himself as Secretary to the Rate-payers' Association, resident of village Yarpur in the district of Patna. He has prayed for an appropriate writ or direction against the opposite-party, who is the Chairman of the Patna Administration Committee, for restraining him from proceeding with the realisation of municipal taxes from the petitioner and other members of the Rate-payers' Association, or from enforcing the provisions of the Bihar and Orissa Municipal Act, 1922, as modified and extended by notifications dated the 25th of April, 1931, and the 25th April, 1951, and similar other notifications to the area in which the petitioner and the members of his association reside, and for quashing the said notifications.

The material facts are that in 1911, when the province of Bihar and Orissa was originally constituted, the municipal legislation applicable to the province was the Bengal Municipal Act, 1884 (Bengal Act III of 1884), and the said Act with modifications from time to time continued to apply to the province. The Bihar and Orissa Legislature subsequently enacted the Patna Administration Act, 1915 (Bihar and Orissa Act I of 1915). This Act was made

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

applicable to Patna, and the area and the boundaries thereof were specified in the schedule to the Act, the said area being subject to exclusion or inclusion of any other local area by notification of the Local Government under section 6 of the Act. Section 3 of the Act authorised the Local Government to impose in Patna any tax which could be imposed there by the Municipal Commissioners, if Patna were a municipality constituted under the Bengal Municipal Act of 1884. Clause (*f*) of section 3(1) of the Act further authorised the Local Government to extend to Patna the provisions of any section of the said Act subject to such restrictions and modifications as the Local Government might think fit; and under section 5 it was also provided that the Local Government might at any time cancel or modify any order under section 3. As I shall show later, these two provisions of the Act, as embodied in sections 3(1)(*f*) and 5, have been very seriously attacked by the learned Counsel appearing on behalf of the petitioner. The Local Government from time to time under various notifications purporting to act on the authority of the said provisions extended to Patna certain sections of the aforesaid Municipal Act. In 1922 the Bihar and Orissa Municipal Act (Act VII of 1922) was enacted, and came into force with effect from the 1st of January, 1923, under Government notification dated the 22nd November, 1922. It extended to the whole of the province of Bihar including the Santal Parganas. By virtue of this Act, the whole of the Bengal Municipal Act applicable to the province of Bihar and Orissa stood repealed. In consequence of this statute, the Patna Administration Act also came to be amended by the Bihar and Orissa Act IV of 1928, and in place of the words " Bengal Municipal Act, 1884 ", the words " Bihar and Orissa Municipal Act, 1922 " were substituted in section 3(1)(*a*) of the Patna Administration Act. This change took place undoubtedly after six years of the passing of the Bihar and Orissa Municipal Act. The result of this change in the Patna Administration Act was that the Provincial Government acquired authority by virtue of section

3(1)(*f*) of the Act to extend to Patna the provisions of any section of the Bihar and Orissa Municipal Act subject to such restrictions and modifications as it thought proper, and also by virtue of section 5 of the Act to cancel or modify any such order made under section 3. On the 25th of April, 1931, the Government of Bihar and Orissa published a notification in the local official gazette. The notification purports to have been made in exercise of the power conferred by clause (*f*) of sub-section (1) of section 3 of the Patna Administration Act and by this notification the Government of Bihar and Orissa were pleased to extend to Patna the sections of the Bihar and Orissa Municipal Act according to the specification which followed in the body of the notification and in the modified form shown therein. The said notification also cancelled all the previous notifications extending to Patna, the sections of the Bengal Municipal Act, 1884, and the Bihar and Orissa Municipal Act, 1922. In the said notification the various sections of the Act, as modified by the Provincial Government in appropriate cases, are mentioned from chapter to chapter. The notification is thus a self-contained legislation in itself. This procedure adopted by the Provincial Government has also been seriously questioned on behalf of the petitioner, and it has been urged that the Provincial Government has in making this notification usurped the functions of the legislature, which it had no authority to do, the Government being a mere delegate of the legislative body for administrative purposes. On the 11th of April, 1951, by a Gazette notification the provisions of the Bihar and Orissa Municipal Act were extended to certain other local areas including the area in which the petitioner resides. It also appears that on the 23rd of April, 1951, there was a further notification by the Government of Bihar in exercise of the power conferred by clause (*f*) of sub-section (1) of section 3 of the Patna Administration Act. under which the Governor of Bihar applied to Patna section 104 of the Bihar and Orissa Municipal Act (Act VII of 1922), in a modified form. The Patna Municipal Corporation Act, 1951 (Act XIII of 1952),

1952.

RAJNARAIN
v.
CHAIRMAN,
P. A. C.

SARJOO
PROSAD, J.

came into force on the 26th of July, 1952, and under section 2 of the Act the Bihar and Orissa Municipal Act, 1922, was withdrawn from the local area comprised within the Patna City Municipality and the Patna Administration Act, 1915, stood repealed but the withdrawal or abolition did not affect the validity of anything done or suffered or obligation or liabilities created under those Acts before the operation of the new statute. The Chairman, Patna Administration Committee has thus been impleaded as the party-respondent to this application. The complaint of the petitioner is that by virtue of these notifications he has been seriously prejudiced on account of the extension of the Bihar and Orissa Municipal Act to the area in which the petitioner and the members of his association reside.

It is contended by Mr. Ghosh on behalf of the petitioner that sections 3(1)(*f*) and 5 of the Patna Administration Act and the notification dated the 25th of April, 1931, in pursuance thereof are void on the ground of delegated legislation. The Local Government under section 3(1)(*f*) undoubtedly enjoyed very large powers to extend to Patna the provisions of any section of the Bihar and Orissa Municipal Act subject to such restrictions and modifications as the Local Government thought fit. These restrictions and modifications might be very far reaching in their character, and it is submitted that some of them are indeed very far reaching, and section 5 further authorised the Local Government at any time to cancel or to modify any order under section 3. This, according to the petitioner, amounted to vesting the Local Government with full legislative powers to make any and every change they liked and to apply the Patna Municipal Act in any shape and form. Indeed the changes effected in the Act might metamorphose the Municipal Act into a completely new legislation. It is to be borne in mind that in pursuance of these modifications the notification dated the 25th of April, 1931, was published by the Local Government, and this notification itself shows that, according to the

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

petitioner, vast changes have been made in the Municipal Act; many of the provisions of the Municipal Act have been omitted, while several others have been substantially changed or altered. He points out, for instance, that section 12 of the Municipal Act has been altered, and there is no provision for a body of Municipal Commissioners as contemplated by the Act. Sections 13 to 23 and various other sections of the Act have been omitted, and substantial changes have been introduced in section 98, which is one of the vital sections, in regard to the assessment of taxes on the annual value of holdings.

These changes are undoubtedly there, but these omissions and changes appear to have been necessary on account of the fact that the area to which the notification applied was not governed by any municipality but by the Administration Committee under the Patna Administration Act which was presided over by a Chairman of its own. The changes were, therefore, consequential, and some of the changes which could not apply to the Administration Committee had to be left out of account in extending the provisions of the Municipal Act to the Patna Administration area. It cannot, therefore, be said that the modifications were so vital as to change the whole character and nature of the legislation which was, after all, a legislation for the purpose of providing the residents of the locality with municipal amenities and also to levy taxes on them for the purpose of financing those amenities. In this connection reliance was placed upon a decision of the Supreme Court in the famous Delhi Laws Act case which is also otherwise known as the Delhi Delegation case—*In re Art.* 143, *Constitution of India, etc.*(1). In that case there were three questions referred to the Supreme Court for its decision. The questions were as follows:—

"1. Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent 'urtra vires' the Legislature which passed the said Act?

(1) (1951) A. I. R. (S. C.) 332.

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

Section 7 of the Delhi Laws Act, mentioned in the question runs as follows:—

The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification.

2. Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent 'ultra vires' the Legislature which passed the said Act?

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, runs as follows:—

Extension of Enactments to Ajmer-Merwara.—The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification.

3. Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent 'ultra vires' the Parliament?

Section 2 of the Part C States (Laws) Act, 1950, runs as follows:—

Power to extend enactments to certain Part C States.—The Central Government may, by notification in the official gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

On the first two questions the majority of the Judges of the Supreme Court were of the view that the laws referred to in those questions were not *ultra vires* the legislature and did not offend against the principle of delegation; in other words, they could not amount to delegated legislation. On the third question there was some difference of opinion expressed by two of the Judges who agreed to the majority view. Kania, C.J., and Mahajan, J., held categorically that all the three sections mentioned in the three questions were *ultra vires* the Legislature. Fazl Ali, J., on the contrary, held with equal unambiguity that none of the provisions which were subject of the three

questions referred to was *ultra vires* and so did Patanjali Sastri, J. (as he then was) and Das, J. Mukherjea, J., held that section 2 of the Part C States (Laws) Act, 1950, was *ultra vires* to the extent that it empowered the Central Government to extend to Part C States Laws which were in force in Part A States, even though such laws might conflict with or affect laws already in existence in the area to which they were extended, and the power given by the last portion of the section to make provisions in any extended enactment for the repeal or amendment of any corresponding provincial law, which was for the time being applicable to that Part C State was, therefore, illegal and *ultra vires*. Bose, J, also agreed with this view of Mukherjea, J., inasmuch as he was also of the opinion that section 2 of the Part C States (Laws) Act, 1950, was *intra vires* except for the concluding sentence which ran as follows:—

"and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

This portion of section 2 he held to be *ultra vires*. With great respect, it is difficult to deduce any definite principle from the decision in question because of the varied opinion of the learned Judges; and I do not find anything in that decision to assist the contention of the petitioner's Counsel. It seems to me safer to base my judgment upon the view of the three learned Judges who were in the majority and who held that the whole of section 2 of the Part C States (Laws) Act, 1950, was *intra vires*. It is to be noticed that all the sections referred to in the three questions authorised the Provincial Government to extend by notification certain enactments "*with such restrictions and modifications*" as they thought fit. That being so, I do not see how on the authority of this decision section 3(1)(*f*) or section 5 of the Patna Administration Act can be held to be anything but *intra vires*. Much stress was laid by the learned counsel on the decision of Bose, J., and some of the

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

observations which obtain in his judgment; but even that learned Judge warned that each case had to be decided on its own facts as and when it arose, and even he was unable to hold in view of the past history of judicial pronouncements and in view of the necessities of a modern State that legislations of this kind were altogether beyond the competence of the Legislatures. I cannot do better than reproduce his Lordship's own picturesque language in this context:—

> "I find myself obliged to steer a middle course between two conflicting principles which have been handed down from the past and which have been woven into the Indian concept of legislative power prior to the present Constitution. One permits very wide powers of delegation for sound and practical reasons despite the attempts made to disguise that fact by placing a special meaning on words like 'delegation', 'legislation', 'sovereignty' and 'abdication'. The other holds that new legislative bodies cannot be set up by fettered legislatures like ours (I mean of course when they are not exercising constituent powers) and, as a corollary to that, that essentially law-making powers cannot be transferred. Both principles are sound and there are weighty reasons for retaining both, as indeed the Privy Council has been at pains to do ever since 1878. But I find it difficult to keep them side by side and at the same time be strictly logical. I have therefore endeavoured to give effect to both in a practical way as best I could. I realise that this will lead to differences of opinion among judges in individual cases. But that, to my mind, is the only feasible and practical way of dealing with a situation in which much confusion of thought already exists. In any event, these are the lines along which British jurisprudence has functioned for centuries and our legal and juristic foundations lie there. It has this much merit. It helps to keep legislation and executive action on an even keel for, so long as the powers are used sparingly and with moderation, no Court is likely to interfere. It is only when advantage

is taken of a doctrine based on sound practical considerations and an endeavour is made to push it further and further till the dividing line between permissible delegation of authority and virtual abdication of legislative functions, as a common-sense man in the street would understand it, devoid of legal subtleties becomes dangerously thin that trouble is likely to arise."

The contention, therefore, on the point of delegation must fail.

Mr. Ghosh next contends that section 98 as published in the notification dated the 25th of April, 1931, in its application to the Patna Administration area was void on account of its being inconsistent with Article 14 of the Constitution which deals with the equality of all persons before the law. Article 14 enacts that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. He has in this connection sought to support his argument by reference to several recent decisions of the Supreme Court. In the *State of West Bengal* v. *Anwar Ali Sarkar*(1) the majority of the Judges held that the procedure laid down by the Act impugned therein for the trial by Special Courts varied substantially from the procedure laid down for the trial of offences generally by the Code of Criminal Procedure, and the Act did not classify or lay down any basis for classification of the cases which might be directed to be tried by Special Courts but left it entirely to the uncontrolled discretion of the State Government to direct any case which it liked to be tried by the Special Court. In the circumstances they held that the Act in question contravened Article 14 of the Constitution and was as such void. Their Lordships also pointed out that a rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law, and it was, therefore, necessary that all litigants who were similarly situated

(1) (1952) S. C. R. 284.

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

were able to avail themselves of the same procedural rights for relief and for defence with like protection and without any discrimination between them. It was also pointed out there that the meaning and scope of Article 14 had been elaborately explained in two earlier decisions of the Supreme Court, viz., *Chiranjit Lal* v. *Union of India*(1) and *State of Bombay* v. *F. N. Balsara*(2). The principles laid down in those decisions were that Article 14 was designed to protect all persons placed in similar circumstances against legislative discrimination, and if the Legislature took care to reasonably classify persons for legislative purposes and if it dealt equally with all persons belonging to a well-defined class, the legislation so enacted would not be open to the charge of denial of equal protection on the ground that the law did not apply to other persons. It was also observed that there was nothing sacred or sacrosanct about the test of reasonableness in making the classification. The same principles appear to have been reiterated in the other two cases cited by the learned Counsel. In *Kathi Raning Rawat* v. *State of Saurashtra*(3) the Saurashtra State Public Safety Measures Ordinance, 1948, was called in question. The Ordinance was brought into being as crimes involving violence such as dacoity and murder were on the increase, and it empowered the State Government by notification in the official gazette to constitute Special Courts of criminal jurisdiction for such area as may be specified in the notification to try such offences or classes of offences or such cases or classes of cases as the Government may by general or special order direct. The procedure laid down by the Ordinance for the trial of such cases also varied from the normal procedure prescribed by the Criminal Procedure Code. The majority of the Judges held that the impugned Ordinance did not contravene the provisions of Article 14 and was not *ultra vires* or void. The following comment of Patanjali Sastri, C.J., on the decision of the Supreme

(1) (1950) S. C. R. 869.
(2) (1951) S. C. R. 862.
(3) (1952) S. C. R. 435.

Court in the Delhi Laws Act case while meeting the argument of Counsel is rather interesting:—

"He attempted to make this out by piecing together certain dicta found in the several judgments delivered in that case. While undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases."

This diversion apart, to come back to the point, Mukherjea, J., who agreed with the majority view, observed as follows:—

"It is well settled that a legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the legislation, that necessity of judicial interference arises."

Mr. Ghosh emphasises upon the *dictum* in urging that the differences made have no rational relation to the objectives of the legislation so far as the enactment of section 98 in the notification before us is concerned, and he, therefore, contends that the necessity

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PRASAD, J.

for judicial interference arises in the present case. His argument is that not only the classification should not be arbitrary or capricious but that it should be reasonably co-related to the objective of the legislation in view. It must be conceded that these are the normal tests of reasonableness and from time to time courts have adverted to these tests to find out whether or not the classification suggested in a particular legislation is reasonable. For instance, another case in point is the decision in *Lachmandas Kewalram Ahuja* v. *State of Bombay*(1) where Das, J., again laid stress on the above tests in the following terms:—

"It is now well established that while article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be nexus between the basis of classification and the object of the Act. To take an example: Under section 11 of the Contract Act persons who have not attained majority cannot enter into a contract. The two categories are adults and minors. The basis of classification is the age. That basis obviously has a relation to the capacity to enter into a contract. Therefore, the section satisfies both the requirements of a permissible classification."

I am unable to appreciate, however, how section 98 of the notification in the present case offends against any of the tests laid down in the above case. Section 98 as given in the notification lays down the procedure for the assessment of taxes on the value of holdings. It provides two different standards for determining the annual value of a holding: (1) in the case of

(1) (1952) S. C. R. 710.

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

holdings of which Government was the owner and which are in the occupation of a Government servant; in such cases the annual rental as determined by Government in the Public Works Department in accordance with the rules for the time being in force was to be deemed to be the annual value of the holdings; (2) in the case of any other holding at the gross annual rental at which it might reasonably be expected to be let. Comparing it with section 98 as mentioned in the Bihar and Orissa Municipal Act, it would appear that owners of holdings not belonging to Government were not in any better or worse position than what they were under the Municipal Act. There is undoubtedly a distinction made between holdings owned by Government and those by private owners. The standard of assessment in either case is evidently different; but there is nothing to show that the classification was unreasonable. It is true that the object of the enactment was to provide for municipal amenities to the residents of the locality but at the same time it had to levy taxes in order to raise funds for carrying on its administration and in assessing these taxes the different standards suggested in section 98 seem to be natural. Government holdings which were meant for occupation of Government servants could not be let out at varying rates of rent, but the maximum rental was fixed in all cases and sometimes they could be even in occupation of officers who were not able to pay the maximum rent fixed. These holdings were not, therefore, meant for bringing any profit to Government in the sense that they could be let out from time to time for earning larger rents from the occupants of those holdings as would be in the case of holdings owned by private owners. In those circumstances it was not unnatural and unreasonable to direct that in the case of Government holdings the annual value had to be fixed on one standard, while those of private holdings it had to be fixed on another standard, namely, " the annual rental " at which the holding was " reasonably expected to be let ". In my opinion, this classification was not only natural but

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

SARJOO PROSAD, J.

rational and could not be criticised as an unwarranted discrimination so as to bring it in conflict with Article 14 of the Constitution. The classification suggested above is vitally co-related to the object of the enactment for the purpose of raising funds for the administration of the municipal area to which the notification applied. There is, therefore, no substance in this contention of Mr. Ghosh at all.

It may be that this classification is now unwelcome to the residents of the area in view of the rise in the letting value of holdings; and a schedule has been attached to the petition, which is Annexure Y, to show that in various cases the taxes imposed on Government and non-Government holdings in the same locality are widely divergent, the taxes on non-Government holdings being much higher than those on Government holdings. This schedule cannot be of any value because the assessment of the tax depends upon various factors, namely, the magnitude of the building, the number of rooms and amenities provided, etc. But even if it is granted that all things were equal, the taxation may still be justified on the ground that the letting value of non-Government holdings had appreciably increased. It is, therefore, impossible for us to say that there has been any discrimination between the two classes of holdings.

There is hardly any other point worthy of serious consideration, and I have no hesitation in coming to the conclusion that the application is without any merit and must be dismissed with costs. The hearing fee is assessed at five gold mohurs.

RAMASWAMI, J.—I agree. Two questions were argued by Mr. B. C. Ghosh: (1) whether section 3(1)(*f*) and section 5 of the Patna Administration Act, 1951, and the Government notification dated the 25th April, 1931, are unconstitutional on the ground of excessive delegation of legislative power; and (2) whether section 98 of the Bihar and Orissa Municipal Act, as modified by the Government notification dated the 25th April, 1931, is void on the

ground that it conflicts with Article 14 of the Constitution. For the reasons which have been elaborately discussed by my learned brother both these arguments have no substance and there is no case made out for issuing a writ against the respondent. On the question of delegation Mr. B. C. Ghosh made a valient attempt to gain support from the dicta of some learned Judges who pronounced judgment in the *Delhi Laws Act case—In re Art.* 143, *Constitution of India, etc.*(1). But it was pointed out by the learned Chief Justice of the Supreme Court in *Kathi Raning Rawat* v. *State of Saurashtra*(2) that it is difficult to say that any particular principle has been laid down by the majority in the *Delhi Laws Act case*(1) which can be of assistance in the determination of other cases. In my opinion the present case falls within the ambit of the actual decision reached by the majority of the Judges in the *Delhi Laws Act case*(1), referred to above, and the attack made on section 3(1)(*f*) and section 5 of the Patna Administration Act on behalf of the petitioner must fail.

1952.

RAJNARAIN v. CHAIRMAN, P. A. C.

RAMASWAMI, J.

Rule discharged.

S. H.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sarjoo Prosad, JJ.

B. DEVI

v.

STATE OF BIHAR.*

1952.

December, 10, 22.

Bihar Land Reforms Act, 1950 (*Bihar Act XXX of* 1950), *whether applies to Santal Parganas—trustee of religious trust in Santal Parganas applying for a* writ *under Article* 226, *Constitution—propriety of.*

* Miscellaneous Judicial Case no. 255 of 1952, in the matter of an application under Article 226 of the Constitution.

(1) (1951) A. I. R. (S. C.) 332.

(2) (1952) S. C. R. 435.

1952.

B. DEVI v. STATE OF BIHAR.

The provisions of section 3 of Regulation III of 1872 are impliedly repealed by virtue of the enactment contained in clause (5) of the fifth schedule and Article 245 of the Constitution of India, 1950, and, therefore, the Bihar Land Reforms Act, 1950, is validly applicable in view of the provisions of section 1(2) of the Act to all portions of the Santal Parganas which have been declared to be scheduled area,

Held, therefore, that a trustee of a religious and charitable trust situated within the district of Santal Parganas is not entitled to the grant of a *writ* under Article 226 of the Constitution on the ground that the Bihar Land Reforms Act, 1950, is not applicable to the district.

Application under Article 226 of the Constitution.

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

J. C. Sinha, for the petitioner.

Bajrang Sahai and *Government Pleader*, for the opposite-party.

RAMASWAMI, J.—The petitioner in this case Srimati Bedabala Devi alleges that her father Maharaj Kumar Mahima Niranjan Chakravarty executed a will dated the 29th September, 1929, wherein he appointed the Official Trustee of Bengal to hold certain properties under trust for charitable and religious purpose. The petitioner instituted an Administration Suit in the Original Side of the Calcutta High Court against the Official Trustee of Bengal. A compromise was effected between the parties, as a result of which a scheme was sanctioned by the Court and the petitioner was appointed Trustee in respect of touzi nos. 551/9 and 608/1. As regards touzi no. 551/9 the petitioner was granted full right of ownership in lieu of arrear of maintenance. It is stated in the affidavit that the State Government in exercise of the powers conferred by section 3(1) of the Bihar Land Reforms Act has issued a notification declaring that title to the touzis had vested in the State Government. The petitioner alleges that the notification is illegal and beyond the

ambit of the jurisdiction of the State Government. The petitioner asks that a *writ* in the nature of *mandamus* should be issued commanding the State of Bihar and the Deputy Commissioner of Santal Parganas not to take possession of the estates which have been notified.

In support of the application Mr. J. C. Sinha submitted in the first place that the Bihar Land Reforms Act did not apply to the district of Santal Parganas. The argument of the learned counsel is founded upon section 3 of Regulation III of 1872 which is to the following effect:—

"3. (1) The enactments specified in the Schedule shall be deemed to be in force in the Santal Parganas, except—

(*a*) such portions of such enactments as have been repealed by any enactment specified in the Schedule, and

(*b*) in the case of any enactments passed before the twenty-fifth day of August, 1886, such portions thereof as had on that day been repealed in the territories to which the enactment generally applies.

(2) 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, when such suits are tried in Courts established under the Bengal, Agra and Assam Civil Courts Act, 1887.

(3) Notwithstanding anything hereinbefore contained, the local Government may, by notification in the *Calcutta Gazette*—

(*a*) declare that any other enactment shall be deemed to be in force in the Santal Parganas;

(*b*) withdraw any such declaration; or

(*c*) with the previous sanction of the Governor-General in Council declare that any enactment specified in the Schedule shall cease to be in force in the Santal Parganas."

It was urged by the learned counsel that the touzis in dispute are located in Dumka and Jamtara subdivisions of Santal Parganas. As the Bihar Land Reforms Act does not expressly provide that the Act would operate in Santal Parganas the learned counsel contends that the notification issued by the State Government is void and beyond its jurisdiction. But the argument of the learned counsel is not correct.

1952.

B. DEVI v. STATE OF BIHAR.

RAMASWAMI, J.

It is true that the touzis in question are situated in a scheduled area but the provisions of section 3 of Regulation III of 1872 are impliedly repealed as a result of the enactment of the fifth schedule of the Constitution. The fifth clause of Part B of this schedule states that—

> "Notwithstanding anything in this Constitution, the Governor or Rajpramukh, as the case may be, may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area in the State or shall apply to any Scheduled Area in the State subject to such exceptions and modifications as he may specify in the notification."

This clause in the fifth schedule must be read in the context of Article 245 of the Constitution which states that—

> "Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

The jurisdiction of the Bihar Legislature to legislate for the scheduled area of Santal Parganas cannot therefore be doubted. In the present case section 1(2) of the Bihar Land Reforms Act expressly declares that the Act extends to the whole of the State of Bihar. It is not contended on behalf of the petitioner that the Governor has made any notification under clause (5) of the fifth schedule directing that the Bihar Land Reforms Act shall not apply to Santal Parganas or any portion of that district. It is manifest that the Bihar Land Reforms Act is validly applicable to all portions of the Santal Parganas district, which have been declared to be Scheduled Area. It is manifest that the provision of Regulation III of 1872 has been repealed by necessary implication as a result of the enactment of the fifth schedule of the Constitution and the argument of Mr. Sinha on this part of the case must fail.

Learned counsel next raised the contention that the properties in dispute have been dedicated for charitable and religious purpose and upon a proper construction of the Bihar Land Reforms Act it ought to be held that the Act does not apply to the estates

held by trustees for religious and charitable purpose. Learned counsel stressed the argument that the proviso to section 4(*f*) of the Act prohibits the Collector from taking charge of any institution, religious or secular, of any trust, or to interfere with the right of a trustee to apply the trust money to the objects of the trust. But there are other provisions in the Act which conclusively indicate that the Legislature intended that estates dedicated for religious and charitable purposes should fall within the ambit of the Act. Section 3(1) grants authority to the State Government to declare by notification that the estates of a proprietor specified in the notification have passed to and become vested in the State. Section 2(*o*) defines ' proprietor ' to mean a person holding in trust or owning for his own benefit an estate or part of an estate. It is important to note that section 2(*s*) defines ' trust ' to mean any express or constructive trust created or existing for a public purpose of a charitable or religious nature and a Hindu, Muslim, Christian, Buddhist or any other religious or charitable endowment. Section 24(3) enacts that in the case of an estate which is dedicated for charitable and religious purpose the compensation payable shall, instead of being assessed under clause (1), be assessed as a perpetual annuity equal to the net income of the estate. Upon a review of these provisions it is clear that the Bihar Land Reforms Act applies to properties held in trust for religious and charitable purpose and the Legislature has unmistakably manifested its intention to this effect. The argument of the learned counsel for the petitioner on this point cannot be accepted as correct.

Lastly it was submitted that there is no provision in the Bihar Land Reforms Act for granting interim compensation to the trutees of a religious and charitable endowment. Learned counsel referred to section 33 of the Act which provides that interim payment of compensation may be made in the case of an outgoing proprietor of an estate which has been taken over by the Government. Learned counsel

1952.

B. DEVI v. STATE OF BIHAR.

RAMASWAMI, J.

pointed out that the table annexed to section 33 does not state that in the case of trustees for religious and charitable endowments *interim* payment should be made at any particular rate. A similar argument was advanced by Dr. Sengupta in Miscellaneous Judicial Case no. 344 of 1952 in which we have recently pronounced judgment. For the reasons elaborately set out in that judgment and which I do not wish to repeat I have come to the conclusion that section 33(1) of the Bihar Land Reforms Act applies to the case of trustees of a religious and charitable endowment and that the State Government has authority to make—is indeed bound to make—*interim* payment of compensation to the trustees equal to the approximate net annual income from the trust properties calculated in accordance with section 23 of the Act.

In my opinion this application must be dismissed with costs. Hearing fee five gold mohars.

SARJOO PROSAD, J.—I agree.

Rule discharged.

S. H.

LETTERS PATENT.

1952-53.

July, 14, 22. December, 19. January, 5.

Before Reuben, C.J., and Sarjoo Prosad,

C. KAR

v.

D. SATAPATHY.*

Orissa Tenancy Act, 1913 (*B. & O. Act II of* 1913), *sections* 6, 56, 57, *scope of*—bazyaftidar *raiyat, whether raiyat or tenure-holder—person recorded as* shikmi *raiyat under* bazyaftidar, *whether can acquire permanent* shikmi *right.*

A person recorded in the record of rights as *bazyaftidar* raiyat is a raiyat within the definition as given in section 6 of the Orissa Tenancy Act and cannot be regarded as a tenure-holder.

* Letters Patent Appeal no. 23 of 1947, from a decision of the Hon'ble Mr. Justice B. K. Ray, one of the Judges of the High Court of Judicature at Patna, dated the 21st day of November, 1946.

1952-53.

C. KAR. v. D. SATAPATHY.

There is nothing in sections 56 and 57 of the Orissa Tenancy Act, 1913, to indicate that an under-raiyat under a *bazyaftidar* can acquire permanent tenancy rights in the lands held by him;

Held, therefore, that a person recorded in the record of rights as *shikmi* raiyat under a *bazyaftidar* raiyat is a *shikmi* tenant but has no permanent *shikmi* interest in the lands held by him and cannot acquire such a right by adverse possession.

Sankar Rao Dogaddu C. Rao Jahagirdah v. *Sambhunath Patil*(1), distinguished.

Appeal under the Letters Patent by the defendants.

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

Shambhu Nath, for the appellants.

SARJOO PROSAD, J.—This Letters Patent Appeal is directed against a judgment of Ray, J. (as he then was). The only point which emerges for decision in this appeal is whether the plaintiffs are entitled to permanent *shikmi* tenancy right in the suit lands which cover an area of 1.20 acres as recorded in the cadastral survey, bearing a rental of Rs. 6-3-0. The lands have been recorded as *khas dakhli* lands of defendants 1 to 4, but in the earlier survey the lands were recorded in the name of one Natha Satapathy as a *shikmi* tenant under these defendants. The survey records also show that the lands appertain to *bazyaftidar sthitiban* holding of the defendants.

The suit to which this appeal relates was filed by the plaintiffs, now respondents before us, for declaration that they had permanent *shikmi* interest in the lands in suit, and also for confirmation of possession. The plaintiffs' case was that the lands in question had been settled by the ancestor of defendants 1 to 4, one Dinabandhu Kar, with the plaintiffs' ancestor (one Shyam Charan Satapathy in Chaitra 1296 (Oriya Sambat) in permanent *shikmi* interest, and Natha

(1) (1940) A. I. R. (P. C.) 192.

1952-53.

C. KAR.
v.
D. SATAPATHY.

SARJOO PROSAD, J.

Satapathy recorded in the revisional survey was the son of the original settlee. It appears that in 1906 there was litigation between the descendants of Dinabandhu and the descendants of Shyam Satapathy leading to a suit for damages which resulted in a compromise promise. The plaintiffs alleged that by virtue of this Natha Satapathy was recognised as a permanent *shikmi* tenant of the lands, and he was accordingly so recorded in the revisional survey proceedings which followed thereafter. The cadastral survey operations came in 1928 when the lands were recorded as *khas dakhli* lands of defendants 1 to 4, and the plaintiffs challenged this entry as collusive. They alleged that in spite of this entry, they continued to be in possession of the lands but the defendants interfered with their possession on the basis of the survey entry and a collusive compromise decree obtained by them against defendant no. 5, who was originally a *bhag* tenant of the plaintiffs. This was the alleged cause of action for the suit.

The suit was contested by defendants 2 to 4 only who denied that the lands were settled in permanent *shikmi* tenancy with Shyam Satapathy as alleged or with the ancestor of the plaintiffs; and their case was that the defendants were in possession of the lands, and that they had obtained a valid compromise decree against defendants 5 and 6, who were in possession, but who had since given up possession thereof.

The trial court found that the plaintiffs had permanent tenancy rights as *shikmi* tenants in the disputed lands. The lower appellate court reversed that decision and held that although the plaintiffs were *shikmi* tenants under the defendants, they had no permanent rights in the lands, and no such right could validly be conferred upon them. The appellate court, therefore, modified the decree and held that the plaintiffs were simply entitled to a declaration that they were *shikmi* tenants of the lands.

Ray, J., disagreed with the decision of the court of appeal below and found in agreement with the trial

court that the plaintiffs were permanent *shikmi* tenants of the lands. The reasons which led His Lordship to come to the above conclusion were mainly threefold: (1) that on a perusal of exhibits 1 and 2 he had no doubt in his mind that

"the recitals in them are mere acknowledgments of a previously existing permanent tenancy";

(2)

"that the defendants' tenure is one of a Bajiafatidar"

and

"Bajiafatidar are not raiyats within the definiton assigned to the word in the successive Tenancy Acts. For convenience sake, they have been classified as raiyats for certain purposes. Accordingly their under-tenants have been nomenclatured as under-raiyats";

and (3) that the decision in *Sankar Rao Dogaddu C. Rao Jahagirdar* v. *Sambhunath Patil*(1)

"is a direct authority in which tenancies of arable lands of which the origin had been lost in antiquity were inferred to be permanent from circumstances, such as, heritability, transferability, smallness of rent and other circumstances of similar nature."

The judgment under appeal also suggests that the plaintiffs seem to have acquired a limited interest of a permanent tenant under the defendants by adverse possession.

If I may say so with respect, none of the above reasons given by the learned Judge can bear the test of scrutiny. The documents, exhibits 1 and 2 were construed by the lower appellate court who came to the finding that there was nothing in those documents to indicate that the plaintiffs or their ancestors had any permanent right from before the execution of these documents. There was undoubtedly a clause in the documents to the effect that Natha Satapathy would possess the disputed lands as before, and that Bhikhari Kar, Biswanath Kar and Panu Kar and others could not eject him and his heirs. The court below rightly pointed out that if the documents themselves purported to create a permanent interest in the lands they required registration and could not

(1) (1940) A. I. R. (P. C.) 192.

1952-53.

C. KAR. v. D. SATAPATHY.

SARJOO PROSAD, J.

otherwise be used in proof of such title. Ray, J., on a construction of these documents held that the recitals proved an acknowledgment of a previously existing tenancy. The original document of settlement set up by the plaintiffs which is alleged to have been made sometime in the Oriya year 1296 corresponding to 1857 A. D. has not been produced. If that document had been produced, it would have been undoubtedly treated as a document of title and the construction of which would be a question of law; but it is difficult to hold that these compromise petitions, even assuming them to be mere acknowledgments of a pre-existing title, would constitute documents of title so as to entitle the court of second appeal to construe them afresh. Be that as it may, even if it is held, as it was done by Ray, J., that there was such an acknowledgment of a permanent *shikmi* tenancy right, it will have to be seen whether such a right could be supported in law. Section 237 of the Orissa Tenancy Act provides that nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by its provisions. No such custom, usage or customary right has been pleaded in this case. It, therefore, requires examination whether irrespective of custom a *shikmi* tenant is entitled to permanent rights at all. The relevant sections which deal with under-raiyats or *shikmi* tenants are sections 56 and 57 of the Act. Section 56 specifies the limit of rent recoverable from under-raiyats, and section 57 deals with the restriction on ejectment of under-raiyats. It is provided under this section that an under-raiyat shall not be liable to be ejected by his landlord except on the expiration of the term of a written lease, and where he holds otherwise than under a written lease at the end of the agricultural year within which a notice to quit as prescribed has been served upon him by the landlord. The proviso to section 56 further contemplates that the *shikmidar* or the under-raiyat could hold land under a *bazyaftidar* and in such a case the percentage of rent payable by the former was to be calculated with

reference to the average of cash rent paid by occupancy raiyats for similar lands in the village. There is nothing in these sections to indicate that an under-raiyat holding under a *bazyaftidar* can acquire permanent tenancy rights in the lands held by him. If this were so, then specific provision would have been made for this purpose as an important incident of the tenancy in Chapter VIII in which sections 56 and 57 occur. The status of a *bazyaftidar* has been defined in section 6 of the Act. It should be remembered that the defendants are recorded as " *bazyaftidar* raiyats ", and clause (*ii*) of the section says that every *bazyaftidar* who is recorded in any such record-of-rights as a *bazyaftidar* raiyat, and his successors in interest, shall be deemed to be a *raiyat* for the purposes of this Act. It would not be, therefore, correct to observe, as held by Ray, J., that *bazyaftidars* were not raiyats within the definition of the successive Tenancy Acts. Clause (*iii*) of this section further provides that every sub-proprietor shall be deemed to be a tenure-holder for the purposes of sections 14 to 20, 99, 100, and Chapter XVI, and to be a permanent tenure-holder for the purposes of section 74. It is not relevant for our present purpose to examine all these sections. But it is significant that sections 56 and 57 do not occur in this clause, and therefore it is apparent that the sub-proprietor or the *bazyaftidar* is not to be regarded as a tenure-holder, for the purposes of these sections, or, in other words, *vis-a-vis* the under-raiyat or the *shikmi* raiyat. The status of the defendants as *bazyaftidar* continued to be the status of a raiyat and not that of a tenure-holder *vis-a-vis* the plaintiffs who were holding under them. The plaintiffs were thus under-raiyats and were governed by the incidents of such a tenancy. In view of the provisions of the Act, I regret I cannot subscribe to the observations of the learned Judge. I am also unable to accept the position that an " occupancy right of an under-raiyat " was not inconsistent with the provisions of the Orissa Tenancy Act. As I have shown, in the absence of any specific provision, or in the

1952-53.

C. KAR. v. D. SATAPATHY.

SARJOO PROSAD, J.

absence of any custom or usage to that effect, the plaintiffs, who are merely under-raiyats could not claim any right of occupancy or permanence. The mere fact of acknowledgment of such a right in the two documents aforesaid could not confer any such right upon them. The saving provisions mentioned in Chapter XVII of the Act also do not provide for the validity of such a contract. If the intention of the law was to save such a pre-existing right, if any, the law would have provided for that contingency because all the incidents of an under-raiyat have been defined in the Act; and it is impossible to hold that any peculiar or special incident could be claimed by any person falling in the class of under-raiyats in derogation of the law. I may also point out that it was not for the defendants to support the correctness of the cadastral survey records recording the lands as *khas dakhli* lands of the defendants but for the plaintiffs to rebut the same and prove their case of permanent tenancy. The above reasons, therefore, which found favour with the learned Judge do not appeal to me at all. The decision of the Privy Council as reported in A. I. R. 1940 P. C. 192, referred to above, is equally unhelpful. In the first place, even on plaintiffs' showing the origin of their tenancy was not " lost in antiquity ". In the second place, the quotation from the judgment itself indicates that the principle laid down is not what the learned Judge sought to spell out. The quotation runs thus:

" Their Lordships would not willingly cast doubt upon the principle that the fact that a tenancy is for agricultural purposes *does not prima facie indicate* that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence. A full exposition of the principles upon which such inference is to be made or rejected has been given by the Board in previous cases and need not here be repeated; *Secretary of State* v. *Luchmeswar Singh* (16 I. A. 6) and *Nabakumari Devi* v. *Behari Lal Sen* (34 I. A. 160). "

I have purposely underlined the words in the quotation Even the record-of-rights of the previous survey does not support the claim set up by the plaintiffs. Natha Satapathy was merely recorded as a *shikmidar* in respect of the disputed lands in the Provincial Survey which came several years after the compromises on which the plaintiffs relied. It is also evidently wrong to assume that any permanent tenancy right could be acquired by adverse possession. The plaintiffs came to Court with the definite case of *shikmi* tenancy right of a permanent character, and if, as already discussed, no such right was available to them under the law, they could not get such a right by prescription.

I, therefore, feel impelled to hold that the decision of the lower appellate court was correct and should be restored and that of Ray, J., should be set aside. The appeal is accordingly allowed but, as there has been no appearance for the respondents, there will be no order for costs.

REUBEN, C.J.—I agree.

Appeal allowed.

S. H.

MISCELLANEOUS JUDICIAL.

1952-53.

December, 9, 10.

January, 5.

Before Ramaswami and Sarjoo Prosad, JJ.

S. M. ZAKI.

v.

STATE OF BIHAR.*

Administration of Evacuee Property Act, 1950 (*Act XXXI of* 1950), *Custodian's power and jurisdiction under—section* 2(*d*) (*i*), '*leaves*' *or* '*has left*', *meaning of—section* 2(*d*) (*ii*), '*resident*', *significance of—Act does not impose*

* Miscellaneous Judicial Case no. 302 of 1950, in the matter of an application under Article 226 of the Constitution of India, and against an order of Mr. S. P. Singh, Deputy Custodian, Gaya, dated the 9th June 1950, affirming an order of Mr. B. N. Mitra, Assistant Custodian Jehanabad, dated the 2nd February 1950.

1952-53.

S. M. ZAKI
v.
STATE OF BIHAR.

unreasonable restriction—Constitution, Article 19(f)—Article 226, application under, maintainability.

The Administration of Evacuee Property Act, 1950, has conferred upon the Custodian jurisdiction not merely to take charge of and administer evacuee properties but also jurisdiction to finally determine whether a certain person is evacuee and whether a certain property is evacuee property within the meaning of the Act.

Therefore, the Custodian can give himself jurisdiction by wrongly deciding that a certain person was evacuee and the proceeding of the Custodian in such a case cannot be challenged in the High Court under Article 226 of the Constitution of India.

The Administration of Evacuee Property Act does not impose unreasonable restrictions upon the right to acquire, hold and dispose of property as vouchsafed under Article 19(*f*) of the Constitution of India.

Abdul Majid Haji Mahomed v. *P. R. Nayak*(1), *Raj Brij Raj Krishna* v. *S. K. Shaw*(2), *Ebrahim Aboobakar* v. *Custodian-General of Evacuee Property, New Delhi*(3) and *Queen* v. *Commissioners for Special Purposes of the Income-Tax*(4), relied on.

The words "leaves" or "has left" in section 2(*d*) (*i*) of the Administration of Evacuee Property Act do not mean leaving temporarily or casually. The words do imply some amount of permanent stay or residence outside India but not to the extent of completely abondoning the Indian domicile.

The word "resident" as used in clause (*ii*) of section 2(*d*) also contemplates some sort of permanent residence in the Dominion of Pakistan though not necessarily with the conclusive intent of abondoning the Indian domicile.

Application under Article 226 of the Constitution.

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

(1) (1951) A. I. R. (Bom.) 440.
(2) (1951) S. C. R. 145.
(3) (1952) A. I. R. (S. S.) 319.
(4) (1888) 21 Q. B. D. 313.

1952-53.

S. M. ZAKI
v.
STATE OF BIHAR.

Dr. Sultan Ahmad, S. Sarwar Ali, A. A. Khan Warsi and *S. Shamsul Hasan*, for the petitioner.

Government Pleader, for the opposite-party.

SARJOO PROSAD, J.—The petitioner, S. M. Zaki, has been declared an evacuee under section 2(*d*) (*i*) of the Administration of Evacuee Property Ordinance, 1949 (Ordinance XXVII of 1949) by the Assistant Custodian. The ground for declaring him an evacuee is that he left India due to the setting up of the Dominions of India and Pakistan. As a result of the declaration, the properties of the petitioner have been declared to be 'evacuee' properties and have vested in the Custodian. The said order of the Assistant Custodian has been upheld on appeal by the Deputy Custodian by an order, dated the 9th June, 1950. The petitioner has consequently moved for a writ of *certiorari* for quashing the orders aforesaid, and also for a *mandamus* restraining the opposite party—the State of Bihar, and the Assistant Custodian and the Deputy Custodian of Evacuee Properties from interfering with his possession and enjoyment of the properties belonging to the petitioner.

The petitioner claims that he is a citizen of India having his domicile and residence in the territory of this Dominion. At the time of the partition of the country he was in service as a railway employee of the then East Indian Railway. Prior to the partition, he was given an option as to whether he intended to serve in India or Pakistan, and he opted for service in the latter Dominion. He, however, states that he never abandoned his domicile or residence in India, and that his wife and children continued to stay here in village Alinagar Pali, police-station Jehanabad in the district of Gaya. He further says that off and on he visited his family and looked after his properties but was compelled to stay in Pakistan merely because of the exigencies of service. He, therefore, submits that he never left

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

SARJOO PROSAD, J.

the territory of India either before or after the 1st day of March 1947, for any place outside it, and the order declaring him an evacuee was entirely illegal and without jurisdiction. In a supplementary affidavit filed after his application for the aforesaid writ, he stated that when he learnt that proceedings were pending against him, he addressed a petition, dated the 10th of April 1950, to the Assistant Custodian, Jehanabad, and forwarded copies of the petition to the District Magistrate of Gaya, the District Mechanical Engineer, East Indian Railway, Lalmanirhat, where he was serving, the General Manager, East Bengal Railway, Chittagong, the District Magistrate of Rangpur and the Assistant Secretary to Government, East Bengal. He says he did send a copy of the petition to the railway authorities and the Government of East Bengal in order to apprise them of the fact that he never had or has any intention of giving up his domicile in India, and that his stay in Pakistan was only temporary and for the period of his service. A copy of the petition formed an annexure to the supplementary affidavit. In the petition he recited that he had reliably learnt of his being treated as an evacuee, and that accordingly notices had been served to show cause as to why all his properties movable and immovable should not be seized under the Bihar Evacuee Ordinance or Act. He then proceeds to explain in the petition that he was a railway employee and had gone to serve in Pakistan on option in ordinary course and then to retire to his native place, and that he had not purchased any property in Pakistan with a view to settle down there or sold any of his belongings in India. On these facts it is urged on behalf of the petitioner that he was not an evacuee at all but a national and citizen of India, and the Evacuee Property Ordinance or the Evacuee Property Act had no application to him. It may be observed that the Evacuee Property Ordinance was later substituted by an Act being the Administration of Evacuee Property Act (Act XXXI

of 1950)—hereinafter called the Evacuee Property Act.

The orders of the Assistant Custodian and that of the Deputy Custodian affirming it show that he was declared an avacuee under section 2(*d*)(*i*) of the Ordinance because he had left India after the setting up of the two Dominions having opted for service in Pakistan as a railway employee. The question, therefore, which arises for consideration is whether on this ground alone the said authorities were competent to declare him an evacuee within the meaning of the Evacuee Property Ordinance or Act. Dr. Sultan Ahmad on behalf of the petitioner contended, firstly, that the petitioner was not an evacuee but an Indian national and could not be declared an evacuee merely because in ordinary course he had opted for service in Pakistan, and, secondly, that if the Ordinance or the Act intended to declare an Indian citizen an evacuee, it was *ultra vires* the Constitution. He also suggested that in any case it would be unfair on the part of the Government of India to impose the restrictions contemplated by the Ordinance or the Act after having given the petitioner, the choice to serve in Pakistan. To deal with these contentions it would be necessary to examine the relevant provisions of the Evacuee Property Ordinance or Act and the Constitution.

The Ordinance came into force on the 18th of October 1949, and was promulgated by the Governor-General under powers conferred on him by section 42 of the Government of India Act. It was later replaced by the Evacuee Property Act which repealed the Ordinance but made a saving in respect of anything done or any action taken in the exercise of any power conferred by or under the Ordinance by virtue of section 58 (2) of the Act. For our purposes it may be assumed that the relevant provisions of the Ordinance and the Act are substantially identical. Section 7 of the Ordinance provided that where any property was in the opinion of the Custodian evacuee property within

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

SARJOO PROSAD, J.

the meaning of the Ordinance, he might after causing notice thereof to be given in prescribed manner to the persons interested and after making such inquiry into the matter as the circumstances of the case permitted, make an order declaring such property to be evacuee property. It also provided that where any such notice had been issued in respect of any property, the said property was to be deemed to have been attached by the Custodian from the date of the notice pending the determination of the question, and any transfer or delivery of such property or any right or interest therein contrary to the attachment should be void against all claims enforceable under the attachment. The Custodian was then to notify either by publication in the official Gazette or in any prescribed manner all properties declared by him to be evacuee properties: and by virtue of section 8 of the Act, any property so declared to be evacuee property was to vest in the Custodian who could, under the provisions of the law, take possession of the property even on ejecting a person forcibly who offered resistance to his possession. The term "evacuee property" has been defined under the law to mean any property in which an evacuee has any right or interest. The definition of the term "evacuee" as provided under section 2(*d*) of the Ordinance and the Act is; therefore, important and, in particular, clause (*i*) of the section with which we are at present concerned. Section 2(*d*) runs as follows:

> (*d*) "evacuee" means any person,—
>
> (*i*) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March, 1947, left any place in a Province for any place outside the territories now forming part of India, or
>
> * * * * * *

Much stress has been laid upon the words "leaves" or "has left" occurring in the clause. The contention of the learned counsel is that the word "left" must be deemed to have been used in the sense of permanently leaving the Dominion of India with a

view to settle down in Pakistan and with the intention of changing one's domicile completely. Reference has been made to Part II of the Constitution of India and the various articles occurring in this Part. Article 5 of the Constitution enacts that every person who has his domicile in the territory of India and who was born in the territory of India; or either of whose parents was born in the territory of India; or who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India. In the light of this article the petitioner contends that he is a citizen of India by all accounts. Article 7, however, provides that notwithstanding anything in Articles 5 and 6, a person who has after the first day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. It has been urged that Article 7 of the Constitution has no application to the petitioner because in view of the finding that he had merely opted for service in Pakistan and was on that account staying in that territory, it could not be held that he had migrated to Pakistan. The word " migration " definitely suggests an element of permanent change of residence and not merely movement from one place to another. Reliance has been placed upon a decision of Chagla, C.J. in *Abdul Majid Haji Mahomed* v. *P. R. Nayak*(1), where His Lordship casually examined the scope of the definition of " evacuee " in section 2(*d*) of the Act and the contentions urged with regard to the wide scope of the definition and incidentally observed that the term " resident " used in sub-clause (*ii*) must connote a certain amount of permanency. A mere temporary abode in Pakistan on legitimate business or occupation would not make a person a resident for the purpose of this sub-clause. Reliance has also been placed upon a recent decision of the Allahabad High Court in *Shabbir Hussain* v. *State of U. P.*(2)

(1) (1951) A. I. R. (Bom.) 440.
(2) (1952) A. I. R. (All.) 257.

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

SARJOO PROSAD, J.

where a Bench of the Court considered the meaning of the expression " migrated from the territory of India to the territory now included in Pakistan " as used in Article 7 of the Constitution, and opined that ' migration ' has been used in the sense of departure from one country to another for the purpose of residence or settlement in the other country. A temporary visit to another country on business or otherwise would not amount to migration. I have no doubt that in the context in which it occurs the word ' migration ' must indicate a change of movement from one place of abode to another with a view to settle down in that country so as to effect the person's right of citizenship in the country from which he had migrated, because it is in this sense that it appears to have been used in Article 7 of the Constitution. The article definitely says that in such a case he shall not be deemed to be a citizen of India and that can only happen where there has been a complete change of domicile and he has no intention of returning to the territory of India and owing allegiance to it. I, therefore, respectfully agree with the view expressed by the Allahabad High Court in the decision in question as to meaning of the expression " migrated ". But even if this meaning is attached to the expression " migrated " as used in Article 7 of the Constitution, the question is whether the word " left " in section 2(*d*) (*i*) of the Evacuee Property Ordinance or the Act carries the same sense as the learned counsel contends. It is suggested on behalf of the petitioner that if any other meaning is given to the expression, it would be in conflict with the Constitution of India and must, therefore, be understood to have been used in the same sense. The argument, however, proceeds on the assumption that the term "evacuee' as used in the evacuee law cannot apply to a citizen of India. This assumption is obviously fallacious in view of clause (*iii*) of section 2(*d*) itself which refers to any person who has after a certain date obtained otherwise than by way of purchase or exchange any right or interest in any

property which is treated as evacuee property. It could not, therefore, be argued that the Act never contemplated to affect or operate upon the rights of an Indian citizen. I do not for a moment suggest that the words " leaves or has, on or after the 1st day of March 1947, left, any place in a State for any place outside the territories now forming part of India " mean leaving temporarily or casually. Such a construction of section 2(*d*) (*i*) would be ludicrous. It is comman and in fact natural that a citizen of India would often and occasionally go out of the territories of India. But it would be unreasonable to assume that any such citizen who leaves India even for a short period would become an evacuee. Such an interpretation cannot commend itself to anyone. The provision of the law has to be reasonably construed in the setting in which the words occur, and there can be no doubt that in the context the words do imply some amount of permanent stay or residence outside India but not to the extent of completely abandoning the Indian domicile. The word " resident " as used in clause (*ii*) of section 2(*d*) must also contemplate some sort of permanent residence in the Dominion of Pakistan though not necessarily with the conclusive intent of abandoning the Indian domicile.

It is next submitted that the Act imposes unreasonable restrictions upon the right to acquire, hold and dispose of property as vouchsafed under Article 19(*f*) of the Constitution and is not saved by clause (5) of that article. This submission is not quite tenable. The Evacuee Ordinance and the Act came into being to meet an unparalleled situation arising in the country on account of the creation of the two Dominions of India and Pakistan. It is common knowledge that during the period and even thereafter there was migration of large populations from the Dominion of Pakistan to the Dominion of India and *vice versa*, and the people who fled from the dominions left property behind; therefore, some legislation was necessary for the protection of those properties and

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

SARJOO PROSAD, J.

for the management thereof. The provisions of the law quite clearly indicate that they were conceived in that spirit in order to meet such a situation. Section 10 provides that the Custodian may take such measures as he considers necessary or expedient for the purpose of securing, administering, preserving and managing any evacuee property. He can carry on the business of an evacuee, appoint a manager for the property and take all such measures as may be necessary to keep the property in good repair, take action for the recovery of any debt due to the evacuee, and institute, defend or continue any legal proceeding in any civil or revenue court on behalf of the evacuee. The section also enjoins on him to pay to the evacuee or to any member of his family or to any person as in the opinion of the Custodian is entitled thereto, any sums of money out of the funds in his possession, and invest money held by him in any of the securities approved by the Central Government. Section 15 further enjoins that he should maintain accounts of the property of each evacuee in his possession; and section 16 enacts that the Custodian may on an application made to him in this behalf in writing by an evacuee or any person claiming to be the heir of an evacuee, restore the evacuee property to which the evacuee or other person would have been entitled subject to such terms and conditions as he may think fit to impose. Such a legislation although in certain cases may work some hardship, cannot be said to be an unreasonable legislation placing undue fetters upon the right to manage and hold property. One has to approach this legislation knowing that it is an emergency legislation,

> "an offspring of emergency, and intended to deal with abnormal and unusual times and conditions".

The above submission, therefore, is without any merit. In this particular case the learned Government Pleader points out that the custody of the property will remain in the hands of the Custodian only so long as the petitioner continues to serve in the

Dominion of Pakistan, and when he returns to this native village on retirement and makes a proper application to the authorities, the Custodian under the provisions of section 16 of the Act may restore the property to the petitioner or his heirs. The Act has also provided for a complete machinery for appeals, review and revision, and a person aggrieved can always take advantage of these provisions for the redress of his wrongs. In the present case an appeal was preferred on behalf of the petitioner though without any success, and we are informed that he has also applied for review or revision of the orders complained against. In those circumstances, where the Act itself has provided adequate remedies, an interference by way of a writ of *certiorari* would not be desirable, except under very extraordinary circumstances for which there is no warrant in the present case.

The Government Pleader on behalf of the State has contended that the question whether the petitioner was or was not an "evacuee" was a matter to be determined by the Custodian himself as the law authorised the Custodian to declare any property to be evacuee property, if in his opinion and after making such enquiry as he thought fit he found that the property was evacuee property. He argued that it was open to the Custodian to issue notice as soon as he formed an opinion that a particular property was an evacuee property, and that jurisdiction which he once acquired could not be defeated merely because on such assumption of jurisdiction, he later wrongly decides that the person who owned the property was an evacuee though legally he was not so. In support of his argument he relied upon two decisions of the Supreme Court in *Rai Brij Raj Krishna* v. *S. K. Shaw*(1) and *Ebrahim Aboobakar* v. *Custodian-General of Evacuee Property, New Delhi*(2). It has been undoubtedly pointed out in those cases that once

(1) (1951) S. C. R. 145.
(2) (1952) A. I. R. (S. C.) 319,

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

SARJOO PROSAD, J.

it is held that the Court has jurisdiction but while exercising it, it made some mistake, then the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly. The last case was a case which arose under the Evacuee Property Ordinance itself and is, therefore clearly apposite.

It was also suggested, though at a late stage in argument, that the petitioner had not been served with any notice as prescribed under section 7 of the Act and an endeavour was made to impress upon the Court that the procedure adopted by the Custodian was in violation of fundamental principles of justice. The petitioner himself never appeared before the Assistant Custodian, or the Deputy Custodian at all. His wife appeared in the proceeding to show cause and she never asserted that no notice under section 7 of the Act had been issued. She raised a plea amongst others that her husband had no property at all, because whatever the husband had passed to the wife by oral gift. Even in the petition before this Court there is no specific allegation about non-service of notice under section 7. On the contrary, I find from a copy of the petition which the petitioner sent to the railway authorities and which forms an annexure to his supplementary affidavit that notices to show cause had been served. Whether the said notices were or not in the prescribed form is not a matter to be considered by this Court to justify the issue of a writ. If there was any genuine grievance on that account the complaint should have been made before the appropriate tribunals authorised to deal with the matter under the law. There is, therefore, no foundation for the above suggestion at all.

For the reasons set forth above, I see no substance in this application which is accordingly dismissed and the rule is discharged with costs: hearing fee five gold mohars.

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

RAMASWAMI, J.

RAMASWAMI, J.—I agree. During the hearing of the case an important question was raised—whether the Custodian has exclusive jurisdiction to decide that the petitioner is an evacuee and that the petitioner's property is an evacuee property within the meaning of the Administration of the Evacuee Property Act. It was strongly contended by Dr. Sultan Ahmad on behalf of the petitioner that the Custodian cannot give himself jurisdiction by wrongly deciding that a certain person was evacuee and that the proceedings of the Custodian in such a case could be challenged in the High Court under Article 226 of the Constitution. The matter resolves itself into the question whether upon a proper construction of the Administration of Evacuee Property Act, the Custodian has authority not merely to take possession of the evacuee property but also to conclusively decide whether a certain person is evacuee within the meaning of the Act and whether such person's properties are evacuee properties. The distinction between the two classes of tribunals has been clearly pointed out by Lord Esher in *Queen* v. *Commissioners for Special Purposes of the Income-Tax*(1): "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as

(1) (1888) 21 Q. B. D. 313, 319.

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

RAMASWAMI, J.

well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide without any appeal being given, there is no appeal from such exercise of their jurisdiction." There can be no doubt that the present case falls within the second category mentioned by Lord Esher. For, in my opinion, the impugned Act has conferred upon the Controller jurisdiction not merely to take charge of and administer evacuee properties but also jurisdiction to finally determine whether a certain person is evacuee and whether a certain property is evacuee property within the meaning of the Act. In the first place, it is important to mark the wording of section 7 which states :

> " *Where the Custodian is of opinion* that any property is evacuee property within the meaning of this Act, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry ....pass an order declaring any such property to be evacuee property."

It should be noticed that the Custodian has jurisdiction to commence inquiry as soon as he forms an opinion that any property is evacuee property. The matter is left to the subjective opinion of the Controller which cannot be obviously vested in a Court of law. This circumstance shows that the legislature has deliberately conferred upon the Controller the exclusive jurisdiction to decide whether a proceeding can be started for declaring a certain property as evacuee

property within the meaning of the Act. It is manifest that if after commencing proceeding the Custodian wrongly decides upon a misconception of law or fact that a certain property is an evacuee property that is a matter which goes not to the root of the jurisdiction but it is only an error of law or fact in the course of exercise of jurisdiction. In the second place, it should be noticed that section 46 of the Act expressly states that no civil or revenue court shall have jurisdiction:

> "(*a*) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property, or ..... (*c*) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or (*d*) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

In this connection, Chapter V of this Act is significant. Section 24 provides for an appeal from the order of the Assistant Deputy Custodian to the Custodian or to the Custodian-General as the case may be. Section 25 similarly provides that any person aggrieved may appeal in certain class of cases to the District Judge nominated in this behalf by the State Government. Section 26 also permits the person aggrieved to apply for review or revision to the Custodian or Additional Custodian who is authorised to call for the record of any proceeding from an officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any order passed. Section 27 grants wide power of revision to the Custodian-General. It is apparent that the Act provides a complete machinery of appeal and revision for the party aggrieved from the order of Assistant or Deputy Custodian. In the context of these provisions, section 46 of the Act must be construed to mean that the jurisdiction of a civil or revenue court is ousted even if the Custodian has wrongly decided that any property is an evacuee property under the Act. Lastly it is necessary to remember that the legislation was enacted against a background of political disturbance when

1952-53.

S. M. ZAKI v. STATE OF BIHAR.

RAMASWAMI J.

there was large influx and movement of refugees from India to Pakistan and *vice versa*. In this context learned Government Pleader said that the Administration of Evacuee Property Act was to some extent political in character. Learned counsel referred to Article 31(5)(*b*)(*iii*) of the Constitution which states that nothing in clause (2) shall affect the provisions of any law which the State may make in pursuance of any agreement entered into between the Government of the Dominion of India and the Government of any other country, with respect to property declared by law to be evacuee property. All these considerations support the view that the jurisdiction of the Custodian falls under second category mentioned by Lord Esher in the passage to which I have already referred. Reference may be made in this connection to *Rai Brij Raj Krishna* v. *S. K. Shaw*(1) and *Ebrahim Aboobakar* v. *Custodian-General*(2). I agree that this application has no merit and should be dismissed with costs.

Rule discharged.

S. H.

APPELLATE CIVIL.

Before Ramaswami and Sarjoo Prosad, JJ.

N. AGARWALA

v.

M. RAJGARHIA.*

1953.

January 7, 8.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* XXXIX, *rule* 1, *as amended in* 1937—*claim case dismissed—claimant's suit for declaration of title—prayer for injunction, whether entertainable.*

*Appeal from Original Order no. 308 of 1952, from an order of Mr. S. Sinha, Subordinate Judge, Sasaram, dated the 11th September 1952.

(1) (1951) S. C. R. 145.
(2) (1952) A. I. R. (S. C.) 319.

1953.

N. AGARWALA v. M. RAJGARHIA.

A person whose claim under Order XXI, rule 58 of the Code of Civil Procedure, 1908, has been dismissed is not entitled to an order of temporary injunction under Order XXXIX, rule 1 of the Code of Civil Procedure as amended in a suit by him under Order XXI, rule 63 of the Code for declaration of his title to the attached property.

Rai Bahadur Dalip Narayan Singh v. *Srimati Amarbas Kuer*(1), distinguished.

Jodhan Prosad Bhakat v. *Heeralal Agarwalla and Co.*(2) and *Inayat Ullah* v. *Gurdit Singh*(3), referred to.

Appeal by the plaintiff.

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

Mahabir Pd., Tarkeshwar Nath, N. L. Untwalia and *Purnendu Narayan*, for the appellant.

G. C. Mukherji, S. K. Sarkar and *Braj Kishore Prasad*, for the respondents.

RAMASWAMI, J.—This appeal is brought on behalf of the plaintiff Nathmal Agarwala against an order of the Subordinate Judge of Sasaram refusing to grant a temporary injunction restraining the defendant 1st party from taking delivery of possession of certain properties in an execution case.

It appears that Nathmal Agarwala had preferred an objection under Order 21, rule 58 of the Civil Procedure Code to the attachment of the properties in question in the case. These properties consisted of plots nos. 842 and 843 situated in Mohania and the properties included also a rice, oil and flour mill and a Gola. Nathmal Agarwala objected to the attachment on the ground that on 5th March, 1949, he had purchased the plots with the standing structures and the Gola and the machinery of the mill for a consideration of Rs. 60,000 from judgment-debtors Nagarmal

(1) (1937) I. L. R. 16 Pat. 738.
(2) (1938) A. I. R. (Cal.) 371.
(3) (1930) A. I. R. (Lah.) 850.

1953.

N. AGARWALA v. M. RAJGARHIA.

RAMASWAMI, J.

Agarwala, Jagdish Prasad Agarwala and Arjun Das Agarwala. It was alleged by Nathmal Agarwala that he was in exclusive possession of the properties and that they were not liable to be sold in execution of the decree obtained against Nagarmal Agarwala and the other two judgment-debtors. The application under Order 21, rule 58 was dismissed by the Subordinate Judge on the ground that the judgment-debtors were in possession on their own account. There was a further finding that the alleged sale of 5th March, 1949, was a sham transaction. Aggrieved by the order of the Subordinate Judge the judgment-debtors preferred an application in revision to the High Court but the application was dismissed by a Bench of this Court on 20th August, 1952. Thereafter Nathmal Agarwala instituted a suit under Order 21, rule 63 asking for a declaration that the properties in question were his properties and were not liable to attachment and sale in execution of the decree obtained by the defendant 1st party against the defendants 2nd party. The plaintiff also filed an application for issue of a temporary injunction against defendant 1st party restraining him from taking delivery of possession of the properties in the execution case. This application was dismissed by the learned Subordinate Judge on the 11th of September 1952.

The important question to be determined in this appeal is whether the plaintiff can be granted an order of temporary injunction under the provisions of Order 39, rule 1, which states that the Court may grant temporary injunction

"if in any suit it is proved by affidavit or otherwise that (*a*) any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree".

A proviso was added to this rule on 8th October 1937. The proviso states as follows:—

"Provided that no such temporary injunction shall be granted if it would contravene the provisions of section 56 of the Specific Relef Act (Act I of 1877).

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property or objection to the sale, or to the attachment preceding it, before the Court executing the decree ".

1953.

N. AGARWALA v. M. RAJGARHIA.

RAMASWAMI, J.

On behalf of the respondents Mr. G. C. Mukherji stressed the argument that in view of the second proviso of the amendment the plaintiff is not entitled to the grant of an injunction restraining the respodendents from taking delivery of possession. It was pointed out by the learned counsel that in the execution case the plaintiff had preferred an objection under Order 21, rule 58 but the application was dismissed by the Subordinate Judge on the ground that the judgment-debtors were in possession of the properties on their own behalf and that there was *prima facie* evidence to suggest that the transaction of sale between the plaintiff and the judgment-debtors entered into on 5th of March 1949 was a sham transaction. On behalf of the appellant the learned Advocate-General submitted that the second proviso of the amendment enacted by the Patna High Court will not operate as a bar in this case. It was contended that the second proviso would apply only in a case where the plaintiff prays for injunction to restrain delivery of possession and not in a case where the plaintiff asks the Court for grant not of a temporary injunction but " such other order " for the purpose of staying or preventing alienation, sale, removal or disposition of the property as the Court thinks fit. To put it differently, the learned Advocate-General attempted to draw a distinction between a temporary injunction to restrain a particular act and " such other order " which may be made by the Court for the purpose of staying or preventing waste, damage, alienation or sale of the property. The question depends upon proper construction of Order 39, rule 1, which states—

" Where in any suit it is proved by affidavit or otherwise—(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of

1953.

N. AGARWALA v. M. RAJGARHIA.

RAMASWAMI, J.

a decree,.....the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit..... ".

The learned Advocate-General argued that the second proviso would apply to a case of, what he called, an injunction proper, that is, an injunction issued to a Court to stay proceeding in execution. It was said that when a Court issues an order to a party restraining him from taking delivery of possession in an execution case, the said order was not injunction in the technical sense but was an order in the nature of an injunction. In my opinion this argument is not correct. It is true that the second proviso to Order 39, rule 1 refers only to a temporary injunction and does not expressly mention an order in the nature of an injunction, but the whole purpose of the proviso would be defeated if the argument of the learned Advocate-General is accepted to be correct. In such a case it would be open to a party who has failed in a claim case under Order 21, rule 58 to institute a suit under Order 21, rule 63 and to apply to the Court for injunction, or, to use the language of the learned Advocate-General, an order in the nature of injunction for restraining the decree-holder from applying to the Court for sale of the attached properties or from taking possession of the properties sold by the Court in the execution case. It would be only necessary for the plaintiff in such a case to label his application as an application for an order in the nature of an injuction and not for an injunction proper and to ask the Court to grant an order restraining the decree-holder from applying for sale or taking possession of the properties. In my opinion the argument of the learned Advocate-General is not correct and the amendment enacted by the Patna High Court must be construed to mean not merely that injunction but also an order in the nature of an injunction to restrain delivery of possession shall not be granted except in a case where the plaintiff cannot

lawfully and could not have lawfully preferred a claim to the property before the Court executing the decree. Any other interpretation would nullify the effect of enacting the second proviso in the amendment. There are further considerations which support the view I have taken. For instance, Order 39, rule 3, states that

> " the Court shall in all cases except.....direct notice of the application for the same to be given to the opposite party. "

Order 39, rule 4 states that any order for an injunction may be discharged or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Order 39, rule 5 provides that an injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain. It is evident that in rules 3, 4 and 5 the word ' injunction ' is used but it is manifest that the word ' injunction ' in these Rules must be construed to mean not merely an injunction but also an order in the nature of an injunction which the Court is competent to make under Order 39, rule 1. Any other interpretation would nullify the effect of Rules 3, 4, 5 and would be against all sound principle of interpretation. For these reasons I think that the argument of the learned Advocate-General on this point cannot be accepted as valid. On the contrary, the second proviso of Order 39, rule 1, would be a bar to the application for injunction filed in the present case on behalf of the plaintiff.

In the course of argument Mr. G. C. Mukherji referred to *Rai Bahadur Dalip Narayan Singh* v. *Srimati Amarbas Kuer*(1) in which it was held that Order 39, rule 1 cannot be applied to a case where the decree-holder has a decree against his judgment-debtor which he is executing against that judgment-debtor in a proper proceeding and somebody else institutes a suit, and after being defeated in his claim case, and

(1) (1937) I. L. R. 16 Pat. 738.

1953.

N. AGARWALA v. M. RAJGARHIA.

RAMASWAMI, J.

claims that the property is his and not that of the judgment-debtor. It was observed by Wort J., that in such a case it was not possible to hold that the property was being wrongfully sold in execution of a decree and the proviso to Order 39, rule 1 will not therefore apply. On behalf of the appellant the learned Advocate-General submitted that the principle laid down in this case is not correct and referred to *Jodhan Prosad Bhakat* v. *Heeralal Agarwalla and Co.*(1) and *Inayat Ullah* v. *Gurdit Singh*(2). It is not necessary at present to examine this question for the position is changed by the amendment of 8th October, 1937, made to Order 39, rule 1. The decision in I. L. R. 16 Patna 738 was pronounced on September 14, 1937, prior to the publication of the amendment. As I have indicated, the amendment makes a drastic change in the application of the rule and the plaintiff in the present case cannot ask for a temporary injunction restraining the respondent from taking delivery of possession of the properties in question.

For these reasons I think that the appeal must be dismissed with costs.

SARJOO PROSAD, J.—I agree.

Appeal dismissed.

S. H.

REFERENCE UNDER THE INCOME-TAX ACT 1922.

Before Ramaswami and Sarjoo Prosad, JJ.,

1953.

January, 8, 9.

COMMISSIONER OF INCOME-TAX

v.

KAMESHWAR SINGH.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 16(1) (*c*), *scope of—assessee agreeing to pay interest accruing from*

*Miscellaneous Judicial Case no. 235 of 1951, reference under section 66(1) of the Income-tax Act of 1922 read with section 19 of the Business Profits Tax Act of 1947 by the Income-tax Appellate Tribunal, Bombay.

(1) (1938) A. I. R. (Cal.) 271.
(2) (1930) A. I. R. (Lah.) 850.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

Government securities as donation to a Fund—amount so paid, whether taxable.

Where an assessee purchased Government securities and agreed to pay the amount of interest that would accrue thereupon to the Viceroy's war purposes Fund and in pursuance of the agreement paid the amount of interest that accrued in the two assessment years to the Fund and claimed that the amount so paid should be exempted from taxation.

Held, that the third *proviso* to section 16(1) (*c*) of the Income-tax Act, which must be read in the context of the other two *provisos* of the section must be construed to relate to a settlement or disposition which is legally enforceable and not to a settlement or disposition which cannot be legally enforced. The so-called agreement of the assessee to pay interest on the securities as donation to the Viceroy's war purposes Fund was not a legally enforceable promise and, therefore, the amount paid by the assessee to the Viceroy's war purposes Fund in the two assessment years is taxable.

Balfour v. *Balfour*(1), *Abdul Aziz* v. *Masum Ali*(2) and *Doraswamy Iyer* v. *Arunachala*(3), relied on.

Kedarnath Bhattacharji v. *Gorie Mahomed*(4), *District Board of Ramnad* v. *Mahomed Ibrahim*(5), *Ramji Keshavji* v. *Commissioner of Income-tax*(6) and *D. R. Shahapura* v. *Commissioner of Income-tax, Bombay*(7), distinguished.

Referrence under section 66(1), Income-tax Act, 1922, read with section 19 of the Business Profits Tax Act, 1947.

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

Gopal Prasad (*Standing Counsel*) assisted by *T. R. Bajaj*, for the Income-tax Department.

S. K. Majumdar and *S. P. Srivastava*, for the assessee.

(1) (1919) 2 K. B. 571.
(2) (1914) I. L. R. 36 All. 268.
(3) (1936) A. I. R. (Mad.) 135.
(4) (1886) I. L. R. 14 Cal 64.
(5) (1933) A. I. R. (Mad.) 524.
(6) (1945) I. T. R. 105.
(7) (1946) I. T. R. 781.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.—In this case the Income-tax Appellate Tribunal has formulated the following question of law for the determination of the High Court:

"Whether in the circumstances of this case the sums of Rs. 7,917 for the assessment year 1945-46 and Rs. 9,458 for the assessment year 1946-47 paid by the Assessee to the Viceroy's war purposes Fund are taxable in the hands of the Assessee?"

According to the statement of the case the assessee who is Maharaja of Darbhanga purchased Government securities 1953—55 bearing interest at 3 per cent., on 17th November, 1943. The interest on these securities amounted to a sum of Rs. 7,917 for the assessment year 1945-46 and Rs. 9,458 for the assessment year 1946-47. It is not disputed that these figures are correct or that the amount of interest was actually paid to the Viceroy's war purposes Fund by the assessee. It is claimed that the Maharaja of Darbhanga purchased securities as a result of correspondence between him and the Vicerene of India. The assessee had agreed that he would purchase 13 lacs worth of securities and that the interest therefrom would be paid to the Viceroy's war purposes Fund for the duration of the war. Before the Income-tax authorities it is claimed on bhealf of the Maharaja that it should be held that a trust was created and that the interest accrued should not be taxed for the respective assessment years. As regards 1945-46 assessment the Appellate Assistant Commissioner did not agree with the submission made by the assessee and ordered that the amount of interest should be taxed. For the assessment year 1946-47, however, the Appellate Assistant Commissioner adopted a different view and agreeing with the contention of the assessee held that the amount of interest was not taxable. Appeals were preferred against the order of the Appellate Assistant Commissioner in each case on behalf of the department and on behalf of the assessee. The Income-tax Appellate Tribunal held

after hearing the parteis that the amount of interest was not taxable in the hands of the assessee for both the assessment years.

On behalf of the Commissioner of Income-tax, learned Standing Counsel stressed the argument that the view taken by the Income-tax Appellate Tribunal is erroneous, that on a proper construction of section 16(1) (*c*) of the Income-tax Act the amount of interest which had accrued for the two assessment years on the amount of securities which had been purchased by the Maharaja was taxable in his hands. It was contended that no trust was created with respect to the securities purchased by the Maharaja but there was a mere promise made by the Maharaja to pay donation of the interest received from the securities to the Viceroy's war purposes Fund. To put it differently, the argument is that there was no legally enforceable agreement between the Maharaja of Darbhanga on the one hand and the Viceroy or Vicerene of India on the other hand to the effect that the assessee would pay the amount of interest accrued on the Government securities for the period of the duration of the war. It was further argued that the third proviso to section 16(1) (*c*) does not contemplate a settlement or disposition in favour of an artificial entity like the Viceroy's war purposes Fund. It was submitted that the assessee could claim exemption under the third proviso only in a case where settlement or disposition is made in favour of a living person and not in a case where an artificial entity either incorporated or unincorporated is a beneficiary under the transaction. The question at issue depends upon the proper construction of section 16(1) (*c*) which states as follows:

"In computing the total income of an assessee—

* * * * * *

(*c*) all income arising to any person by virtue of a settlement or disposition whether revocable or not.....shall be deemed to be income of the settler or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor:

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the re-transfer directly or indirectly of the income or assets to the settler, disposer or transfere.....

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settler or disponer' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made:

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the life time of the person and from which income the settler or disponer derives no direct or indirect benefit but that the settler shall be liable to be assessed on the said income as and when the power to revoke arises to him ".

We are concerned with the third proviso to section 16(1) (*c*) in this case. The first question which arises is whether the promise made by the Maharaja of Darbhanga that he would pay the interest on the Government securities to the Viceroy's war purposes Fund so long as the war lasted is a legally enforceable obligation. From the statement of the case it appears that there was correspondence between the Maharaja of Darbhanga and the Vicerene of India, as a consequence of which it was agreed by the Maharaja that he would purchase 3 per cent. Government loan to the extent of 10 lacs and that he would pay the interest accrued on the securities for the duration of war. The Income-tax Appellate Tribunal in its order dated the 27th October, 1949, held that a trust was created of this Fund and the income therefrom is not taxable in the hands of the appellant. The Tribunal said:

"The claim of the assessee is that by virtue of correspondence between the Vicerene and the Appellant, the Appellant purchased Rs. 10 lakhs worth of securities and agreed that the interest therefrom should go to the Viceroy's War purposes Fund as long as the war lasted. It is submitted in the circumstances that it should be held that a Trust was created of this Fund and the income therefrom should not be taxed in the hands of the Appellant. It is not the case of the Appellant that the securities were transferred to the Fund, but it is claimed that the Trust was created during the lifetime of the 'person' meaning the benificiary, *i.e.*, Viceroy's war purposes Fund. This

view has been accepted by the Appellate Assistant Commissioner for assessment of 1946-47. We are inclined to hold that this view of the Appellate Assistant Commissioner is correct".

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

In this Court Mr. S. K. Majumdar who ably argued the case on behalf of the assessee attempted to support the view of the Tribunal that a trust was created. It is obviously impossible to accept this argument. Learned counsel further contended that there was an agreement on the part of the Maharaja that he would pay the amount of interest accrued on the Government securities year after year so long the war lasted. Learned counsel in fact submitted his argument in the alternative. In the first place, learned counsel said that there was a legally enforceable obligation on the part of the Maharaja of Darbhanga and the Income-tax authorities have rightly exempted levy of tax on the interest which had been paid to the Viceroy's war purposes Fund. In the alternative learned counsel submitted that even if there was a mere promise, not legally enforceable on the part of the Maharaja, the third proviso to section 16(1) (*c*) would operate and the Maharaja would be entitled to claim exemption of income-tax on the amount of interest accrued on securities for the two assessment years. As regards the first alternative argument presented by Mr. Majumdar I am of opinion that upon the facts disclosed in the statement of the case, the so-called agreement of the Maharaja to pay interest on the securities as donation to the Viceroy's war purposes Fund is not a legally enforceable promise. There is nothing to show that there was a contract or agreement in the legal sense between the Maharaja and the Vicerene of India or any one else representing the Viceroy's war purposes Fund. There is nothing to suggest that there was any consideration of any sort or description for the Maharaja's promise to pay the interest. The Maharaja no doubt paid the amount of interest to the war purposes Fund not because there

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

was any legal obligation to pay or there was any legal contract. It was a mere promise of donation and it is entirely voluntary on the part of the Maharaja and voluntary also on the part of the Vicerene. There was no intention of the parties in entering into the agreement that any legal obligation should be created. Unless there was an intention on the part of the Maharaja that any legal obligation should be created I do not think that there was a contract in the legal sense and there was any binding legal obligation on the part of the Maharaja to pay the amount of donation he had promised to the Vicerene. The principle has been stated beyond any possibility of doubt by Lord Atkin in *Balfour* v. *Balfour*(1),; " To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. That is a wellknown definition, and it constantly happens, I think, that such arragements made between husband and wife are arrangements in which there are mutual promises or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts ". The principle is also stated in an earlier case, the facts of which bear a close parallel to the facts of the present case. In *In re Hudson*(2) A verbally promised to give £20,000 to the Jubilee Fund of the Congregational

(1) (1919) 2 K. B. 571.
(2) (1885) 33 W. R. 819.

Union, and also filled up and signed a blank form of promise not addressed to anyone, but headed "Congregational Union of England and Wales Jubilee Fund," whereby he promised to give £ 20,000, in five equal annual instalments of £4,000 each, for the liquidation of chapel debts. A paid three instalments of £4,000 to the fund within three years from the date of his promise, and then died leaving the remaining two instalments unpaid and unprovided for. The Congregational Union claimed £8,000 from A's executors, on the ground that they had been led by A's promise to contribute larger sums to churches than they would otherwise have done; that money had been given and promised by other persons in consequence of A's promise; that grants from the Jubilee Fund had been promised to cases recommended by A; and that churches to which promises had been made by the committee, and the committee themselves, had incurred liabilities in consequence of A's promise. It was held by the Court of Chancery that the action must fail on the ground that there was no enforceable contract and that there was no consideration to support the contract. At page 820 Pearson, J., who pronounced the opinion of the Court stated: "The first question is whether or not there is any contract at all to pay. I mean a contract in the legal sense of the word 'contract'; was there any consideration of any sort or description for Mr. Hudson's promise to pay £20,000 anything that could be considered a consideration either in this court or elsewhere? I am utterly at a loss to ascertain that there was any consideration. The parties expressed their intention to contribute, and I have no doubt that, if Mr. Hudson had lived and had been able to pay his two remaining instalments of £4,000 each, he would have paid them; but then he would have paid them in the same manner in which he paid the previous instalments, not as being bound by a legal contract to pay, or as paying a debt, but as making, from time to

1953

COMMISSIONER OF INCOME TAX v. KAMESHWAR SINGH.

GAJENDRAGADKAR, J.

time, a charitable gift which he had expressed his intention to make, and which he continued minded to make. Now, here, the only promise was this, that, at the meeting, he said that he would give—that is to say, that he intended to give £20,000. What is the consideration for the promise which was to make it a contract? There was no consideration at all". There are Indian authorities to the effect that a promise to pay donation may be legally enforceable in certain circumstances. For instance, in *Kedarnath Bhattacharji* v. *Gorie Mahomed*(1) it was held by a Bench of the Calcutta High Court that a suit will lie to recover a subscription promised if the subscriber knew that, on the faith of his and other subscriptions, an obligation was incurred to a contractor for the purpose of erecting a building to be paid for out of the monies subscribed. This case was followed by *District Board of Ramnad* v. *Mahomed Ibrahim*(2) in which it was held that a promise to pay a subscription becomes enforceable as soon as any definite steps have been taken in furtherance of the object and on the faith of the promised subscription. These decisions may be explained on the ground that there was not a bare promise or agreement to pay but there was an estoppel against the promisor on the ground that definite steps had been taken in furtherance of the object and on the faith of the promisor to pay the subscription. This was the view taken in *Abdul Aziz* v. *Masum Ali*(3) in which a Muhamadan promised Rs. 500 to a fund stated to rebuild a mosque but no steps were taken to rebuild the mosque and it was held by the High Court that the promise was without consideration and the subscriber was not liable. To a similar effect is the decision in *Doraswamy Iyer* v. *Arunachala*(4) in which it was held by

(1) (1886) I. L. R. 14 Cal. 64.
(2) (1933) A. I. R. (Mad.) 524.
(3) (1914) I. L. R. 36 All. 268.
(4) (1936) A. I. R. (Mad.) 185.

Cornish J., that mere promise to subscribe a sum of money or the entry of such promised sum in a subscription list did not furnish any consideration for any contract or legally enforceable agreement. Upon this review of the authorities it is clear that a mere promise to pay subscription without any allegation of any estoppel would not constitute a legally enforceable contract. The argument of Mr. Majumdar that the agreement of the Maharaja in the present case is legally enforceable cannot be sustained.

Learned counsel then submitted the alternative argument that even if the promise of the Maharaja was not legally enforceable, the third proviso to section 16(1) (*c*) would still be applicable and the Maharaja would be entitled to be granted exemption of income-tax on the amount of donations he had paid. It was pointed out by the learned counsel that the second proviso defines the expression ' settlement or disposition ' to include any disposition, trust, covenant, agreement or arrangement. But it is not possible, in my opinion, to construe the expression ' settlement or disposition ' in such a wide manner as is contended for by Mr. Majumdar. It is manifest on examination of the language of second and third provisos that ' settlement or disposition ' must refer to settlement or disposition which is legally enforceable. This view is supported by the clause in the third proviso which states that a settlement or disposition shall not be revocable for a period exceeding six years or during the lifetime of the person. Unless there was a legally enforceable settlement or disposition how is it possible for the settler or disponer to make a revocation. The last portion of the proviso states that the settler shall be liable to be assessed on the said income as and when the power to revoke arises to him. If the expression ' settlement or disposition ' is construed to include legally enforceable and legally non-enforceable transactions it is not possible to attribute any sensible

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

meaning to the last portion of the third proviso which reserves the right of assessment on the income of the settler when the power to revoke arises to him. The language of the first proviso is also relevant in this connection. This proviso states that a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settler, disponer or transferor. This proviso speaks of a revocable transaction and it is not apt use of language to say that a transaction which is not legally enforceable can be revoked. In view of these considerations I am of opinion that the third proviso which must be read in the context of the other two provisos of section 16(1) (*c*) must be construed to relate to a settlement or disposition which is legally enforceable and not to a settlement or disposition which cannot be legally enforced.

In course of the argument Mr. Majumdar referred to *Ramji Keshavji* v. *Commissioner of Income-tax, Bombay*(1) and *D. R. Shahapure* v. *Commissioner of Income-tax, Bombay*(2) in support of his contention that section 16(1) (*c*) would be applicable. In 1945 Income Tax Reports 105 the assessee had executed in favour of his wife a deed of trust by which he conveyed certain properties to the trustees and reserved to himself the right to occupy a portion of the premises which was already in his occupation. Clause (3) of the deed provided that the net income from the properties should be paid to his wife during her lifetime and that she should maintain her minor children by the assessee and should run the household. Clause (4) provided that in the event of the assessee surviving his wife, the income should be paid to him. In making assessment for the year 1941-42 the Income-tax authorities included in the total income of the

(1) (1945) I. T. R. 105.
(2) (1946) I. T. R. 781.

assessee under the provisions of proviso 1 to section 16(1) (*c*) the income from the properties paid to his wife. It was held by the High Court that the income derived from the trust properties and payable to the assessee's wife during her lifetime could not be deemed to be the assessee's income by virtue of the third proviso to section 16(1) (*c*). The facts of this case are wholly different from the facts with which we are concerned in the present case. There was a valid and legally enforceable deed of trust by the assessee in favour of his wife conveying certain properties and providing certain income to his wife for her lifetime. The decision is obviously right but it has no bearing on the question at issue in the present case. The same comment applies to 1946 Income Tax Reports 781 in which the assessee, with a view to make provision for his fifth wife, made an entry in his business books that an estate worth Rs. 20,000 would be handed over to his wife for her benefit up to her death. There was a clause that the capital supplied would remain entirely the property of the assessee but the wife would get the income over it up to the end of her life. Upon these facts it was held that the entry was an irrevocable covenant to pay the income accruing on Rs. 20,000 in favour of the wife for her lifetime. It is manifest that the settlement in this case was legally enforceable. The principle has no possible application to the present case where the question at issue is different.

For the reasons expressed I think that in the circumstances of this case the sums of Rs. 7,917 for the assessment year 1945-46 and Rs. 9,458 for the assessment year 1946-47 paid by the Maharaja of Darbhanga to the Viceroy's war purposes Fund are taxable in the hands of the assessee.

The question must accordingly be answered in favour of the Commissioner of Income-tax and the

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

assessee must pay the cost of the reference. Hearing fee Rs. 200.

SARJOO PROSAD, J.—I agree.

S. H.

Reference answered.

RAMASWAMI, J.

REFERENCE UNDER THE BIHAR SALES TAX ACT, 1947.

Before Ramaswami and Sarjoo Prosad, JJ.

1953.

January, 14, 15.

STATE OF BIHAR

v.

T. R. JAIN*

Bihar Sales-tax Act, 1947 (Bihar Act XIX of 1947), section 25(1)—90 days for making an application for reference to High Court, whether to be counted from date of order under section 24(4)—omission to do so, whether fatal.

The period of 90 days prescribed in section 25(1), Bihar Sales-tax Act, 1947, for making an application to the Board of Revenue for referring to the High Court any question of law in a case is to be computed from the passing by the Board of Revenue of any order under section 24(4) of the Act and not from the date of the communication of that order to the assessee, and the omission to make the reference within that time is fatal to the validity of the reference.

Firm of Mohan Lal Hardeo Das v. *Commissioner of Income-tax, Bihar and Orissa*(1) and *Doma Sao Kishun Lal* v. *State of Bihar* (2), relied on.

Statement of case by the Revenue Board, Bihar, under section 25(1), Bihar Sales-tax Act, 1947, at the instance of the assessee.

*Miscellaneous Judicial Case no. 233 of 1951, re: statement of case under section 25(1) of the Bihar Sales-Tax Act, 1947 (Act XIX of 1947) by the Board of Revenue, Bihar, at the instance of Telu Ram Jain Firm.

(1) (1929) I. L. R. 9 Pat. 172.
(2) (1952) A. I. R. (Pat.) 857.

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

Gopal Prasad, for Advocate General, for the petitioner.

N. L. Untwallia, for the opposite-party.

RAMASWAMI AND SARJOO PROSAD, JJ.—This case is stated by the Board of Revenue under section 25(1) of the Bihar Sales-tax Act, 1947 (Act XIX of 1947) at the instance of the assessee Telu Ram Jain.

While making certain enquiries under section 13(5) of the Bihar Sales-tax Act, the Sales-tax Officer, Dhanbad, discovered that the assessee, who was employed as a contractor at Sindri, had received in the year 1947-48 a sum of Rs. 4,94,000 and odd on account of the execution of contracts from the Central Public Works Department. In spite of his being employed in the execution of contracts the assessee had not applied for registration; nor did he pay sales-tax from the 1st of April, 1948. After examining the accounts of the assessee the Sales-tax Officer made an assessment of sales-tax to the extent of Rs. 14,000 for the first three quarters of 1947-48. The assessment order was made on the 31st of March, 1949. Aggrieved by this order of assessment Telu Ram Jain preferred two appeals to the Commissioner of Sales-tax. The appeals were dismissed on the 8th of October, 1949. Thereafter, the assessee applied for revision before the Board of Revenue by two separate petitions. The Board of Revenue heard the parties on the 1st of March, 1950, and rejected the petitions by an order, dated the 5th of March, 1950. The assessee then filed two applications to the Board of Revenue for making reference to the High Court on certain questions of law mentioned therein. The applications were filed on the 31st of July, 1950. The Board of Revenue heard lawyers of the parties on the 7th of April, 1951, and made the present reference under section 25(1) of the Act on the 19th of June, 1951.

1953.

STATE OF BIHAR v. T. R. JAIN.

RAMASWAMI AND SARJOO PROSAD, JJ.

The following questions of law have been formulated in the statement of the case:

" (1) Whether a petition filed under section 25 of the Act after the expiry of 90 days from the date of the passing of the orders by the Board can be admitted or not?

(2) Whether in the circumstances of this case, and in consideration of the provisions of the Indian Partnership Act, the two firms should be treated as separate dealers or not, and whether Teluram Jain alone can be assessed to sales-tax on the contracts obtained by him from the Central Public Works Department?

(3) Whether the Amending Act VI of 1949 can be applied as it appears to be the intention of the legislature to correct the 1947 Act, with effect from the date of its first publication, and whether the petitioners have been rightly assessed under the 1947 Act as amended by the 1947 Act ? and

(4) Whether the Amending Act, which was extended to Chota Nagpur on 22nd March 1949, would govern the proceedings which were commenced on 13th January 1949 ? "

When the argument of the case commenced Mr. Gopal Prasad, who appears on behalf of the Advocate General, raised a preliminary objection that the application filed by the assessee under section 25(1) of the Act was not maintainable on the ground that it was not made within 90 days of the passing of the order in revision by the Board of Revenue. It was submitted by the learned Counsel that if this preliminary question was decided in favour of the Department, it was not necessary for the High Court to examine or determine the other questions of law formulated in the statement of the case. The question of limitation is the first question of law which is formulated by the Board of Revenue, and we propose to examine this question at the outset.

On behalf of the assessee Mr. Untwallia addressed a careful argument in the course of which he cited a number of authorities bearing on the question of limitation. It was submitted by the learned Counsel that in this case the Board of Revenue heard the revision applications on the 1st of March, 1950. The judgment was reserved on that date but the Board of Revenue after consideration pronounced judgment on

the 5th of March, 1950, dismissing the revision applications. It is alleged on behalf of the assessee that on the 3rd of June, 1950, a post-card was sent to the assessee from the office of the Board of Revenue intimating to the assessee that the applications had been dismissed. The post-card was actually received by the assessee on the 6th of June, 1950, through the Sales-tax Officer, Dhanbad. It was submitted by the learned Counsel that the period of 90 days should be computed in the present case not from the 5th of March, 1950, when the order of the Board of Revenue dismissing the applications was actually passed but from the 6th of June, 1950, when the order was actually communicated to the assessee. In this view of the matter it was contended by the learned Counsel that the applications for reference under section 25(1) of the Act were made in time on behalf of the assessee, and the High Court was competent to determine the other questions of law raised in the statement of the case. The question at issue depends upon the proper construction of section 25(1) of the Bihar Sales-Tax Act, 1947. Section 25(1) states:

> " Within ninety days from the passing by the Board of Revenue of any order under sub-section (4) of section 24 affecting any liability of any dealer to pay tax under this Act, such dealer may, by application in writing accompanied by a fee of one hundred rupees, require the Board to refer to the High Court any question of law arising out of such order. "

It is contended on behalf of the assessee that the words

> " within ninety days from the passing by the Board of Revenue of any order under sub-section (4) of section 24 "

should be construed to mean ninety days from the date of communication to the assessee of any order passed by the Board of Revenue under sub-section (4) of section 24. It is argued by the learned Counsel that any other interpretation of the section would work injustice. It was stated that the order of the Board of Revenue was not pronounced in the present case in the presence of the parties in open Court but judgment was reserved and on the 5th of March, 1950,

1953.

STATE OF BIHAR v. T. R. JAIN.

RAMASWAMI AND SARJOO PROSAD, JJ.

the Board of Revenue pronounced judgment in the absence of the assessee. It was urged that no notice was given by the Board of Revenue as regards the date on which the judgment was to be pronounced in the case, and in view of these circumstances it was contended that the *terminus a quo* for the period of limitation should commence on the 6th of June, 1950, when the assessee was actually apprised of the order of the Board of Revenue on the revision applications. On the question of construction Mr. Untwallia referred to a line of authorities commencing from *Annamalai Chetti* v. *Colonel J. G. Cloete*(1) in which it was held by the Madras High Court that under section 25 of Act XXVIII of 1860 (Madras Boundary Act, which limits the time within which a suit may be brought to set aside the decision of a Settlement Officer to two months from the date of the award, time will not begin to run until the date on which the decision is communicated to the parties. This case was followed in *Seshama* v. *Sankara*(2) and *Secretary of State for India in Council* v. *Gopisetti Narayanswami Naidu Garu*(3) in both of which the statute was construed to mean that the starting point of limitation will be the date on which the officer concerned pronounced his decision if he had given the parties sufficient notice of the day on which the decision would be pronounced to enable them, if they choose, to be present and hear his decision; otherwise the starting point of limitation would be the date when the decision was actually communicated to the parties. There is another line of authorities in respect of section 77 of the Registration Act which states:

> "Where the Registrar refuses to order the document to be registered, under section 72 or section 76, any person claiming under such document, ... may, within thirty days after the making of the order of refusal, institute in the Civil Court, ... a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree".

(1) (1883) I. L. R. 6 Mad. 189.
(2) (1889) I. L. R. 12 Mad. 1.
(3) (1910) I. L. R. 34 Mad. 151.

It was held by the Bombay High Court in *Abdul Ali* v. *Mirja Khan*(1) that the expression " making of the order, " in section 77 of the Registration Act (III of 1877), means not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it, and that a suit brought under the provisions of section 77 of the Registration Act for a decree directing a document to be registered, may be filed within thirty days of the date on which the order of refusal was communicated to the party concerned. To the same effect is the later decision in *Swaminathan* v. *Letchmanan*(2).

In our opinion, none of these authorities can afford much assistance to the assessee for the matter is concluded by the authority of a Division Bench of this High Court in *Firm of Mohan Lal Hardeo Das* v. *Commissioner of Income-tax, Bihar and Orissa*(3). One of the questions that arose for determination in that case was whether the period of limitation for an application under section 66(2) was one month from the passing of the appellate order under section 31 or 32 or whether the period of one month should be computed from the date on which the appellate order is communicated to the assessee. It was argued in that case on behalf of the assessee that the Assistant Commissioner of Income-tax fixed no time for passing the order in appeal and the order was in fact passed in the absence of the assessee. It was contended that in these circumstances it was only just that the period of limitation should be computed not from the date on which the order purports to have been recorded but

(1) (1903) I. L. R. 28 Bom. 8.
(2) (1929) I. L. R. 53 Mad. 491.
(3) (1929) I. L. R. 9 Pat. 172.

1958.

STATE OF BIHAR v. T. R. JAIN.

RAMASWAMI AND SARJOO PROSAD, JJ.

from the date when the order was communicated to the assessee. It was also pointed out that, according to the prevailing practice, the officers of the Income-tax department do not insist on the presence of the party on the date on which the order is to be passed, and, as no date is fixed for the passing of the order, the order is always communicated to the party by post. It was urged that it may mean great hardship to the parties in certain cases because it is possible that the party may not know anything about the order until the period of limitation has expired. The argument was rejected by the Division Bench and it was held that the period of limitation for the application under section 66(2) of the Income-tax Act, 1922, was one month and the date should be computed from the passing of the appellate order under section 31 or 32 and not one month from the date on which the date of the appellate order was communicated to the assessee. At page 177 Fazl Ali, J. (as he then was) states:

"Now, if the learned Advocate for the petitioners means to point out to us what should be the law, we would say that his argument deserves serious consideration. In the present case, however, our concern is not to lay down what should be the law, but to interpret the law as it stands. In doing so I have to say that I do not find anything in the language of the section to enable us to hold that the expression 'passing of the order' should be interpreted as the communication of the order to the party. On the other hand it is noticeable that while under clause (2) of section 66, time is to run from the passing of the

order, it is to be computed under clause (3) from the date on which the assessee is served with notice. Whether this distinction was deliberately made or whether, at the time clause (3) was being amended, the language used in clause (2) was not noticed, is difficult to say, but it is clear that the plain language of the section does not support the contention of the petitioners. It is true that ordinarily the judgement of a Court, in order to be properly delivered, must be pronounced in court, and in fact there is a specific provision to this effect in section 33 and Order XX, rule 1, of the Civil Procedure Code. There is, however, no such clear provision in the Income-tax Act and I cannot hold, without considerably straining the law, that the order passed by the Income-tax Commissioner can be ignored for the purpose of limitation, until it has been duly communicated by post to the assessee. ''

In the present case also the material facts are similar and there is the same contrast between section 24(2) and section 25 of the Bihar Sales-tax Act. Section 25(1) states that the period of limitation would be 90 days from the passing by the Board of Revenue of any order under sub-section (4) of section 24. The language used in section 24(2) is different. Section 24(2) provides that every appeal under this section shall be presented within forty-five days of receipt of the notice issued under sub-section (4) of section 14. In I. L. R. 9 Patna 172 Fazl Ali, J., pointed out a similar distinction between the language of section 66(2) and section 66(3) of the Income-tax Act, 1922. In our opinion, the present case falls

1953.

STATE OF BIHAR v. T. R. JAIN.

RAMASWAMI AND SARJOO PROSAD, JJ.

within the scope of the principle laid down by the Division Bench in I. L. R. 9 Patna 172 with which we are bound.

Our decision in *Doma Sao Kishun Lal* v. *State of Bihar*(1) is also relevant. In that case we held that the time prescribed by section 21 of the Bihar Sales-tax Act, 1944 which corresponds to section 25 of the Bihar Sales-tax Act, 1947, is an essential condition pre-requisite for making the reference and the omission to make the reference within the time prescribed is fatal to the validity of the reference. We further held in the circumstances of that case that the Board of Revenue improperly made the reference in violation of the provision of the Statute and the High Court was capable of entertaining objection to the statement of the case, and if it came to the conclusion that the case should never have been stated, the High Court was not compelled to express its opinion upon the questions of law referred.

For the reasons stated, we think that the first question of law raised in the statement of the case should be answered against the assessee and in favour of the Sales-tax Department. In this view of the matter, it is not necessary for us to express any opinion on the other three questions of law referred to in the statement of the case. The assessee must pay the costs of hearing: We fix the hearing fee at ten gold mohurs.

K. D. *Statement answered.*

(1) (1952) A. I. R. (Pat.) 357.

REFERENCE UNDER THE BIHAR SALES TAX ACT, 1947.

Before Ramaswami and Sarjoo Prosad, JJ.,

1958.

January, 9, 12.

STATE OF BIHAR

v.

R. JUTE MILLS.*

Bihar Sales Tax Act, 1947 (Bihar Act XIX of 1947), sections 2(d), 13(2)(b), scope of, 'loom hours', whether 'goods' within the meaning of—price of 'loom hours', whether taxable.

'Goods' in the Sales Tax Act, 1947, must be construed to mean only tangible corporeal property and not abstract rights like 'loom hours' or actionable claims, stocks, shares or securities and therefore 'loom hours' do not fall within the ambit of the Bihar Sales Tax Act, 1947.

Hence the amount of sale price of 'loom hours' is not taxable under section 13(2) (*b*) of the Act.

Reference under section 25(1), Bihar Sales Tax Act, 1947.

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

Gopal Prasad, for the *Advocate-General*, for the State.

S. N. Bhattacharji and *S. Ahmad Hussain*, for the opposite party.

RAMASWAMI, J.—This case is stated by the Board of Revenue under section 25(1) of the Bihar Sales Tax Act (Act XIX of 1947).

The assessee is an incorporated company called Messrs. Rameshwar Jute Mills, Limited, of Muktapur in the district of Darbhanga. Assessment was made by the authorities under section 13(2) (*b*) of the Sales Tax Act for the five quarters ending 31st September, 1947, 31st December, 1947, 31st March, 1948, 30th June, 1948 and 30th September, 1948. For these five quarters the taxable turnover was

* Miscellaneous Judicial Case no. 321 of 1950, *re*: statement of case under section 25(1) of the Bihar Sales Tax Act XIX of 1947.

1953.

STATE OF BIHAR v. R. JUTE MILLS.

RAMASWAMI, J.

determined to be Rs. 9,21,043, Rs. 9,39,910, Rs. 12,09,864-12-0, Rs. 6,58,752 and Rs. 6,92,895.

The assessee claimed deduction in respect of two matters. In the first place, he claimed certain amounts shown as the price of 'loom hours' which were sold by the assessee to different parties, the amount of the sale price being credited in the account books of the assessee. It appears that the Indian Jute Mills Association, of which Rameshwar Jute Mills is a member allotted certain 'loom hours' to each mill and there was a condition that if for any reason a mill was not able to utilise its quota of loom hours, either due to shortage of raw materials or due to labour trouble or due to any other cause, it had the option of selling loom hours to some other concern which was capable of utilising the same. It was claimed on behalf of the assessee that the sale of 'loom hours' did not fall within the ambit of the Bihar Sales Tax Act. The argument was rejected by the taxing authorities. In the second place, it was alleged on behalf of the assessee that a quantity of gunny bags was sold to Messrs. Tata Iron and Steel Co., Ltd., through Messrs. Shaw Wallace and Co., who acted as brokers. It was said that the sale was to a registered dealer and the price received for the gunny bags ought to be exempted from sales tax. This claim also was rejected by the taxing authorities on the ground that the sale was effected in favour of Messrs. Shaw Wallace and Co., and the books of the assessee showed that goods were supplied not to the Tatas but to Shaw Wallace and Co., on whom the responsibility for payment of the price rested.

Upon these facts the following questions of law have been formulated for the determination of the High Court:

(1) "Are 'looms hours' goods as under section 2(*d*) of the Bihar Sales Tax Act of 1947 and can sales of these be covered by section 2(*g*) and thus be included as turnover as under section 2(*i*) of the Act?"

and

1953.

(2) " Are sales to registered dealers of Bihar, through commission agents outside Bihar, exempt from taxation by the operation of section 5(2) (*a*) (*ii*) of the Act?"

STATE OF BIHAR v. R. JUTE MILLS.

RAMASWAMI, J.

After hearing learned counsel for the parties we are of opinion that the questions should be altered in the following manner: (1) " Are the sales of ' loom hours ' in the circumstances of this case taxable under the provisions of the Bihar Sales Tax Act of 1947?" and (2) " Are the sales of gunny bags which were delivered to Messrs. Tata Iron and Steel Co., Ltd., Jamshedpore, sales to Messrs. Shaw Wallace and Co., in the circumstances of this case or whether they were sales to Messrs. Tata Iron and Steel Co., Ltd., and therefore exempt under section 5(2) (*a*) (*ii*) of the Act? "

On the first question it was contended by Mr. Bhattaharji on behalf of the assessee that ' loom hours ' cannot by any stretch of language be deemed to be goods, the sale of which can be taxed under the provisions of the Bihar Sales Tax Act. It was argued by the learned counsel that there was a domestic arrangement between the members of the Indian Jute Mills' Association, in consequence of whih ' loom hours ' were allotted to each Jute Mill and they had also agreed that if for any reason a mill was not able to utilise its quota of loom hours, it had the option of ' selling ' the loom hours to some other concern which was capable of utilising the same. It was submitted by the learned counsel that there was no legal sanction behind this arrangement and the so-called right to utilise the loom hours was not a right in the legal sense at all and so was not capable of being transferred or sold to any third parties. To put it differently, learned counsel said that loom hours in the context of the facts of the present case were not property in the legal sense and was not capable of being transferred. The materials on the

1953.

STATE OF BIHAR v. R. JUTE MILLS.

RAMASWAMI J.

record are not sufficient for determining the question whether the arrangement *inter se* between the Jute Mills Association and the members thereof was a legally enforceable agreement or not. The question would depend upon the exact terms of the agreement or arrangement between the Indian Jute Mills' Association and its members including the assessee, Rameshwar Jute Mills. No document has been produced in this case to show what were the precise terms of the agreement. In the absence of any such document or any other evidence to show as to the details of the arrangement it is impossible to determine the question whether the allotment of loom hours had any legal sanction and whether the assessee could transfer any legal right to third parties by the sale of the so-called loom hours. But assuming for the sake of argument that the sale of loom hours had legal sanction the question would still remain whether the transaction falls within the ambit of the Bihar Sales Tax Act. The question is whether the sale of loom hours would be sale of goods within the meaning of section 2(*d*) of the Bihar Sales Tax Act. Section 2(*d*) defines 'goods' to mean

> 'all kinds of movable property other than actionable claims, stocks, shares or securities, and includes all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property'.

Movable property is not defined in the Act but it was pointed out by Mr. Gopal Prasad who appears on behalf of the Advocate-General in this case that 'movable property' is defined in the General Clauses Act to mean 'property of every description except immovable property'. Section 3(25) states that 'immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. The argument of Mr. Gopal Prasad is that the sale of loom hours was not sale of movable

property as defined in the General Clauses Act and therefore it was sale of immovable property and so falls within the purview of the Bihar Sales Tax Act. There is a fallacy behind this argument for it proceeds on the assumption that loom hours is property and therefore falls within the definition of movable property under the General Clauses Act. On this point Mr. Gopal Prasad referred to the definition of ' property ' in the Sale of Goods Act. Section 2(11) of the Sale of Goods Act defines ' property ' to mean the general property in goods, and not merely a special property. But this definition has no bearing on the question we have to decide in the present case. There is a juristic distinction between a right or legally protected interest and the *res* or object of that right. It is obvious that section 2(11) of the Sale of Goods Act defines property in the sense of the right and not of the *res*. In the present case the answer to the question at issue must depend upon the construction of the language of section 2(*d*) of the Bihar Sales Tax Act. Section 2(*d*) defines ' goods ' to mean

> ' all kinds of movable property other than actionable claims, stocks, shares or securities, and includes all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property '.

If section 2(*d*) is compared to section 2(7) of the Sale of Goods Act, it would be immediately apparent that the definition in the Sales Tax Act is much narrower in scope than the definition in the Sale of Goods Act. In the Bihar Sales Tax Act the definition of ' goods ' excludes not merely actionable claims but also stocks, shares or securities but in the Sale of Goods Act the definition includes stocks and shares. It is also important to notice that the latter part of section 2(*d*) of Bihar Sales Tax Act states that ' goods ' shall include all materials, articles, and commodities, whether or not to be used in the construction, fitting out, improvement or repair of

1953.

STATE OF BIHAR v. R. JUTE MILLS.

RAMASWAMI, J.

immovable property. The expression 'movable property' in the first part of the section 2(*d*) must be read in the context and collocation of the language of the latter part. If section 2(*d*) is so read, it is clear that 'goods' in the Bihar Sales Tax Act must be construed to mean only tangible corporeal property and not abstract rights like loom hours or actionable claims, stocks, shares or securities. It follows that in the present case the sale of loom hours does not fall within the ambit of the Bihar Sales Tax Act and the amount shown in the books of the assessee as sale price of the loom hours was not rightly taxed by the authorities.

As regards the second question it was submitted by Mr. Bhattacharji that the gunny bags were actually sold to Messrs. Tata Iron and Steel Co., Ltd., Jamshedpore, who were registered dealers and the sales were exempt from tax under the provisions of section 5(2) (*a*) (*ii*) of the Bihar Sales Tax Act. It was argued that Messrs. Shaw Wallace and Co., were merely commission agents, that they purchased the goods from the assessee on behalf of Messrs. Tata Iron and Steel Co., Ltd., who were the real purchasers. The evidence on this point was examined by the taxing authorities who found that sales were in fact effected to Messrs. Shaw Wallace and Co. and not to Messrs. Tata Iron and Steel Co., Ltd. The Sales Tax Officer pointed out in the order of assessment that the books of the assessee showed that the goods were credited to Messrs. Shaw Wallace and Co., and not to the Tatas. The name of the Tatas does not appear anywhere in the books of the assessee. There is a further finding that the responsibility for payment of the price rested on Messrs. Shaw Wallace and Co. and not on the Tatas. It was contended on behalf of the assessee that the goods were supplied to the Tatas on the instruction of Messrs. Shaw Wallace and Co. That may be so but upon the other facts established in the case the

Sales Tax Officer and on appeal the Commissioner and the Board of Revenue found that the sale of the goods was in fact made to the Tatas. That is primarily a question of fact for which there was proper evidence before the taxing authorities. The second question must therefore be answered against the assessee and it must be held that sales of gunny bags delivered to Messrs. Tata Iron and Steel Co., of Jamshedpore were in fact sales made to Messrs. Shaw Wallace and Co., and therefore not exempt from tax under the provisions of section 5(2) (*a*) (*ii*) of the Bihar Sales Tax Act.

In the result the first question must be answered in favour of the assessee and the second question in favour of the Department. There will be no order as to costs of this reference.

SARJOO PROSAD, J.—I agree but would wish to add a few observations of my own. The question whether the sale of loom hours falls within the sale of goods under the Sales Tax Act is somewhat intriguing. The word ' sale ' discarding unnecessary details as defined in this Act means any transfer of property in goods for cash or deferred payment or other valuable consideration, and the word ' goods ' has been defined in section 2(*d*) of the Act to mean all kinds of movable property other than actionable claims, stocks, shares or securities, and includes all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property. The word ' movable property ' has not been defined in the Sale of Goods Act itself but the Board of Revenue has relied upon the definition given in the General Clauses Act under section 3(34) which says that it shall mean property of every description, except immovable property. The definition of ' movable property ' as given in the General Clauses Act is certainly very wide and anything which is not immovable property would come

1953.

STATE OF BIHAR v. R. JUTE MILLS.

SARJOO PROSAD, J.

under the connotation of 'movable property'. The contention of the assessee is that the sale of loom hours is not property at all and, therefore, does not come in the definition. The contention is based upon the assumption that there is no legal sanction behind this right or behind the transfer of this right. The assessee was claiming this exemption and he has shown nothing to indicate that there was no legal sanction behind the right. It may be that it was some kind of right, though intangible, which was capable of being legally transferred by the assessee; but even then the question remains, as my learned Brother has pointed out, whether the definition of 'movable property' as given in the General Clauses Act should be wholly adopted for the purposes of construing the definition of 'goods' as given in section 2(*d*) of the Sales Tax Act. It is true that the word 'property' has been defined in the Sale of Goods Act to mean general property in goods, and again the word 'goods' has been defined in section 2(7) of the Sale of Goods Act to mean every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. It is obvious that this definition of the term 'goods' in the Sale of Goods Act is much wider than the definition of 'goods' in the Sales Tax Act with which we are here concerned; and presumably, therefore, it is not possible to adopt the wider connotation given to the term 'property' or 'goods' in the Sale of Goods Act or for the matter of that the still wider connotation of 'movable poperty' in the General Clauses Act. The collocation of the words used in the definition of 'goods' in the Sale of Goods Act apparently suggests that the 'goods' there defined refer to tangible goods or tangible movable property and not to any kind of intangible right. I, therefore, agree that the sale of loom hours does not come within the definition as

given in the Sale of Goods Act and the Sales Tax Act and is exempt from payment of tax.

1953.

STATE OF BIHAR v. R. JUTE MILLS.

SARJOO PROSAD, J.

The second question formulated by the Board is as follows :—

"Are sales to registered dealers, through commission agents, whose offices are situated outside Bihar, sales of the class mentioned in section 5(2) (*a*) (*ii*) of the Act?"

In view of the findings in the statement of the case submitted by the Board it is quite obvious that the question does not arise and need not be answered. The Board rejected the contention of the assessee that it was a sale to the Tatas and held, on the contrary, that it was a sale to Shaw Wallace and Co., who are admittedly not registered dealers in Bihar and, therefore, the exemption under section 5(2) (*a*) (*ii*) is not available to the assessee. In my opinion, therefore, that question has rightly not been answered and did not arise for consideration at all.

Order accordingly.

S. H.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sarjoo Prosad, JJ.

N. I. ASSURANCE CO.

v.

C. G. I. TRIBUNAL.*

1953.

January, 13, 14.

Industrial Disputes Act, 1947 (*Act XIV of* 1947), *sections* 2(*k*), 10(1), *scope and applicability of*—' *industrial dispute* ', *meaning of*—*dismissal of an employee of a company* —*reference to Industrial Tribunal*—*reference, whether without jurisdiction*—*Constitution of India*, 1950, *Article* 226.

*Miscellaneous Judicial Case no. 290 of 1951, re: an application under Article 226 of the Constitution of India.

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL.

Where an industrial company dismissed one of its employees and the Government of India referred the matter to an Industrial Tribunal under section 10(1) of the Industrial Disputes Act, 1947;

Held, that the dispute between the petitioner and the dismissed employee does not fall within the ambit of the expression ' industrial dispute ' as defined in section 2(*k*) of the Industrial Disputes Act, 1947, and, therefore, the reference made by the Government of India under section 10(1) of the Act was without jurisdiction and the petitioner was entitled to a *writ* in the nature of *certiorari* for the quashing of the proceedings before the Tribunal.

Kandan Textile v. *Industrial Tribunal*(1), *Manager, U. C. Bank* v. *Labour Commissioner*(2), *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association*(3), *George Hudson, Ltd.* v. *Australian Timber Workers' Union*(4), *and Members of the Sasamusa Workers' Union* v. *State of Bihar*(5) relied on.

Standard Coal Company, Ltd. v. *S. P. Varma*(6), distinguished.

The Industrial dispute referred to in section 2(*k*) of the Industrial Disputes Act, 1947, must be construed to mean not a dispute between an individual workman and the management but a dispute which though it may originate in an action with regard to an individual workman has developed into a dispute in which the majority of the workmen and the establishment were interested.

The expression " industrial dispute " in the section cannot be construed in a grammatical sense so as to mean any dispute relating to an industrial establishment. The conception of industrial dispute is a conception in the realm of economics. It connotes a dispute between capital and labour organised in a collective sense.

(1) (1951) A. I. R. (Mad.) 616.
(2) (1951) A. I. R. (Mad.) 141.
(3) (1908) 6 C. L. R. 309, 332.
(4) (1923) 32 C. L. R. 413.
(5) (1952) A. I. R. (Pat.) 210.
(6) (1952) A. I. R. (Pat.) 56.

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL.

Petition for the issue of a *writ* in the nature *certiorari* against the opposite party under Article 226 of the Constitution.

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

Baldeva Sahay, Shivanugrah Narain and *Udai Sinha* for the petitioners.

Mahabir Pd., B. C. Ghosh, A. C. Mitra, Amulya Kanta Choudhury and *R. K. Bagachi*, for the opposite party.

RAMASWAMI, J.— In this case the petitioner, namely, The New India Assurance Co., Ltd., had obtained a *writ* from this High Court on 14th June, 1951, prohibiting the Industrial Tribunal at Dhanbad from proceeding with Reference no. 12 of 1951 for adjudication of the dispute between the petitioner and Nagendra Nath Bhattacharya who had been dismissed from the Company's service on 27th April, 1949. The reference was made to the Tribunal under section 10(1) of the Industrial Disputes Act (Act no. XIV of 1947) by the notification, dated 3rd of May, 1951. After the High Court had issued the rule the Government of India cancelled the order of reference by the notification, dated the 9th July, 1951. On the same date the Government of India passed another order to the following effect:—

" Whereas an industrial dispute has arisen between the New India Assurance Co., Ltd., Calcutta and the Bihar Provincial Insurance Employees' Association, Patna, in the matter of the termination of services of Sri Nagendranath Bhattacharya a workman at the Patna Branch of the New India Assurance Company.

And, whereas the Central Government considers it desirable to refer the dispute for adjudication: Now, therefore, in exercise of the powers conferred by clause (c) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947, (Act XIV of 1947), the Central Government hereby refers the said dispute for adjudication to the Central Government Industrial Tribunal at Dhanbad constituted under section 7 of the Act ".

Thereafter the petitioner instituted the present proceeding in the High Court for issue of a *writ* in the

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL.

RAMASWAMI, J.

nature of *certiorari* under Article 226 of the Constitution for calling up the record of the proceedings pending before the Tribunal and for quashing the same on the ground that there was no jurisdiction on the part of the Government of India to make the reference.

Cause was shown against the rule by the Advocate-General on behalf of the Government Industrial Tribunal and by Mr. B. C. Ghosh on behalf of the dismissed employee Nagendranath Bhattacharya and on behalf of the Bihar Provincial Insurance Employees' Association.

In support of the rule Mr. Baldeva Sahay argued in the first place that there is no 'industrial dispute' within the meaning of section 2(*k*) of the Industrial Disputes Act and consequently the Government of India had no jurisdiction to make a reference under section 10(1) and proceedings pending before the Tribunal at Dhanbad were illegal and ought to be quashed. The argument of the learned counsel is that in order to constitute an 'industrial dispute' there must be a dispute or difference between the employer and a body of workmen in the collective sense and that the dispute must be connected with the employment or terms of the employment or with conditions of labour of any person. It was submitted by the learned counsel that dispute between a single workman and the management of the Company was merely an individual dispute concerned with the terms of the employment or the terms of dismissal of a solitary workman, that it was not in its nature or quality an 'industrial dispute' contemplated by the Act. The question is a matter of construction. and depends upon the language of clause 2(*k*) of the Industrial Disputes Act. Clause 2(*k*) defines an 'industrial dispute' to mean

'any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen,

which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.'

On behalf of the respondents Mr. B. C. Ghosh, referred to the General Clauses Act and contended that under section 13 of that Act " words in the singular shall include the plural, and *vice versa* " unless there was anything repugnant in the subject or context. It was argued by Mr. B. C. Ghosh that the word ' employee ' in section 2(*k*) of the Industrial Disputes Act must be construed so as to include a dispute between the management and a solitary workman whose terms of employment had been affected. In my opinion the argument of Mr. B. C. Ghosh is not correct. Section 13 of the General Clauses Act no doubt enacts a general rule of construction that words in the singular shall include the plural and *vice versa*, but the rule is subject to the proviso that there shall be nothing repugnant to such a construction in the subject or context of the Act which is to be construed. In the present case the proper approach is to examine section 2(*k*) in the setting and the context and other important provisions of the Industrial Disputes Act. Section 10(2) of the Act provides for a reference to a Court or a Tribunal on the application of the parties to an industrial dispute if the appropriate Government is satisfied " that the persons applying represent the majority of each party ". Section 10(3) is also important in this connection. Section 10(3) states that

" where an industrial dispute has been referred to a Board or Tribunal under this section, the appropriate Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference. "

Sections 10(2) and 10(3) therefore contemplate a state of affairs where the action of the management in connection with a single workman has developed into a general dispute involving the whole of the workmen or the majority of the workmen in the

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL. RAMASWAMI, J.

particular establishment and there is an apprehension or threat of strike. Section 18 of the Act is also important. This section states that—

"a settlement arrived at in the course of conciliation proceedings shall be binding on (*a*) all parties to the industrial dispute; (*b*) all other parties summoned to appear in the proceedings .....; (*c*) where a party referred to in clause (*a*) or clause (*b*) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates; (*d*) where a party referred to in clause (*a*) or clause (*b*) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

Section 36 also throws light on the proper construction of the expression 'industrial dispute'. This section states that—

"a workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—(*a*) an officer of a registered trade union of which he is a member; (*b*) an officer of a federation of trade unions to which the trade union referred to in clause (*a*) is affiliated; (*c*) where the worker is not a member of any trade union by an officer of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorised in such manner as may be prescribed."

Section 36(2) similarly provides that—

"an employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—(*a*) an officer of an association of employers of which he is a member; (*b*) an officer of a federation of associations of employers .....; (*c*) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged ....."

In the context of these important provisions of the Industrial Disputes Act it is clear that the 'industrial dispute' referred to and defined in section 2(*k*) must be construed to mean not a dispute between an individual workman and the management but a dispute which though it may originate in an action with regard to an individual workman has developed into a dispute in which the majority of the workmen in the establishment are interested. This

view is supported by the decision in *Kandan Textile* v. *Industrial Tribunal*(1) in which it was held that a dismissed workman cannot, by making a demand for reinstatement, create an industrial dispute, but, if a workers' union or a substantial body of workmen who continue in employment espouse his cause then an industrial dispute may arise. The point was actually decided by Mack, J. but the Chief Justice did not express his final opinion on this point. In a subsequent case, however, *Manager, U. C. Bank* v. *Labour Commissioner*(2) the Chief Justice definitely expressed the view that if section 2(*k*) of the Industrial Disputes Act was to apply there must be a dispute between a body of employees in the collective sense and the management and that a dispute between a solitary employee and the management would not by itself constitute an industrial dispute falling within the scope of section 2(*k*) of the Industrial Disputes Act. At page 144 the learned Chief Justice said: " In my opinion, this is not the result. The two Acts, namely, the Industrial Disputes Act and the Madras Act are not in *pari materia*. Though in one sense, section 41(2) of the Madras Act concerns a dispute between an employee and an employer, an individual dispute falling under it would not by itself be an industrial dispute falling within the scope of the Industrial Disputes Act. It may be that the dismissal of even one workman can become the subject of an industrial dispute, but then it is no longer an individual dispute between the dismissed workman and the employer only; it becomes a dispute between the workmen on the one hand and the employment on the other. Such a dispute, it may be called a collective dispute, certainly cannot be the subject-matter of an appeal under section 41 of the Madras Act. Such dispute would have to be referred to a Tribunal or other authority under section 10, Industrial Disputes Act either by the

(1) (1951) A. I. R. (Mad.) 616.
(2) 1951) A. I. R. (Mad.) 141.

1953. Government *suo motu* or at the instance of one or both of the parties. In the *Kandan Textile, Ltd.* v. *The Industrial Tribunal, Madras*(1), it was held by Bench of this Court that something more than an individual dispute between a worker and the employer is required to make the dispute an industrial dispute. It was pointed out in that case that a dispute which in its origin might be an individual dispute may at a later stage develop into a collective dispute which could be properly called an industrial dispute. We have not been referred to any authority which holds to the contrary ". The same view has been adopted in *J. Chowdhury* v. *M. C. Banerjee*(2) and *Standard Vacuum Oil Co.* v. *Industrial Tribunal*(3).

N. I. ASSURANCE CO. v. C. G. I. TRIBUNAL. RAMASWAMI, J.

There is another matter to be considered in this connection. The Industrial Disputes Act (Act XIV of 1947) is legislation with reference to item no. 22 in the Concurrent List, namely, " Trade Unions; Industrial and labour disputes ". The expression ' industrial dispute ' cannot be construed in a grammatical sense so as to mean any dispute relating to an industrial establishment. The conception of industrial dispute is a conception in the realm of economics. It connotes a dispute between capital and labour organised in a collective sense. The object of an industrial dispute in this sense is to obtain new industrial conditions for the body of employees and not merely to ventilate the grievance of any specific individual employee at a particular moment in an industrial establishment. An industrial dispute, therefore, involves two elements, viz., (1) the dispute must relate to industrial matters; and (2) at least on one side of the dispute the disputants must be a body of men acting in collective manner and not individual. In the Australian case *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association*(4)

(1) (1949) 2 Mad. L. J. 789.
(2) (1951) 55 Cal. W. N. 256.
(3) (1952) A. I. R. (Travancore) 249.
(4) (1908) 6 C. L. R. 309, 332.

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL. V. RAMASWAMI, J.

Griffith, C. J. said that " an industrial dispute exists where a considerable number of employees engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them ". In a later case *George Hudson, Ltd.* v. *Australian Timber Workers' Union*(1) Isaacs, J. referred pointedly to the difference between an individual dispute and an industrial dispute. At page 441 the learned Judge states: " The very nature of an ' industrial dispute, ' as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen or which might arise if the demand were not acceded to and observed for a period really indefinite. The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class ".

In the present case, therefore, I am of opinion that the dispute between the petitioner and the dismissed employee Nagendranath Bhattacharya does not fall within the ambit of the expression ' industrial dispute ' as defined in section 2(*k*) of the Act and that the conciliation proceedings initiated under section 12 were without jurisdiction. It follows that the reference made by the Government under section 10(1) of the Act by the notifications, dated the 3rd May 1951 and the 9th July 1951 must be held to be beyond jurisdiction and *ultra vires*.

(1) (1923) 32 C. L. R. 413.

1958.

N. I. ASSURANCE Co. v. O. G. I. TRIBUNAL

RAMASWAMI, J.

It was nevertheless argued on behalf of the respondents that the cause of the dismissed employee was taken up by the Insurance Employees' Association and there was an 'industrial dispute' within the meaning of the Act on the date when the Government of India issued the notification, dated the 9th July 1951. On this point the learned Advocate-General referred to the terms of the notification and argued that there was a presumption that the facts stated in the notification are correct and that there was a dispute between the Association and the petitioner on the date the notification was issued. The presumption upon which the Advocate-General relies is not an absolute presumption but it may be rebutted by proper evidence adduced by the parties interested. In the present case it was submitted by Mr. Baldeva Sahay on behalf of the petitioner that there was nothing to show that at any time the Association had approached the petitioner for the reinstatement of Mr. Bhattacharya. It was contended by the learned counsel that the Association made no demand from the petitioner and no reasonable opportunity was given to the petitioner to comply with any such demand. It was stated that the petitioner was not aware that the Association had taken up the cause of the dismissed employee or that it made any reference to the Government of India in the matter. Learned counsel referred to paragraph 4 of his affidavit which states that—

> "the Association did not raise any dispute at the time of the dismissal of the aforesaid Sri Nagendranath and did not make any demand on his behalf, which could possibly have been refused."

In the affidavit field on behalf of the Employees' Association there is no specific denial of the facts stated in paragraph 4(*b*) of the petitioner's affidavit. In this state of facts it is impossible to hold that there was any dispute between the Association and the petitioner which would give jurisdiction to the Government of India to make a reference under section 10(1) of the Industrial Disputes Act. The

1953.

N. I. ASSURANCE Co. v. C. G. I. TRIBUNAL. RAMASWAMI, J.

case is governed, in my opinion, by the principle laid down by this Court in *Members of the Sasamusa Workers' Union* v. *State of Bihar*(1) in which it was held that there was no ' industrial dispute ' within the meaning of the Act if there was no material to show that the notice of strike by the Workers' Union was in fact served upon the management or that reasonable opportunity was given to the management to comply with the demands made on behalf of the Workers' Union, or that the management was otherwise aware of those demands. On behalf of the respondents reliance was placed by the learned Advocate-General on *Standard Coal Company, Ltd.* v. *S. P. Varma*(2) in which it was observed that " there may be instances where workers may consider it wholly useless to make a demand for redress on the management and prefer to move the appropriate machinery set up by Government for the redress of their grievances. But nevertheless, it will be an industrial dispute if it comes within the meaning of section 2(*k*) of the Act ". This observation must be, however, read in the context of the special facts admitted or proved in that case. It would appear that certain demands were made by the workmen through their trade union direct to the Regional Labour Commissioner and not direct to the management of the colliery. But there was material in that case to indicate that the Regional Labour Commissioner had correspondence with the management of the colliery who was aware of the demands made by the workers. Upon these facts it was held by the Bench that it was wholly useless for the workers to make a formal demand for redress on the management and it was open to them to move the appropriate machinery set up by Government for the redress of their grievances. In the present case the material facts are wholly different. There is no evidence whatsoever to suggest or to indicate that the petitioner was aware that the Association had taken up the cause of the dismissed employee or that it was insisting on his

(1) (1952) A. I. R. (Pat.) 210.
(2) (1952) A. I. R. (Pat.) 59.

1953. reinstatement. In my opinion upon the facts proved in this case it must be held that there was no industrial dispute within the meaning of section 2(*k*) of the Act and that the reference made by the Government of India under section 10(1) is without jurisdiction.

N. I. ASSURANCE CO. v. C. G. I. TRIBUNAL. RAMASWAMI, J.

For these reasons I would make the rule absolute and direct that the reference made by the Government of India by the notification, dated the 9th July 1951 and the proceedings, consequent on the reference, pending before the Tribunal at Dhanbad should be quashed. There will be no order as to costs.

SARJOO PROSAD, J.—On the facts disclosed in the affidavits of the respective parties I cannot but hold that there is no existence of any industrial dispute within the meaning of section 2(*k*) of the Act so as to warrant a reference to the Tribunal. There is nothing in their affidavits to show that the Provincial Insurance Employees' Association which came into being on 18th March, 1950, long after the dismissal of the workman Sri Nagendra Nath Bhattacharya on the 27th April, 1949, at any stage interested itself on behalf of the dismissed employee before the petitioner Company or took up his cause before it. There is apparently some conflict between a Division Bench judgment of this Court [*Standard Coal Company, Limited* v. *S. P. Varma*(1)] and another Bench decision of this Court [*Members of the Sasamusa Workers' Union* v. *State of Bihar*(2)] to which my learned Brother was himself a party. It is not necessary, however, to attempt to resolve that conflict if any, because the decision in A. I. R. 1952 Patna 56, as pointed out by my learned Brother, has to be confined to its own facts. I, therefore, agree that the rule should be made absolute and the proceedings pending before the Tribunal should be quashed.

S. H. *Rule made absolute.*

(1) (1952) A. I. R. (Pat.) 56.
(2) (1952) A. I. R. (Pat.) 210.

REFERENCE UNDER THE INCOME TAX ACT, 1922.

Before Ramaswami and Sarjoo Prosad, JJ.

1953. January, 19.

G. M. L. CHAKALIA

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (Act XI of 1922), section 25A(1) and 25A(2)—proceedings for assessment under section 25A, whether should be commenced by a notice to every member of the family—word "assessment" in clause 25A(2), meaning of.

It is not necessary that the proceeding for assessment under section 25A should be commenced by a notice to every member of the family. By a process of fiction the Hindu undivided family is deemed to be an existing entity for the purpose of assessment under section 25A even though there had been partition of the members and the Income-tax authorities had passed order under section 25A(1) of the Act. In such a case it is not improper on the part of the Income-tax authorities to issue notice to the *karta* of the former Hindu undivided family though it had ceased to be undivided and joint.

The word "assessment" in clause 25A(2) is not used in the sense of a proceeding for assessment for imposing liability upon the assessee. The word "assessment" used in this clause means "computation of income" or the determination of the amount of tax payable.

Lakshminarain Bhadani v. *Commissioner of Income-tax*(1), relied on.

Commissioner of Income-tax, Madras v. *Swaminathan*(2), referred to.

---

* Miscellaneous Judicial Case no. 323 of 1951, in the matter of the Indian Income-tax Act XI of 1922.

(1) (1951) 20 I. T. R. 594, S. C.

(2) I. L. R. (1948) (Mad.) 399.

1953.

G. M. L. CHAKALIA. v. COMMISSIONER OF INCOME-TAX.

Reference under section 66(1) of the Income-tax Act, 1922.

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

V. D. Narayan and *B. N. Jain*, for the petitioner.

Standing Counsel, for the opposite party.

RAMASWAMI AND SARJOO PROSAD, JJ.—In this case the following question of law has been formulated by the Income-tax Appellate Tribunal:

> " Whether on the facts and in the circumstances assessments on the Hindu undivided family for the years 1943-44 and 1944-45 are sustainable under section 25A(2) of the Income-tax Act ? "

The material facts according to the statement of the case are as follows. There was a partition suit no. 2 of 1942 instituted by Manoharlal Bakrewalla in the court of the Sub-Judge of Singhbhum, Chaibassa. A compromise was effected on 31st March, 1943, as a result of which Manoharlal Bakrewalla, his wife Ganga Devi and his five sons, three of whom were minors, agreed to partition the Hindu undivided family and transfer assets, liabilities, etc., to a public limited company called ' Gulabrai Manoharlal Co., Ltd.', which had been incorporated on 29th March 1943. A memorandum was subsequently executed on 6th May 1943 between the members of the assessee family as vendors and the limited company as vendee. In consideration of Rs. 5,00,000 worth of shares distributed in 5,000 shares to Manoharlal and his family members out of total capital of Rs. 11,00,000 the company took over the assets and liabilities on 1st June, 1943. The final memorandum of agreement is dated the 21st May 1943. On a claim being made under section 25A the Income-tax Officer recorded an order that the partition had taken place among the members of the undivided family of the assessee. In response to the notice under section 23 the assessee did not file return of its income nor produced book of account. On 23rd June, 1947, the Income-tax Officer

completed the assessment under section 23(4) for the two periods of accounting, viz., the first period being from 20th October 1941 to 8th November 1942 and the second period being from 9th November 1942 to 31st March, 1943. Appeals were preferred against the order of assessment to the Appellate Assistant Commissioner and to the Income-tax Appellate Tribunal. The appeals were dismissed and the assessments made were confirmed. On the application of the assessee the Appellate Tribunal has referred the question of law which has been stated above.

On behalf of the assessee Mr. V. D. Narayan concentrated his argument on the point that the proceedings of the Income-tax Officer were illegal and without jurisdiction since they related to a Hindu undivided family which had ceased to exist with effect from 31st March 1943. The contention of the learned counsel is that notice of assessment under section 22 should have gone not to the *karta* of the undivided Hindu family but to the separate members of the family, viz., Manoharlal Bakrewalla, his wife Ganga Devi and his five sons. It was argued that assessment should have been made on separate members and not on the undivided family as such. Learned counsel conceded that in the assessment order the Income-tax Officer had said that the tax will be realised from six separated members according to their shares. Nevertheless it was urged on behalf of the assessee that the proceedings before the Income-tax Officer were without jurisdiction since the Income-tax Officer purported to assess the undivided Hindu family of Gulabrai Manoharlal which had ceased to exist. The whole argument is based on section 25A of the Income-tax Act. Section 25A(1) states:

" Where at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place, among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the

1953. joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect: Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family ".

G. M. L. CHAKALIA. v. COMMISSIONER OF INCOME-TAX. RAMASWAMI AND SARJOO PROSAD, JJ.

Section 25A (2) states:

" Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23: Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such ".

The contention of the learned counsel on behalf of the assessee is that under section 25A the notice of assessment should have gone not to the *karta* of the undivided Hindu family but to the separated members. It was submitted that the Income-tax Officer had no jurisdiction to start assessment proceedings against undivided Hindu family of Gulabrai Manoharlal which had ceased to exist. In our opinion the argument of the learned counsel is not correct. On a true construction of section 25A it is clear enough that the Income-tax Officer in the first place has to make assessment of the total income of the joint family as if no partition had taken place. It is not necessary that the proceedings for assessment under section 25A should be commenced by a notice to every member of the family. By a process of fiction the Hindu undivided family is deemed to be an existing entity for the purpose of assessment under section 25A even though there had been partition of the members and the Income-tax authorities had passed

order under section 25A(1) of the Act. In such a case it is not improper on the part of the Income-tax authorities to issue notice to the *karta* of the former Hindu undivided family though it had ceased to be undivided and joint. This interpretation is supported by several considerations. In the first place it is important to take note of the fact that section 25A(1) contemplates a case where the Income-tax authorities have already started proceedings for assessment under section 23 and thereafter it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition had taken place. This sub-section necessarily implies that proceedings for assessment are already commenced by a notice against the *karta* of an undivided Hindu family and a claim is made in the course of such proceedings that there had been partition, and the taxing authorities then make an inquiry and if satisfied that there has been a partition record an order to that effect. In the second place, section 25A(2) states that the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place. In the third place, there is a proviso to section 25A(2) which states that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such. In view of all these considerations it is obvious that the proceedings under section 25A was properly initiated in the present case by the issue of a notice against the *karta* of the joint family. The position is as if the taxing authorities are making assessment of the income of a Hindu undivided family as such. It was contended by the learned counsel on behalf of the assessee that the notice of the proceedings should have been given to each and every member of the Hindu joint family which had been divided. Learned

1953.

G. M. L. CHAKALIA. v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

counsel referred to the latter part of section 25A(2) which states that

"the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23."

But the word 'assessment' in this clause is not used in the sense of a proceeding for assessment for imposing liability upon the assessee. The word 'assessment' used in this clause means 'computation of income' or the determination of the amount of tax payable. There is therefore no substance in the contention of the assessee that the proceedings should have been initiated by a separate notice against each of the individual members of the erstwhile joint family. It is necessary to point out that in the present case the Income-tax Officer has properly observed that under section 25A(2) the tax would be realised from six separated members of the family according to their shares. It also appears from the paper-book that demand notice under section 29 had been sent to the six family members. On this point there is a slight mistake in the order of the Appellate Tribunal, dated the 4th July, 1950, for the Appellate Tribunal states that no separate demands according to Counsel have been made on the six constituent members of the old family as is required by section 29 of the Income-tax Act. In the background of these facts we think that the assessment has been properly made on the Hindu undivided family for the years 1943-44 and 1944-45 under section 25A(2) of the Indian Income-tax Act. The view we have taken of the interpretation of section 25A is supported by the decision of the Supreme Court in *Lakshminarain Bhadani* v. *Commissioner of Income-tax*(1) in which a joint Hindu family, of which the appellant was *karta*, was assessed to income-tax for the year 1939-40. In 1944 the Income-tax Officer considered that

(1) (1951) 20 I. T. R. 594 (S. C.).

1953.

G. M. L. CHAKALIA v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

certain income of the family taxable in 1939-40 had escaped assessment. In the meanwhile, the family had become divided and an order had been passed under section 25A(1) of the Act. The Income-tax Officer issued a notice in the name of the joint Hindu family and served it on the appellant under section 34 read with section 22 to make a return in respect of the escaped income and the appellant sent a return in response to that notice. Thereafter, the Income-tax Officer made an assessment on the escaped income and issued a notice of demand on the appellant as the *karta* and on the two other members of the family. In this state of facts it was held by the High Court that the procedure of the Income-tax Officer in issuing the notice under section 34 was defective inasmuch as under that section the notice was to be issued on the person liable to pay the tax and under section 25A(2) it was the ex-members of the family that were liable; and a notice should have been issued upon each ex-member in order to make each liable. On appeal before the Supreme Court it was contended that the proceedings were illegal as no valid notice under section 34 could be issued against the *karta* of the joint family which had ceased to exist. The argument was rejected by the Supreme Court and it was held that the proceedings were validly initiated by the issue of notice to the erstwhile *karta* of the joint family and that it was not necessary to issue notice under section 34 read with section 22 to every member of the family. At page 596 Kania, C. J. states: "Mr. Umrigar, on behalf of the appellant, argued only one point for our consideration. He contended that as the High Court had held that the proceedings were irregularly initiated and completed they were invalid and no order for assessment could be made. For this contention he relies on the wording of section 25A(1). In our opinion, this contention is unsound and the opinion of the High Court that the proceedings were initiated irregularly is also unsound. It

1953.

G. M. L. CHAKALIA v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

does not appear necessary, when proceedings are initiated under section 34 read with section 22 of the Income-tax Act, to issue notice to every member of the family. The position is as if the Income-tax Officer was proceeding to assess the income of the Hindu undivided family as in 1939-40. In our opinion, therefore, that contention must be rejected".

Our view is also supported by the decision of the Madras High Court [*Commissioner of Income-tax, Madras* v. *Swaminathan*(1)]. It was held by the Chief Justice and Patanjali Sastri, J. (as he then was) in that case that notice under section 34 of the re-assessment of the Hindu undivided family was valid notwithstanding that the family had ceased to exist as such under the partition which took place in January 1940, previous to the issue of notice. It was further held that the notice served on the assessee under section 34 was proper and valid though there was no indication in it as to whether it was his personal assessment or the assessment made on him as the manager of the family for the year 1939-40 that was proposed to be re-opened. It was argued in that case that the assessee was not aware from the notice served upon him whether he was proposed to be assessed as *karta* of the family or in his individual capacity and the proceedings against him were hence without jurisdiction. The argument was rejected by Patanjali Sastri, J., who said that even assuming that the notice did not give the correct particulars as to the person or income which the authorities sought to assess the irregularity must, in the circumstances of the case, be deemed to have been waived by the assessee.

In our opinion the present case falls within the ambit of the principle enunciated by the Supreme Court in 20 Income-tax Reports 594 and it must be

(1) I. L. R. (1948) Mad. 899.

held that the proceedings before the taxing authorities purporting to tax the Hindu undivided family of Gulabrai Manoharlal and demanding the tax assessed from the six divided constituent members under section 29 of the Income-tax Act are legally valid and that the question framed by the Income-tax Appellate Tribunal must be answered in favour of the Income-tax Department. The assessee must pay the cost of this reference. Hearing fee Rs. 250.

1953.

G. M. L. CHAKALIA. v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

Reference answered.

S. H.

REFERENCE UNDER THE INCOME TAX ACT, 1922.

Before Ramaswami and Sarjoo Prosad, JJ.

H. PHULCHAND

v.

COMMISSIONER OF INCOME-TAX.*

1953.

January, 19, 21, 22.

Excess Profits Tax Act, 1940 (Act XV of 1940), schedule 1, rule 1, significance of—Excess Profits Tax Officer, whether bound to accept computation of income by the Income-tax Officer as the assessee's profits for the charging period.

Rule 1 of Schedule 1 of the Excess Profits Tax Act, 1940 cannot be interpreted to mean that the Excess Profits Tax Officer was bound in law to accept the computation of income made by the Income-tax Officer for the assessment year as the assessee's profits for the chargeable accounting period.

Reference under section 66(1), Income-tax Act, 1922.

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

* Miscellaneous Judicial Case no. 386 of 1951, in the matter of the Income-tax Act of 1942 and Excess Profits Tax Act XV of 1940.

1953.

H. PHULCHAND. v. COMMISSIONER OF INCOME-TAX.

R. J. Bahadur, for the petitioner.

Standing Counsel, for the opposite party.

RAMASWAMI AND SARJOO PROSAD, JJ.—The assessee Harsahaimal Phulchand is a Hindu undivided family, which deals in yarn and groceries on a large scale. The assessment which is in dispute in the present case is for the chargeable accounting period of Samvat year 1999. For this chargeable accounting period the Excess Profits Tax Officer determined that the profit from business was Rs. 92,761. Under section 6 of the Excess Profits Tax Act the assessee did not select any standard period. Hence under section 6(4) the Excess Profits Tax Officer applied the minimum standard profit of Rs. 36,000 in the case of the assessee. The chargeable accounting period was 11 and 21/31 months and so the standard profit was computed to be Rs. 35,032 under sections 4 and 6 of the Excess Profits Tax Act. The net profit chargeable was therefore Rs. 57,729. But under section 7 the assessee is entitled to relief on account of deficiency of profits occurring in the previous chargeable accounting periods. There were four such chargeable accounting periods, viz., 1st September 1939 to 10th November 1939 (part of Samvat year 1995), 11th November 1939 to 30th October 1940 (Samvat year 1996), 30th October 1940 to 19th October 1941 (Samvat year 1997) and 20th October 1941 to 8th November 1942 (Samvat year 1998). No assessment for excess profits tax was made for these four chargeable accounting periods but the Excess Profits Tax Officer computed the profit from business for these four periods and after deducting the standard profits for the respective periods he arrived at the deficiency for each chargeable accounting period. In this manner he determined that the net deficiency liable to be deducted under section 7 for the Samvat year 1999 was Rs. 56,326. The net excess profit for

1953.

H. PHULCHAND. v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

Samvat year 1999 was therefore computed to be Rs. 1,403, upon which the tax payable was Rs. 935-5-0. In calculating the relief to be given under section 7 the Excess Profits Tax Officer computed the profit for the first three chargeable accounting periods according to the amount calculated for the corresponding income-tax assessments. For the fourth accounting period, viz., Samvat year 1998, the Excess Profits Tax Officer did not accept the profit determined for the purpose of income-tax assessment. He discovered that the amount of Rs. 18,000 together with interest of Rs. 430 had been credited in the books of the assessee but there was no satisfactory explanation for this item. Accordingly the Excess Profits Tax Officer treated the amount of Rs. 18,430 as secreted profits and added it to the amount of the income-tax assessment. An objection was raised by the assessee that the amount of Rs. 18,430 ought not to have been added as secreted profit for the Samvat year 1998. The objection was rejected by the taxing authorities. At the instance of the assessee the Income-tax Appellate Tribunal has framed the following question of law:—

"Whether regard being had to rule 1 of the Rules in Schedule I to the Excess Profits Tax Act, the Excess Profits Tax Officer was bound in law to accept the computation of income made by the Income-tax Officer for the assessment year 1943-44 as the assessee's profits for the chargeable accounting period Samvat year 1998?"

The main argument on behalf of the assessee is that in making computation of profits for the four chargeable accounting periods it was not open to the Excess Profits Tax Officer to travel beyond the assessment made by the Income-tax Officer for the corresponding periods. It was contended by Mr. R. J. Bahadur that even if the Excess Profits Tax Officer discovered that a particular item of cash credit was not explained or even if there was evidence that the amount was secreted profits it was not open to the Excess Profits Tax Officer to differ from the

1953.

H. PHULCHAND. v. COMMISSIONER OF INCOME-TAX.

RAMASWAMI AND SARJOO PROSAD, JJ.

amount of income-tax assessment or to add the amount of secreted profits found for the purpose of assessing excess profits tax. The proposition put forward by the learned counsel is that the amount of assessment made for the purpose of income-tax must be the basis of assessment for the purpose of charging excess profits tax and the law does not permit that there should be a deviation in the *quantum* of the assessable amount for the purpose either of income-tax or excess profits tax. The argument is based upon rule 1 of Schedule I of the Excess Profits Tax Act which states that

> " the profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under section 10 of the Income-tax Act, 1922 ".

In the present case there is no standard period under section 4 for the assessee did not choose any such period for the calculation of standard profits. The argument of the learned counsel is that rule 1 prescribes the mode of calculating the profits of a business during any chargeable accounting period. There is, however, nothing in this rule to suggest that the Excess Profits Tax Officer is bound to accept the figure arrived at by the Income-tax authorities for the purpose of assessment of income-tax for the particular chargeable accounting period. The rule merely states that in computing the profits of business the Excess Profits Tax Officer ought to act according to the principles on which the profits are computed for the purpose of income-tax under section 10 of the Indian Income-tax Act. The Excess Profits Tax Act is, of course, in *pari materia* with the Income-tax Act but the language of rule 1 does not suggest nor there is any reason in principle why the Excess Profits Tax Officer should await the result of assessment of income-tax before proceeding to make assessment of the business for the purpose of excess

profits tax. It may well be that the whole proceeding of assessment of income-tax in the case of any particular assessee may take one or two years and it is unreasonable to suppose that the legislature intended that the Excess Profits Tax Officer should await the final result of the income-tax assessment. Such an interpretation of the Act would not accord with convenience and reason. The actual language of the rule does not also support such an interpretation. The rule only requires that the Excess Profits Tax Officer should compute the profits of the business in accordance with principles of section 10 of the Income-tax Act, and not that the quantum of profits so calculated by the Excess Profits Tax Officer should be the same as that for income-tax assessment. In this view of the matter it cannot be held in the present case that the Excess Profits Tax Officer was not legally right in adding the amount of Rs. 18,430 as secreted profits for the fourth chargeable accounting period, that is, Samvat year 1998. In our view, rule 1 of Schedule I of the Excess Profits Tax Act cannot be interpreted to mean that the Excess Profits Tax Officer was bound in law to accept the computation of income made by the Income-tax Officer for the assessment year 1943-44 as the assessee's profits for the chargeable accounting period, that is, Samvat year 1998.

For these reasons the question formulated by the Appellate Tribunal must be answered in favour of the Income-tax Department. The assessee must pay the cost of this reference. Hearing fee Rs. 250.

Reference answered.

REFERENCE UNDER THE INCOME TAX ACT, 1922.

Before Ramaswami and Sarjoo Prosad, JJ.

1953.

COMMISSIONER OF INCOME-TAX

v.

January, 2, 5, 6, 7, 23.

KAMESHWAR SINGH.*

Income-tax, interest by way of damages, whether taxable—accrual of interest on 'advance-tax', whether exempt from assessment—Income-tax Act, 1922 (Act XI of 1922), section 18A.

A mill belonging to an assessee was sold. The manager of the mill retained the sale proceeds. The assessee realised the amount with interest by suit;

Held, that the amount of interest realised by way of damages was taxable under the Act.

Bengal Nagpur Railway Co., Ltd., v. *Ruttanji Ramji*(1), *House of Lord in Westminster Bank, Ltd.*, v. *Riches*(2), relied on.

Commissioner of Income-tax v. *Rani Prayag Kumari Debi*(3), distinguished.

Commissioners of Inland Revenue v. *Ballantine*(4), *Simpson* v. *Executors of Bonner Maurice*(5) and *The London, Chatham and Dover Railway* v. *The South Eastern Railway Company*(6), referred to.

Held, further, that the amount awarded as interest under section 18A of the Act was not exempt from assessment.

* Miscellaneous Judicial Case no. 284 of 1951, in the matter of the Income-tax Act XI of 1922.

(1) (1937) L. R. 65 Ind. App. 66.
(2) (1947) 28 Tax Cas. 159.
(3) (1940) I. T. R. 25.
(4) (1924) 8 Tax. Cas. 595.
(5) (1929) 14 Tax. Cas. 580.
(6) (1893) A. C. 429.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

Schulze v. *Bensted*(1), relied on.

Behari Lal Bhargava, In re.(2), distinguished.

Reference under section 66(1) of the Income-tax Act, 1922.

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

Gopal Prasad (*Standing Counsel*), for the petitioner.

S. K. Majumdar and *S. P. Srivastava*, for the opposite-party.

RAMASWAMI, J.—This reference is made at the instance of the assessee by the Income-tax Appellate Tribunal under section 66(1) of the Income-tax Act.

The first objection relates to a sum of Rs. 10,497 which the Income-tax authorities included as taxable income for the assessment year 1947-48. The assessee owned textile mills known as Navsari Mills which had closed down several years past. Babu Gokulchand who was the proprietor of the firm Sital Prasad Kharag Prasad managed the textile mills on behalf of the assessee. Gokulchand sold away the machinery of the mills and a sum of Rs. 13,363 was due from Gokulchand to the Maharaja on this account. During the accounting year the Maharaja realised as a result of litigation between him and Gokulchand a sum of Rs. 25,530 which included the principal, law charges expenses as also interest. Out of the amount of Rs. 25,530 realised by the assessee the Income-tax Officer calculated the interest to be Rs. 10,497. The assessee claimed that this amount should be treated as accretion to capital because the mill business having been closed the sale proceeds of the machinery could

(1) (1915) 7 Tax Cas. 30.
(2) (1940) 9 I. T. R. 9.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

not be profits arising from that business. The contention was rejected by the Income-tax Appellate Tribunal who held that the price of the machinery was only Rs. 13,000 and odd, which was deducted from the amount decreed to the Maharaja. After making other deductions the interest was computed to be Rs. 10,497 which, the Income-tax Appellate Tribunal held, was taxable in the hands of the assessee.

A second objection was also preferred by the Maharaja with respect to the 1947-48 assessment. It appears that the Maharaja had made advance payment of tax under section 18A of the Income-tax Act. Under the provisions of this section the Maharaja was entitled to interest at the rate of 2 per cent. on the amount deposited. A sum of Rs. 41,813-6-0 was thus due to the Maharaja as statutory interest on the amount of tax he had paid in advance. It was claimed by the Maharaja that this amount was not taxable but the objection was overruled by the Income-tax Appellate Tribunal.

The questions of law referred are.

(1) "whether in the facts and circumstances of this case the amount of Rs. 10,497 which was realised from Gokulchand being a part of Rs. 25,530 has been rightly taxed as income in the hands of the assessee?"

and,

(2) "whether the sum of Rs. 41,813-6-0 received by the assessee as statutory interest under section 18A has been rightly taxed as income under the Indian Income-tax Act?"

As regards the first question the argument presented by Mr. S. K. Majumdar on behalf of the assessee is that the amount of Rs. 10,497 was awarded as damages against Gokulchand for detention of the amount of sale proceeds. It was argued that the amount though called as interest in the decree was not really interest but was in the nature of damages for retention of money. The contention of the learned counsel is that there is a distinction between the

quality of interest which is awarded by way of damages and the quality of interest proper which arises out of a contract or agreement. It was said that in the present case the amount of Rs. 10,497 was not interest in proper sense but was compensation estimated and measured in terms of interest and was not therefore taxable under the Income-tax Act. In my opinion the argument of the learned counsel proceeds upon a misconception. It is true enough to state that there is a difference between interest which accrues as a result of an express contract and interest which is granted by way of damages for wrongful retention of money. To put it differently the distinction is between the conception of interest as a reward for the use of money and the conception of interest as compensation for the deprivation of money. For instance, section 73 of the Indian Contract Act has been construed to mean that in the absence of any contract, express or implied, or of any provision of law to justify the award of interest on the decretal amount for the period before the institution of the suit, interest for that period cannot be allowed by way of damages for wrongful retention of money [*Bengal Nagpur Railway Co., Ltd.* v. *Ruttanji Ramji*(1)]. But the distinction has no relevance in the realm of Income-tax law. The question is not whether the amount in dispute is interest in its proper sense or interest by way of damages, but the question is whether the amount is of an income or capital nature. In the present case the textile mills were sold by Gokulchand who retained the sale proceeds and did not make them over to the assessee. A suit was brought and ultimately the assessee was granted a decree for Rs. 25,530 which included the principal amount of Rs. 13,363 and interest calculated to be Rs. 10,497 and certain other expenses.

(1) (1937) L. R. 65 Ind. App. 66.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

Mr. S. K. Majumdar argued that as the mills have been closed down the amount of Rs. 10,497 cannot be said to be income arising from the textile mills. Learned counsel is correct when he states that the amount is not income from business. But the amount is nevertheless income for the reason that it constitutes interest on the sale proceeds which Gokulchand ought to have made over to the Maharaja. In my opinion the taxing authorities rightly treated this amount as taxable income in the hands of the assessee. This opinion is supported by the decision of the House of Lords in *Westminster Bank, Ltd.* v. *Riches*(1). R brought an action against the Westminster Bank as judicial trustees of X's estate. R, claimed to be entitled under an agreement made in 1936 to a half share of the profits realised by X on the purchase and resale of certain shares, and the Court awarded R the sum of £36,255 as representing the balance due to him. After judgment application was made on R's behalf to the Court to exercise its discretion under section 3 of the Law Reform (Miscellaneous Provision) Act, 1934. The Court granted in its discretion a further sum of £10,028 representing interest on the £36,255 at 4 per cent. from 14th June. 1936, to 14th May, 1943. It was held by the House of Lords that this amount was 'interest of money' within Schedule D of the Income-tax Act and that income-tax was payable on that amount.

On behalf of the assessee Mr. Majumdar placed much reliance on *Commissioner of Income-tax* v. *Rani Prayag Kumari Debi*(2). But the material facts of that case are different. The Rani had instituted a suit for recovery of all the moveables and immoveables of an impartible Raj against a collateral of the last maleholder of the estate. A decree was passed in 1933 awarding to the Rani a number of moveables and

(1) (1947) 28 Tax Cas. 159.
(2) (1940) I. T. R. 25.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

damages to the extent of Rs. 22 lacs for wrongful detention of them. After some part payments a compromise was arrived at to the effect that all payments should be credited in the proportion of 6 annas towards the balance of principal amount and 10 annas towards the balance of damages. In the accounting year 1936-37 the assessee received Rs. 1 lac out of which Rs. 62,500 was adjutsed towards damages according to the compromise. The question was whether this sum of Rs. 62,500 was taxable as income in the hands of the assessee. It was held by the High Court that the amount was received by the assessee as damages for wrongful detention of the moveable properties of the assessee and not under any contract to pay interest and that it was not, therefore, income within section 3 of the Income-tax Act read with section 4(3) (*vii*). In the course of his judgment, Manohar Lall, J., referred to the mode of accounting which was ordered by the decree of the Calcutta High Court and reached the conclusion that the sum awarded to Rani Prayag Kumari was awarded as damages and not by way of interest. The actual decision may be supported on the ground that the interest calculation was merely used as a means of arriving at a capital sum of damages, the interest calculation being *in modum aestimationis*. In the present case, the material facts are obviously different.

In a case of this description the crucial question is whether interest calculation is used as a means of estimating a capital sum of damages or not. In other words, the question is whether the amount sought to be taxed is damages by way of interest or interest by way of damages. For instance, in *Commissioners of Inland Revenue* v. *Ballantine*(1) the arbitrators to whom a claim for 'additional costs, loss and damages' was referred, awarded an amount

(1) (1924) 8 Tax, Cas. 595,

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI J.

which included a sum described as interest. The Court of Sessions, having concluded that what was described as interest was in fact part of the total sum awarded by way of damages, rejected the claim of the Revenue to tax upon it. As Lord President said: "If the decree was substantially one of damages, the interest ordered to run on it was just part of the damages, and not therefore chargeable to Income-Tax." Again in *Simpson* v. *Executors of Bonner Maurice*(1), tax was held not to be payable upon any part of a sum which was paid by way of compensation under Article 297(*e*) of the Treaty of Versailles. In the Court of Appeal the Master of the Rolls in course of his judgment dealt with the nature and quality of the compensation which was paid under Article 297 of the Treaty of Versailles. At page 601 the Master of the Rolls stated: "Is it interest? Is that its quality, or is it compensation estimated and measured in terms of interest? It appears to me quite clear that, apart from Article 297, no such sum could have been recovered. It could not have been recovered according to English law as interest. In the case of *The London, Chatham and Dover Railway* v. *The South Eastern Railway Company*(2) which was before the House of Lords, there was a delay in payment of an important sum by one railway to another, and the creditor sought to recover interest in consequence of the delay. It was pointed out that interest, according to our law, depends upon, first, a contract express or implied, and, secondly, the Statute of 3 and 4 William IV, Chapter 42, under which you can make interest payable in respect of a debt or sum certain, payable by virtue of a written instrument at a certain time, or after a demand has been made giving notice that interest will be charged. Now it is quite clear that there was no contract made by the Germans to pay this interest. The duty to pay compensation was

(1) (1929) 14 Tax Cas. 580.
(2) (1893) A. C. 429.

imposed upon them by the Treaty. The Statute does not apply it, and the root of the payment is the duty to pay compensation ". The Master of Rolls later on stated: " That being our law about it, how has this sum come to be paid? It appears to me that it has been paid only by virtue of sub-clause (*e*) of Article 297, which lays down that the nationals, such as Mr. Kay 'shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests,' and it is that right on which the sum paid is based—' compensation in respect of damage or injury inflicted upon their property, rights or interests '. For withhold this sum, for preventing Mr. Kay, or his executors, exercising the power of disposition over his property, the Germans have been compelled to pay compensation. The way to estimate that compensation or damages—the sensible way no doubt—would be by calculating a sum in terms of what interest it would have earned. That has been done, but the sum that was paid has not been turned into interest so as to attach Income-tax to it. It remains compensation and, for these reasons, it appears to me that it is not a sum which attracts or attaches Income-tax to it."

Mr. Majumdar then submitted that the amount of Rs. 10,497 was receipt which was of a casual and non-recurring nature and so was exempt from income-tax under section 4(3) (*vii*) of the Income-tax Act. Learned counsel said that the amount in question was a lump sum payment awarded to the Maharaja and there was no quality of recurrence about it. I do not think this submission is correct. It is true that the Maharaja received a lump sum payment on account of interest. That does not, however, necessarily mean that the amount of interest is not a receipt of recurring nature. On the other hand, the interest is calculated upon the footing that it accrues *de die in diem*, and hence it has the essential quality of

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

recurrence which is sufficient to bring it within the scope of income-tax. The argument of the learned counsel for the assessee on this aspect of the case must, therefore, be rejected. It was also contended that the receipt of interest was casual in its character. The expression 'casual' has not been defined in the Act and must therefore be construed in its plain and ordinary sense. According to the Oxford English Dictionary the word 'casual' is defined to mean (*a*) subject to, depending on, or produced by chance; (*b*) occurring at uncertain times; not to be calculated on. A receipt of interest which is foreseen and anticipated cannot be regarded as casual even if it is not likely to recur again. It is not possible to accept the argument that the receipt of interest under the decree obtained by the Maharaja against Babu Gokulchand is a receipt of casual or non-recurring nature.

I proceed to the next question whether the amount of interest granted to the assessee under section 18A of the Income-tax Act is liable to be taxed. The Maharaja paid advance instalments of tax under section 18A in the year 1944-45 and the statutory interest accrued was Rs. 41,813 and odd up to the date of assessment, that is, up to 27th of March, 1946. Section 18A provides that the Income-tax Officer may require an assessee to make advance payment of tax in quarterly instalments. Section 18A(5) states that the Central Government shall pay on the amount of deposit simple interest at two per cent. per annum from the date of payment up to the date of assessment made under section 23. On this question learned counsel for the Maharaja advanced arguments similar to those with respect to the first question. Indeed Mr. Majumdar did not deal with the two questions separately but much of his argument was common. The amount of statutory interest which is the subject-matter of the second question has certain special elements. The interest is not paid by virtue of any decree granted by Court. The amount of interest is payable under the statute and the Maharaja

is entitled to the interest at the rate prescribed as a matter of right. The amount in question being granted in lieu of interest has the quality of recurrence as I have already shown. It cannot be argued that the receipt of interest was not foreseen; on the contrary, the statute itself provides that the Maharaja is entitled to receive the rate of interest prescribed in section 18A for the advance payment of tax. In *Schulze* v. *Bensted*(1) the question arose whether a sum which a negligent trustee had failed to get in and which he had been ordered to make good to the trust estate was liable to income-tax. It was held by the Court of Sessions that the amount was rightly assessed under Schedule D in respect of the interest. The reason was that the trustee having duly paid the interest, it was in the words of Lord Johnston " a surrogatum for that which ought to have termly reached the hands of the trustees and have been applied by them as income ". In *Commissioners of Inland Revenue* v. *Barnato*(2) the facts were very similar. There too the defendants became bound under a consent Order, founded on certain admissions, to pay not only a principal sum but interest upon it. It was held that such interest was liable to tax. These cases illustrate the proposition that which reaches the hand of the recipient as interest upon a principal sum is income liable to income-tax, notwithstanding that it may come to him in a single sum and as the result of a hostile suit. Applying the principle to the present case it is manifest that the amount of Rs. 41,813 and odd awarded as interest under section 18A was undoubtedly income in the hands of the Maharaja.

In this connection learned counsel on behalf of the Maharaja referred to *Behari Lal Bhargava's case*(3) in which it was held by the Allahabad High Court that the interest awarded under section 28 of the

(1) (1915) 7 Tax. Cas. 30.
(2) (1936) 20 Tax. Cas. 455.
(3) (1940) 9 I. T. R. 9.

1953.

COMMISSIONER OF INCOME-TAX v. KAMESHWAR SINGH.

RAMASWAMI, J.

Land Acquisition Act was in the nature of compensation for the loss of the assessee's right to retain possession of the property acquired, that it was damages assessed in terms of interest; that it was not income and therefore was not assessable as such to tax. The learned Judges however reached their decision " not without considerable doubt and hesitation ". One of the reasons given was that under section 28 the awarding of interest was not mandatory but was discretionary with the Court and so the claimant was not entitled to it as of right under any rule of law. On this point the case must be clearly distinguished for in the present case the Maharaja is entitled as a matter of right to a grant of two per cent. interest on the advance payment of tax. It is not a matter of discretion for the Central Government but the duty to pay interest is imposed by the statute. Apart from this I think (with great respect) that the Allahabad decision is of doubtful authority. The decision is not consistent with the principle laid down in 7 Tax Cases 30 and 20 Tax Cases 455. The Madras High Court expressly declined to follow the Allahabad case in *Commissioner of Income-Tax* v. *Narayana Chettiar*(1).

For the reasons expressed I hold that in the circumstances of the case the amount of Rs. 10,497 which was realised by Gokulchand and the amount of Rs. 41,813-6-0 paid as interest under section 18A have been rightly taxed as income in the hands of the Maharaja.

The questions must accordingly be answered in favour of the Income-tax Department. The assessee must pay the cost of the reference. Hearing fee Rs. 250.

SARJOO PROSAD, J.—I agree and have nothing to add.

S. H. *Reference answered.*

(1) (1943) I. T. R. 476.

APPELLATE CRIMINAL.

Before Jamuar and Banerji, JJ.

J. LODHIN

v.

STATE.*

1953.

January, 2, 3, 27.

Criminal Trial—evidence—value of the statement of a child witness.

The evidence of a child witness should be very closely scrutinised before the same is accepted by a court of law.

Darpan Potdarin, In re.(1), *Abbas Ali Shah* v. *Emperor*(2), referred to.

Appeal by the accused person. The facts of the case material to this report are set out in the judgment of Banerji, J.

Sushil Kumar Mazumdar, for the appellant.

G. P. Shahi, for the State.

BANERJI, J.—This appeal is from a conviction and sentence passed by Mr. S. P. Singh, Sessions Judge of Manbhum-Singhbhum at Jamshedpur.

The story that I am to relate concerns two women, one the deceased, the wife of Budhram Lodhi (P. W. 9), and another, his concubine, Jalwanti Lodhin, who is alleged to have committed the murder by striking her with a hammer while she was asleep. On the 10th of April, 1950, Motiram Sharma (P. W. 10) received an information from an old woman that the wife of P. W. 9 had been killed by the accused, Jalwanti. He came to the spot and then left for the Town Outpost where he met the Havildar (P. W. 12) and reported to him about the incident. P. W.

* Criminal Appeal no. 464 of 1951, from a decision of Mr. S. P. Singh, Sessions Judge of Manbhum at Jamshedpur, dated the 24th September, 1951.

(1) (1938) A. I. R. (Pat.) 158.
(2) (1933) A. I. R. (Lah.) 668.

1953.

J. LODHIN v. STATE.

BANERJI, J.

12 then sent a telephonic message to Bistupur Police-Station, at a distance of about three miles, which was received by the investigating officer, B. N. Sinha (P. W. 13). After getting the message entered in the Station Diary, he left for the scene of occurrence, which he reached at 2.15 P.M. He drew up the *fard-beyan* on the statement of P. W. 10; held inquest over the dead body; inspected the place of occurrence and prepared a seizure list on finding certain articles concealed in the house. Later, after completing the investigation, he submitted charge-sheet against the accused.

An enquiry under Chapter XVIII of the Code of Criminal Procedure ended in the discharge of the accused on the 15th June, 1950, on the finding that no *prima facie* case had been established by the prosecution, but, afterwards, the Additional Deputy Commissioner of Singhbhum set aside the order and directed the accused to be committed for trial.

Fifteen witnesses were examined in the Court of Sessions, the most important witness being a daughter of the deceased, Chanda (P. W. 11), who is the sole witness alleged to have seen the murder of her mother by the accused. Besides the evidence of this eye-witness, the prosecution depends upon various circumstances, which are as follows: (1) the deceased and the accused were quarrelling with each other for some time before the occurrence; (2) she tried to conceal the blood-stained hammer and a blood-stained jacket in some other part of the house which, in the circumstances, she thought would not be searched by the police; and (3) the improbability of the injuries having been caused by an accidental fall from above on the hammer.

The learned Sessions Judge, disagreeing with the unanimous opinion of the four assessors, has found the accused guilty and has sentenced her to transportation for life under section 302, Penal Code.

1953.

J. LODHIN v. STATE.

BANERJI, J.

The defence case was that the deceased had gone up the *kotha* in order to bring down a drum containing lime, but she slipped and fell, and in this fall her head came in violent contact with the hammer lying on the floor and the other part of the body with the ground, as a result of which she sustained the injuries found on her person. It was denied that the hammer had been concealed, and the blood stains on the jacket were explained as having been caused by coming in contact with the injured body when it was being removed from the floor to the cot. No defence witness was examined.

Before I deal with the various circumstances proved in this case, I would like to give a description of the injuries which were found by Dr. D. N. Mandal, Assistant Surgeon (P. W. 15), on examination. This witness held the *post-mortem* examination of the body on the 11th April, 1950, at 10-30 A.M. and found the following injuries :—

(1) Lacerated wound 1″ × ¼″ × 1″ deep on the left side on head, 1½″ above the left ear;

(2) Incised wound 1″ × ¼″ × ½″ directed upward and forward on the right side on head, 3″ above the right ear;

(3) Fracture of 2nd and 3rd ribs in the middle on the right side;

(4) Blood clots covering an area 2″ × 1½″ on the left side of head under the scalp;

(5) Depressed fracture of left parietal and left temporal bones combined about an area of 2½″ × 2″; and

(6) Laceration on the left lobe of brain about 1″ × ½″.

Now, this medical officer, who was examined as P. W. 15 in the trial, stated in examination-in-chief that the injuries could not have been caused by a simple fall from an elevation. On this evidence, the prosecution presses hard for maintaining the conviction of the accused. There would have been some strength in this reliance of the medical evidence if the medical officer had stuck to his statement in

1953.

J. LODHIN v. STATE.

BANERJI, J.

examination-in-chief and had not conceded probabilities which completely fitted in with the defence suggestion. In cross-examination he has said that, if the hammer was made to stand on one end, the injuries 1 and 5 could be possible by a fall from a height of 7 or 8 feet. Again, he repeated that those two injuries could be possible by a fall on the hammer if it was kept lying flat. The hammer was sent for, and we have seen it ourselves. It is a big and heavy one, and therefore, I am not in a position to say that the statement in cross-examination of the medical officer was made out of some other consideration. Again, the witness has stated that a fall on the cemented floor could cause the fracture of two or three ribs. It is in evidence of one of the prosecution witnesses that the floor was actually a cemented one (vide the evidence of P. W. 1). Looking at the injuries, it appears to me that injuries nos. (1), (5) and (6), which were all on the left side, could be caused by one blow, direct or indirect, and injury no. (4), which was also on the left side, could be the result of injury no. (1). The prosecution has no explanation how the deceased could get an incised wound on the head and a fracture of the second or the third rib if the accused had struck the deceased on the head only with a hammer. There is difference between incised wounds and incised-looking wounds. In this connection, I may state that the Sub-Inspector found a drum containing lime with blood stains on it. which were found by the State Serologist to be of human origin. This incised injury could not have been caused, to my mind, by a blow of the hammer which has been produced in this case. The prosecution has not been able to give any explanation how the two ribs of the unfortunate woman could be fractured if she was sleeping peacefully on a cot when she was murderously attacked with a hammer. Accordingly, the medical evidence does not fully support the prosecution; rather, the injuries do not at

all rule out the possibility of those being caused by a fall from an elevated place.

1953.

J. LODHIN
v.
STATE.

Let me now examine the circumstances which appear to be against the accused. If the accused had actually concealed the blood-stained clothings and the hammer, then, certainly, an inference may legitimately be drawn against her. She has explained the blood-stained garment found on her person by stating in Court that it got soaked with blood while she lifted the deceased. She admitted that she had washed it with soap and that the police had seized it and the saree as well. As regards the finding of the hammer, which was kept concealed in the cattle-shed in a gunny bag, it has been argued by the defence that it was so done by some of the members of the public who wanted to save the family of the accused from harassment by the police. P. W. 10, the informant, stated in his *fard-beyan* that some of the persons who had collected in the house were suggesting among themselves to burn the blood-stained clothes. It is not an unusual practice, based on long-standing prejudice against our police system, to remove all clues, which might indicate the commission of a crime, causing apprehension of future harassment. There is no evidence on the record to show that the accused had actually concealed a blood-stained jacket in the tin-shed and the blood-stained hammer in the cattle-shed. Here, I may mention that blood, too small for serological test, had been detected in the stains on the hammer. This was unlikely if the hammer was actually used for the purposes of attack. At the same time, this supports the defence case of an accidental fall on the hammer and immediate reaction to throw the head back in the opposite direction. In any event, these two circumstances are not so inculpatory as to be incompatible with the innocence of the accused.

BANERJI, J.

1953.

J. LODHIN v. STATE

BANERJI, J.

I shall now discuss the oral evidence produced by the prosecution in this case. On a scrutiny of the evidence, I find that the witnesses have resiled from what they had stated before the Committing Magistrate and have tried their very best to support the defence. I have omitted to mention before that the two women lived in the same house and the accused was treated on the footing of a legally-married wife. Two daughters were born of the deceased and one son of the accused through the same person, Budhram Lodhi (P. W. 9). Budhram Lodhi has stated in the Court of Sessions that he had asked the deceased to take out the drum containing lime from the upper floor. He has further stated that no one told him that his daughter Chanda (P. W. 11) had seen the accused killing the deceased. The old woman, who is said to have reported to Motiram Sharma (P. W. 10), that the accused had killed the deceased, was not examined by the prosecution, and no explanation has been given why this important evidence has been withheld. The only thing that we find in the evidence is that she is an old decrepit woman and at present unable to move. There was nothing to hinder the prosecution from applying for examination of the woman on commission. P. W. 2 is a witness who had informed Budhram about the incident in his house. He had heard about it from one Ramdhari, who, too, has not been examined. P. W. 2 has stated in cross-examination that Ramdhari did not tell him how the deceased had died and he, too, did not question him on the point. P. W. 5 is a medical officer. He was approched by Budhram and P. W. 4 on that very day at 1 P.M. He was merely told that a woman had become unconscious. This witness has stated that he closed the room in order to keep off the large crowd. It has been argued by the defence that some members of this crowd might have concealed the hammer and the blood-stained jacket to shield the inmates from

police suspicion. P. W. 11, the little girl aged six or seven years, has gone back on her statement made before the Committing Magistrate and has deposed that her mother fell down from the roof and died and that she had been threatened by the police to make the statement against the accused. About this witness I shall deal presently. Here I only leave her with the remark that she is capable of making incorrect statements whenever she chose to do so. In view of this state of the evidence, it can hardly be possible to lay the blame on the accused.

1953.

J. LODHIN v. STATE.

BANERJI, J.

Mr. G. P. Shahi, appearing on behalf of the State, has argued that there was motive for this murder and the accused had killed the deceased due to the continuous friction between them for a few months before the occurrence. The *fard-beyan* does state about the quarrels. It is stated therein that the two women had been quarrelling for the last three days and they were not pulling on well with each other. It is also mentioned that the accused used to assault the deceased often. There is no evidence of any previous assault in this case. P. W. 1 has merely stated that the two women used to quarrel with each other before the occurrence. P. W. 3 has deposed that he could not say the state of relation between the two women in their house, but outside they met on ordinary terms. Before the Committing Magistrate he had stated that the two at times quarrelled with each other. P. W. 8, a close neighbour of the deceased's family has stated that the deceased never complained to him about her quarrels with the accused. P. W. 9, their husband, has gone so far as to say that there was no quarrel between the deceased and the accused prior to the occurrence. I am not going to place full reliance upon the husband as it is clear to me that he has been trying to save his mistress. I fully believe that, occasionally, the two women quarrelled with

1953.

J. LODHIN v. STATE.

BANERJI, J.

each other. There is, however, no material to indicate that the quarrels were of such a violent nature as to furnish a motive for the murder. Quarrels between women living in the same house, placed as they were, were not at all extraordinary. Indeed, it would have taken two angles, placed as wife and mistress, not to quarrel, and, even then, I have my serious doubts if any perfect peace could prevail in such a family. In the circumstances, I do not think the prosecution has been able to prove the motive in this case.

The whole controversy centres round the evidence of the child, Chanda (P. W. 11), aged about six or seven years. When she was examined under section 164, Criminal Procedure Code, on the 11th April, 1950, a day after the occurrence, she stated that she was asleep when Jalwanti (accused) beat her mother on the head with a *martaul* (hammer). It is not clear whether she had woken up at the time of the actual assault. If she was indeed asleep and if there was only one blow given, then it was not probable for her to see the fatal blow being struck. Before the Committing Magistrate, this witness deposed that she was roused by the sound and that she saw her mother being killed by her *mausi-ma* (aunt), the accused, with a hammer. She further said that the accused took her towards the *kotha* and, on returning to her mother, she again gave another blow with the hammer on the head. I have already shown that, from the injuries on the person of the deceased, it is difficult to say whether two blows with a hammer were administered on the head. In the Court of Sessions the witness gave a complete go-by to her previous statements and added that the police had instructed her to say so. She also made some very inconsistent and improbable statements for which she can hardly be relied upon. It may be that, according to the provisions of section 118 of the Evidence Act, she was

a competent witness to give evidence in Court, as, it appears from her deposition, she could understand the questions put to her and give rational answers thereto, but it has justly been laid down in *Darpan Potdarin* v. *Emperor*(1) that the evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated. I would rather go further and advise close scrutiny of the evidence of child witnesses before the same is accepted by a Court of law. Kenny has observed in his Outlines of Criminal Law at page 420 (1952 edition) that children are a most untrustworthy class of witnesses, and it is found from common experience that they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, although intelligent children are very often acutely observant of facts and events external to themselves and remember them with great accuracy. His observations have been adopted by a Division Bench of the Lahore High Court in *Abbas Ali Shah* v. *Emperor*(2). Children, in the age of about seven, are in a stage of maturation when the higher mental processes are forming. They are then creatures of will, emotion and action and sometimes subjected to hallucinations and illusions. Karl Buhler in his book, The Mental Development of the Child, has said at page 85: " The ' fibs ' of childhood are known to everyone. A little mite of 3 or 4 will tell us in all seriousness that he has met a bear on his walk, and the like. These things must not be regarded as serious moral lapses, for the child has a vivid imagination and often cannot distinguish memories from events which have been merely imagined." Dr. Hans Gross, who has been described by many as the father of criminal research, has set out in his book, Criminal Investigation, 1934 edition, at pages 61-62 the nature and character of evidence given by

(1) (1938) A. I. R. (Pat.) 153, 158.
(2) (1933) A. I. R. (Lah.) 667, 668.

1953.

J. LODHIN v. STATE.

BANERJI, J.

children. He has said that in one sense the best witnesses are children of seven to ten years of age as at that time love and hatred, ambition and hypocrisy, considerations of religion, rank, etc., are yet unknown to them. He has, however, pointed out the great drawbacks which have made men distrustful of the capacity of children. They are apt to say much more from imagination than they actually know. To quote his words, "the child, as yet devoid of principles, places great faith in the words of grown up people; so; if a grown up person brings influence to bear on it, especially sometime after the occurrence, the child will imagine it has really seen what it has been led to believe". At another place the eminent author has remarked as follows: "The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started, there is gossip of what others have seen or might in certain circumstances have seen. *If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its own mind, and ultimately it believes it has itself seen what the others have related*" (the italics are mine). From the evidence on the record, I am rather inclined to think that this child witness heard different versions from the crowd which had gathered at the time of the incident and drew her own inferences from her imagination that her mother had been killed by the accused.

Summing up, therefore, I find that the circumstances are not inconsistent with the innocence of the accused; that the medical evidence supports the theory of death by misadventure; that there was no positive motive for the alleged murder; that the witnesses have made inconsistent and untrue statements from stage to

stage, and that the only eye-witness, who is a child of tender years, cannot be believed or trusted implicitly. Accordingly, the appeal is allowed, the conviction and sentence are set aside, and the appellant is discharged from her bail bond.

1953.

J. LODHIN v. STATE.

BANERJI, J.

JAMUAR, J.—I agree.

Appeal allowed.

K. D.

CRIMINAL REFERENCE.

Before Narayan and Ahmad, JJ.

1952-53.

S. SINGH

v.

B. SINGH.*

November, 3, 4, 5. February, 11.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 145, *scope of—recent civil court delivery of possession, whether prohibits the magistrate from taking action under section—law on the subject, summarised—case-law, reviewed, sections* 435, 439.

The question of possession that has to be determined in a proceeding under section 145 of the Code of Criminal Procedure is the question of actual possession with regard to the property in dispute. Actual possession certainly means actual physical possession, that is, the possession of the person who is cultivating the land or growing crops on it irrespective of whether he has any legal right to the land or the title to possess it.

What concerns the magistrate is not the right to possess the subject-matter of dispute but the actual possession thereof on the date when he makes the order under sub-section (1) of section 145. At one time no doubt there was a sharp difference of opinion on the question as to whether a

*Criminal Reference no. 33 of 1952, reference made by Mr. Ramjivan Sinha, First Additional Sessions Judge, Patna, in his letter no. 1638, dated the 23rd/26th May, 1952.

1952-53.

S. SINGH v. B. SINGH.

magistrate has jurisdiction to interfere when there is an order of the civil court on the question of possession or when the possession has been delivered to a person under the orders of the civil court. But the view that once there has been a delivery of possession by the civil court the magistrate has no jurisdiction to take action under section 145 of the Code of Criminal Procedure is no more sustainable.

Where the judgment-debtors contend that the peon's report is not correct and that there was no *dakhaldehani* on the spot then certainly that is a question which has to be investigated, and it is within the province of the magistrate to investigate this question in the proceeding under section 145 of the Code of Criminal Procedure. It is another thing that after the delivery of possession is proved the magistrate has to respect the delivery of possession, but so long as the delivery of possession is not proved, it is absolutely within the competence of the magistrate to draw up a proceeding under section 145 of the Code in the event of an apprehension of a breach of peace and to investigate whether a *dakhaldehani* was actually effected on the spot or not. A fraudulent service of process is not an unknown thing in this part of the country, and when the judgment-debtors in this case were contending that actually there had been no delivery of possession, this question had to be investigated.

The words " actual possession " as used in section 145(1) of the Code of Criminal Procedure mean actual physical possession, even though wrongful. In other words, a magistrate has complete jurisdiction to interfere even if he finds that a recent trespasser is in actual possession at the time of drawing up proceedings under section 145.

It will be premature for the High Court to interfere before the magistrate has decided the case. If the magistrate's decision is ultimately found to be grossly erroneous, the High Court under the existing sections 435 and 439 of the Code will have the jurisdiction to interfere with it.

Agni Kumar Das v. *Mantazaddin*(1), relied on.

(1) (1928) I. L. R. 56 Cal. 290, F. B.

1952-53.

S. SINGH
v.
B. SINGH.

Reference made by the First Additional Sessions Judge, Patna, under section 438, Code of Criminal Procedure, 1898.

The case in the first instance came before Sinha, J., sitting single, and he referred it to a Division Bench.

On this reference—

K. K. Varma and Hari Kishore Thakur, for the reference.

Shambhu Barmeshwar Prasad against the reference.

NARAYAN, J.—This is a reference by Mr. Ramjiwan Sinha, First Additional Sessions Judge of Patna recommending that the order of the learned Subdivisional Magistrate of Dinapur drawing up a proceeding under section 145 of the Code of Criminal Procedure be set aside.

The disputed property is 21 bighas of land situate in mauza Balipankar, police-station Paliganj, district Patna. This land was given in usufructuary mortgage to two persons named Jamuna Prasad Singh and Sarswati Prasad Singh by virtue of two registered documents, dated 31st March 1944 which had been executed by Ramnandan Prasad Narayan Singh, the adoptive father of Krishnandan Prasad Narayan Singh, and his brother Shyamnandan Prasad Narayan Singh. On 27th June 1949 the mortgages were assigned to Bharath Singh and others by a registered document. On 26th May 1950 Krishnandan Prasad Narayan Singh deposited the mortgage money under section 83 of the Transfer of Property Act, and notices with regard to the deposit were served on Bharath Singh and others who have been described in the letter of reference as opposite-party nos. 1 to 8.

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

In July 1950 Sheonarayan Singh and others who have been referred to as petitioners in the letter of reference took settlement of the land in dispute from Krishnandan Prasad Narayan Singh and Shyamnandan Prasad Narayan Singh by virtue of two registered *mukarrari* deeds, dated 5th July 1950 and 14th July 1950. As in spite of the deposit opposite party nos. 1 to 8 did not give up possession of the land Sheonarayan Singh and others instituted a suit for redemption in the Court of the Third Subordinate Judge, Patna (Title Suit no. 132 of 1950), and they prayed for a decree for khas possession in their favour. This suit was decreed on 31st July 1951, and in execution of the decree possession was delivered to Sheonarayan Singh and others on 19th August 1951. Bharath Singh and others then filed an application which was labelled as an application under sections 47 and 151 of the Code of Civil Procedure, and they contended *inter alia* that the delivery of possession was a nominal one and that as a result of it possession had not been transferred to the decree-holders. The objections with regard to the delivery of possession were dismissed, but the learned Subordinate Judge observed as follows:—

> "The legal objections, therefore, fail. The serving peon has reported that the possession has been delivered to the judgment-creditors who also support his report. In the circumstances I do not think it would serve any useful purpose by investigating whether in fact possession has been delivered or not. If the judgment debtors are in possession they are free to take advantage of it."

In November 1951 Bharath Singh and others lodged an information with the Paliganj police in which they alleged that there was an apprehension of breach of peace. The police submitted a report to the learned Subdivisional Magistrate for taking action under section 144, Criminal Procedure Code, and a notice under section 144, Criminal Procedure Code, was issued to all the parties concerned restraining them from going over the land. On 28th February

1952, the learned Magistrate ordered that " the matter should be determined under section 145, Criminal Procedure Code ", and he directed the issue of notice to the parties and an attachment of the land and its produce. Sheonarayan Singh and others then filed an application before the learned Sessions Judge for making a recommendation to this Court that the order of the learned Magistrate be set aside, and the application was heard by the learned Additional Sessions Judge Mr. Ramjivan Sinha.

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

The learned Additional Sessions Judge is of the opinion that the learned Subdivisional Magistrate should have respected the delivery of possession which has been made under the orders of the Court and should have helped Sheonarayan Singh and others in retaining possession of the property; and he has accordingly recommended that the entire order of the learned Magistrate should be set aside.

Because of the divergence of judicial opinion with regard to the effect of a delivery of possession effected under the order of the Court in a proceeding under section 145 of the Code of Criminal Procedure, I took time for examining the authorities on the subject, and after having considered all the important decisions of this Court and some of the other Courts which may have a bearing on the precise question raised in this case, I find that the question which arises in this reference can easily be disposed of. It is now well-settled that the question of possession that has to be determined in a proceeding under section 145 of the Code of Criminal Procedure is the question of actual possession with regard to the property in dispute. Actual possession certainly means actual physical possession, that is, the possession of the person who is cultivating the land or growing crops on it irrespective of whether he has any legal right to the land or the title to possess it. Because of the provisions of sub-section (4) of section 145 of the Code of

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

Criminal Procedure, it cannot be contended that the power or the competency of the magistrate to interfere under section 145 of the Code of Criminal Procedure has anything to do with the right to possess the land. What concerns the magistrate is not the right to possess the subject-matter of dispute but the actual possession thereof on the date when he makes the order under sub-section (1) of section 145. At one time no doubt there was a sharp difference of opinion on the question as to whether a magistrate has jurisdiction to interfere when there is an order of the Civil Court on the question of possession or when the possession has been delivered to a person under the orders of the Civil Court. But the view that once there has been a delivery of possession by the Civil Court the magistrate has no jurisdiction to take action under section 145 of the Code of Criminal Procedure is no more sustainable. The view taken by the Full Bench of the Calcutta High Court in the well-known case of *Agni Kumar Das* v. *Mantazaddin*(1) is now taken to be the correct view, and this decision has been followed or referred to with approval in some of the later decisions of this Court. This Calcutta case is a direct authority in support of the proposition that the words "actual possession" as used in section 145(1) of the Code of Criminal Procedure mean actual physical possession even though wrongful. In other words, a magistrate has complete jurisdiction to interfere even if he finds that a recent trespasser is in actual possession at the time of drawing up proceedings under section 145. But even in this case Rankin, C. J. who delivered the main judgment observed as follows:

"It is the civil court's duty to give possession on the ground of right: it is the Magistrate's duty to maintain possession against force or show of force. To say that when a Magistrate, twelve months after

(1) (1928) I. L. R. 56 Cal. 290, F. B.

a civil court peon has delivered possession, finds that the judgment-debtor is back in possession of the land, he is interrupting or interfering with the execution proceedings of the civil court, if he acts under section 145, is a violent abuse of language. On the other hand, it is true that, if on a given date the plaintiff has been put into possession by the civil court however inefficiently or irregularly, then on that date the plaintiff got possession as against the defendant. The defendant's actual possession has been broken as a matter of fact, even if only for the moment. This is as true of symbolical possession improperly so called as of any other possession, though what happened at the time of delivery may well be important on the question whether the plaintiff continued in possession very long or was ousted in the following week. Still it is an error to hold in such cases that the decree-holder was never in possession [*Cf. Atul Hazrah's case* (20 C. W. N. 796)] or to ignore the delivery to him. This is a particularly grievous error in cases of boundary disputes or disputes as to outlying portions of the land delivered. Cases in which it has been said that the Magistrate has interfered with or nullified the civil court's decree will, on examination, be found to be cases where the Magistrate has come to a wrong finding on the fact of possession by reason of this error. ''

Mukherji, J. in this case made the following observation which, in my opinion, should be of great assistance to us in determining the point raised in this reference:—

'' For a dispute as to actual possession to be effectively determined, it is not enough that there has been a decree determining the rights of the parties, unless it is a decree by which a suit for declaration of right and recovery or confirmation of possession has been dismissed, thus putting an end to the plaintiff's rights and claim for possession for ever and beyond

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

all controversy. In cases of decrees which merely determine the rights of the parties, even if they decide that one party is entitled to possession as against the other, the dispute as to possession still remains; and it is only by delivery of possession in execution of such a decree and in favour of one party as against another that the dispute can be said to be determined beyond any controversy. Such possession, however, must be actual or khas possession and not merely symbolical possession, because it is actual possession and not a right to possession that section 145 is concerned with. If all these requisites are present, there is no dispute in the eye of law, though in point of fact there may be one. Then again the nature of the enquiry contemplated by the section shows that the 'respective claims as respects the fact of actual possession' is to be investigated. A claim when put forward before a tribunal involves an idea of its capability to be adjudicated upon. I find it exceedingly difficult to conceive how one can put forward a claim before any court saying: 'There is a serious apprehension of a breach of peace. I have been turned out of possession by the civil court. I am still in possession by some means or other. I cannot get the civil court to decide on my right to possession again. Please declare my possession, maintain the possession that I have, forbid my opponent to disturb it and ask him to go to the civil court and to request that court to reopen and reconsider the matter.' That in substance is what a claim of this character comes to. Widely different is the possession of an ordinary trespasser or wrongdoer, whose claim has never been decided by a competent court; and between him and the rightful owner, the criminal court can hardly give any preference to either, except on the footing of actual possession, because to attempt to go on any other footing would be to do the very thing that the law forbids, namely, to decide on the merits of the claim as to the right to possess."

1952-55.

S. SINGH v. B. SINGH.

NARAYAN, J.

For the purposes of this case we must note the particular observation that the " nature of the enquiry contemplated by the section shows that the respective claim as respects the fact of actual possession is to be investigated ". A Full Bench of this Court had also to consider this question as early as in the year 1916. [*See Parmeshwar Singh* v. *Kailaspati*(1).] Of course, this decision was given at a time when sub-section (3) of section 435, Criminal Procedure Code, had not been deleted. Before the amendment by the Amendment Act of 1923 proceedings under Chapter XII of the Criminal Procedure Code were not liable to revision by any Court, so that the High Court in the exercise of its revisional jurisdiction under section 439 of the Code was not competent to revise an order passed under Chapter XII. The present position is that orders under Chapter XII can be revised by the High Court not only on the question of jurisdiction but also on the ground that they are illegal or erroneous. But even in that Full Bench decision in which the High Court was exercising powers conferred on it by section 107 of the Government of India Act, Sharfuddin, J. observed as follows:

" An order passed under section 145 is in its nature a summary order and it is a preventive measure. The Magistrate gets jurisdiction if there is an apprehension of a breach of the peace with regard to ' any land or water ' and the party found to be in possession may be declared entitled to remain in possession until evicted therefrom by a competent Court. A Civil Court decree in favour of a party will become infructuous if the Magistrate interferes with it but the Magistrate is not bound to maintain it blindly. If after the passing of the decree the Magistrate finds on evidence that the party's possession has been disturbed or that the possession has changed

(1) (1916) 1 Pat. L. J. 336, F. B.

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

hands he has jurisdiction but this will be a matter of fact, which the Magistrate has to decide. If he comes to a finding, which would be a finding of fact, that such possession has been disturbed since the decree was passed he has jurisdiction in a proceeding under section 145 to pass orders irrespective of the Civil Court decree. In the case of a Civil Court decree of very recent date where there is no evidence to shew disturbance or change of possession since the decree the Magistrate is bound to respect the Civil Court decree and if he does not do so he acts without jurisdiction."

In Behari Gir v. *Rani Bhubaneswari Koer*(1) Sultan Ahmed, J., following three decisions of the Calcutta High Court reported in *Daulat Koer* v. *Rameswari Koeri*(2), *Kunja Behari Das* v. *Khetra Pal Singh*(3) *and Atul Hazrah* v. *Uma Charan Chongdar*(4) held that where possession of immoveable property has been delivered to an auction-purchaser under Order XXI, rule 35, of the Code of Civil Procedure, a magistrate acts without jurisdiction in proceeding under section 145 of the Code of Criminal Procedure, and in making an order against the auction purchaser under that section. The facts of that case as indicated in his Lordship's judgment were that possession had been delivered under Order XXI, rule 35 of the Code of Civil Procedure, and his Lordship took the view that there was no jurisdiction in the Magistrate to interfere because of the delivery of possession under Order XXI, rule 35, though the magistrate's jurisdiction can be attracted in spite of delivery of possession when possession is delivered under Order XXI, rule 36. In view of the later decisions, I say with respect, his Lordship's dictum that the magistrate has no jurisdiction to interfere after a recent delivery of possession cannot be followed, but certainly even the later

(1) (1920) 5 Pat. L. J. 104.
(2) (1899) I. L. R. 26 Cal. 625.
(3) (1901) I. L. R. 29 Cal. 208.
(4) (1916) 20 Cal. N. N. 796.

decisions lay down that a recent delivery of possession is bound to be respected by the magistrate. As was pointed out by Mohamad Noor, J., in *Rajendra Narayan Bhanja Deo* v. *Chaudhuri Chintamani Mahapatra*(1) a magistrate in spite of delivery of possession has jurisdiction to start a case under section 145, but no hard and fast rule can be laid down and a magistrate has discretion when there is an apprehension of a breach of the peace to choose either section 145 or section 107. A Division Bench of the Calcutta High Court in *Abhoy Mondal* v. *Basu Rai*(2) laid down that in a proceeding under section 145, Criminal Procedure Code, the magistrate cannot go behind the decision of the Civil Court and cannot ignore the decree even though the Court which passed the decree had no jurisdiction over the subject-matter of the suit. In *Bahali Singh* v. *Safayat Gop*(3) Manohar Lall, J., following certain earlier decisions of this Court, laid down that when the magistrate's finding is vitiated by his not keeping in view important facts, such as the writ of delivery of possession issued by the Civil Court, the High Court will interfere, even though the magistrate has committed no error as to jurisdiction. The *ratio decidendi* of the latest authoritative decisions on the subject, therefore, appears to be that in spite of a recent delivery of possession, the jurisdiction of the magistrate to interfere under section 145 is not ousted but that the magistrate has to give due weight to the recent delivery of possession while disposing of the proceeding under section 145. It is also important to remember in this connection that the Privy Council in *Thakur Sri Sri Radha Krishna Chanderji* v. *Ram Bahadur*(4) laid down that symbolical possession availed to dispossess the defendants or the judgment-debtors sufficiently, because they were

(1) (1939) A. I. R. (Pat.) 151.
(2) (1922) 27 Cal. N. N. 267.
(3) (1938) A. I. R. (Pat.) 105.
(4) (1917) 27 Cal. L. J. 191, P. C.

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

parties to the proceedings in which it was ordered and given. This Privy Council decision has been followed in several cases, and it has been laid down that even when the delivery of possession is under rule 36 or rule 96 of Order XXI of the Code of Civil Procedure, that is, when the property is in possession of someone on behalf of the judgment-debtor who is not liable to be dispossed under the writ of *dakhaldehani*, the service of the writ effectively dispossesses the judgment-debtor, and he cannot interfere with the man to whom possession has been delivered under the orders of the Court. Though it was a criminal appeal in the case of *Mahabir Singh* v. *Emperor*(1) it was pointed out that a judgment-debtor whose property had been sold in execution of a decree could not claim a right to assault the auction-purchaser who had been put in possession of the property by the Civil Court. This is in consonance with the observation of Rankin, C. J. in the case of *Agni Kumar Das*(2) that it is the Civil Court's duty to give possession on the ground of right and it is the magistrate's duty to maintain possession against force or show of force. In *Ramanand* v. *Bindhachal*(3) a Division Bench of this Court (the judgment of the Bench having been delivered by me) held, after considering several relevant decisions on the subject, that where in execution of a decree, symbolical possession is delivered of immoveable property to a person entitled to possession thereof, and such a person brings a suit for recovery of actual possession, the symbolical possession will be deemed equivalent to actual possession as against the judgment-debtor or his representatives and the suit will be deemed to have been brought in time if it has been brought within twelve years from the date of the symbolical possession. The Privy Council decision in *Thakur Sri Sri Radha Krishna Chanderji*(4) was followed by us in this case. The position, therefore, is that as against the judgment-debtors or their representatives even symbolical

(1) (1934) A. I. R. (Pat.) 565.
(2) (1928) I. L. R. 56 Cal. 290, F. B.
(3) (1948) I. L. R. 27 Pat. 267.
(4) (1917) 27 Cal. L. J. 191, P. C.

possession amounts to actual possession. A magistrate, though he has jurisdiction to interfere even in the case of a recent delivery of possession, has to take into consideration the circumstance that there has been a recent delivery of possession with regard to the subject of the dispute. The advantage which may accrue to a third person, that is, a person who is no party to the execution proceeding cannot accrue to the judgment-debtor or his representatives even in a proceeding under section 145 of the Code of Criminal Procedure; and it will be open to the High Court in revision to interfere, if a recent delivery of possession has been disregarded, on the ground that the order of the magistrate is improper or erroneous. This appears to me to be the present legal position, and though I cannot agree with the learned Additional Sessions Judge in his view that because of a recent delivery of possession the magistrate had no jurisdiction to draw up a proceeding under section 145, Criminal Procedure Code, he is right if he thinks that the learned Subdivisional Magistrate should have respected the delivery of possession made in favour of Sheonarayan Singh and others. The question, however, still arises as to whether I will be justified in interfering at the present stage of the proceeding. I have already referred to the observation of Mukherji, J. in the case of *Agni Kumar Das*(1) that the nature of the enquiry contemplated by section 145 shows that the respective claims as respects the fact of actual possession has to be investigated and that a claim when put forward before a tribunal involves an idea of its capability to be adjudicated upon. This, I think, is the view which has been consistently taken in the decisions of this Court. I respectfully agree with the decision of Rowland, J. in *Raj Nandan Missir* v. *Chhedi Thakur*(2) that it will be premature for the High Court to interfere before the magistrate has decided the case. If the magistrate's decision is ultimately found to be grossly erroneous, the High Court under the existing sections 435 and 439 of the Criminal Procedure Code

(1) (1928) I. L. R. 56 Cal. 290, F. B.
(2) (1930) 13 Pat. L. T. 178.

1952-53:

S. SINGH v. B. SINGH.

NARAYAN, J.

will have the jurisdiction to interfere with it. As was pointed out by Jwala Prasad and Coutts, JJ. in *Ram Krishna Singh* v. *King-Emperor*(1), in order to find out as to whether the possession was disputed or not the magistrate could investigate as to the actual service of the writ of delivery of possession, but if once a *dakhaldehani* was proved to have been effected to the satisfaction of the magistrate, it was his bounden duty to maintain the possession of the person in whose favour the *dakhaldehani* was effected. In *Kamla Prasad Singh v. Gobind Sahay*(2) also it was pointed out that the first party purchaser has certainly to establish that possession was delivered to him by the Nazir under the writ issued by the Court and that the second party has a right to dispute this fact and put the first party purchaser to a proof of it. In other words if the *factum* of delivery of possession is disputed, then certainly the magistrate has to decide whether possession was actually delivered or not: and such an enquiry is within the scope of section 145 of the Code of Criminal Procedure. We must agree with the Counsel for the opposite-party that in this case it was not admitted that possession had actually been delivered by the bailiff of the Court. The learned Additional Subordinate Judge by his order, dated 11th September 1951 could dispose of the points of law which had been raised against the alleged delivery of possession, but he refused to decide the question as to whether as a result of the *dakhaldehani* possession had been actually delivered or not. In other words, the learned Additional Subordinate Judge in the miscellaneous proceeding was not inclined to decide the question as to whether there was a real delivery of possession or a nominal delivery of possession. If the judgment-debtors contend that the peon's report is not correct and that there was no *dakhaldehani* on the spot, then certainly that is a question which has to be investigated, and it is within the province of the magistrate to investigate this question in the proceeding under section 145 of the Code of Criminal Procedure. It is another thing

(1) (1922) A. I. R. (Pat.) 197.
(2) (1922) 3 Pat. L. T. 828.

1952-53.

S. SINGH v. B. SINGH. NARAYAN, J.

that after the delivery of possession is proved the magistrate has to respect the delivery of possession, but so long as the delivery of possession is not proved, it is absolutely within the competence of the magistrate to draw up a proceeding under section 145 of the Criminal Procedure Code in the event of an apprehension of a breach of peace and to investigate whether a *dakhaldehani* was actually effected on the spot or not. A fraudulent service of process is not an unknown thing in this part of the country, and when the judgment-debtors in this case were contending that actually there had been no delivery of possession, this question had to be investigated. I agree with the learned Additional Sessions Judge that the learned Subdivisional Magistrate should not at all be influenced by the observation of the learned Additional Subordinate Judge in his judgment by which he disposed of the objections against the writ of delivery of possession to the following effect:

> "The serving peon has reported that the possession has been delivered to the judgment-creditors who also support his report. In the circumstances I do not think it would serve any useful purpose by investigating whether in fact possession has been delivered or not. If the Judgment-debtors are in possession they are free to take advantage of it."

The question whether there was a *dakhaldehani* on the spot or not has to be investigated by the learned Magistrate, even though the trouble has started very soon after the delivery of possession. The learned Additional Sessions Judge has rightly pointed out that opposite party nos. 1 to 8 were admittedly parties to the decree and were bound by the decree and the *dakhaldehani* which might have been effected in execution of the decree. So far as the other opposite parties, namely, opposite-party nos. 9 to 12 are concerned, the learned Judge has pointed out that neither in the Title Suit nor in the miscellaneous case which was disposed of by the learned Additional Subordinate Judge by his order, dated the 11th September 1951, it has been alleged that there had been a *bataï* settlement of the land and that the *bataidars* were in actual possession of it. For the guidance of the learned Magistrate I have already referred to the

1952-53.

S. SINGH v. B. SINGH.

NARAYAN, J.

decision which lay down that a delivery of possession will be effective as against the judgment-debtor or his representatives. The question of possession will now be decided by the learned Magistrate in the light of the observations made above.

This reference is discharged.

AHMAD, J.—I entirely agree with the judgment of my learned brother. It is one thing to say that the magistrate has no jurisdiction to start a proceeding under section 145 of the Code of Criminal Procedure and it is entirely different to say that in the exercise of that jurisdiction he should give proper weight to an order passed by a competent civil court, especially when the order is a recent one. What, however, I feel is that if the order passed by the civil court is to be respected and maintained especially when there is no allegation that the possession delivered by the civil court has been subsequently disturbed, it is desirable in those circumstances that the magistrate should draw a proceeding under section 107 of the Code of Criminal Procedure against the party who wants to negative the possession given by the civil court and not to start a proceeding under section 145 of the Code of Criminal Procedure in order to avoid the likelihood of a breach of the peace. That would save the rightful person, who has been given possession by the civil court, from much of harassment. If, however, in the course of a proceeding under section 107 of the Code of Criminal Procedure it appears to the magistrate that the delivery of possession claimed by the party, in whose favour the possession is said to have been given by the civil court, is void, the magistrate may convert the proceeding under section 107 into one under section 145 of the Code of Criminal Procedure to decide the dispute for land and also to avoid the likelihood of a breach of the peace. This I say on the principle that *prima facie* the order passed by the civil court giving delivery of possession to one of the parties should have *prima facie* a presumption of correctness in its favour.

Reference discharged.

K. D.

APPELLATE CRIMINAL.

Before Imam and Narayan, JJ.

KING-EMPEROR

v.

S. S. SINGH.*

1948. April, 5, 6, 7.

Criminal Trial, conviction on circumstantial evidence, whether sustainable—confession, admissibility—legal position explained—conviction for dacoity and murder, legality of—sentence of death, court, whether can impose lesser sentence —Evidence Act, 1872 (*Act I of* 1872), *section* 114(*a*)—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 164—*Penal Code*, 1860 (*Act XLV* of 1860), *sections* 396, 302

The fundamental principle of circumstantial evidence is that the inculpatory facts must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused.

Therefore, in a case in which murder and robbery have been shown to form part of one and the same transaction, a recent and unexplained possession of the stolen property will be presumptive evidence against the prisoner on a charge of robbery and would, similarly, be evidence against him on a charge of murder.

Queen Empress v. *Sami and another*(1) and *The Emperor* v. *Sheikh Neamatulla*(2) referred to.

Held, that the confession in the case was admissible and that there was sufficient compliance with the provisions of section 164, Code of Criminal Procedure, 1898.

No form of questions is prescribed by section 164(3) of the Code from which the magistrate must satisfy himself that he believes the confession was made voluntarily.

*Death Reference no. 2 of 1948 with Criminal Appeals nos. 30 and 35 of 1948, reference made by H. R. Krishnan, Esqr., I.C.S., Sessions Judge of Monghyr, in his letter no. 363/X—1, dated the 23rd/24th February, 1948. Appeals nos. 30 and 35 from a decision of H. R. Krishnan, Esqr., I.C.S., Sessions Judge of Monghyr, dated the 20th February, 1948.

(1) (1890) I. L. R. 13 Mad. 426.
(2) (1913) 17 Cal. W. N. 1077.

1948.

KING-EMPEROR v. S. S. SINGH.

Ghinuo Oraon v. *King-Emperor*(1) and *Emperor* v. *Dubai*(2), relied on.

Punia v. *King Emperor*(3) and *Baldeo Mushar* v. *King Emperor*(4), distinguished.

Emperor v. *Dubai*(5), *Thibu Bhogta* v. *King Emperor*(6) and *Kommoju Brahman* v. *Emperor*(7), referred to.

Where a *dacoit* in the progress of, and in pursuance of, the commission of a dacoity, commits a murder, all of his companions, who are participating in the commission of the dacoity, may be convicted under section 396, Penal Code.

Punjab Singh v. *The Crown*(8), referred to.

So long as the law enjoins the sentence of death to be the primary sentence it is the business of the court to impose it unless there appear mitigating circumstances, or grounds for the exercise of a judicial discretion in the matter.

Per, IMAM, J.—The real purpose of section 164; is two fold: (1) that the person about to make a confession should be timely warned that he is not bound to make a statement and that if he does, it may be used against him and that he may be convicted on that statement, and (2) to convey to the mind of the person making the statement the fact that his statement must be a voluntary one.

Reference under section 374, Code of Criminal Procedure, 1898 and appeals by the accused person.

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

Government-Advocate, for the Crown.

G. P. Das and *P. Misra*, for the appellant.

NARAYAN, J.—This is a reference for the confirmation of the sentence of death passed on one Sheo Shankar Singh, otherwise known as Sheo Das or

(1) (1917) 3 Pat. L. J. 291.
(2) (1942) A. I. R. (Pat.) 427.
(3) (1945) I. L. R. 24 Pat. 646.
(4) (1946) I. L. R. 25 Pat. 391.
(5) (1942) A. I. R. (Pat.) 113.
(6) (1923) 4 Pat. L. T. 279.
(7) (1940) A. I. R. (Pat.) 163.
(8) (1933) I. L. R. 15 Lah. 84.

Sheo Shanker Das, aged about 25 years, for the murder of one Baba Ramdas Mahant in the night of the 18th August, 1946 or in the early hours of 19th August, 1946 at village Naokothi.

1948.

KING-EMPEROR v. S. S. SINGH.

The condemned man has sent a petition of appeal from the Central Jail, Bhagalpur, where he is detained at present, and another appeal has been filed on his behalf by Mr. Pitambar Misra, Advocate. The appeals and the reference have been heard together.

NARAYAN, J.

The appellant, according to the prosecution, was living in the temple attached to the *math* as a *chela* of the late *mahant* and was seen with the *mahant* even in the evening of the 18th August, 1946. One Nokhe Dhanuk was menial servant of the *mahant* and also a *choukidar* of the *math*. As usual, he had left the *thakurbari* in the evening of 18th August 1946 after having finished his daily work, and after his departure, the only two persons left in the *math* were this appellant and the deceased *mahant*. When Nokhe Dhanuk turned up the next morning at about 7 A.M., for doing his duty, he saw the *mahant* lying dead in the *Jhoolan* room, where the appellant used to sleep, with his neck cut and with several other injuries on his face. The appellant had disappeared and there was nobody else in the *thakurbari* at the time. There had been profuse bleeding, and Nokhe found a blood stained *garansa* and a vegetable cutter near the cot on which the dead body was found. The room in which the *mahant* used to keep his valuables and other articles had been opened and things were lying scattered in that room. The idols in the temple had been stripped of their ornaments and a wooden box kept in the room had also been opened. Nokhe ran to Awadh Bihari Singh, the landlord who had made endowment to the temple and he also met the *patwari* of Ayodhya Babu besides others. The *patwari* went to the *math* and saw the *mahant* lying dead. The *daffadar* and a few other persons on receiving the information also came to the *thakurbari* and saw the

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

condition of things there. Nokhe was sent to lodge information at the Bakhri police-station, which is about 9 miles south-west from the place of occurrence, and he lodged the information at 10 A.M., on 19th August 1946. The officer in charge of Bakhri police-station after recording the first information report left for the spot. He arrived at the place of occurrence at about 4 P.M., on the same day. He made an inspection of the place of occurrence and when he went inside the *thakurbari*, which is in the middle of an orchard and outside the *basti*, he found all the idols stripped of their ornaments such as *mukut*, *chhatri*, etc. In the northern room he found a wooden box or chest with its contents scattered about and a blood smear on the door sill near the lock. In the room, which is called the *Jhoolan* room, he found the corpse of the *mahant* on a cot and there was blood on the *charpai* as well as below it. He scraped the blood stained earth. Near the cot there were also a blood-stained *garansa* and a *baithki* with blood marks. There were a *ganja chilam* and a pair of *khadauns*, both near the cot. He held an inquest on the dead body and sent the corpse for postmortem examination. He then examined the villagers and took up the investigation, but up till 8th September 1946, when he got certain information from Monghyr, he was not able to find any definite clue.

One *Havildar* and one constable attached to Purabsarai town outpost, Monghyr, arrested the appellant and one Rajo Dusadh alias Thengar Dusadh at about 11-30 P.M., on the night of the 19th August, 1946 in most suspicious circumstances. While these policemen were patrolling near the Jain Dharamsala in Monghyr, they saw these two men in a lane. Rajo was carrying a bundle and both were proceeding towards the main road. When challenged, they turned back and ran towards the side from which they had come. They were, however, pursued and captured by these two policemen. They were taken to the town police-station where the Sub-Inspector

opened the bundle, and the bundle was found to contain certain wearing apparels (four pieces with blood stains), a brass *lota* with coins of the value of Rs. 210 in it and silver ornaments about eleven in number. Most of these ornaments were ornaments used on idols, such as *jibbi* (a silver bow), and *mukuts*. The officer in charge of the Monghyr police-station started a case under section 109 of the Code of Criminal Procedure against the arrested persons and sent enquiry slips to other police-stations includng Bakhri police-station. He received information from Bakhri police-station that the captured persons and the articles recovered should be forwarded to them, and this was done. The confession of the appellant was recorded by a magistrate on 16th October 1946, and charge-sheet was submitted for his prosecution under section 302/280 of the Penal Code on 26th October 1946.

The blood-stained articles were sent to the chemical examiner for analysis of the blood stains and report. It appears from the report of the chemical examiner and the serologist that the *khadi dhoties*, the *khadi chaddar* and the *malmal kurta* were found stained with human blood.

The postmortem examination on the body of the deceased was held on 20th October 1946 by the Assistant Surgeon of Begusarai, and the following injuries were found:—

(1) One oblique incised wound about $3\frac{1}{2}'' \times \frac{1}{4}'' \times \frac{1}{4}''$ cutting the underlying left malar bone for about $1'' \times 1/16'' \times 1/10''$ on the left cheek.

(2) One oblique incised wound about $4'' \times \frac{1}{4}''$ about $\frac{1}{4}''$ below injury no. 1 partially cutting the left malar bone for about $1\frac{1}{4}'' \times 1/6'' \times 1/10''$ on left cheek extending to left side of nose.

(3) One oblique incised wound about $1\frac{1}{4}'' \times \frac{1}{2}''$ partially cutting the lower jaw for about $\frac{1}{2}'' \times 1/16'' \times 1/10''$ on lower jaw at left side.

(4) One oblique incised wound about $2\frac{1}{4}'' \times \frac{1}{2}'' \times$ skin deep on chin.

(5) One oblique incised wound with irregular margins at places about $7'' \times 1\frac{1}{4}''$ extending from about $1\frac{1}{2}''$ below left ear passing from the left side of the neck to the right side of the neck for about $1\frac{1}{2}''$. On dissection the wound was found to cut the larynx and all the larger vessels

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

and other soft issues of the neck at the left side completely, and the underlying vertebra was partially cut for about $\frac{3}{4}'' \times 1/12'' \times 1/10''$ at the left side.

(6) One oblique wound about $2\frac{1}{2}'' \times \frac{1}{2}'' \times \frac{3}{4}''$ on left shoulder.

There were extravasation of blood in the sub-tissues at the sites of the injuries. The doctor was of the opinion that death was due to shock and haemorrhage from injuries received particularly from the injury in the neck. There can be no doubt that this was a case of a very brutal murder, whoever may be the murderer.

The police Sub-Inspector seized the *dhoti* of the accused when he interviewed him in Monghyr jail because the *dhoti* was suspected to contain blood marks, and this *dhoti* was sent to the chemical examiner. But from the report it does not appear that human blood was found on this particular *dhoti*.

The evidence unmistakably goes to show that this appellant was living in the *mahant's thakurbari* as one of his *chelas*. Nokhe says that the appellant was at the *thakurbari* for about two months before the murder, and that at that time he was the only *chela* of the *mahant*. P. W. 8, a woman, aged about 60 years, used to borrow loans from the *mahant*. She also had seen the appellant at the *thakurbari*. According to her statement, the appellant was not only the *chela* of the *mahant* but also used to cook his food. Her statement that the appellant used to cook the *mahant's* food finds corroboration from the petition of appeal which this appellant has sent from jail. In this petition of appeal the appellant has stated

> "There is no reason why a cook will take such a rash course of murder when he can easily murder by poisoning".

The *patwari* of Babu Ayodhya Singh has also deposed that he had seen the appellant at the *thakurbari* for about two months before the murder. The appellant's learned lawyer ultimately conceded that the appellant was in fact living with the *mahant* as his *chela*.

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

On the statement of Nokhe we can safely hold that the appellant was seen at the *thakurbari* in the evening of Sunday, the 18th August, 1946. There is slight inconsistency in his statements as to the time when he left the *thakurbari* in the evening of Sunday. His statement before the committing Court was that he worked in the *thakurbari* up to little before sunset, but his statement before the Sessions Judge was that he left the temple at about 7 or 8 P.M., on that Sunday after finishing his work. The inconsistency cannot be regarded as a material one, when on the whole the evidence goes to show beyond all doubt that the appellant was living in the *thakurbari* as one of his *chelas* and that he was there even in the evening of Sunday. The *patwari* also had deposed to that effect although before the police and the magistrate he did not state that he had gone to the *thakurbari* in the evening of Sunday. If it is found, as it must be found, that the man was living in the *thakurbari* but that he suddenly disappeared after the occurrence, this circumstance alone speaks a volume against the appellant. The condition of things as found by the Sub-Inspector when he inspected the *thakurbari* and by the witnesses when they went to the place of occurrence in the morning of the 19th August, 1946, leaves no room for doubt that this is not a simple case of murder. It appears that a number of persons had been brought to the *thakurbari* with the intention of committing theft, robbery, and dacoity and they not only committed theft of articles but also killed the *mahant*. People living in the *thakurbari* must have been roused from their sleep on account of the noise and disturbance created, and the appellant, if he was there, could not have remained sleeping after an incident of this nature, and even assuming that he was not roused from his sleep in spite of the serious disturbances, there was no reason why he should have run away in the morning. Nobody could ordinarily suspect him and it is he who should have lodged the first information report in the morning about the theft and the

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

murder of his *guru*. While we cannot hold the appellant guilty under section 302 or section 396 of the Penal Code merely because of his disappearance the next following morning, this is a circumstance which stands against him and it has to be considered along with the other circumstances and the direct evidence forthcoming in this case. The appellant was arrested along with Rajo Dusadh at about 11-30 P.M., in the town of Monghyr, and his companion Rajo was carrying a bundle which after it was opened, was found to contain ornaments of the *thakurbari* and blood-stained clothes. The Sub-Inspector has given a list of the articles which the bundle contained, and as I have already said, ornaments such as *jibbi* and *mukut* were found and they are certainly ornaments belonging to a *thakurbari*. Unfortunately, no test identification parade with regard to these articles was held, but there is no reason for discarding the evidence of Nokhe (P. W.7) and Awadh Bihari Singh (P. W. 12) that these were articles belonging to the *math* of the deceased. P. W. 7 is an old servant of the *math*. He used to wash the utensils and sweep the floor of the *thakurbari*. He was certainly in a position to identify the ornaments of the idols, and he has described how some of these ornaments were used, for example, he says that exhibits VI and VII are the silver umbrellas of the idols, exhibits VIII and IX are one pair of *Kangan*, exhibits X and XI are *bajus* of Sitamai and exhibits XIII and XIV are ornaments of the idol Ramji. P. W. 12, Awadh Bihari Singh, claims to be one of those persons who have made endowments to the *thakurbari*, and certainly he is a man interested in the *thakurbari*. He also has identified these ornaments as properties of the *math* and has given details as to how some of them were used. P. W. 8, the woman who used to borrow money from the *mahant* after pledging ornaments, has identified the *hansuli* and the *haekal* as articles which she had pledged with the *mahant*. Another woman, Lalpari (P. W. 17) has stated that the

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

pahunchi (exhibit XIX) had been pawned by her with the *mahant*. There is no reason for discarding the evidence of these witnesses, and the appellant's learned lawyer had to say nothing against them. It, therefore, comes to this that articles belonging to the *math*, which had been removed during the course of the theft or the dacoity, committed in the night of the 18th August, 1946, were found with the appellant and Rajo Dusadh on the night of 19th August, 1946, when they were arrested at Monghyr. They, as already pointed out, attempted to run away as soon as they were challenged, but the policemen succeeded in capturing them. It has been contended that the articles were found with Rajo and, that Rajo's evidence should be discarded as he is in the position of an accomplice. An absolutely disinterested witness, P. W. 14, Jago Singh, has come forward to say that on the morning of Monday, that is on the morning of 19th August 1946, while he was at his *darwaza*, this appellant came to him and told him that he had some things to be carried and that he would require a coolie. This Jago Singh did the appellant a service by procuring a labourer for him, and this labourer was none else than Rajo Dusadh. Rajo started with the bundle for Balia station in the presence of this witness. Rajo corroborates the statement of Jago, and it further appears from his evidence that when at Balia he asked for his wages the appellant asked him to carry the bundle up to Monghyr and threatened that otherwise he would not give him anything. Rajo had, therefore, no other alternative but to carry the bundle to Monghyr where he along with the appellant was caught near the Dharmsala. There is no reason for disbelieving the evidence of this man that he never thought that the bundle contained stolen properties. It would be, to my mind, preposterous to contend that this witness is in the position of an accomplice when he had neither a guilty knowledge nor a guilty conscience. It is really the appellant who was carrying these articles

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

and the witness had been merely engaged as a labourer to carry the articles. The articles stolen from the *math* were in the possession of the appellant and he was found in possession of them within 24 hours of the theft, and hence a presumption under section 114 of the Evidence Act must be drawn against him. Illustration (*a*) to section 114 says that the court may presume that a man who is in possession of stolen goods soon after the theft is either a thief or has received the goods knowing them to be stolen unless he can account for his possession. In a case in which murder and robbery have been shown to form part of one and the same transaction, a recent and unexplained possession of the stolen property will be presumptive evidence against the prisoner on a charge of robbery and would similarly, be evidence against him on a charge of murder. I am supported in this view by a decision of the Madras High Court in *Queen Empress* v. *Sami*(1). The fact, therefore, that this appellant was found with blood-stained clothes and articles stolen from the *math* soon after the murder, is a strong circumstance against him and I should say a conclusive evidence for establishing his guilt. It is true that the fundamental principle of circumstantial evidence is that the inculpatory facts must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. To my mind, the inculpatory facts found in this case are absolutely incompatible with the inocence of the accused and are incapable of explanation upon any other hypothesis than his guilt. I need not repeat that the murder and the theft had taken place in the night of 18th, August, 1946 or in the early hours of 19th August, 1946. The appellant was found at a place called Katarmala, police-station Balia, in the morning of the 19th August, 1946. He had to cross the *ghat* there, and it is there that he sought the help of Jago Singh who supplied him with a labourer for carrying

(1) (1890) I. L. R. 13 Mad. 426.

his bundle. We have examined the map of that thana and we find that that was the way by which the appellant could have proceeded to Monghyr. I am inclined to agree with the learned Government-Advocate that the circumstances are too strong in this case for bringing home not only the offence under section 412 but also the offence under section 302 to this appellant, and even if we discard the confession, regarding which the much debated question arises as to whether it is admissible or not, we would be justified in convicting the appellant under section 302 of the Penal Code on the basis of the circumstantial evidence referred to above.

It is true that for establishing the charge under section 396 of the Penal Code there is no other evidence against the appellant except his own confession, and with regard to his confession, the question arises whether the magistrate has complied with the requirements of section 164 of the Code of Criminal Procedure in order to make this confession admissible. Before I discuss the question whether the confession is admissible or not, I cannot help referring to an observation of Agarwala, J. (as he then was) in *Baldeo Mushar* v. *King-Emperor*(1). I am referring to this observation with a view to emphasise once more that some magistrates of this province have shown a callous disregard for the important instructions given and the observations made in several judgments as to the manner in which a confession is to be recorded. The observation runs as follows:—

"As is usual, however, the ignorance or carelessness of the Magistrate who recorded the confession, Mr. Shafi renders the document inadmissible in evidence. Although this is by no means the first time that this Court has found it necessary to invite the attention of the magistracy to the provisions of section 164 of the Code of Criminal Procedure, I will do so in some detail once more".

(1) (1946) I. L. R. 25 Pat. 391.

1948.

KING-EMPEROR v. S. S. SINGH.

It need not be said that much of public time would be saved if the magistrates are careful enough to follow the instructions given from time to time and let us still hope that a day will come when they may think of following the instructions.

NARAYAN, J.

Coming to the case-law, I am of opinion that on an examination of the authorities it appears to me that this is a fit case in which the confession should not be discarded as inadmissible. The first case which I should like to refer is the case of *Ghinua Oraon* v. *King-Emperor*(1). This is a Full Bench decision, and while referring to this case Manohar Lall, J., in *Emperor* v. *Dubai*(2) observed as follows:—

> " It is enough in the present instance to point out that in the decision of this Court in the Full Bench case in *Ghinua Oraon* v. *Emperor*(1) the matter with which we are concerned was considered where the learned Chief Justice who delivered the judgment of the Full Bench pointed out, if I may say so with respect, the correct view of the matter at page 301;
>
> The last objection that the confession was on the face of it bad as it did not disclose all the questions and answers put and received must also fail. No form of questions is prescribed by section 164(3) from which the Magistrate must satisfy himself that he believes the confession was made voluntarily. The questions recorded as having been put and the answers given as well as the demeanour of the appellant may well have convinced the Magistrate that the confession was a voluntary one, and there is no reason to suppose that the recorded statement does not record all the questions put. "

(1) (1917) 3 Pat. L. J. 291, F. B.
(2) (1942) A. I. R. (Pat.) 113.

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

I have particularly referred to this decision of Manohar Lall and Rowland, JJ., because it was expressly laid down in this case that the authority of the Full Bench decision had not been shaken at all by the Privy Council decision in *Nazir Ahmad* v. *King-Emperor*(1).

The next decision which should be referred to in this connection, and which as far as I know has never been dissented from, is the decision in *Thibu Bhogta* v. *King-Emperor*(2). Sir Dawson Miller, C. J., who delivered the judgment in this case, observed that it would be a very dangerous rule to lay down that any particular form of questioning was necessary and that while it was clearly desirable that a magistrate should always put such questions as might be necessary to enable him to determine whether the confession was voluntary, there was no reason why a comprehensive question such as that objected to by Roe, J., in the case of *Ragho Laya* v. *Emperor*(3) should not be sufficient in certain cases. The question that had been put to the accused in this case was as follows if it can at all be deemed to be a question:—

" I am a *hakim;* you may make your statement if you so wish ".

His Lordship, with whom Mullick, J., agreed, was satisfied that the confession was a voluntary one and did not discard it as a document inadmissible in evidence.

Even in the case of *Kommoju Brahman* v. *Emperor*(4), which is often cited at the Bar on behalf of the accused, Meredith, J., observed that it would be going too far to say that the question must be in any special form for the simple reason that section 164 did not prescribe any special form.

(1) (1936) L. R. 63 Ind. App. 372.
(2) (1923) 4 Pat. L. T. 279.
(3) (1917) 40 Ind. Cas. 721.
(4) (1940) A. I. R. (Pat.) 163.

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

The case of *Sukar Dusadh* v. *Emperor*(1) contains some important observations in this connection. In this case it was laid down that a voluntary and genuine confession was legal and sufficient proof of guilt and that there was no rule of law that an accused person cannot be convicted on a confession made and subsequently retracted without independent corroborative evidence.

In the case of *Emperor* v. *Dubai*(2) Rowland, J., considered how far the Privy Council decision in *Nazir Ahmad* v. *Emperor*(3) had shaken the authority of the Full Bench decision already referred to, and also the authority of another decision reported in *Ramsidh Rai* v. *Emperor*(4). In the latter case Mohammad Noor, J., had observed as follows:—

"In recording the confession in this case the learned Magistrate omitted to put any question to the accused whether he was confessing voluntarily. No doubt the learned Magistrate gave him a warning... but the courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. In the present case the record does not show that any question was asked by the Magistrate in order to ascertain that the confession was made voluntarily. It appears, however, that in giving answer to the warning of the Magistrate, Jagdish himself stated that he was making the statement voluntarily; and the Magistrate has in his evidence stated that he was satisfied that the confession was voluntary".

His Lordship pointed out that the effect of this and the previously cited decisions was that it was question of fact for the trial court whether a confession was voluntary or not. He further said that the law was authoritatively stated in the Full Bench

(1) (1941) Pat. W. N. 69.
(2) (1942) A. I. R. (Pat.) 113.
(3) (1936) L. R. 63 Ind. App. 372.
(4) (1938) A. I. R. (Pat.) 352.

decision in 3 Patna Law Journal, 291, cited above, and that there was nothing in the case of *Nazir Ahmad*(1) and the subsequent decisions to detract from this authority. With his Lordship's observation I respectfully agree. It was further pointed out in this case that the observation of Meredith, J., in *Kommoju Brahman*(2) that because the Magistrate did not comply with the mandatory provisions of the second part of section 164, he had no jurisdiction to say that he was satisfied that the confession was voluntary was *obiter dictum*.

There is another case reported in *Jhiktu Bhogta* v. *Emperor*(3) decided by Varma and Rowland, JJ. In this case the questions put to the accused by the Magistrate were as follows :—

" The statement that you will make before me will be taken in evidence against you and you may be convicted thereon. You are not bound to make any statement. Do you understand? If you want to make any statement voluntarily you may make it ".

The reply of the accused was that he was making a true statement voluntarily. Their Lordships held that the statement was voluntary and that it was not necessary for the Magistrate to put any further question to the accused. This case appears to me to be a case quite in point, and it can be relied on as an authority in this case because almost the same sort of questions had been put by the Magistrate who recorded the confession in this case.

The appellant's learned lawyer, however, relied on two recent decisions of this Court; *Punia* v. *King-Emperor*(4) and *Baldeo Mushar* v. *King-Emperor*(5). With all respect for the learned Judges who decided the case of *Punia* v. *King-Emperor*(4) I

(1) (1936) L. R. 63 Ind. App. 372.
(2) (1939) I. L. R. 19 Pat. 301.
(3) (1942) A. I. R. (Pat.) 427.
(4) (1945) I. L. R. 24 Pat. 646.
(5) (1946) I. L. R. 25 Pat. 391.

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

am not able to agree with any observation made by their Lordships which may conflict with the view taken in the earlier decisions which must still be regarded as good law. Moreover from a perusal of the judgment of Ray, J., it appears that in the case before their Lordships none of the three requirements as laid down by section 164 of the Code of Criminal Procedure had been complied with. The magistrate who had recorded the confession in that case had stated on oath that he had not given the warning to the accused that he was not bound to make a statement. In my opinion the facts of this reported case are clearly distinguishable from the facts of the present case before us. The facts of the other case, namely the case reported in I. L. R. 25 Patna, 391, are stil more distinguishable. We have examined the paper-book of this case and it appears that no question had been put to which the deponent could be deemed to have given the answer "I have said finally. I would voluntarily make a statement". Moveover in this reported case, the confession of another accused was being sought to be used against the accused, whose case their Lordships were considering. I must agree with the appellant's learned lawyer that the Magistrate who recorded the confession in this case before us ought to have put some further question with a view to test whether the confession was voluntary one, and it is, therefore, that I have adopted with respect the observations of his Lordship, Agarwala, J., (as he then was) in the case reported in I. L. R., 25 Patna, 391. But after an examination of the question which have been put in this case another answer given by the accused we feel satisfied that the learned Magistrate has substantially complied with the provisions of section 164. The questions and the answers taken together go to establish that this confession was a voluntary one. The Magistrate went to the length of dissuading the deponent from making

a confession and he distinctly told him that he should not make a confession at the instigation or inducement of others. Evidently, he meant that the deponent was not bound to make a confession, and further he told him that he was a Magistrate and that any confession made by him would be used against him and he would be convicted as a result of that confession. Still the man replied that he was making a voluntary statement of his own accord and that he was not doing so at the threat, inducement or instigation of others. The confession contains details which certainly go to show that it was not the result of any tutoring. The accused has been careful enough to state that though he had brought the miscreants for committing the dacoity or robbery, he had asked them not to murder the *mahant*. Certainly, if under police influence the man was making this confession, he would not have made this exculpatory statement at least so far as the charge under section 302 is concerned. In my opinion, it is a confession which must be regarded as a voluntary one, it being another matter that it contains certain statements which may not be regarded as absolutely correct. There is no reason why on the basis of this confession the accused should not be held guilty under section 396 of the Penal Code. It appears from the confession that he had brought a number of persons, certainly more than 5, for committing theft in the *math* and that it is they who killed the *mahanth*. It was argued by the appellant's learned lawyer that having regard to the statement of this man in the confession that he had asked the other dacoits not to murder the *mahanth*, the extreme penalty of law should not be inflicted on him. But it appears from the confession that he had entered the service of the *mahant* with the intention of having a dacoity committed and that he got the dacoity committed after the *mahant* had begun to confide in him and after he was able to know all the details with regard to the *math*. Section 396 of the Penal Code lays down;

1948.

KING-EMPEROR v. S. S. SINGH.

NARAYAN, J.

"If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years".

If a dacoit in the progress of, and in pursuance of, the commission of a dacoity, commits a murder, all of his companions, who are participating in the commission of the dacoity, may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity. In the case of *Punjab Singh* v. *Crown*(1), a Division Bench of the Lahore High Court laid down that in order to render the other dacoits liable under section 396 of the Penal Code for the act of one of their associates, it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in or abetted its commission. Indeed, they may not have been present at the scene of murder or may not have even known that murder was going to be committed or in fact had been comitted. It is, therefore, manifest that this appellant cannot escape liability under section 396 of the Penal Code, and in view of the fact that it is he who had brought these dacoits, I do not think we should inflict upon him the lesser penalty, namely transportation for life. Unfortunately this man appears to be a most evilminded man, and for this heinous and dastardly crime he appears to be solely responsible. All the assessors who had assisted at the trial were of the opinion that the accused was one of the murderers, and one amongst the dacoits, and that the articles recovered were in his or in his servant's possession.

The reference is, therefore, accepted, and the sentence of death passed on the appellant is confirmed. The appeals are dismissed.

(1) (1933) I. L. R. 15 Lah. 84.

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.—Three charges were framed against the accused Sheo Shanker Singh; (1) for murder of Mahant Ram Das, (2) for an offence under section 396 of the Penal Code in circumstances indicating that a murder was committed in the course of the dacoity at the *thakurbari* of Ramdas, and (3) for being in possession of property transferred by the commission of the dacoity, and, therefore, guilty of an offence punishable under section 412 of the Penal Code. The case of the prosecution rests on circumstantial evidence and the confession of the accused recorded by a magistrate under the provisions of section 164 of the Code of Criminal Procedure on the 6th of October, 1946. As to the confession, this is a subject with which I shall deal later on.

The circumstantial evidence in the case is, in my opinion, so strong that no man with any reason could have any room for doubt that it was the appellant who was guilty either directly or constructively of the murder of the deceased Mahant Ram Das. It has been established by evidence beyond question that shortly before the murder, the accused and *mahant* Ram Das were the only occupants of the *math*. The *mahant* employed a servant to attend on them for the purpose of sweeping the rooms and cleaning the utensils. This man is Nokhe Dhanuk (P. W. 7). According to his evidence, he left the appellant and the deceased *mahant* together in the *math* somewhere about 7 to 8 P.M. His evidence is positive that apart from these two persons, there was no other occupant of the *math*. When he left, the *mahant* was with the accused in the *Jhoolan* room. The evidence of this witness further shows that the *Jhoolan room* was the room occupied by the accused where he used to sleep and that the *mahant* used to sleep in a separate room known as the northern room. It will, therefore, be seen from the evidence of this witness that the last person to be seen with the *mahant*, while alive, was the accused, and this was in the evening of the 18th

1948.

KING-EMPEROR v. S. S. SINGH.

of August, 1946. The learned Advocate for the accused had pointed out a discrepancy as to the time stated by this witness when he left the *mahant* and the accused together in the *thakurbari*. Before the committing court, he appears to have stated that it was a little before sun set, whereas in the court of session, he stated that it was about 7 to 8 P.M. The statement made before the committing magistrate was on the 10th of February, 1947, and the statement made in the court of session, was on the 28th of January, 1948. Whatever the discrepancy between these two statements may be, the first information report lodged by the witness at the police-station on the 19th of August at 10 A.M., states that he had seen the accused and the *mahant* until 9 P.M. It seems to me that the time given in the first information being nearest to the event was more likely to be correct. It cannot, however, be used as substantial evidence. There is, however, one statement of Nokhe which, in my opinion, carries the matter beyond doubt that the statement before the court of session as to the time is more accurate than what he had stated before the magistrate. He had stated in the court of session that he had waited until the lamps were lighted and then left, and he could not recall if he had stated before that he left before sun set. The lighting of lamps must have been an incident which he could well recollect, whereas he might have made a mistake in giving the time as if from a watch or a clock. I see no reason for myself why this witness should be disbelieved when he has stated in the court of session that it was somewhere between 7 to 8 P.M., that he left the deceased and the accused together in the *thakurbari*. I have examined the calendar, and I find that the sun-set was in fact about 6-33 P.M., on the 18th of August, 1946. The difference in time is not of such importance. The more important question is that the last time the deceased *mahant* was seen alive was in the company of the accused. That

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

the accused was at the *thakurbari* in the evening of the 18th of August, 1946 is well proved and one finds from the evidence of Gangadhar *patwari* (P. W. 13) who is an employee of the *math*, from a very long period, that he saw the accused at the *thakurbari* at 4 P.M. When Nokhe Dhanuk arrived at the *thakurbari* on the morning of the 19th of August at about 7 or 8 A.M., he found the *mahant* lying in the *Jhoolan* room on a cot with his neck and face cut and that he was dead. There was blood underneath the cot. A blood-stained *garansa* was lying there as well as a *baithi* (vegetable chopper), but the accused was not there. It is a circumstance which requires explanation on the part of the accused as to what induced him to disappear from the *thakurbari* after 7 o' clock in the evening. The accused has nowhere suggested either in his examination or in his written statement that there was any particular reason for him to have left the *thakurbari* in the evening of the 18th of August. At about sun-rise on the 19th of August, at a village called Katarmala, which is roughly about 4 to 5 miles south-east of Naokothi, the village of occurrence, the accused was seen near the ferry by Jago Singh (P. W. 14). The accused asked him as to whether he could get him a coolie to carry some of his things. Jago Singh then obtained a labourer, namely Rajo Dusadh *alias* Thengal Dusadh (P. W. 15). The two then left together. According to Rajo Dusadh, he carried the bundle which the accused gave him to the railway station Balia where he demanded his wages from the accused. The accused told this witness that he must reach him with the bundle to Monghyr, otherwise he would not get anything. At Monghyr, they ate at a hotel near the Dharmsala, and in the night they were arrested by the police. The witness does not profess to have opened the bundle. It will be seen from the evidence of these two witnesses, Jago Singh (P. W. 14) and Rajo Dusadh (P. W. 15) that early in the morning of the 19th of August the accused was going away from Naokothi with a bundle whereas

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

one should have expected him to have been at the *thakurbari* at Naokothi. The arrest of the accused and Rajo Dusadh at Monghyr was effected by Sheopujan *Havildar* (P. W. 10), who says that on the 19th of August, 1946 at about 11-30 in the night he saw these two persons near the Jain Dharamshala, that one of them, namely Rajo Dusadh, had a bundle, and that he asked them who they were, when the two men ran back in the same direction as they had come. The *Havildar* chased them and with the help of a police constable and these persons were caught. According to the *Havildar*, when he first saw these two people they were one or two paces behind each other. The arrested men were taken to the Monghyr police-station and a *Sanha* was recorded. The officer in charge of the police-station was Mohammad Majiduddin (P. W. 9). According to him, the bundle contained four pieces of wearing apparel with blood stains, a brass lota containing coins of the value of Rs. 210 and a number of silver ornaments eleven items in all—some of these items contained several pieces. It is to be remembered that the arrest of these two people with the articles found had taken place at a time when the police officer in charge of the Monghyr police-station apparently had no knowledge of a murder having been committed at village Naokothi. These ornaments, although not the four pieces of wearing apparel, were identified as the properties which belonged to the *mahant*, some of the ornaments being the ornaments which decorated the five idols in the *math* and some ornaments which had been pawned with the *mahant* by certain persons. There can be no doubt from the nature of the ornaments that several of them were of a kind which would be used only for the purposes of adorning an idol. The evidence is clear that the five idols in the *math* were deprived of their ornaments. Although there was no test identification parade held, there seems to me to be no reason to disbelieve Nokhe, the servant of the *thakurbari*, or Gangadhar *patwari*, who have identified the ornaments belonging to the idols, nor is there

any reason to disbelieve Awadh Bihari (P. W. 12) who was one of the persons who had endowed the Naokothi *math*. This witness had also identified several of the ornaments as ornaments which were put on the idols in the *thakurbari*. According to the Sub-Inspector, the reason why no test identification parade could be held was that it did not materialise because some times the magistrate had no time, and again, the witnesses did not turn up. Of course, it would have been better to have a test identification parade in order to obviate the argument which has been raised in this case, namely that the evidence of identification without such a parade is valueless. Because there was no test identification parade, it does not follow that the court is disentitled to do that which the law permits, namely to believe or disbelieve a witness. As I have already pointed out, the nature of the articles were such that they were capable of identification by people who had seen them for years at the *math* and as ornaments which had adorned the idols in the building. The consistent evidence of Nokhe, Gangadhar *patwari* and Awadh Bihari leaves no room for doubt that in the bundle which was opened by the police officer of the Monghyr police-station on the night of the 19th August, 1946, ornaments belonging to the idols of the *math* were found. As to the other articles, there is the evidence of Mt. Sarbatia (P. W. 8) who speaks of having identified two of them, the *hansuli* and the *haekal*, as belonging to her which she had pledged with the deceased *mahant*. Similarly, Lalpari (P. W. 17) claimed the pair of *pahunchis* as pawned by her with the *mahant* and as belonging to her. The reason given by this witness for recognising the ornament is by its appearance and pattern and because of a certain repair. For myself, I see no reason to disbelieve these two witnesses either. But independently of their evidence, the evidence of three persons, who ought to know a good deal about the

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

math and the ornaments which adorned the idols, proved that the ornaments of that place were found in the bundle which was opened by the police at Monghyr on the night of the 19th of August, 1946. This bundle, containing these properties, had been given by the accused to Rajo Dusadh near village Katarmala to carry for him from that place to Balia railway station and subsequently to Monghyr. The possession of Rajo Dusadh, therefore, must be deemed to be the possession of the accused. From the evidence so far indicated, it is proved that the accused was the only companion of the deceased *mahant* in the *thakurbari*, that the deceased *mahant* was last seen alive not only in the company of the accused but in the room where the accused used to sleep and that about sun-rise in the morning of the 19th August, 1946 some four or five miles away from the village the appellant was found in possession of a bundle, a bundle which contained ornaments belonging to the deceased *mahant* and properties of the *math* along with four wearing apparels stained with blood, which has been proved by the report of the chemical examiner to contain stains of human blood. To any man with common sense this circumstantial evidence would prove beyond reasonable doubt that in the circumstances the appellant was either the murderer of the *mahant* himself or he had actively participated in his murder. I venture to suggest that even in the disposal of a case of such a grave nature as this, there is no call upon the court to abandon common sense in dealing with the guilt or innocence of the accused. In this connection, I would refer to the decision of Sir Lawrence Jenkins in *Emperor* v. *Sheikh Neamatulla*(1). My learned brother has already referred to a Madras case. I am referring to the decision of Sir Lawrence Jenkins, for, in my opinion, the words of that learned Judge carry a weight of their own in the judicial history of this Country. In

(1) (1913) 17 Cal. W. N. 1077.

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

the Calcutta case, a woman was murdered in an empty house at 115 Russa Road South and she was wearing certain ornaments at the time. It was the prosecution case that the accused Neamatulla was seen entering this empty house at 115 Russa Road South by Nannay Khan and that he made certain statements to Nannay Khan and one Muhammad Ashraf. The story told by Nannay Khan and Muhammad Ashraf was disbelieved by the jury and the trial judge although the learned Counsel for the Crown pressed upon the court the truth of the story told by these two men. Sir Lawrence Jenkins, however, convicted the accused on the following circumstantial evidence, namely that the ornaments found in possession of Neamatulla had traces of blood as well as on the clothing which the accused was wearing at the time of his arrest. Sir Lawrence Jenkins observed that these were indications of guilt on which Courts constantly rely and he cited the case of *The Queen* v. *White*(1). His Lordship then went on to observe:—

" Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. By way of illustration to that section it is said that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The matter does not rest there, because it is a matter of common procedure to utilize evidence of this kind and the presumption such as this in connection not only with theft and receipt of stolen goods but more aggravated offences: and it is stated in Wills on Circumstantial Evidence that 'the possession of

(1) (1847) 2 Cox. Cr. Cases 192.

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder: which special application of it has often been emphatically recognized ' ".

His Lordship, accordingly, felt that there had been misdirection in the charge to the jury by the learned trial judge and concluded that the evidence as a whole, coupled with the facts to which he had drawn attention, showed beyond any reasonable doubt that the accused Neamatulla was guilty of the murder of the woman.

When the accused was examined in the court of session under section 342 of the Code of Criminal Procedure he was informed that the charge against him was that on the night of the 18th of August, 1946 he had murdered or abetted the murder of his *guru*, *mahant* Ramdas, and looted his properties and that on the night of the 19th August, 1946 the following stolen properties were recovered from him. He was accordingly asked as to whether he had anything to say. To this the accused replied that he did not commit murder nor did he loot the properties; he had come to Monghyr from Ithari on a Sunday and was returning from the Cinema when he was arrested by the constable on curfew duty, and that he shall file a written statement. The written statement, as usual, is more in the nature of an argument which probably was drafted by the lawyer defending him. In paragraph 7 of the written statement it is stated that the accused did not come to Monghyr Dharamsala with Rajo Dusadh, that he happened to be near the Dharamsala and he was arrested by mistake. As I have already pointed out from the evidence, the accused has not been able to give any reasonable explanation for his absence from the *thakurbari* and

his presence at Katarmala with the ornaments and the blood-stained wearing apparels-ornaments belonging to the deceased mahant and the idols of the *thakur-bari*. He has on the contrary attempted to inform the court that he had come to Monghyr from a place called Ithari. The District map of Monghyr shows that this place Ithari is on the Monghyr side of the river Ganges and is towards the east of Monghyr on the railway line between Monghyr and Sultanganj. He has, therefore, offered a false explanation for his presence in Monghyr. The evidence on the other hand clearly shows that from a place only 4 to 5 miles from the scene of murder, the accused was proceeding to railway station Balia and to Monghyr in the Company of Rajo Dusadh (P. W. 15). Mr. Das had urged that this witness was an accomplice and his evidence should not be relied upon unless at least corroborated. In fact, there is corroboration of Rajo Dusadh's in the evidence of Jago Singh, prosecution witness no. 14, for it is Jago Singh who asked Rajo Dusadh to act as a coolie for the accused. But so far as Jago Singh is concerned, Mr. Das had argued that he was examined a month after the occurrence. That may well be, for it was not until the police officer of Bakhri got clue as to what had happened at Monghyr that he had any occasion to record the statement of Jago Singh. There is no reason to suppose that Jago Singh had any motive for deposing falsely against the accused. Indeed, the witness appears to be a quite respectable person, and it does not seem to me at all likely that he would have come to make a statement falsely. But independent of the evidence of Jago Singh, I decline to accept the argument that Rajo Dusadh was in fact an accomplice. The evidence is quite clear that he only carried the bundle as a coolie for wages without knowing its contents or that the contents were subject of an offence having been committed. One may answer the contention of Mr. Das by asking the question that

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

if a person goes to the railway station with a box and hires a coolie to carry that box to the railway carriage, and that when box is opened by the Police and found to contain incriminating articles, would the coolie in such circumstances be regarded as an accomplice. The answer clearly must be 'no'. There is one further circumstance to be considered. When Nokhe Dhanuk left the accused and the *mahant* at the *thakurbari* on the evening of the 18th of August, 1946, he had seen them together in the *jhoolan* room, that is to say in the room where the accused used to sleep. There is evidence that the *mahant* used to smoke *ganja*, and this is proved by the evidence of Awadh Bihari (P. W. 2) that near the cot on which the dead body was lying there was a *ganja chilim*. The Sub-Inspector also saw it. One of the questions raised by Mr. Das was as to why the *mahant* should have gone to the room of the accused as the usual place where he used to sleep was the northern room. It is impossible to answer queries of this kind. The evidence is clear that the deceased and the accused were last seen together in the *jhoolan* room. It is just possible that the deceased had begun to smoke *ganja* and that when he was under its effect, the accused committed the murder and the theft of the ornaments. I have no doubt in my mind that the circumstantial evidence proved in the case leads to no other conclusion than this that either the accused himself committed the murder or took an active part in it and in the theft which took place at the *thakurbari*.

There is the confession next to be considered. Mr. Das relied upon various authorities and mainly upon the cases of *Punia* v. *King-Emperor*(1) and *Baldeo Mushar* v. *King-Emperor*(2). Section 164, sub-section (3) states that a magistrate shall before recording any such confession explain to the person making it that he is not bound to make confession and that if he does so it may be used as evidence against

(1) (1945) I. L. R. 24 Pat. 646.
(2) (1946) I. L. R. 25 Pat. 391.

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

him, and no magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. These words clearly indicate that there are two functions for a magistrate to perform before he records a confession. The first function which he has to perform is to inform the person about to make a confession that he is not bound to make a confession and that if he does so, it may be used as evidence against him. The magistrate who recorded the confession in this case as to this told the accused as follows:

" Q.—I am a Magistrate. If you make any statement before me, you may be convicted on your own statements. Do you know it? "

To this the accused answered; " Yes sir. I know it. " It is clear, therefore, that so far as the first function of a magistrate is concerned, it was performed in accordance with the provisions of section 164 of the Code of Criminal Procedure. When examined at the trial he stated:

" I warned him that he was not bound to give a statement and that if he did it might be used as evidence against him. I gave half an hour to think calmly about what he was to do. He said, in spite of my repeated cautioning, that he was repentant, and must confess. It was voluntary. I was satisfied that it was voluntarily ".

The magistrate gave the usual certificate at the end of confessional statement and gave reasons for being satisfied the confession was voluntary in column 7 of the form for recording confession. The question which has been raised by Mr. Das is as to whether the second function, namely, before recording such a confession the magistrate had put question to the person making it in order to be satisfied that it was voluntary, as required by the Code. As to this the magistrate told the accused:

Q.—" Do not make any statement at the instigation and inducement of others. You may make voluntary statement ".

To this the accused answered:

" I make voluntary statement of my own accord after due consideration. I am not making statement at the threat, instigation and inducement of others ".

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

Later on immediately before recording the statement the magistrate put the following question:

Q.—" Whatever you have to state you may voluntarily state ".

The accused then proceeded to make his statement. Mr. Das has argued that this is no compliance with the provisions of the Code as there has been no questioning of the person making a confessional statement. I think for myself that every case has to be decided on its own facts as to whether actually the provisions of the Code have been observed or not. In *Baldeo Mushar* v. *King-Emperor*(1) the manner in which the confession was recorded led their Lordships to conclude that in fact no questions were put to ascertain if the statement about to be made was a voluntary one and, therefore, the second function required under section 164(3) had not been complied with, and, therefore, the statement was inadmissible. We sent for the paper-book of the appeal and looking at the confession which is to be found in that book, it is quite clear that apart from the first function, namely the warning, the magistrate had not put any question of a nature to ascertain whether the statement about to be made was a voluntary one. In *Punia* v. *King Emperor*(2), it would appear from the decision that the magistrate who recorded the confession had, in his evidence at the trial, clearly stated that he had put no questions to the person making the confessional statement as to whether the statement which he was going to make was a voluntary one. In my opinion, these two cases were decided on their own facts. Section 164 does not in itself indicate as to what is the nature of the question or what is the form in which it is to be put to a person about to make a confession in order to ascertain whether it was a voluntary statement. The real purpose of section 164, in my opinion, is two-fold: (1) that the person about to make a confession should be timely warned that he

(1) (1946) I. L. R. 25 Pat. 391.
(2) (1945) I. L. R. 24 Pat. 640.

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

is not bound to make a statement and that if he does, it may be used against him and that he may be convicted on that statement, and (2) to convey to the mind of the person making the statement the fact that his statement must be a voluntary one, and in order to ascertain whether the person has understood this, question or questions in some form or other is to be put in order that the magistrate may be satisfied that the statement about to be made is really a voluntary one. The question which the magistrate put to the accused regarding the voluntary nature of his statement is in the form of a question though in substance it may appear at first sight to look as if it were a caution. I think the words which I have quoted above mean that he was asking the accused as to whether he understood that the statement which he was to make must be a voluntary one and not one at the instigation or inducement of others. That the accused understood the magistrate well enough appears from the answer which I have already quoted. The magistrate was not satisfied with this merely, but immediately before recording the statement he again put to him the question:

"Whatever you have to state you may voluntarily state".

It seems to me that although the magistrate may not have said

"Why do you make a statement?".

the effort made by him was to ascertain in the circumstances of this case as to whether the accused was making a voluntary statement, and with that end he emphasised to him more than once that his statement should be a voluntary one. When the accused persisted in his attitude that he was willing to make a statement and that it was a voluntary one, I can see no reason why the magistrate was precluded from proceeding to record the statement. In my opinion, on the facts of this case, there was a sufficient compliance with the provisions of section 164 of the Code of Criminal Procedure and the statement was admissible. As to

1948.

KING-EMPEROR v. S. S. SINGH.

IMAM, J.

how much reliance one can place upon the statement, it is necessary to point out that the accused has made attempts in the statement itself to minimise his part in the crime. He stated that he had told the dacoits to take the properties but not to kill the *mahant*. He, however states towards the latter part of his confession that he took away Rs. 900 from under the rice which was kept in the box, and also two ornaments, a *hansuli* and another which he could not name, and that he fled away from there. He confesses of his arrest by the *havildar* at Monghyr, but alleged that three ten-rupee currency notes were taken by the *havildar* saying that he would get him released by the Sub-Inspector. The *havildar* took him to the house of the Sub-Inspector, and the Sub-Inspector also took from him whatever money and ornaments he possessed. In fact, as I have already said, Rs. 210 was found in cash in a *lota* in the bundle and more than two ornaments were found in that bundle. But the accused, on his admission, was taking away the stolen property and admitted his flight from the *thakurbari* as well as his arrest at Monghyr. It is true that his allegation that he took Rs. 900 may be incorrect as only Rs. 210 was found at the time of his arrest, but that would not prevent the court from relying upon his statement as a whole that he had taken out some of the money and ornaments from the *thakurbari* and fled away with it. The confession in addition to the circumstantial evidence concludes the matter entirely. I have, however, laid great stress upon the circumstantial evidence in the case, and I have no hesitation in expressing my own view that independent of the confession recorded by the magistrate, the circumstantial evidence in the case is conclusive regarding the guilt of the appellant with reference to the murder of the deceased *mahant*.

Mr. Das had urged the question of sentence on the ground that the accused was a young person. I must point out that so long as the law enjoins the sentence of death to be the primary sentence it is the

business of the court to impose it unless there appear mitigating circumstances or grounds for the exercise of a judicial discretion in the matter. In some cases, youth has been considered as a ground for mitigation. In this case, the accused is between 22 years as recorded by the committing magistrate and 25 years as recorded by the judge. It has been pointed out that the magistrate who recorded the confession estimated the age of the accused as 19. It seems to me that the accused must be somewhere in the neighbourhood of 22 or 23 years of age. While he is young, it cannot be said that his youth is such that that in itself is a ground for reduction of the sentence. On the other hand, it is to be remembered that the murder of the *mahant* was a brutal one. He was butchered by the accused, a betrayer of a benefactor. If a murder of this horrible nature can be committed, and the court be asked to impose the lesser sentence on the mere ground that the accused is a youthful person, it seems to me that one would be exercising a wrong discretion judicially, if one imposes the lesser sentence merely on that ground. There is another forum whose prerogative of mercy is far wider than ours. That forum need not give any reasons for reduction of the sentence, but as a Court one is bound to give judicial reasons for it. I can find none in this case.

I agree that the appeals be dismissed, the reference accepted and the sentence of death confirmed.

Reference accepted. Appeals dismissed.

REVISIONAL CRIMINAL.

1953.

January, 12, 13, 14. February, 17.

Before Reuben, C. J. and Misra, J.

D. SHASTRI

v.

K. B. SAHAY.*

Evidence Act, 1872 (*Act I of* 1872), *sections* 52, 53, 54, 55—*prosecution for defamation—accused, whether entitled to put questions to the complainant regarding his reputation—legal position, explained—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 499, 500.

There is a basic distinction between the fact in issue in a civil action for libel and slander and the fact in issue in a criminal prosecution for defamation, as in a civil action what the plaintiff seeks to do is to compensate himself for loss of his reputation in terms of money. The *quantum* of damage, therefore, must differ from case to case and according to the status of the plaintiff. It is not so in a criminal prosecution. In a criminal prosecution what really matters is the *mens rea* of the accused person.

It is in civil cases, where the question of amount of damages to be awarded to the plaintiff is concerned, that the character of the plaintiff becomes relevant under section 55 of the Evidence Act, 1872, but no such provision has been made in regard to the character of the prosecutor or complainant either in section 55 or sections 52, 53 and 54 of the Act.

Reputation within the meaning of section 499 of the Penal Code, 1860, is not at all a necessary fact to be proved in a charge under section 500 of the Code, hence it is not a fact in issue. Facts in issue on a charge under the section are the necessary ingredients of that section to be established in order to bring the charge home to the accused person.

* Criminal Revision no. 1196 of 1952, against an order of Mr. Ramjivan Sinha, first Additional Sessions Judge of Patna, dated the 17th September, 1952, refusing to make a reference to the Hon'ble High Court against the order of Mr. S. C. Gupta, Judicial Magistrate, Patna, dated the 22nd July, 1952.

Therefore, reputation is not a fact in issue either in a case under section 500 of the Penal Code or under the Evidence Act or as a mitigating circumstance.

Hence, in a prosecution under section 500 of the Penal Code, 1860, it is not open to the accused person to put questions to the complainant to show the type of reputation the complainant enjoyed at the relevant date.

Laidman v. *Hearsey*(1), *Scott* v. *Sampson*(2) and *Firangi Rai* v. *Emperor*(3), distinguished.

Devi Dyal v. *The Crown*(4) and *Munnalal* v. *D. P. Singh*(5), doubted and not followed.

Amrit Lal Bose, In re.(6), *The Englishman, Ltd.* v. *Lajpat Rai*(7), *Maharaja Srish Chandra Nandy* v. *Rakhalananda Thakur*(8), and *Ramnarain* v. *King Emperor*(9), relied on.

Hobbs v. *Nottingham Journal, Limited*(10), referred to.

Application in revision by the accused.

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

The case was admitted by Das, J., who at the time of admission observed that the case be finally heard by a Division Bench.

Thus the case came to be heard by the Division Bench.

Ramchandra Prasad Sinha, Umesh Chandra Prasad Sinha and *Rasbehari Singh*, for the petitioner.

(1) (1885) I. L. R. 7 All. 906.
(2) (1882) 8 Q. B. D. 491.
(3) (1933) A. I. R. (Pat.) 189.
(4) (1922) I. L. R. 4 Lah. 55.
(5) (1950) A. I. R. (All.) 455.
(6) (1917) I. L. R. 44 Cal. 1025, 1046, F. B.
(7) (1910) I. L. R. 37 Cal. 760.
(8) (1940) L. R. 68 Ind. App. 34.
(9) (1924) A. I. R. (All.) 566.
(10) (1929) 2 K. B. D. 1.

1953.

D. SHASTRI v. K. B. SAHAY.

Lal Narayan Sinha, Bajrang Sahai, Hari Kishore Thakur and *Rajendra Narain Sinha*, for the opposite-party.

MISRA, J.

MISRA, J.—This application in revision arises in the following circumstances. Shri Krishna Ballabh Sahay, Revenue Minister, Government of Bihar, instituted a complaint against the petitioner, who happens to be the chief editor of a daily newspaper at Patna, known as *Navarashtra*, in the court of a magistrate at Hazaribagh alleging that there was a defamatory publication in that newspaper concerning the complainant which lowered him in the estimation of the public, for which the editor was liable to be punished under section 500 of the Penal Code. The case was transferred from Hazaribagh to Patna under the orders of this Court and placed before Mr. S. C. Gupta, Judicial Magistrate, for trial. The trial was duly taken up, and while the complainant was under cross-examination, the defence lawyer put certain questions to the complainant in respect of his general reputation with a view to eliciting that the general reputation of the complainant was such that the petitioner committed no offence in publishing the correspondence in question respecting the case against one Zahur Ali, yarn importer, whose house at Ranchi was raided by the police on the 16th of May, 1951. It is unnecessary to state the details of the case against Zahur Ali or the actual defamatory matter contained in the correspondence of the 8th of July, 1951, and the correction note in regard to that correspondence published in the issue of the newspaper of the 11th of July, 1951, because that concerns the merits of the case under trial before Mr. S. C. Gupta, Judicial Magistrate.

The order complained of in the present petition is dated the 22nd July, 1952, by which the learned Magistrate disposed of the application of the learned

defence lawyer, dated the 10th of July, 1952, and in substance negatived his prayer that he was entitled to ask questions in general concerning the character and reputation of the complainant so as to show that it was already of such a type that the news item or correspondence complained of could not lower it further and hence the publication by the editor did not bring him within the mischief of section 500 of the Penal Code. The petitioner thereafter moved the learned Sessions Judge of Patna for making a reference to this Court for setting aside the order passed by the learned magistrate and giving a direction that the petitioner's advocate should be permitted to carry on the cross-examination along the line he was seeking to do. The first additional Sessions Judge of Patna, who heard the application, however, refused to make a reference on the ground that the application was directed against an interlocutory order and as such he was not inclined to accede to the prayer of the petitioner. He, however, made certain observations, which were more or less along the line which was followed by the learned magistrate.

Learned Counsel for the petitioner has raised in the present petition the points which were pressed before the learned magistrate as well. He has drawn our attention in this connection to a number of decisions, which, according to him, supported his contention that in the case of a prosecution under section 500 of the Penal Code, it is open to the accused person to put questions to the complainant not only with regard to his veracity or to impeach his credit, but also to show the type of reputation the complainant enjoyed in public estimation. Learned Counsel has formulated his argument in broad terms like this. Section 499 of the Penal Code, which defines defamation, reads as follows:—

"Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation

1958

D. SHASTRI v. K. B. SAHAY.

concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person is said, except in the cases hereinafter excepted, to defame that person."

MISRA, J.

This section it is contended makes special reference to reputation as an element to be established by the prosecutor which ran the risk of being harmed by any defamatory statement. The prosecutor, therefore, has to prove his reputation in the first instance, and as a necessary corollary it is certainly the right of the accused person to counter the existence of that reputation by necessary questions in cross-examination as also by leading evidence, if necessary. The main argument, therefore, is based upon the provisions of section 499 of the Penal Code. In this connection he has invited our attention to a number of decisions, both Indian and English, and has also quoted from certain authoritative writers on this subject.

The three Indian cases mainly relied upon by him are: *Laidman* v. *Hearsey*(1), *Devi Dyal* v. *The Crown*(2) and *Munnalal* v. *D. P. Singh*(3). It is contended that 7 Allahabad, 906, was a Division Bench ruling of that Court and Petheram, C. J., who delivered the judgment, held:—

"The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is, and, moreover, Mr. Ross puts the case for the prosecution on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood, and not with a

(1) (1885) I. L. R. 7 All. 906.
(2) (1922) I. L. R. 4 Lah. 55.
(3) (1950) A. I. R. (All.) 455.

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

genuine intention to furnish proper information to the public. Upon this issue, it must be material to ascertain whether Captain Hearsey, in his letter as a whole, was telling the truth or not."

It is argued that it is clear from this fact that reputation became the fact in issue in the trial under section 500 of the Penal Code in terms of its definition under section 499 of the Penal Code, and as such evidence concerned reputation, it was held to be admissible. It is necessary to bear, however, the facts of that case in mind in order to appreciate the worth of this contention. In that case, what the accused person, Captain Hearsey, was alleged to have done was that he wrote a letter, dated the 25th of February, 1885, to the Government of India and to the Government of North-West Provinces stating that on the 9th of February while he was in the court of Mr. George J. Laidman, the complainant, who was the Subordinate Judge of Dehra Dun and Mussoorie, to give evidence in a law suit, he saw three respectable Rajput zamindars entering the court of Mr. Laidman in connection with a case in which they were interested and which had been remanded to the Subordinate Judge's court by the High Court for re-hearing and revision. The Subordinate Judge looked up and finding them there burst out into abuse in the following words:

" Sooars, badmashes, haramzadas, tum hamare degree High Court ko appeal kiya ";

and after repeating the three obnoxious and abusive epithets, ordered them out of the court till their case was called on. As Captain Hearsey left the court, the three zamindars approached him and asked him if he had heard the Subordinate Judge abusing them. He said that he did. They complained to him of that kind of treatment and expressed their difficulty as to where they would get justice if this was the attitude and behaviour of the court which was in

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

seisin of their case. Captain Hearsey assured them of redress and accordingly he brought the matter to the notice of the Government of India and the Government of the North-West Provinces commenting in his letter on the conduct of the Subordinate Judge which was characterised as not only illegal and cruelly oppressive, but also ungentlemanly and cowardly in the extreme. He also referred to another specific instance of the behaviour of Mr. Laidman when he was officiating for the Superintendent of the Dun in the end of 1883 and fined a gentleman in Mussoorie a sum of Rs. 300 for saying in a privileged conversation that the Municipality were a set of pigs. He stated further that this was not an isolated case of Mr. Laidman's abusing respectable natives in his court and when the time came, he would produce several others whom he had treated in a similar manner. The allegation in the letter of the accused in that case related not only to the particular date on which Captain Hearsey happened to be present in the court of the complainant, but also to specific instances of his behaviour on other occasions. The prosecution case was laid not only on the ground of the accused person writing a defamatory letter against the complainant, but also on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood. As a matter of fact, the Hon'ble the Chief Justice appeared to hold that the questions must be confined to specific instances and not to reputation in general. Many questions were discussed in course of the argument at the Bar, but it is not necessary to refer to them specifically, as the decision was based upon the nature of the allegation in the letter complained of. It is clear from what has been stated above, that the principle of law laid down in that case will not help the petitioner in the present case, as the allegation in the correspondence complained of in this case relates to a single instance, namely, the part, if any, played by the complainant, or, at any rate, his connection with the talk, dated the

15th of May, 1951,—there appears to be some error regarding this date—between phone no. 126 Ranchi, alleged to be the telephone number of Zahur Ali, and phone no. 179 Patna, which is alleged to be telephone number of Shri Krishna Ballabh Sahay, Revenue Minister, Government of Bihar. There are certain allegations in the correspondence with regard to the transfer of Shri Gopi Krishna Sahay, the Sub-Inspector of the anti-smuggling force, who was responsible for the raid at the house of Zahur Ali, which again arises out of the same incident. Whatever aspersions, therefore, are cast in the correspondence on the character or reputation if any, of the complainant are confined to a particular incident which alone can be the subject matter of enquiry in the present case pending before the Judicial Magistrate. The principle of law as laid down in the Allahabad case will not apply to the facts of the present case, because there is no reference to any other incident of a similar character involving the conduct of the complainant.

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

The next case relied upon by learned Counsel for the petitioner is *Devi Dyal* v. *The Crown*(1), which is a single Judge decision of the Lahore High Court wherein it was held:—

" Similarly in a criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had is relevant. If the petitioner in the present case were able to prove that the complainant had a notoriously bad reputation as a bribe-taker it might reasonably be argued that the imputation made as to his having taken a bribe on

(1) (1922) I. L. R. 4 Lah. 55.

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

the particular occasion in question, even if false, could not damage his reputation as he had none to lose; and in any case proof of the complainant's bad reputation would affect the sentence to be passed in case of conviction. I hold, therefore, that the evidence which the petitioner wished to adduce in proof of the complainant's bad reputation was wrongly excluded."

It is true, no doubt, that there was reference to a particular incident only in that case as the complainant alleged that there was an imputation against him published by the accused in that case that the complainant had compelled the accused to pay a bribe in order to avoid a prosecution for a certain offence. Martineau, J. in that case held that evidence as to the complainant having taken bribes on specific occasions other than the one which formed the subject of that case would be irrelevant, but that the accused person was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker. The learned Judge in that case relied upon *Scott* v. *Sampson*(1) and Odgers on Libel and Slander, 5th edition, for the view that in an action for damages for libel or slander, evidence might be given that the plaintiff had a general bad character in mitigation of damages, and in a criminal prosecution, the same principle should apply, as there was no difference in essence between a civil action and a criminal prosecution, where the reputation of the person concerning whom the publication is alleged to have been made is a necessary element to be proved. It is true no doubt that the Lahore decision, if taken to lay down the law correctly, supports the contention on behalf of the petitioner but for the reasons I propose to give hereafter, it cannot be accepted as correct law on the point, and we are unable to agree with the view expressed in that decision. For one thing, it is clear

(1) (1882) 8 Q. B. D. 491.

that this case differs from the decision in I. L. R. 7 Allahabad, 906, referred to above, as in the Allahabad case general evidence was not the point in issue and it was not favoured by Petheram, C. J., but it was confined to specific instances of similar conduct on the part of the person defamed, and the allegation in that letter also ran to the same effect. In the second place, there is a basic distinction between the fact in issue in a civil action for libel and slander and the fact in issue in a criminal prosecution under section 500 of the Penal Code, as in a civil action what the plaintiff seeks to do is to compensate himself for the loss of his reputation in terms of money. The quantum of damage, therefore, must differ from case to case and according to the status of the plaintiff. Not so in a criminal prosecution where what really matters is the *mens rea* of the accused person. The difference between the two kinds of cases is a real and substantial one. It is not only supported on general principles but has been pointedly considered by Sir Ashutosh Mukherji in the case of *Amrit Lal Bose*(1) thus:—

"The distinction between a tort and a crime, between a civil suit and a criminal proceeding, may be regarded as of an elementary character, and the same wrongful act sometimes gives rise to a civil as well as to a criminal liability. The purpose of the civil suit is to compel the defendant to compensate the plaintiff for what he has unjustly suffered, while the object of the criminal proceeding is punishment and the cure of what may be called a public wrong. A crime is thus a wrong which the Government deems injurious to the public at large and punishes through a judicial proceeding instituted in its own name or on its behalf".

Further

"The essence of the matter is that the proceeding has been instituted not to indemnify a person to the

(1) (1917) I. L. R. 44 Cal. 1025, 1046, F. B.

1953.

D. SHASTRI v. K. B. SAHAY.

extent of the loss he may have suffered from a wrongful act, but to inflict punishment on the wrong-doer for an act which the Government deems injurious to the public at large."

MISRA, J.

Indeed, this principle has been a well established thing in our system of jurisprudence and may have different implications in respect of acts which may be the subject matter of the criminal prosecution or a civil action at the same time.

The third case mainly relied upon by Mr. R. P. Sinha on behalf of the petitioner is *Munnalal* v. *D. P. Singh*(1), which is a single Judge decision of that High Court where it was held:—

"In disallowing the questions the main consideration, which seems to have weighed with the learned Magistrate, was that having made one imputation the accused was not entitled to make other imputations likely to defame the complainant. He, however, failed to consider what the accused was entitled to establish in his defence. Apart from denying or attempting to justify the alleged imputations, he was entitled to rebut the complainant's case that the imputation was likely to harm his reputation. He could do that by showing that the complainant's reputation was, in view of certain acts of omission or commission already at a low ebb. He was also entitled to show that the complaint was not *bona fide*."

In that case, the complainant was charged by the accused in his correspondence to a newspaper that the complainant had utilised his position as Collector and District Magistrate to acquire certain properties along with other imputations likely to lower the complainant in the estimation of the public relating to

(1) (1950) A. I. R. (All.) 455

the manner in which he discharged his duty as Collector and Magistrate. The defence lawyer in the case wanted to put questions respecting the various occasions in which the complainant's reputation had been questioned by various persons, which questions were disallowed by the learned trying magistrate as in his opinion " it cannot ever be the purpose of the provisions of the Evidence Act governing cross-examination to make the forum of a case of alleged defamation the forum for several more defamatory allegations ". The learned Judge relied upon the cases in I. L. R. 7 Allahabad, 906 and I. L. R. 4 Lahore, 55, and apparently followed the decision in I. L. R. 4 Lahore, 55, in toto not keeping in view the distinction between a civil action and a criminal prosecution. For the reasons stated above for our inability to accept the correctness of the view of the law expressed in I. L. R. 4 Lahore, 55, we are unable to accept this decision as well as laying down the correct proposition. As a matter of fact, the learned Judge, while referring to I. L. R. 7 Allahabad, 906, and extracting the general principle therefrom, did not take into account the real nature of the allegation which was the subject matter of the case in I. L. R. 7 Allahabad, 906, and which we have set out above.

In this connection the learned Counsel for the petitioner has also invited our attention to an English case, which was referred to in I. L. R. 7 Allahabad, 906, namely, *Scott* v. *Sampson*(1) where it was held that evidence of general reputation might be led by the defence, and likewise questions in cross-examination might be put to the plaintiff regarding his general reputation, quoting with approval a passage from Starkie on Evidence which runs as follows:—

" To deny this would be to decide that man of the worst character is entitled to the same measure

(1) (1882) 8 Q. B. D. 491.

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained a knowledge of the party's previous character is not only material but seems to be absolutely essential:"

It is clear that *Scott* v. *Sampson*(1) was a civil action for libel wherein the amount of damages payable to the plaintiff was necessary to be determined by the court before the suit of the plaintiff could be decreed. As a matter of fact, the very use of the words "to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential" shows why it was held to be necessary that the defendant could call evidence to show the kind of reputation the plaintiff possessed. As a matter of fact, Mathew, J. in that very case sounded a warning to keep in view the caution necessary while referring to the argument on behalf of the plaintiff that "if the defendant were right a plaintiff in an action for libel would be placed in a position of great difficulty, for he might not be prepared to meet charges of which he would have had no notice, and an unscrupulous or vindictive defendant might thus make use of the action brought to clear the plaintiff's character to heap calumnies upon him as unfounded as the original libel. The result would be that a court of law would be less dreaded by the worst libellers than by their victims, for few men would face a trial at the risk of having to encounter charges which the malicious ingenuity of the defendant might render it almost impossible to meet". It was, therefore, the consideration of the quantum of damage which really weighed with the court in

(1) (1882) 8 Q. B. D. 491.

allowing evidence of general reputation, keeping out, of course, matters relating to rumours and suspicions about the plaintiff's character or disposition.

Mr. Lalnarain Sinha on behalf of the opposite party has drawn our attention to *The Englishman, Ltd.* v. *Lajpat Rai*(1) wherein also the same principle was re-affirmed and it was held that the general reputation of the plaintiff in respect of libel was relevant because his Lordship concluded: "The injury, therefore, to his reputation by the imputation contained in the defendant's libel is far less than it would have been had he professed to use his influence for the purpose of allaying rather than promoting discontent". On this ground the amount of damage allowed to the plaintiff Lajpat Rai was scaled down.

The learned Counsel for the petitioner has also drawn our attention to Russell on Crime, 10th edition, volume I, at page 896 for the proposition that in English law a libellous statement is regarded as penal for it creates ill blood and provokes the parties to acts of revenge and breaches of the peace or because of its supposed tendency to raise angry passion, provoke revenge, and thus endanger public peace. He contends that since the framers of the Penal Code distinctly ruled out this conception in framing section 499 and made defamation an offence without any reference to its tendency to cause a breach of the peace reputation became under section 500 of the Penal Code in itself a fact in issue, and as such evidence to show the kind of reputation the prosecutor possessed became as a necessary implication relevant in such a proceeding. We are unable to accept this contention as well, as in our opinion, the reasons why the framers of the Code phrased section 499 as they did are not to determine the gravamen of the charge which will have to be ascertained with reference to the ingredients to be proved in terms of the express

(1) (1910) I. L. R. 37 Cal. 760.

1952.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

provision of the section. It is no doubt true that there are certain exceptions with regard to the manner in which a newspaper man in England might be prosecuted for libel and the way in which he can be prosecuted in India, where there is no special procedure prescribed for him unlike section 8 of the Law of Libel Act, 1888, and section 4 of the Newspaper Libel and Registration Act, 1881, but so far as the facts in issue are concerned, there is no difference between the English law and the Indian law on the point. The original distinction between words of libel having a tendency to provoke a breach of the peace is now more a matter of historical interest than of practical importance. As Russell himself puts at page 895: "As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself, it has been held that not only charges of a flagrant nature, reflecting a moral turpitude on the party, are defamatory, but also such as set him in a discreditable, scurrilous, ignominious, or ludicrous light, whether expressed in printing or writing, or by signs or pictures, for these equally create ill blood and provoke the parties to acts of revenge and breaches of the peace". The argument on the underlying policy of criminal law in England and in India regarding libel or defamation has no bearing upon the point for consideration in the present application.

Mr. R. P. Sinha has also drawn our attention to the case of *Firangi Rai* v. *Emperor*(1) in support of his contention that proof of reputation is necessary in a criminal proceeding, and also to show how that is to be done by the party concerned. That was a case under section 110 of the Code of Criminal Procedure and reputation there was the point to be established before the person proceeded against

(1) (1933) A. I. R. (Pat.) 189.

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

might be asked to furnish security to be of good behaviour. Apart from the fact that section 110 of the Code of Criminal Procedure is a preventive section of the law of crime, it is directly connected with section 117 of the Code of Criminal Procedure where sub-section (4) lays down that a man being a habitual offender or being so desperate and dangerous as to render his being at large without security hazardous might be proved by evidence of general repute or otherwise. It is thus clear that the nature of evidence required to be adduced in a proceeding under section 110 of the Code of Criminal Procedure could have no bearing on the question where there is no statutory provision like section 117, sub-section (4) of the Code of Criminal Procedure. The learned Advocate does not contend that there is an identical provision in section 499 of the Penal Code. As a matter of fact, it is remarkable that while section 499 defines the offence, it also provides for the various exceptions which are in the nature of pleas which the accused person can put forward to answer the charge of defamation levelled against him. There is no mention of the fact that he could also plead that the prosecutor's reputation was such as was not or could not be tarnished by the alleged defamatory statement. A reference to the various exceptions provided in that section makes it clear that the words 'conduct' and 'character' occur specifically in some of these exceptions. They are *exceptions* 2, 3, 5, 6 and 9. It is remarkable, however, that wherever the word 'conduct' occurs, there is a cautious limitation provided so as to restrict the scope of enquiry about the prosecutor's character in so far as it is reflected in the particular conduct complained of. We can take the second *Exception* as an illustration of this fact which runs thus:—

"It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of

11 I. L. R.

4

1953. his public functions, or respecting his character, so far as his character appears in that conduct, and no further."

D. SHASTRI v. K. B. SAHAY. MISRA, J.

The other *Exceptions* also are to the same effect. The way in which the legislature has provided these exceptions would also incidentally indicate that it was never intended that the prosecutor's character in general should be treated as a fact in issue in a trial under section 500 of the Penal Code. The inference which we could draw from the way in which section 117 of the Code of Criminal Procedure has been drafted stands against the contention on behalf of the petitioner on this point. In view of this, it is not necessary for us to deal with how reputation has to be proved as considered in A. I. R. 1933 Patna, 189.

Learned Counsel for the petitioner has also placed before us certain passages from Taylor on Evidence, twelfth edition, § 350, for the proposition that 'character' and 'reputation', according to the learned author, could mean more or less the same thing. The passage relied upon runs as follows:—

"The term 'character', as here used, is not, as some able Judges have considered it to be—anonymous with 'disposition', but it simply means 'reputation', or the general credit which a man has obtained in public opinion. A witness, therefore, who is called to speak to character,—unlike a master who is asked for the character of his servant,—cannot give the result of his own personal experience and observation, or express his own opinion, but, in strict law, he must confine himself to evidence of mere general repute. This rule,—which appears to rest rather on authority than on reason,—would probably have been rejected long ago by the Courts, had it not been for two causes. First, the rule, in practice, is seldom strictly enforced, and, next, it has to a certain extent been modified by the Judges. Aware that 'the best character is generally that

which is the least talked about ', they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that ' they never heard anything against the character of the person on whose behalf they have been called ' ."

The point sought to be made out of this is that evidence with regard to reputation on this authority should be allowed to be led, and the petitioner is thus entitled to give evidence or to put questions in cross-examination to the complainant with regard to his reputation which is necessary to be established in terms of section 499 of the Penal Code. It will be necessary to revert to this argument when we deal with this point under various sections of the Evidence Act bearing upon the question of character evidence, because this argument has a twofold objective, one to lead evidence of reputation on account of the phraseology of section 499 of the Penal Code and the other on account of the Evidence Act. With regard to the Penal Code, as considered above, assuming that evidence in certain circumstances of reputation might be given, this does not advance in substance the argument for the petitioner, because unless we are satisfied otherwise that evidence relating to reputation or character is admissible, the passage, which makes character identical with reputation, will have no material bearing. As a matter of fact, what is explained in this section by Taylor is again how and what the witness has to say when he is called to speak to character and nothing more.

The learned Counsel for the petitioner has endeavoured to support his argument with reference to the various sections of the Evidence Act as well. He refers to sections 52 to 55, and to section 55 in particular for his argument that in India the word ' character ' includes both reputation and disposition, unlike the English law where ' disposition ' is not included in the word ' character '. He argues from

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

- this that it is open to a party in India to lead evidence with regard to a man's general disposition and his reputation both of which taken together very much widen the scope of enquiry with regard to a man's character when it becomes the fact in issue. Here the learned Advocate confines his argument to the limit laid down in the section, namely, that evidence might be given only of general reputation and general disposition and not of particular acts by which reputation or disposition was shown. But I am unable to follow this argument of the learned Advocate as section 55 in terms refers to several acts, and if any light has to be thrown upon the point in controversy in the present case from the terms of section 55 of the Evidence Act, it is clear that it is only in civil cases, where the question of amount of damages to be awarded to the plaintiff is concerned, that the character of the plaintiff becomes relevant. As a matter of fact, in none of these four sections is there any reference to the character of a prosecutor as being in any circumstance relevant. This rules out the argument based on section 499 of the Penal Code. Mr. Lalnarain Sinha, who appears for the opposite party, has also referred to these very sections in support of his contention that even if reputation is taken as identical with character, the admissibility of evidence with regard to character must be governed by the provisions of the Evidence Act which are exhaustive of the evidence which is admissible in a case either civil or criminal. He has referred to a number of decisions for the proposition that no evidence beyond what is permissible under the Evidence Act can be led in a case, but he relies particularly upon *Maharaja Sris Chandra Nandy* v. *Rakhalananda Thakur*(1) wherein their Lordships of the Judicial Committee distinctly ruled out any idea that the provisions of the Evidence Act on the

(1) (1940) L. R. 68 Ind. App. 34.

point of admissibility of evidence could be supplemented by any consideration of what might be regarded as matters essential for the ascertainment of truth. As their Lordships put:

"Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt, to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as, on the whole, to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances."

In view of this clear pronouncement upon the point, his contention is that unless it could be shown on behalf of the petitioner that under any of the provisions of the Evidence Act character of the prosecutor has been specifically made relevant, it is not open to the accused person to insist on his right to show that the character of the prosecutor is of a particular brand different from what he claims it to be. It appears to us that this is so. I have already referred to section 55 where in a civil action the character of the plaintiff has been specifically made a fact in issue for the purpose of ascertainment of damages, but no such provision has been made in regard to the character of the prosecutor or complainant in a criminal case. It is not that the legislature had not in mind that in certain kinds of prosecution the accused might think it necessary to assail the character of the prosecutor, and yet it made no provision with regard to the evidence respecting the

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

character of the complainant in a case of defamation. The very absence of this provision also goes against the contention advanced on behalf of the petitioner. This view receives further support from sub-clause (4) of section 155 of the Evidence Act where on a charge of rape it has been specifically provided that the accused might show that the prosecutrix was of generally immoral character. There is no reason why the legislature would not have made a similar provision in respect of the character of the complainant in a case of defamation if it thought that this was necessary to be established or was relevant on a charge under that section. The learned Counsel for the petitioner attempted to meet this contention by submitting that these sections of the Evidence Act were subject to a general provision in the same Act as to what could be proved in the context of a case. The general provision is that every fact in issue can be the subject matter of proof, and since in a prosecution for defamation reputation was a fact in issue, it was open to the accused person to assail that by means of questions in cross-examination or by adducing defence evidence on the point. This argument has been answered in substance in our discussion of the point in connection with the use of the word 'reputation' in section 499 of the Penal Code. We have held above that reputation is not at all a necessary fact to be proved in a charge under that section and hence it does not become a fact in issue. Facts in issue on a charge under that section are the necessary ingredients to be established in order to bring the charge home to the accused person, and those ingredients relate only to the publication of a libellous statement intending to harm, or knowing or having reason to believe that such imputation would harm, the reputation of the person. Mr. Lalnarain Sinha in this connection has argued that the reputation of a person, either as plaintiff or as complainant, has to be taken for granted as an existing fact however

low it might be, and an aspersion cast upon that reputation is bound to make it worse than what it was before. However black a man's character may be, it can certainly be tarred and made to appear much blacker than what it was before, and, therefore, it could never be the fact in issue in a criminal prosecution, and only for a limited purpose in a civil suit for damages for defamation. He refers to Corpus Juris, volume 37, § 428 where the following passage occurs:—

"Since plaintiff's bad reputation is no justification for the publication of a defamatory charge against him, the general bad reputation of plaintiff is not as a general rule admissible under a plea of justification."

He contends, therefore, that in a criminal case it is not within the scope of enquiry before the magistrate to enter into that question at all.

Halsbury in his Laws of England, Hailsham Edition, Volume XX at page 507 enunciates the proposition as follows:—

"In actions of libel and in actions of slander for words which are actionable *per se* it is not necessary for the plaintiff to allege in his statement of claim that he has suffered special damage. If, however, in such actions he wishes to recover special damage, he must allege and prove it. If he fails to prove special damage, he still has the right to resort to and recover general damages. For the law presumes that the publication of a libel or a slander which is actionable *per se* has of itself a natural and necessary tendency to injure the plaintiff."

Again, at page 510:—

"The fact, however, that a plaintiff is shown to have a bad reputation which cannot be made worse is no answer. A plaintiff proving a statement which is *prima facie* defamatory and is not answered by justification, privilege, or fair comment is always entitled to nominal damages."

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

These observations which apply to civil action will apply to a criminal prosecution with even greater force. In *Ramnarain* v. *King-Emperor*(1) which was a prosecution under section 500 of the Penal Code, it was held that a person committed defamation within the meaning of section 499 of the Penal Code who published any imputation concerning any person intending to harm the reputation of that person whether harm was actually caused or not.

The learned Counsel for the petitioner has advanced another line of argument in support of his case. He says that even if it be held that the petitioner might not cross-examine the complainant in respect of his reputation, he might still cross-examine him or lead evidence to the same effect because he had a right to show circumstances mitigating the gravity of the offence which would weigh with a court of law in determining the degree of punishment which it would think proper to mete out to the accused person. His argument is that in this view the position in regard to a civil libel or a criminal libel boils down to the same point. Just as in a civil action questions with regard to the plaintiff's reputation would be permissible on the ground of quantum of damages, so also in a criminal case evidence to that effect should be permissible to enable the accused person to bring on record circumstances of a mitigating character. It is difficult for me to accept this argument on analogy, because as already held, in a civil suit the plaintiff comes to court to be reimbursed in damages in terms of money for what he has lost, and hence he has got to prove what actually is the quantity of his loss. It is not so in a criminal case. It is true that the accused person can, by his conduct in certain circumstances, invoke the leniency of the court by apology or in some other manner, but he cannot do it by insisting upon showing up the character of the

(1) (1924) A. I. R. (All.) 566.

complainant in general. It might start a roving enquiry about the prosecutor's character bringing on the record matters which are not capable of affirmative proof, or in any case making the trial an enormously lengthy affair. Leaving out of consideration this aspect of the matter, we have got to answer this argument on the question of mitigation in reference to section 499 of the Penal Code itself. The legislature therein has made detailed provisions as stated before as to what are the things and the circumstances which an accused person may prove even after he has done something which comes within the definition of defamation, in order to escape liability for the same. Since there is no provision for mitigating circumstances in that section, it is not open to an accused person to claim as a matter of right, against the provisions with regard to character in the Evidence Act, to introduce matters regarding reputation.

It may be that under the first exception to section 499 of the Penal Code in a case of defamation imputing anything which is true concerning any person, if it be for the public good that the imputation should be published, the truth of the matter alleged may be established, and as has been held in a number of decisions, this can be done either by putting questions in cross-examination of the complainant or by leading evidence on behalf of the defence. In some cases, according to the nature of the allegation made by an accused person, it may well be that he gets the privilege of putting questions to the prosecutor or his witnesses which are very near damaging the reputation of the person concerned. It cannot be denied that the burden of proving the exception lies upon the accused person, and on account of that responsibility he may feel justified, in certain circumstances, in putting questions or leading evidence which may not be warranted under any general right of showing up the reputation of the prosecutor. That, however,

1953.

D. SHASTRI v. K. B. SAHAY.

MISRA, J.

is an aspect of the matter with which we are not concerned in the present case. Here the allegation, as stated above, refers to a particular incident only, which, if found on a consideration of the evidence by the learned trying magistrate to refer to the complainant, will alone be the subject matter of the charge. If the petitioner pleads or elects to base his case on the truth of the allegation and also that the publication was in the public interest, or it comes under any other exception, he will certainly be entitled to put any questions relating to the incident itself. There is nothing further in the alleged correspondence in question published in the petitioner's newspaper, dated the 8th of July, 1951, which can be said to go beyond Zahur Ali's release on bail without filing even a vakalatnama and the transfer of Sri Gopi Krishna Sahay, the Sub-Inspector of Police of the anti-smuggling force at Ranchi. Hence even under *Exception* 1, questions can only be directed towards the end of proving the truth of whatever has transpired in the arrest, release and transfer, etc., of the persons concerned in that case. In this view, it is not necessary for us to express any opinion as to how the scope of cross-examination or admissibility of evidence might be affected by different kinds of allegations in different contexts. The case of *Hobbs* v. *Tinling and Company, Limited*, and *Hobbs* v. *Nottingham Journal, Limited*(1) decided by the Court of Appeal throws a good deal of light on the principles and points involved in the discussion set out above. It will be useful to make a short excerpt from this elaborate judgment as relevant for the present purpose. Greer, L. J. at page 46 of the Report held:—

"I think also they ought to have been told that in estimating the amount of the damages they were entitled to consider, not merely the character of the

(1) (1929) 2 K. B. D. 1.

plaintiff, but also the conduct of the defendants; that a man does not lose his right to damages because his character is not free from reproach, that a man with a damaged character is entitled to have his damaged character protected, and if newspapers for their own purposes falsely allege that he has been guilty of crimes and misconduct the jury might well consider that even a man of bad character ought not to have his character made out to be blacker than the proved facts warrant."

Learned Counsel for the opposite party has further invited us not only to give a clear pronouncement on the point of law involved in the case, but to go further and to decide which of the various questions which were disallowed should not have been disallowed. In my opinion, it will not be fair for us at this stage to enter into the particulars of the trial. The learned magistrate will, of course, keep in view the principle we have laid down in this case, and as for other questions, he will be guided by the general provisions of the Evidence Act as to how far questions pertaining to the character of a witness may be put so as to shake his credibility as a witness under section 146 of the Evidence Act and how far a witness requires protection of the court in terms of section 152 or any other section in Chapter X of the Act. It is neither proper nor practicable for us to fetter the discretion of the learned magistrate in the matter.

The contentions specifically raised on behalf of the petitioner having failed, the application is dismissed. The learned magistrate will now proceed on with the trial in its due course.

REUBEN, C. J.—I agree.

Mr. R. P. Sinha argues that one element of defamation is intention to harm reputation or knowledge that reputation will be harmed, and therefore evidence is admissible that the complainant has no

1953.

D. SHASTRI v. K. B. SAHAY.

REUBEN, C. J.

reputation. This is a plausible argument and finds some support in the cases cited by him. The fallacy in the argument is what the defence want to prove is not that the complainant has no reputation, but that the complainant's reputation is so low that it cannot be injured by the imputation. In other words the point sought to be put in issue is not the existence of a reputation but the level at which the reputation stands. It is this level of which Petheram, C.J., was thinking when in *Laidman* v. *Hearsey*(1) he said:

> " The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is.....".

So also in *Devi Dyal* v. *The Crown*(2) Martineau, J. thought the question " what reputation the complainant had " to be relevant and Bhargava, J. in *Munnalal* v. *D. P. Singh*(3) expressed the view that the accused could adduce evidence to prove that " the complainant's reputation was, in view of certain acts of omission or commission, already at a low ebb ". The fact is that every one has a reputation and the only question that can arise regarding it is whether it is high or low. This question, with all respect to their Lordships, is irrelevant in a prosecution for defamation. The law does not contemplate that any person's reputation is so low that it cannot fall lower by the publication of fresh defamatory matter relating to him. Also, it is unthinkable that the law can intend that defamatory matter about a person of high reputation can be published without incurring liability for prosecution under section 500 of the Penal Code merely because his reputation stands so

(1) (1885) I. L. R. 7 All. 906.
(2) (1922) I. L. R. 4 Lah. 55.
(3) (1950) A. I. R. (All.) 455.

high that the imputation is not likely to be believed. Even in civil libel the absence of *damnum* is no defence and the plaintiff may recover general damages without proof of special damage. Still less can it be a defence in a criminal case that the reputation of the complainant is such that it cannot be injured by the imputation. The view is supported by the fact that the truth of the imputation is not by itself a defence, *vide* the first exception to section 499. It has been pointed out by my learned Brother that while the Civil Court is concerned to compensate the plaintiff, the criminal court acts to punish a crime which it deems to be injurious to the public at large. In this view, what Greer, L. J. said about the right of a man with a damaged reputation to protection from the Civil Court is even more true of the Criminal Court.

1953.

D. SHASTRI v. K. B. SAHAY.

REUBEN, C. J.

Rule discharged.

S. H.

REVISIONAL CRIMINAL.

Before Narayan and Ahmad, JJ.

R. N. SARKAR

v.

A. N. SARKAR.*

1952-53.

October, 22, 27, 28, 29. *February*, 19.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 181(2), *applicability—Penal Code*, 1860 (*Act XLV of* 1860), *section* 405, *significance and scope of—jurisdiction to try a case of criminal breach of trust—proper venue—law on the subject, summarised—case-law, reviewed.*

Section 181(2), Code of Criminal Procedure, 1898, is the section which is applicable to a case of criminal misappropriation or criminal breach of trust, and according to

* Criminal Revision no. 1255 of 1951, against an order of Mr. S. C. Gupta, Judicial Magistrate, Patna, dated the 8th September, 1951.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

this section the offence of criminal misappropriation or criminal breach of trust may be enquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused persons, or the offence was committed.

Section 405 of the Penal Code, 1860, which defines criminal breach of trust, falls into two parts. The first part will apply where it is known that the accused has dishonestly misappropriated or converted to his own use the entrusted property at a particular place, and the jurisdction to try the accused will be at that place.

Where, however, it cannot be alleged that the misappropriation was actually and definitely committed at any particular place, there the case comes under the second part of section 405, namely dishonestly disposing of the property in violation of any direction of law or of any legal contract; and in such a case if the legal contract required that the accused should remit or deliver or otherwise dispose of the property at a particular place, then the offence arising out of the failure to do so may be tried at such place.

Where, the complainant is not able to know where the misappropriation actually occurred, jurisdiction certianly lies at the place where the property had to be delivered.

Mohru Lal v. *Emperor*(1), relied on.

Jivandas Savchand, In re-(2) distinguished.

Gunananda Dhone v. *Lala Santi Prakash Nandy*(3) and *Daityari Tripathy* v. *Subodh Chandra Chowdhury*(4), not followed.

Application in revision by the accused person.

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

(1) (1935) I. L. R. 58 All. 644.
(2) (1930) A. I. R. (Bom.) 490, F. B.
(3) (1925) A. I. R. (Cal.) 613.
(4) (1942) A. I. R. (Cal.) 575.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

The case in the first instance came to be heard by Das, J., sitting single and he passed the following.

Order of Reference.

" This is an application for quashing certain proceedings pending against the petitioners in which charges under sections 420 and 409, Penal Code, have been framed against them. The two points which have been urged in support of this petition are (1) that the facts alleged or proved so far do not disclose any offence under section 420 or section 409, Penal Code; and (2) that in any view of the matter, the entrustment having taken place in Calcutta, the Patna court has no jurisdiction to try the petitioners. As I propose to direct that this application should be placed before a Division Bench for hearing, I do not wish to express any opinion on the two points urged, except to indicate the reasons why I think that this application should be placed before a Divison Bench for hearing. On the second point which relates to the question of the place of trial, several decisions have been placed before me which are not all reconcilable. In *Paul De Flonder* v. *Emperor*(1), it was laid down that in a case of criminal breach of trust by a servant whose duty it was to render account at one place, and there was no evidence to show where the alleged misappropriation was committed other than the fact of non-accounting, the venue might be laid at the place where the accused failed to account. This view was accepted as correct in other decisions, such as in *Mohru Lal* v. *Emperor*(2). A contrary view was however, expressed in *Daityari Tripathy* v. *Subodh Chandra Chowdhury*(3), where it was held that an offence of criminal breach of trust was not triable at a place where neither the entrustment nor any positive act of conversion of the monies entrusted took place, because an offence of criminal breach of trust always consisted in an act and not in an omission; it was pointed out that neither failure to account nor breach of contract, however dishonest, was, actually and in itself the offence which section 405, Penal Code, defined, but merely evidence of that offence; hence, section 181(2), Code of Criminal Procedure, did not confer jurisdiction on a court at a place where the accussed had failed to account or to dispose of property as per contract. A similar view was expressed in the Full Bench decision in *Jivandas Savchand In re*(4) and in *Mukhi Tiwthdas* v. *Jathanand Matvalomal*(5).

The only decision of this court which was brought to my notice is the Single Judge decision in *Abdul Karim* v. *King Emperor*(6) which merely held that section 179, Code of Criminal Procedure, did not apply on the facts of that case. I think that the point is of sufficient

(1) (1931) I. L. R. 59 Cal. 92.
(2) (1935) I. L. R. 58 All. 644.
(3) (1942) A. I. R. (Cal.) 575.
(4) (1930) A. I. R. (Bom.) 490. F. B.
(5) (1937) A. I. R. (Sind) 68, F. B.
(6) (1929) 10 Pat. L. T. 161.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

importance, and it is desirable to have an authoritative Division Bench decision on the point, particularly in view of the divergence of opinion expressed in the decisions, referred to above.

For these reasons, I direct that the application be placed before a Division Bench for hearing ".

On this reference.

Bhabananda Mukherji, for the petitioners.

G. C. Banerji, for the opposite-party.

AHMAD, J.—This is an application for quashing a proceeding pending in the court of Mr. S. C. Gupta, Magistrate, 1st class, Patna, on the complaint of the opposite party against the petitioners on a charge for having committed the offence of cheating punishable under section 420 of the Penal Code and the offence of criminal breach of trust punishable under section 409 of the Penal Code.

The prosecution case briefly stated is that the petitioners are the proprietors of Sarkar and Co. and this Sarkar and Co. are the managing agents of Messrs. Ramkrishna Investment, Ltd., having their head office at 7, Swallow Lane, Calcutta. Messrs. Ramkrishna Investment, Ltd., do the business of brokers in shares and other things. The complainant is the first cousin of Mr. U. N. Sinha, *alias* Barun Babu, Barrister-at-Law, and resides at Patna. Mr. Sinha had some share scrips which he was anxious to dispose of. For the sale of those share scrips there had been some correspondence between the complainant and the petitioners. Ultimately on 13th June, 1950, the complainant received a letter from the accused persons wherein, it is said, they agreed to sell those share scrips on the terms suggested by the complainant and to send the sale proceeds to the complainant at Patna within four or five days of the receipt of the scrips. In that letter it was also mentioned that the scrips share should be sent immediately to them. Accordingly those share scrips

were sent by the complainant from Patna to the company of the petitioners at Calcutta on 16th June, 1950, which the petitioners received on 19th June, 1950. The shares covered by the scrips were—(1) 500 Shri Durga Preference; (2) 100 Shri Durga ordinary; (3) 50 Bangasri Preference and (4) 38 Bangasri ordinary. Contrary to the terms agreed upon, the petitioners did not send the money of those shares for a long time and as a result thereof the complainant wrote a strong letter to the petitioners drawing their attention to the undertaking given. In reply at first certain excuses were given for not selling those shares. It was said that they were unpopular and not marketable and that the share market had suddenly fallen. Ultimately on 19th July, 1950, the petitioners sent a letter informing the complainant that 50 Bangasri preference shares had been sold and that negotiation for the early sale of the remaining shares was in progress but even that letter also was completely silent about the sale proceeds of those shares which were said to have been sold. This was near about 19th July, 1950. In reply to that letter the complainant, however, on his own initiative wrote to the petitioners not to send the sale money of the shares by instalments and further directed the petitioners to try the sale of the remaining shares for two weeks more and in case they were not sold by then, to send the purchase money of the shares sold along with the shares unsold. The two weeks expired but even then neither the money nor the shares unsold were sent back to the complainant, and, therefore, on 7th September, 1950, a registered notice was sent to the petitioners to comply with the direction immediately. Thereafter on 9th September, 1950, the complainant received a letter intimating that 38 Bangasri ordinary shares were also sold but this time as well the money received from the sale of even those shares were not sent. Instead they in the letter tendered some excuses for not sending that money.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

The excuse, in substance, was that the money received from the sale of the said shares had been spent by the petitioners. They, however, returned the 100 ordinary shares of Shri Durga to the complainant at Patna. Suspecting some foul game on the failure to receive the money, the complainant filed the complaint giving rise to this application on 15th September, 1950, at Patna in the court of the Subdivisional Officer. It may be stated here that some time after the filing of the complaint Mr. U. N. Sinha succeeded in obtaining the remaining 500 Shri Durga preference shares directly from Shri Durga Co., to whom they had been sent by the petitioners most probably for the compliance of necessary formalities, which had to be complied as a condition precedent to their sale.

At the outset I must say that this is a very unfortunate case especially because all the parties involved in it appear to be members of the same family. The petitioner R. N. Sarkar is a first paternal cousin of the complainant and the petitioner J. Sarkar is the wife's sister's husband of petitioner no. 1. Mr. S. C. Gupta before whom the case is at present pending for trial has so far examined only one witness, namely, the complainant, and on his evidence he has framed the following charges against the petitioners:—

"First.—That you, between the 13th day of June 1950 and the 19th day of June 1950 at Patna cheated Sri A. N. Sirkar—the complainant—by dishonestly or fraudulently inducing him to deliver properties to wit (1) 50 Preference shares of Bangasri, Ltd., (2) 38 ordinary shares of Bangasri, Ltd., (3) 500 Preference shares of Sri Durga (4) 100 ordinary shares of Sri Durga (sic) and thereby committed an offence punishable under section 420 of the Penal Code, and within my cognizance.

Secondly.—That you, on between the 16th day of June, 1950 and the 9th day of September 1950 being a broker was in such capacity entrusted for sale, at Patna with property to wit. 50 Preference shares of Sri Bangasri, Ltd., committed criminal breach of trust at *places unknown* of the sale proceeds of the aforesaid shares amounting approximately to Rs. 400 and thereby committed an offence punishable under section 409 of the Penal Code, and within my cognizance.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

Thirdly.—That you, on or about the same period as the 2nd charge and at the same place being a broker was in such capacity entrusted for sale at Patna with property to wit 38 ordinary shares of Bangasri, Ltd., committed criminal breach of trust at *places unknown* of the shares aforesaid and thereby committed an offence punishable under section 409 of the Penal Code, and within my cognizance or alternatively you on or about the same period and at the same place being a broker was in such capacity entrusted for sale at Patna with a property to wit 38 ordinary shares of Bangasri, Ltd., committed criminal breach of trust at places unknown of the sale proceeds of those shares amounting approximately to Rs. 275-8-0 and thereby committed an offence punishable under sertion 409, P. C. and within my cognizance.

And I hereby direct that you be tried on the said charge."

The petitioner had before the framing of the charge raised the preliminary objection that there was no evidence against the accused R. N. Sarkar and that the court at Patna had no jurisdiction to try the case. On this point the learned Magistrate having heard the parties held :

" All these conclusively make it clear that this court has got clear jurisdiction to try this case. Moreover in this particular case it is not known as to where the money was misappropriated."

The present application is directed against this interlocutory order for quashing the charges framed at the trial. It originally came up for hearing before Das, J., sitting singly. From the order of Das, J., referring the case to the Division Bench it appears that in the course of hearing before him reliance was placed on authorities on the point of jurisdiction which were conflicting and the only decision of this Court that was referred to before him was the Single Judge decision reported in 10 P. L. T. 161. For that reason Das, J., decided to refer the case to a Division Bench observing :

" I think that the point is of sufficient importance, and it is desirable to have an authoritative Division Bench decision on the point, particularly in view of the divergence of opinion expressed in the decisions."

The application is, therefore, now before this Bench for disposal. It has been pressed before us on

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

two grounds, firstly, that the facts alleged or proved do not disclose any offence under section 420 or section 409 of the Penal Code; and, secondly, that in any view of the matter, the entrustment having taken place in Calcutta, the Patna Court has no jurisdiction to try the petitioners on that charge. I propose to take up this second point of jurisdiction first.

The subject of jurisdiction of the criminal courts in inquiries and trials is dealt with in Chapter XV of the Code of Criminal Procedure. In this particular case, however, the relevant sections of that Chapter which deserve consideration are 177, 179 and 181.

Section 177 is the general section and it reads:

"Every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it was committed."

Section 179 deals with those cases where the offence charged includes in itself as its ingredient the consequence arising out of it. It reads:

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

Section 181 is a special section and it deals with cases of special characters. One of them is misappropriation or criminal breach of trust. That is provided in sub-section (2) of that section. That sub-section reads:

"(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

This sub-section of section 181, as it appears to me on the bare reading of its language, is the only relevant provision regulating the venue of trial in the

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

case of misappropriation or criminal breach of trust. The concluding clause of this special sub-section includes in it the general provision stipulated in section 177. Some time back there was a divergence of opinion on the point as to whether a case of misappropriation or criminal breach of trust was as well covered by the provisions of section 179 and so triable at a place where loss arising out of misappropriation or criminal breach of trust was incurred. By now this controversy, however, has been set at rest and it is now a settled law that section 179 can only apply where the act complained of and the consequences arising out of it together constitute an offence and that in a case of criminal misappropriation or criminal breach of trust, the loss though a normal consequence of it is not its necessary ingredient and therefore the venue of trial for that offence is to be determined according to the provisions of sub-section (2) of section 181 and not that of section 179. Mr. G. C. Banerji, learned Counsel appearing for the complainant, was very fair in his contentions and conceded this point at the very outset before us. In this connection I may quote here the following important passage from the judgment of the learned Chief Justice Beaumont in the case of *Jivandas Savchand*(1):—

"Now I must confess that but for the fact that many eminent Judges have taken a different view I should have thought that the language of that section was perfectly plain. What it provides is that when a person is accused of the commission of any offence by reason of two things, by reason first of anything which has been done, and, secondly, of any consequence which has ensued, then jurisdiction is conferred on the Court where the act has been done or the consequence has ensued. But the offence must be charged by

(1) (1950) I. L. R. 55 Bom. 59, F. B.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

reason of those two things, the act done and the consequence which ensued. If that is so the consequence is necessarily part of the offence. It does not matter whether you say, as some of the Courts have said, that the consequence must be an integral part of the offence or whether you say, as others of the Courts have said, that it is a necessary ingredient of the offence, the point is that the consequence must be part of the offence charged. The section does not refer to an offence charged by reason of an act done, from which act any consequence has ensued."

And then the learned Chief Justice held:

"This Court should come into line with the High Courts of Calcutta and Madras, and hold that section 179 has no application to cases of criminal breach of trust."

Now, therefore, accepting the principle that the venue of trial in the case of criminal misappropriation or criminal breach of trust is to be determined according to the provisions of sub-clause (2) of section 181 of the Code of Criminal Procedure, we have to find as to which place shall be the venue of trial in the present case or as to whether Patna in the circumstances of the present case can at all be chosen as the venue for trial for the offences alleged. Mr. Bhabananda Mukherji appearing for the petitioners has contended that even if any offence has been committed, as stated above, by the petitioners, it was committed at Calcutta and in no case it can be said to have been committed at Patna. This submission was based on the footing that the place where the direction of law or the contract touching the discharge of the trust is found to have been violated cannot in any circumstance be said to be the place where the offence itself is committed, and, therefore, it cannot be the forum of the trial of that offence. Mr. G. C. Banerji, on the other hand, appearing for the opposite party contended that in cases where there is no evidence to prove as to where

dishonest misappropriation, conversion, user or disposal has taken place, the place where the direction of law or the contract touching the discharge of the trust is violated can be taken in a particular set of circumstances to be the place where the offence is committed and also the forum where it can be tried.

The sub-section (2) of section 181 of the Code of Criminal Procedure suggests three places, firstly the place where the property, which is the subject-matter of offence, was received by the accused persons; secondly, the place where the property, which is the subject-matter of offence, was retained by the accused persons; and thirdly the place where the offence has been committed.

In this case the subject-matter of misappropriation, if any, is money realised for the shares and not the shares themselves. The action of the petitioners in selling the shares was perfectly consistent with and in accordance to the direction given to them by the complainant. There was nothing wrong in that act. The misappropriation or criminal breach of trust, in these circumstances, can be, if at all, only in respect of the money realised from the sale of the shares. The allegations, however, so far made in this case in support of the charge of misappropriation or criminal bearch of trust with regard to that money realised from the sale of the shares made by the complainant either in the petition of complaint or in the evidence of the complainant in court do not disclose as to where that money was in fact realised, received or retained. On the other hand, what the complainant has definitely stated in his evidence in court is that:

"I do not know and I have no idea as to who purchased the above two scrips of Bangashri nor do I know to which place the purchasers belong nor I know where they paid the purchase money to that accused persons nor do I know as to where the accused persons kept the purchase money nor do I know as to where the accused persons converted the purchase money to their own use."

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

Now whatever may be the ultimate findings on facts, this application at present on the point of jurisdiction has to be disposed of on the assumption that the facts alleged by the complainant in the petition of complaint and in his evidence are correct. In that view of the matter it is to be accepted at present, in the light of the statement referred to above, that there is no evidence in this case as to the place where the money, said to have been misappropriated or embezzled, was realised, received or retained by the petitioners. In the light of the allegations so far made, therefore, the venue of trial in the present case can be only, if any, the last alternative place as laid down in the concluding part of sub-clause (2) of section 181 of the Code of Criminal Procedure, that is, the place where the offence alleged may be found to have been committed. So in order to find out the venue of trial for the offence what we have to find is as to where *prima facie* the offence at present can be said to have been committed. That enquiry is of course subject to the assumption that an offence of misappropriation or embezzlement has been committed. Unless and until that premise is there, the question regarding the venue of trial does not arise. Cases, however, do arise where there is no direct evidence available either to prove the offence itself or the place of its commission. In such cases the proof of the commission of the offence as well as that of its place of commission depends only on circumstantial evidence.

Coming back to the question as to where, in the present case, the offence can be said to have been committed, we find that the offence as defined under section 405 of the Penal Code is as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts

to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

The offence, therefore, in the light of this definition, lies in either of the three acts—firstly in the act of dishonest misappropriation or conversion of the property by the person entrusted to his own use; secondly in the act of dishonest user or disposal of the property by the person entrusted in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust: and lastly in the act of the person entrusted wilfully suffering any other person to dishonestly misappropriate or convert to his own use that property or to dishonestly use or to dispose of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust. In other words the offence according to the first part of the section lies in doing a positive act, that is, the act of misappropriation or conversion to his own use by the accused of the property entrusted to him. This part, therefore, may be called the affirmative part. The offence according to the second part of the section likewise lies in doing a positive act, that is, the act of user or disposal of the property by the person entrusted but with a condition that that positive act is in violation of what is directed by law or any legal contract, express or implied, concerning the trust. In this case, therefore, the positive act has to be accompanied with a negative counterpart, though it is not so in the offence as defined in the first part of the section. For this reason this part of the definition may be called the negative part. The negative element in the second part has been, in my

AHMAD, J.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

opinion, introduced to facilitate the proving of the offence in cases where the direct evidence is not available to prove the positive acts contemplated by the section. In cases where the direct evidence in proof of the direct acts constituting the offence is available, the evidence in support of the negative part only supplements the direct evidence and confirms the conclusion based on that; but in cases where direct evidence in support of the positive acts is not available, the evidence in suport of the negative counterpart may play an important role by itself. In many cases, however, the direct evidence in support of the act of dishonest user or disposal of property in violation of the direction of law or the legal contract concerning the trust are not available and what comes to the surface is that the direction of law or the contract touching the discharge of the trust has been violated. In such cases the violation of the direction of law or the contract concerning the trust in the matter of user or disposal of the property by the person entrusted May, I think, in a certain set of circumstances be sufficient to prove the charge for the offence under the second clause of the section. And then the place of commission of the offence under those circumstances may, in my opinion, be reasonably presumed to be the place where the violation is made. The offence according to the third part lies in being wilfully a party to the commission of the positive act contemplated by the first clause of the section or in being wilfully in collusion with other or others in the violation of the direction of law or the contract concerning the trust. In this sense the liability arising out of the third part of the section may be said to be constructive liability. I have put the different clauses of the section in these forms in order to understand scientifically and a bit more clearly as to which particular act or acts singly or collectively along with the necessary ingredient of *mens rea* constitutes or constitute the offence and when the aforesaid act or acts can be said to have been completely executed in a

particular set of circumstances. If, therefore, the positive acts which constitute the offence are known and evidence proving those acts are available, it can be easily said that in those cases the offence is committed at a place where the positive act is done subject no doubt to the condition that the essential ingredient of criminal intent is present along with that positive act. In those cases reliance need not be had on the implication arising out of the violation of the direction of law or legal contract touching the discharge of trust, in support of the charge independent of the direct evidence for committing the offence of misappropriation or breach of trust. But in cases where the direct evidence in support of the positive acts constituting the offence are not available, and the only factor known is that the direction of the law or the contract touching the discharge of trust has been violated. In such cases if the circumstances in support of the criminal intent are present, then the violation of the direction of law or contract touching the discharge of trust may be sufficient to prove the offence and in that case place of violation may be *prima facie* presumed to have been the place where that violation is made. I need not enter here into the discussion of the constructive part of the offence as the present case is not covered by that part.

Now let us apply the rule just stated to a case wherein the beneficiary is within one jurisdiction and the accused or the man trusted with the money is in another jurisdiction and the accused is to discharge the trust according to the direction of law or contract concerning the trust by payment of the trust money at the place where the beneficiary lives, as in the present case, but where payment is not made. The non-payment of the money by itself may be due to some *bona fide* reasons without any criminal act or it may be the result of some dishonest misappropriation, conversion, user or disposal as contemplated by

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

section 405 of the Penal Code. The former will not constitute the offence but certainly the latter will. When will non-payment amount to the offence and when will it not shall always depend on the facts of each case. We are here concerned with those non-payments which in the light of the facts available can be said to be the result of dishonest misappropriation, conversion, user or disposal as contemplated by section 405 of the Penal Code.

This latter class of cases may again be sub-classified into two groups, the first covering those cases where the evidence proving the place of commission of the positive acts of misappropriation, conversion, user or disposal are available and the second covering those cases where there is no evidence to prove directly as to where the positive acts of misappropriation, conversion, user or disposal has been committed but what is only known is that the direction of law prescribing the mode in which such trust is to be discharged or of the legal contract, express or implied, touching the discharge of trust has been violated as contemplated by the negative part of the section. In my opinion in the first group of cases on the principle stated above the offence will be said to have been committed at the place where the positive acts are done and, in the second group of cases, at the place where the direction of law or contract is violated.

In the course of discussion on this point we have been taken along a series of decisions by the different High Courts in this country. I now propose to take up the decisions of each High Court separately, and to test the principle stated above in the light of the decisions arrived at in them. First I deal with the decisions of the Calcutta High Court. The case of *Gunananda Dhone* v. *Lala Santi Prakash Nandi*(1) is a Bench decision. Judgment in that case was

(1) (1925) I. L. R. (Cal.) 613.

delivered by Mukerji, J. Their Lordships observed therein:

"My conclusion therefore is that where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate, may enquire into and try the offence under the provisions of section 181, sub-section (2), Criminal Procedure Code."

In this case of *Gurunanda Dhone*(1) the property was to be sold in Calcutta and the final adjustment of account had to be done at Burdwan. The allegation made by the prosecution was that the final adjustment had not been made at Burdwan. There was, however, no evidence to the effect that the money had in fact been dishonestly misappropriated or converted in Calcutta. In the light of those facts the conclusion arrived by the learned Judge, if I may say so with all respect to him, was correct. There is, however, a passage in the judgment to the effect:

"So in the case of an act of commission, such as embezzlement, when there is no evidence of embezzlement except non-accounting, the venue may be laid in the place where the non-accounting occurred; but this does not apply where there is distinct evidence of misappropriation elsewhere, for then the offence is triable in either place: *R.* v. *Davidson* and *Gordon*(2) *per* Alderson B. at page 162."

In the concluding portion of this observation the learned Judge, I think, has put the proposition in too wide a form. In my opinion, when there is an

(1) (1925) A. I. R. (Cal.) 613.
(2) (1885) 7 Cox. C. C. 159.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

evidence of positive acts of dishonest misappropriation or conversion, user or disposal as contemplated by the first or second part of the section and also an evidence of the violation of the direction of law or contract concerning the trust as contemplated by the second part of the section then the offence will be said to have been committed at the place where the positive acts are done and not at either of those places. In such a case the *factum* of violation of the direction of law or contract only supplements the conclusion arising out of the facts proving the positive acts and does not stand by itself. The soundness of this decision was doubted by Rankin C. J., in the case of *G. N. Pascal* v. *Raj Kishore Mathur*(1). But in that case it was doubted not on the ground that the place where the trust has to be discharged can never be venue of trial of that offence even if the direction of law or contract concerning the trust is violated there but on the ground, as stated by the learned Chief Justice, that " the fact that a man fails to account in Calcutta does not seem to me to be the same thing as that he dishonestly uses the money in Calcutta or that he dishonestly disposed of the money in Calcutta ". The facts of *Pascal's case*(1) were that the head office was in Calcutta and the accused was in charge of the branch office at Patna and it was alleged that though he had realised amounts from different hirers of motor cars at Patna he never deposited those amounts to the credit of the firm at Calcutta as was his duty. In those circumstances the learned Chief Justice observed :

" Decisions have been cited to us which show that, in a case of this character, the offence is held to be triable at the place where the person entrusted ought to have accounted and that has been justified under the concluding words of sub-section (2) of section

(1) (1930) 35 Cal. W. N. 320.

181, Cr. P. C. At one time, apparently, this was justified on the footing that the loss had happened at the place of accounting and that the matter came under section 179, Cr. P. C. I agree in the view that has now been arrived at on the decisions that that view is untenable."

It is apparent from the aforesaid observations that the learned Chief Justice considered the *Gunananda's case*(1) only from the point of loss as contemplated by section 179 of the Code of Criminal Procedure, and not from the point of view of the implication arising out of the second or negative part of section 405, P. C. In fact the decision given in the *Pascal's case*(2) is completely silent on the point raised in this case. In the concluding part of the judgment, however, he observed:

"However in the present case, the position is that there is no certainty as to the facts. We do not know whether it may not yet be shown that this money was dishonestly disposed of in Calcutta or dishonestly misappropriated in Calcutta; and it is quite impossible that, upon a nebulous state of facts such as this case presents, we should interfere with the prosecution. If the petitioner is so advised at the end of the day, should he be convicted, he will be entitled still to come to this Court upon a proper basis and it may be possible then for him to repeat his present argument; but it is not possible in this case that we should now interfere and make the rule absolute."

The law as laid down by Mukerji, J. in *Gunananda's case*(1) came, however, directly under discussion in the case of *Paul De Flonder* v. *Emperor*(3). Therein Lort William, J. observed:

(1) (1925) A. I. R. (Cal.) 613.
(2) (1930) 35 Cal. W. N. 320.
(3) (1931) I. L. R. 59 Cal. 92.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

"Mukerji, J. quotes this passage in his judgment, but adds the following phrase 'for then the offence is triable in either place' and seems to be under the impression that these words were uttered by Baron Alderson, because he quotes them as such. But these words are not in the report and are the direct antithesis of what Baron Alderson said."

What Baron Alderson said in 1855 in *Reg.* v. *Davis.n*(1) was:

"Where there is no evidence of fraudulent embezzlement, except the non-accounting, the venue may be laid in the place where the non-accounting occurred, because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere."

Relying on this view of the law, the learned Judge held:—

"There is, therfore, no authority either in the English or in the Indian decisions, or in the language of the Code itself for the proposition suggested by Mukerji, J., and I am unable to agree with his decision. Nor do I agree with his suggestion that the provision that the accused may be tried where the offence is committed is superfluous. If omitted, the section would have been read as meaning that the places where the property was received or retained were the only venue. If there is evidence apart from the afct of non-accounting to show where the misappropriation was committed, the venue must be laid either in that place or in the place where the property was received or retained. If there is no evidence to show where the misappropriation was committed, other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account,

(1) (1885) 7 Cox, C. C. 158.

because that is where the offence was committed within the meaning of section 181 (2): *Reg.* v. *Davison*(1).

In the particular case before the learned Judge, however, there was clear evidence that the money had been received at Srinagar and also that it had been misappropriated at Srinagar. Therefore, in view of those facts it was held there that the Magistrate had no jurisdiction to try the accused at Calcutta. This case, if I may say so with all respect to the learned Judges, enunciated the law on a very sound basis.

Then came the decision in the case of *Niwasilal Modi* v. *Routhmull*(2). Lort William, J., was a party to that decision. Therein Mallik, J., observed:

"..... in support of his contention he relied on an observation made by the learned Judges in an unreported decision (to which my learned brother was a party) in *Paul De Flonder* v. *Emperor*(3). I do not see how this observation could be of any help to the complainant in the present case. The observation alluded to which was based on the decision in the case of *R. V. Davison*(1), runs thus:

'If there is no evidence to show where the misappropriation was committed other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account.'

It may be said that in the present case the non-accounting took place in Calcutta. But the non-accounting in Calcutta was not the only evidence to establish the alleged misappropriation. As would appear from the allegations made by the complainant, himself in his petition of complaint, the petitioners had cashed the hundis and realized moneys in Bihar and did not credit them in the books

(1) (1885) 7 Cox. C. C. 158.
(2) (1931) A. I. R. (Cal.) 532.
(3) (1931) A. I. R. (Cal.) 528.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

of the firm in Bihar and thereby misappropriated the moneys realized.

For the aforesaid reasons I am therefore clearly of opinion that the venue in the present case based on the allegations made by the complainant in his petition of complaint was not in Calcutta....."

The facts of this case, therefore, disclose that there was positive evidence on the record to prove the commission of the positive acts, namely, dishonest misappropriation, conversion, user or disposal. But in spite of these facts it was contended that the venue of trial could be Calcutta as the accused had failed to account at Calcutta. In these circumstances the learned Judges, if I may say so with all respect to them, rightly held that the offence could not be tried at Calcutta. That view was reiterated in the case of *Prokash Chandra Sircar* v. *Mohim Chand Haldar*(1). The judgment in the case was delivered by Mukerji, J., who had given the judgment in *Gunananda's case*(2), referred to above. In this case the learned Judge having discussed the different cases including that of *Gunananda's case*(2) concluded :

"In the present case it has not been alleged by the complainant that there was misappropriation committed in respect of the sum which forms the subject-matter of this case or any parts of it at any particular place but the whole of the case as to misappropriation is founded upon the allegation that there was no accounting in respect of the money. Account, as already stated, was to be rendered at the Sudder Kutcherry in Calcutta. I am unable to see how it can be said, as has been stated by the learned Magistrate in his explanation, that in the present case if there has been any misappropriation such misappropriation must have taken place in Burdwan. There is no such allegation, nor is there any evidence to that effect."

(1) (1934) A. I. R. (Cal.) 392.
(2) (1925) A. I. R. (Cal.) 613.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

This decision is, therefore, in full conformity with the earlier case reported in A. I. R. 1931 Calcutta, 532.

Then I come to an important Bench decision of the Allahabad High Court in the case of *Emperor* v. *Mohru Lal*(1). The members of the Bench were Sulaiman, C. J. and Bennet, J. There the learned Judges with reference to section 405 of the Penal Code, observed :

" This section falls into two parts. The first part is a positive part and deals with dishonest misappropriation or conversion of property. To charge a person under this part of the section there should be an allegation that at a particular time and place that person has dishonestly misappropriated or converted to his own use property which was entrusted to him. Now the second part of the section may be a negative part. It consists of dishonestly using or disposing of property in violation of (*a*) any direction of law, or (*b*) any legal contract touching the discharge of the trust. Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled. We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of section 405 of the Penal Code where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place. The first part of section 405 will apply where it is known that the accused has dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But

(1) (1935) I. L. R. 58 All. 644.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

where it is alleged that the accused has failed to account for the property, then the second part of section 405 will apply and jurisdiction exists at the place where the property should have been delivered by the accused."

AHMAD, J. In this case the learned Judges reviewed all the important decisions on the point of jurisdiction in a case of misappropriation or criminal breach of trust, and they have drawn a clear line between the cases covered by the first or the positive part of section 405 and those covered by the second or the negative part of section 405. The principle laid down by them boils down to the proposition that in cases where the place of conversion or misappropriation are known then that place will be the venue of trial of that offence. In cases, however, where the place of user and disposal is not known, but this much is evident that the direction of law or the contract touching the discharge of trust has been violated, in that case the place where the trust had to be discharged according to the direction of law or the contract touching the discharge of trust will be the venue of trial for that offence. This latter class of cases again may be split up into two sub-types of cases: (1) where the contract or the direction of law touching the discharge of trust imposes on the accused a duty to remit the money or to dispose of the property at a particular place, and (2) where it does not impose on the accused a duty to remit the money or dispose of the property at a particular place, but directs him merely to deliver a statement of the accounts there. In the latter class of cases where there is no duty to remit the money and the direction demands only the transmission of a statement of accounts, the question of violation of the direction of law or contract touching the discharge of trust does not arise and, therefore, in the absence of a duty to dispose of the property at a particular place, the mere failure to send the statement of accounts to that

place will not constitute an offence in the absence of any other fact or circumstance to support the charge and hence that circumstance alone will not give a forum for the trial of the offence of misappropriation or breach of trust at that place. Unlike it, where there is a clear duty to remit the money at a particular place, the failure to remit it at that place will constitute an offence as contemplated by the second or the negative part of section 405. This will, however, come into operation only when there is no direct evidence as to the misappropriation or conversion of the trust money at a particular place.

Our attention was also drawn to a decision of a Single Judge in the case of *Kunj Behari Lal* v. *Braham Datta*(1). That decision is based on the principle laid down in the case of *Emperor* v. *Mohru Lal*(2). In that case Allsop, J. observed :

"They had already distinguished between the first part of the section which they described as a positive part dealing with dishonest misappropriation or conversion of property and the second part which they described as a negative part, that is, a failure to prove that the property entrusted to the accused had been used by him in accordance with any direction of law or any legal contract by which he was bound. In the case before me the charge obviously is that the accused had misappropriated the property by depositing the money in his own firm. Whether that amounts to a criminal offence is not the question before me. That is the charge and in accordance with the judgment in A. I. R. 1936 Allahabad, 193, the offence was committed under the first part of section 405, Penal Code. The second part is to be invoked only when the first part cannot. It was clearly held

(1) (1942) A. I. R. (All.) 439.
(2) (1935) I. L. R 58. All. 644.

1962-63.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

in the decision in the earlier case of this Court that the fact that there are consequences of an offence does not give any Court jurisdiction in the place where those consequences occur unless those consequences are necessary ingredients to the offence itself."

This case, therefore, in the light of the observation quoted above is not of any assistance to the petitioners in support of the proposition laid down by Mr. Bhabananda Mukherji to the effect that in no case the place where the trust is to be discharged can be the venue of the trial.

The Full Bench decision in the case of *In re Jivandas Savachand*(1) was relied upon by both the parties in support of their respective contentions. That case, I think, as observed by Sulaiman, C. J. in the case of *Emperor* v. *Mohru Lal*(2), is clearly distinguishable on its own facts. The complainant and the accused in that case were partners in a business. According to the partnership articles, the head office was to be at Bombay and the accused was to manage and conduct the business of the firm at Rangoon and to send weekly statements of accounts of the partnership business transacted on behalf of the partnership to the head office in Bombay. The charge against the accused was that he misappropriated the firm's money in Rangoon and falsified the accounts in Rangoon. So this charge was in terms of the first clause of the section, and there was clear allegation that the money had been misappropriated at Rangoon. With these facts, reliance could not be had on the negative part of the second clause of the section.

The defence contention in that case was that as the accused were bound to send their accounts to Bombay the misappropriation was not complete until after those accounts were delivered in Bombay which

(1) (1930) I. L. R. 55 Bom. 59, F. B.
(2) (1935) I. L. R. 58 All. 644.

for the first time could show to the complainant that he was being robbed. This argument was not accepted as, according to the prosecution allegation itself, the misappropriation had already been committed at Rangoon.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

Our attention was next drawn to the decision of a Full Bench of Sind in the case of *Mukhi Tirathdas* v. *Jethanand Matvalomal*(1). The facts of that case, as it appears from the judgment, were that the complainant and the accused were doing business together and the accused managed the business at Lucknow in partnership with the complainant and on the dissolution of the partnership it was agreed that certain sums that were due to the firm should be collected by the accused at Lucknow and remitted to the complainant at Sukkur. The accused collected the sums due, but failed to remit them and a complaint was made by the complainant against the accused for an offence under section 405, Penal Code, in the Court at Sukkur. The point raised was that as the loss had been incurred at Sukkur in consequence of misappropriation the Court at Sukkur had the jurisdiction to try the charge for misappropriation or criminal breach of trust of that amount. So here the discussion in this case centred round the point whether section 179 of the Code of Criminal Procedure was applicable for fixing the venue of trial of an offence for misappropriation or criminal breach of trust. On that point the Full Bench observed :

AHMAD, J.

" In our opinion, loss is not in itself a necessary ingredient of an offence under this section. The essence of the offence is the misappropriation or conversion or user or disposal with dishonest intention ",

(1) (1937) A. I. R. (Sind) 68, F. B.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

and in the light of that principle came to the conclusion that "If money is to be sent to Sukkur which is dishonestly misappropriated or converted or used or disposed of within the meaning of section 405, Penal Code, at Lucknow and is not sent to Sukkur, we cannot see how it can be said that it was dishonestly misappropriated or converted or used or disposed of at Sukkur, nor do we see that section 43, Penal Code, makes any difference to the case. It may be said that the failure to send it to Sukkur is evidence of dishonest misappropriation or conversion or user or disposal at Lucknow, but a jurisdiction is not to be determined by the place where evidence is to be found but by the place where the offence is committed. We ourselves are of the opinion that jurisdiction, so far as the offence of criminal breach of trust is concerned, is quite clearly and specifically provided for in section 181(2), Criminal Procedure Code and that the jurisdiction given there is sufficiently wide for all purposes." This observation speaks for itself that the point under consideration was whether the provisions of section 179 of the Code of Criminal Procedure was applicable to the offence of embezzlement or misappropriation on the ground of loss arising from it and not that which is the subject-matter of discussion in the present case. Therefore, this case is of no assistance in the solution of the question raised in this case. It is evident that this observation to my mind is based on the supposition that the money was in fact misappropriated, converted, used or disposed of at Lucknow and in the view of that supposition it was rightly held that it could not be said that the mere non-sending of the money after its misappropriation at Lucknow could lead to the inference that it was in fact misappropriated at Sukkur. Mr. Bhabananda Mukherji appearing for the petitioners laid great stress on this case specially on the observation made

therein that mere non-sending the money to Sukkur, according to the terms of the directions, could not in law lead to the inference that it was misappropriated at Sukkur. That again was based on the assumption that the misappropriation was already completed at Lucknow. The judgment, however, did not stop there. It appears that in course of the argument reliance was placed by the prosecution on the case of *Mohru Lal* v. *Emperor*(1). In answer to that the learned Judges observed :

"Now, with very great respect to the learned Judges who decided that case, reading through section 405, I. P. C., we cannot see that that section is divided into positive parts or negative parts at all. Throughout the section it appears to us that the offence consists of dishonestly misappropriating or converting property or dishonestly using or disposing of property in violation of any direction of law or of any legal contract within the provisions of that section. It is the dishonest misappropriation or conversion or user or disposal, as the case may be, which is the very heart of the offence, and we cannot, with respect, see how section 43, I. P. C., assists the matter."

In my opinion, what the learned Chief Justice Sulaiman in the case reported in A. I. R. 1936 Allahabad, 193, meant to convey was that as the direction was to the effect that the property had to be disposed of at a particular place and as that property was not accordingly disposed of at that place, therefore, in the absence of any other evidence of dishonest misappropriation or conversion to his own use of that property at any other place the inference may be drawn that that property in violation of the direction was in fact dishonestly used or disposed of at the place where

(1) (1936) A. I. R. All. 193.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

it ought to have been disposed of according to the direction though in fact it was not so disposed of. In other words, according to the learned Chief Justice, the omission on the part of the accused to dispose of the property at a place named in the direction, in the absence of any direct evidence of dishonest misappropriation or conversion to his own use of that property at any other place, leads to the inference that the property had been in fact dishonestly used or disposed of in violation of that direction at that place. Looked at from this point of view, the conduct on the part of the accused in violating the direction can reasonably lead to the inference that the positive act in the form of dishonest user or disposal of the property has been committed at the place where the money ought to have been used or disposed of according to the direction. I think this rule of law laid down in A. I. R. 1936 Allahabad, 193, is perfectly consistent with the language of the section. It is true that it is the dishonest misappropriation or conversion or user or disposal which is the essence of the offence but in cases where there is no direct evidence in support of the positive act of misappropriation or conversion or user or disposal at any particular place in that circumstance, I think, the failure to carry out the direction to dispose of the property in trust at a particular place along with other circumstances appearing on the record may be reasonably susceptible to the inference that the subject-matter of trust has been misappropriated, converted, used or disposed of contrary to the direction and that the misappropriation, conversion, user or disposal has been done at the place where the trust has to be discharged. This aspect of the matter was not considered by the learned Judges who decided the case of *Mukhi Tirathdas* v. *Jethananda Matvalomal*(1) and for that reason they were led to

(1) (1937) A. I. R. (Sind) 68 F. B.

differ with the decision in the case of *Mohru Lal*(1) and lay down a proposition of law which, I think, with all respect to the learned Judges, is not sound.

The case of *Vasanji Khimjee* v. *Kanji Tokersey*(2) though decided by a Single Judge, is no doubt to the point. In that case there was a firm of merchants at Akyab and the accused as its partner was working at Cochin under the arrangement between the parties. The accused was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab but did not do so. On the failure to do that, a complaint was filed at Akyab. The question that arose thereon was whether the court at Akyab in those circumstances had jurisdiction to try the case. The complainant in support of his complaint relied on the case of *Emperor* v. *Mohru Lal*(1), Mackney, J., who decided the case, observed :

" Now, it seems to me that this is perhaps to state the matter too broadly, if I may say so with the greatest respect, because it might well be that a person might fail to remit the money, or bring it to the place to which he had to bring it, through causes beyond his control. The failure to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. The words used in section 405 are ' dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property '. No doubt it will be a necessary part of the evidence against the accused that he failed to account

(1) (1935) I. L. R. 58 All. 644.
(2) (1937) 39 Cr. L. J. 529.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

when he should have accounted." As was remarked by the learned Judges in this same case at page 649 :

'Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled.'

But it is with the sentence which immediately follows this sentence, that I find myself unable to agree. They say :

'We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the Court having jurisdiction at that place, will have jurisdiction to try the offence of the second part of section 405, I.P.C., where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place.'

But if the accused fails to remit or bring money where does that failure occur? It occurs at the place where the accused is, not in the place to which the money is to be sent or brought. So, even on this view of the law, it appears to me that as the omission to send the money has taken place in some other spot than Akyab, the Courts at Akyab cannot have jurisdiction. If it be said that the offence was constituted because the respondent failed to come to Akyab that omission to appear in Akyab cannot be said to have taken place at Akyab. The respondent omitted to come to Akyab in the place where he happened to be. Even a sin of omission cannot be committed by a sinner in a place where the sinner is not. This aspect of the matter does not appear to have presented itself to the learned Judges who decided the case in 58 Allahabad, 644."

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

In my opinion, Mackney, J., if I may say so with all respect to him, overlooked the reasoning given in the decision of *Emperor* v. *Mohru Lal*(1) in support of the conclusion arrived at therein. The first part of the reasoning in the observation of Mackney, J., deals with the elements necessary to constitute the offence of embezzlement or misappropriation and not with the question as to where the offence in certain circumstances can be said to have been committed. I think that was not the subject-matter of discussion in that case. The question in inquiry was as to what was the place where the offence was committed. That question was undoubtedly based on the assumption that an offence of embezzlement or misappropriation had been committed. The second part of the reasoning is all the more vague. The language used in the second or negative part of the section is "in violation of any direction of law prescribing the mode in which such trust is to be discharged". So in case money has to be brought or remitted to a fixed place then the failure to discharge the trust on the part of the person entrusted can arise only when he fails to remit or bring the money at that place. That failure cannot be said to occur unless that failure has appeared at the place where the trust is to be discharged and in no case it can occur at the place from where the money is to be remitted or brought in order that the trust may be discharged at some other place. In the third part of the observation the learned Judge seemed to be too much obsessed with the conception of physical presence of the man trusted at the place where the money was to be remitted or brought. Here it was overlooked that the place where the failure to discharge the trust occurs, according to the second or the negative part of the section, can be taken as the place where the offence has been committed only when there is no evidence as to where the

(1) (1935) I. L. R. 58 All. 644.

1952-53.

R. N SARKAR v. A. N. SARKAR.

AHMAD, J.

user or disposal of the property has taken place though it is known that such an user or disposal has in fact been committed. If the place where the offence is committed is known then there is no difficulty to fix the venue of trial. The difficulty arises only in cases where the place is not known and in such circumstances reliance is had on the logic of law and not on the view arising from physical conception of things. The negative clause of section 405, Penal Code, by itself deleting the other part of the section reads:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, commits criminal breach of trust."

The essential ingredients of this part of the section, therefore, are firstly dishonest user or disposal of the property and secondly the failure on the part of the accused to discharge the trust in accordance with the direction of law or the legal contract touching the discharge of the trust. The first ingredient is the positive part of the offence and the second ingredient is its negative part. The negative ingredient is just the counter-part of the positive ingredient. The failure on the part of the man trusted to discharge the trust in accordance with the direction of law or the legal contract touching the discharge of the trust appears simultaneously with his dishonest user or disposal of the property contrary to the direction. Once the place of user or disposal is known, it can be easily said that the failure has as well taken at that place. In case, however, the place of user or disposal is not known then the

place of failure, if it can be fixed, may be *prima facie* assumed to be the place where the user or disposal has taken place. This second rule is based on the conception, as already stated, that the positive and negative parts appear simultaneously in the same place. It may not be out of place to repeat here that the question as to where the offence has been committed is based on the assumption that the offence has been committed. This reasoning may not be available in order to find out as to where the offence itself has been committed. I have already expressed myself that the rule laid down in the case of *Mohru Lall*(1) is consistent with the section and I have no hesitation to think, if I may say so with all respect to Mackney, J., that the grounds given by him for not accepting that view in the case of *Vasanji Khimjee* v. *Kanji Tokersey*(2), is not correct.

Then the Full Bench case of *Bangshilal Bhora* v. *Rowtmal Patwari*(3), was cited at the bar. The facts in that case were that the complainant was the manager of a firm at Fakiragram and the accused were the proprietor and the employee of another firm at Karimganj. The firm of the accused had agreed to sell mustard oil of the complainant firm as commission agent at Karimganj and to send them at Fakiragram the sale-proceeds along with the account by draft deed or postal insurance. In accordance with the arrangement arrived at the accused firm took delivery of 441 tins of mustard oil at Karimganj but failed to send the sale-proceeds of the same to the firm of the complainant at Fakiragram. On enquiry the accused alleged that they had paid the sale-proceeds to one of the agents of the complainant firm, who was also an accused in that case, but who according to the complainant had no authority to receive the money. On these allegations a complaint was filed at Dhubri. At the trial one of the objections

(1) (1935) I. L. R. 58 All. 644.
(2) (1937) 39 Cr. L. J. 529.
(3) (1951) A. I. R. (Assam) 131, F. B.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

raised by the accused was that the offence of criminal misappropriation or criminal breach of trust, if any, was committed at Karimganj in respect of which the magistrate at Dhubri could have no jurisdiction. The case was decided on the consideration of two points: (1) Would the court be justified in quashing a complaint which on the face of it discloses an offence, on the sole ground that the magistrate at Dhubri had no territorial jurisdiction to try the case, and (2) was it a case in which the court should accede to the prayer of the applicant to transfer the case to Karimganj to be tried by a magistrate having jurisdiction, in the exercise of the power under clause (1) of section 526 of the Code of Criminal Procedure. As to the first point it was laid down that court should refuse to quash a complaint which on the face of it discloses an offence. As to the second point it was observed that the case did not attract the operation of section 526 of the Code of Criminal Procedure. In view of these opinions expressed in connection with the aforesaid two points, the application was ordered to be dismissed by the two of the three Judges constituting that Full Bench. Ram Labhaya, J., who differed from the view expressed by the other two Judges, opined that the complaint be transferred to a competent court at Karimganj. I think this case is not of much assistance in deciding the point raised in the present case.

Mr. Bhabananda Mukherji placed great reliance on a Bench case of *Daityari Tripatty* v. *Subodh Chandra Chowdhury*(1). That is the judgment of Blagden, J., with whom Lodge, J., agreed. That case was decided on two principles: firstly that loss being not a necessary ingredient of criminal breach of trust, as defined under section 405 of the Penal Code, the provision of section 179 of the Code of Criminal

(1) (1942) A. I. R. (Cal.) 575.

Procedure is not applicable in order to find the forum for the trial of the offence of misappropriation or criminal breach of trust. The second principle laid down in that case was that criminal breach of trust always consists in an act and not in an omission and that the failure to account, howsoever strong an evidence of that act, cannot take the place of that act itself. It is true that the actual crime created by section 405 consists in any of the four positive acts, e. g., misappropriation, conversion, user or disposal of property and not in a breach of contract by pure non-feasance or failure to account. It is, however, sometime overlooked that the rule of law laid down in the case of *Emperor* v. *Mohru Lal*(1), is applicable only on two assumptions—firstly that an offence under section 405 of the Penal Code has been committed and secondly that there is no direct evidence to indicate as to where either of the four positive acts has been committed. On the basis of these two assumptions the failure to carry out the direction touching the discharge of the trust at a particular place is *prima facie* deemed to indicate as if the acts of misappropriation, conversion, user or disposal have been in fact committed at that particular place though this rule will undoubtedly not apply in a case where there is not even a *prima facie* evidence to suggest that an offence under section 405 of the Penal Code has been committed. It must be clearly understood that the failure to account at a particular place by itself is not being used in the inquiry under discussion as the conclusive evidence to prove the commission of the offence under section 405 but only to locate as to where could the offence take place in circumstances where its commission is taken for granted but the place of its commission is not known. The point under enquiry in the case of *Daityari Tripatty* v. *Subodh Chandra Chowdhury*(2)

(1) (1935) I. L. R. 58 Cal. 644.
(2) (1942) A. I. R. (Cal.) 575.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

was not whether the offence was at all committed or not. On the contrary, it was taken for granted that the offence was committed and the only point under investigation was that if the place of the commission of the offence was not known, could the place where the failure to account took place be taken as the place where the offence was committed. The learned Judge perhaps, with all respect to him, did not look at the problem from that point of view. He was under the wrong impression that failure to account by itself was suggested to be taken as conclusive in order to prove the commission of the offence and was, therefore, led to the wrong conclusion that " hence section 181(2), Criminal P. C., does not confer jurisdiction on a Court at a place where the accused has failed to account or to dispose of property as per contract," though, if I may say so with all respect to him, he rightly observed that " neither failure to account nor breach of contract, however dishonest, is actually and in itself the offence which section 405, Penal Code, defines but merely evidence of that offence ". For the reasons stated above, I think the rule of law laid down by the learned Judge in the case was not at all a correct law.

Lastly I may mention that the view taken by the learned Chief Justice Sulaiman in the case of *Emperor* v. *Mohru Lal*(1), has been followed in a number of cases, for example, in the case of *Public Prosecutor* v. *Podimonu Besry*(2) and the case of *S. Arunachala Gounden* v. *K. S. Akhileshwara Ayyar*(3). The case of *Anthony D'Mello* v. *Joseph Mathew Pereira*(4), was also decided on the same principle. That case was disposed of by Broomfield and Wadia, JJ. Therein the learned Judges observed :

" There is S. 181 of the Code also to be considered. If there is a doubt as to whether the criminal breach of trust was committed in Karachi, for instance, or

(1) (1936) A. I. R. (All.) 193.
(2) (1928) A. I. R. (Mad.) 1186.
(3) (1951) 2 Mad. L. J. 627.
(4) (1937) A. I. R. (Bom.) 371.

Bombay, that I think would give the Bombay Court jurisdiction. *Emperor* v. *Mahadeo*(1) is a case in which the facts were almost precisely similar. One *M* was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various districts in lower Bengal, and from time to time as he sold goods he remitted money to his employers at Mirzapur. When called upon to furnish accounts, he offered to furnish Rs. 500 as a deposit, but did not submit any account. It was held that the Courts at Mirzapur had jurisdiction to try *M* for criminal breach of trust. No doubt Tudball, J., followed an earlier decision of the Allahabad High Court [*Queen Empress* v. *O' Brien*(2)], where jurisdiction was said to depend upon S. 179. That is contrary to the view which has been taken by a Full Bench of this Court [*In re Jivandas Savachand*(3)]. But the learned Judge also said : ' S. 182 of the Code would apply, it seems to me, equally well '. I can see no reason why S.182 should not be applied if the facts are as alleged. Of course if it should appear, after all the evidence is heard, that there is really no doubt about the matter that there was no misappropriation or conversion or wrongful disposal in Bombay at all, and that if any offence was committed it must have been outside Bombay, the plea of want of jurisdiction would have to be sustained and there could be no conviction. But that stage has not been reached."

In the case reported in A. I. R. 1928 Madras, 1136, it was held that the failure to deliver the goods intact is sufficient evidence to prove breach of trust and the place of delivery must be presumed to be the place where the offence took place unless the accused proves that the offence was not committed at that place.

(1) (1910) I. L. R. 32 All. 397.
(2) (1898) I. L. R. 19 All. 111.
(3) (1930) I. L. R. 55 Bom. 59, F. B.

1952-53.

R. N. SARKAR v. A. N. SARKAR. AHMAD, J.

The case of *Abdul Karim* v. *the King Emperor*(1) is, I think, of no assistance to the present discussion. That is the judgment of Wort, J., sitting singly. In that case the complaint was filed under sections 193, 196, 200 and 120(*b*) of the Penal Code. In the course of discussion Wort, J., referred to the provisions of section 179 of the Code of Criminal Procedure and observed :

" There is no doubt that the provisions of section 179 do not apply in so far as the words ' and of any consequence which has ensued ' are concerned where the offence alleged is complete."

The point involved in that case, therefore, was entirely different.

In the result, therefore, we find that the authorities on the point under discussion vary between two extremes. On the one end is the case of *Gunananda Dhone* v. *Santi Prakash*(2). On the other end is the case of *Daityari Tripatty* v. *Subodh Chandra Chowdhury*(3). As already stated the proposition laid down in the former is very wide while in the latter is erroneous. In my view the law as laid down in the case of *Emperor* v. *Mohru Lall*(4) is, if I may say so with all respect to the learned Chief Justice, correct and sound. I may repeat here

(1) (1929) 10 Pat. L. T. 161.
(2) (1925) A. I. R. (Cal.) 613.
(3) (1942) A. I. R. (Cal.) 575.
(4) (1935) I. L. R. 58 All. 644.

that in the present case the complainant has stated in his evidence that it is not known to him as to where the money was received or retained or used or converted by the accused persons. That evidence for the disposal of this case has to be accepted for the present. In that view of the case, I think, the Patna Court has jurisdiction and the trial is not bad for want of jurisdiction. AHMAD, J.

Next it was argued by Mr. Bhabananda Mukherji that there is no evidence on the record in support of the charge of cheating under section 420 of the Penal Code. Even the petition of complaint, according to him, does not mention that the accused had any dishonest intention of receiving the complainant at the inception of the negotiation or even at the time when he received the shares. This aspect of the case is not now, in view of my findings on the point of jurisdiction for the trial of the offence of criminal misappropriation and criminal breach of trust, of much importance. The petitioners have to face the trial at least for the offence of criminal misappropriation and criminal breach of trust, and the case, as pointed out by Rankin, C. J., in 35 C. W. N. 320, should not be thrown out on the ground that there is no evidence on the record in support of the charge of cheating under section 420 of the Penal Code. The Magistrate who is trying the case is definitely of opinion that there is a *prima facie* evidence in support of the charge under section 420 of the Penal Code. For these reasons, I think, it is not the proper stage to quash the proceeding on the ground alleged by

1952-53.

R. N. SARKAR v. A. N. SARKAR.

AHMAD, J.

the petitioners. If in the course of trial it appears to the Magistrate that there is no sufficient evidence in support of the charge under section 420 or any other section, he will no doubt acquit the accused persons of that charge.

In the result, therefore, I think that the Magistrate at Patna has in the circumstances of the case, as it appears at present, jurisdiction to try the case and there does not appear to be so far any good reason to quash the proceeding. The application is accordingly dismissed and the rule is discharged.

NARAYAN, J.—I agree. It is still quite premature to say that the Patna Court has no jurisdiction to try this case. The complainant has in his evidence stated the facts in great detail, and on the facts stated by him it cannot be asserted at present that there was no deception practised upon him or that he was never fraudulently or dishonestly induced to send the share scrips to the accused. Cheating is a complete offence by itself and is really not a form of criminal breach of trust. A person who fraudulently induces another to deliver property to him bears no resemblance to a trustee in the ordinary sense of the word. The nature of the representation will be important, and it cannot definitely be held at the present stage that there was no fraudulent representation made to this complainant. On the facts stated by the complainant it can reasonably be held that a *prima facie* case under section 420 of the Penal Code has been made out against the accused, and, as such, the offence under section 420 is clearly triable by the Patna Court.

Towards the end of his deposition the complainant has stated as follows :—

" I do not know and I have no idea as to who purchased the above two scrips of Bangashri nor do I know to which place the purchasers belong nor do I know where they paid the purchase money to the accused persons nor do I know as to where the accused persons kept the purchase money nor do I know as to where the accused persons converted the purchase money to their own use."

One who commits the offence of criminal misappropriation or criminal breach of trust will certainly observe secrecy and will do all that lies in his power to prevent the person whose money he has misappropriated from knowing the exact manner of the misappropriation or the time and the place of misappropriation. There are, of course, cases in which in spite of the secrecy, vigilance and caution maintained the person put to loss may know the details. But there are very many cases in which the details cannot be known to the complainant at all, though he feels confident that deception and fraud have been practised upon him and that there is a criminal misappropriation of the amount to which he is entitled. As pointed out by my learned brother, the authorities are not agreed as to the venue where an offence of criminal breach of trust may be enquired into or tried by a Court, and the wordings of sections 179 and 181 of the Criminal Procedure Code are responsible for this difference of opinion. It is, however, well-settled by now that section 181(2) is not controlled by section 179. As was pointed out by Sulaiman, C. J., in *Emperor* v. *Kashi Ram Mehta*(1) section 177 is the general section laying down the place of enquiry in ordinary cases and it is subject to the particular sections that follow it, and therefore it is not correct to say that section 179 either controls or is controlled by section 181. According to this Full Bench decision of the Allahabad High Court and other authoritative decisions, if the offence is

(1) (1934) I. L. R. 56 All. 1047, F. B.

1952-53.

R. N. SARKAR v. A. N. SARKAR.

NARAYAN, J.

complete in itself by reason of the act having been done, and the consequence is a mere result of it which was not essential for the completion of the offence, then section 179 would not be applicable. It need hardly be pointed that in the case of criminal misappropriation and criminal breach of trust the offence is complete as soon as there is a misappropriation or conversion with a dishonest intention, and it is not at all necessary for the completion of the offence that loss of the owner should have actually accrued by that time. Section 181(2) is, therefore, the section which is applicable to a case of criminal misappropriation or criminal breach of trust, and according to this section the offence of criminal misappropriation or criminal breach of trust may be enquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed. In this case the complainant is not yet able to know as to where the misappropriation or conversion actually took place. From the conduct of the accused and from the correspondence entered into by the accused the complainant has been led to the impression that the accused have deceived him and that they have misappropriated the money to which he was entitled as the price of the shares. This being the position in fact, the question arises whether in the particular circumstances of this case the Patna Court will have jurisdiction to hear the case. The decision of the Allahabad High Court in *Mohru Lal* v. *Emperor*(1) is a clear authority in favour of the complainant, and in view of the statement made by the complainant the venue can be laid at the place where the accused have failed to account for the property. I respectfully agree with this decision that section 405 falls into two parts, and no serious exception can be taken to the proposition that section 405 stands divided into two parts, one of which is the *positive* part and the other the *negative* part, so long

(1) (1935) I. L. R. 58 All. 644.

as one is not prepared to quarrel with the view that the jurisdiction to try the accused may be at the place where the accused has failed to deliver the property. The legislature has in its wisdom divided the sub-section also into two parts, and it is obviously intended to cover a case where it is not possible to ascertain at what place the misappropriation actually took place, and when there is no evidence to show at what place the misappropriation was actually committed other than the fact of non-accounting, then the venue may be laid at the place where the accused failed to account, because that is the place where the offence will be deemed to have been committed according to sub-section (2). The Full Bench decision of the Bombay High Court in *In re Jivandas Savchand*(1) does not trouble me at all. That was a case in which the charge levelled against the accused was that they had misappropriated the firm's money in Rangoon, and if this was the charge, then on the wordings of section 181(2) the offence had to be tried in Rangoon. The other decisions have been reviewed in the exhaustive judgment of my learned brother, and we find unable to agree with the extreme views taken in *Gunananda Dhone* v. *Lala Santi Prakash Nandy*(2) and *Daityari Tripatty* v. *Subodh Chandra Chowdhury*(3) Jurisdiction does exist at the place where the property should have been delivered by the accused, and it also exists at the place where the property is received or retained by the accused. In a case like the present one in which the complainant is not able to know where the misappropriation actually occurred, jurisdiction certainly lies at the place where the property had to be delivered. I, therefore, agree with my learned brother that this application must be dismissed.

Rule discharged.

K. D.

(1) (1930) A. I. R. (Bom.) 490, F. B.
(2) (1925) A. I. R. (Cal.) 618.
(3) (1942) A. I. R. (Cal.) 575.

APPELLATE CIVIL.

Before Ramaswami and Jamuar, JJ.

1953.

February, 20.

J. P. MISSIR

v.

A. MAJID.*

Receiver—order appointing receiver, whether appealable—receiver's remuneration, whether realisable by execution against person in possession of the property—Code of Civil Procedure, 1908 (Act V of 1908), Order XL, rule 2.

An order fixing remuneration of a receiver is in the nature of a special order coming within the scope of Order XL, rule 2, Code of Civil Procedure, 1908, and therefore, such an order is not appealable.

T. C. Tweedie v. *Pokea Khatun*(1) and *Ghafur Ali* v. *Mt. Kamen*(2), relied on.

Where appeal against an order appointing a receiver is allowed and the receiver is removed, he is entitled to recover his remuneration for the period he has worked by execution against the party in possession of the property.

Prem Lall v. *Sumbhoonath*(3), relied on.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Ramaswami and Jamuar, JJ.

Ashwini Kumar Ray, for the appellant.

J. C. Sanyal, for the respondent.

RAMASWAMI AND JAMUAR, JJ.—This appeal is directed against the order of the Subordinate Judge of

* Appeal from Original Order no. 143 of 1950, from an order of Mr. A. Hasan, Subordinate Judge of Motihari, dated the 25th January, 1950.

(1) (1915) A. I. R. (Cal.) 74.
(2) (1930) A. I. R. (Lah.) 354.
(3) (1895) I. L. R. 22 Cal. 960.

1953.

G. P. MISSIR. v. A. MAJID.

RAMASWAMI AND JAMUAR, JJ.

Motihari, dated the 25th of January, 1950, fixing the remuneration of the receiver, Mr. A. Majid, to be a sum of Rs. 2,061 and odd and permitting the receiver to take out execution for the amount against the plaintiff.

From the order-sheet it appears that Mr. A. Majid was appointed as a receiver on the 5th of November, 1948. An appeal was preferred to the High Court on behalf of the defendant no. 1 against the order of the Subordinate Judge appointing the receiver. The appeal was allowed by the High Court, and the receiver was removed from his office on the 3rd of January, 1949. For the period during which he had worked, the receiver submitted a bill for a sum of Rs. 2,444-6-11. The bill was checked and passed by the learned Subordinate Judge for a sum of Rs. 2,061-6-11. On the 16th of September, 1949, the learned Subordinate Judge ordered that the plaintiff should pay the amount to the receiver; in default, execution would be taken out for the amount against the plaintiff. Subsequently, the plaintiff objected before the learned Subordinate Judge stating that the receiver was to get only ten per cent of the amount of collection but his bill had been passed for more than that amount. The objection was rejected by the learned Subordinate Judge on the 25th of January, 1950.

When the hearing of the appeal commenced, Mr. J. C. Sanyal took a preliminary objection that the appeal was incompetent, and ought not to be maintained. Learned Counsel pointed out that the order for the payment of the remuneration of the receiver was made by the Subordinate Judge under the provisions of Order XL, rule 2, Civil Procedure Code, which was not appealable. It was conceded by learned Counsel that, if the order had been passed under Order XL, rule 1, or under Order XL, rule 4, an appeal could have been taken out by the plaintiff. To this, it was

1953.

G. P. MISSIR. v. A. MAJID.

RAMASWAMI AND JAMUAR, JJ.

contended on behalf of the appellant that the order of the learned Subordinate Judge fixing the remuneration of the receiver was an order made under the provisions of Order XL, rule 1(*d*) or an order under Order XL, rule 4. Mr. Ashwini Kumar Ray pointed out that, in the order of appointment, the Subordinate Judge had fixed the remuneration of the receiver to be ten per cent of the net amount of the proceeds collected from the estate. Learned Counsel argued, therefore, that the remuneration of the receiver was to be paid from the rents and the profits of the estate, and so the matter would be governed by Order XL, rule 1(*d*), and, therefore, subject to appeal. In our opinion, there is no substance in this argument. The order fixing the remuneration of the receiver is in the nature of a special order coming within the scope of Order XL, rule 2. In view of this special procedural provision, it is difficult to hold that the matter of remuneration is governed either by Order XL, rule 1 or by Order XL, rule 4. In this connection, it is not a relevant consideration whether the remuneration of the receiver is to be paid out of the rents and profits of the estate in his hand or not. Even if the remuneration is to be paid to the receiver from the receipts and profits of the estate, the matter would properly fall within rule 2 which states that

> " the Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver ".

If this is the correct position, it follows that no appeal lies against the order passed by the Subordinate Judge in this case. This view is supported by the decision of the Calcutta High Court in *T. C. Tweedie* v. *Pokea Khatun*(1) and of the Lahore High Court in *Ghafur Ali* v. *Mt. Kamen*(2).

1953.

G. P. MISSIR. v. A. MANN.

RAMASWAMI AND JAMUAR, JJ.

On merits, the case of the appellant stands on a much stronger footing. It was contended by Mr. Ashwini Kumar Ray that the remuneration to be paid to the receiver ought, in every case, to be borne by the estate which is the subject-matter of the litigation. It was pointed out that the receiver was appointed in this case for the protection of the estate from alleged acts of waste, and, merely because the order of the learned Subordinate Judge was set aside by the High Court, there was no warrant or justification for throwing the entire liability of remunerating the receiver upon the shoulders of the plaintiff. It was submitted by learned Counsel that, in this view of the matter, the order of the learned Subordinate Judge was erroneous, and the plaintiff ought not to have been made personally liable for paying the amount of remuneration due to the receiver. In our opinion, there is great force in the argument of learned Counsel. In *Premlall Mullick* v. *Sumbhoonath Roy*(3) a receiver had been appointed in a suit brought in the Calcutta High Court for administration of the estate of Nundo Lall Mullick. The receiver was appointed on the 18th of December, 1893. But there was an appeal to the Privy Council, and, on the 11th of May, 1895, their Lordships of the Privy Council made an order reversing the order of the High Court and dismissing the suit. When the matter came again before the High Court, it was held by Sale, J., that the order of dismissal of the suit clearly operated as a discharge

(1) (1915) A. I. R. (Cal.) 74.
(2) (1930) A. I. R. (Lah.) 352.
(3) (1895) I. L. R. 22 Cal. 960.

1953.

G. P. MISSIR. v. A. MAJID.

RAMASWAMI AND JAMDAR, JJ.

of the receiver, and was intended so to operate; but the receiver, though discharged by the dismissal of the suit in which he was appointed, would be entitled to a lien on the estate for all his just claims and allowances. In support of this view, Sale, J., quoted the opinion of the Master of Rolls in *Bertrand* v. *Davies*(1) as follows:—

> "Where a Receiver or manager is appointed by the Court in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance and also to a lien on the estate, as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his accounts.

The learned Subordinate Judge has not considered the matter from this aspect. Though we are compelled to dismiss the appeal for the reason we have indicated, we must make it clear that it is open to the appellant to file a proper application before the learned Subordinate Judge and ask for a direction that the receiver should take out execution for the amount of the remuneration not against the plaintiff personally but against the defendants who are in possession of the estate. If such an application is made, the Subordinate Judge should decide it after giving a hearing to the defendants.

Subject to this direction, we dismiss the appeal; but there will be no order as to costs.

Order accordingly.

K. D.

(1) (1862) 31 Beav. 429.

APPELLATE CIVIL.

Before Reuben and Narayan, JJ.

1951.

SUKAN

v.

KRISHNANAND.*

February, 27, 28. March, 16.

Adverse possession, nature of—onus on person disputing to disprove acquisition of title by adverse possession—adverse possession neither distinctly pleaded nor raised—plaintiff raising the question of acquisition of title by adverse possession in appeal—Evidence Act, 1872 *(Act I of* 1872), *section* 110.

Ordinarily, the principle no doubt holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject matter of an issue, but the plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the court of appeal when the fact is clear and unmistakable and the defendant is not taken by surprise. What is required is that the possession should be overt, continuous and without concealment for 12 years.

Possession of immoveable property is certainly presumptive proof of ownership and the burden of showing that the person in possession is not the owner is on the person who affirms it. That is, possession is evidence of title and anybody impugning that title has to show that his possession arose in some way which has not created any independent title for him.

Musammat Batina Kuer v. *Raja Ram Pandey*(1), *Lilabati Misrain* v. *Bishun Chobey*(2), *Municipal Board, Etawah* v. *Mt. Ram Sri*(3), *Biressur Banerjee* v. *Onooda Churn*

*Appeal from Appellate Decree no. 1412 of 1948, from a decision of Mr. Sachidanand, Subordinate Judge of Muzaffarpur, dated the 28th April, 1948, reversing a decision of Mr. A Chandra, Munsif of Muzaffarpur, dated the 22nd April, 1947.

(1) (1925) I. L. R. 5 Pat. 441.
(2) (1907) 6 Cal. L. J. 621.
(3) (1931) A. I. R. (All.) 670.

1951.

SUKAN v. KRISHNANAND

Banerjee(1), *Secretary of State for India in Council* v. *Debendralal Khan*(2) and *Ramchandra Narayan* v. *Narayan Mahadev*(3), relied on.

Shiro Kumari Devi v. *Govind Shaw Tanti*(4), *Joytara Dassee* v. *Mahomed Mobaruck*(5) and *Sheikh Alimuddin* v. *Shaikh Salim*(6), distinguished.

Phulchand v. *Natee Mirza*(7), not followed.

Appeal by the plaintiff.

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

The appeal in the first instance came before B. P. Sinha, J., and he referred it to a Division Bench.

On this reference.

Lalnarain Sinha and *Nandlal Untwalia*, for the appellant.

B. C. De, Rai T. N. Sahai, A. N. Lal and *Shivanugrah Narain*, for the respondents.

NARAYAN, J.—This is an appeal by the plaintiff in a suit for declaration of title and confirmation of possession with regard to a piece of land having an area of 2 bighas 16 kathas and odd which originally formed part of a holding of 6 bighas and odd belonging to Jhonti Tanti, the grandfather of Ganga Das, who was impleaded as defendant, third-party in the suit. Jhonti had a brother named Ramdhari, and the plaintiff and Budha Das, who was impleaded as

(1) (1865) 3 W. R. 12.
(2) (1933) I. L. R. 61 Cal. 262, P. C.
(3) (1886) I. L. R. 11 Bom. 216.
(4) (1877) I. L. R. 2 Cal. 418.
(5) (1882) I. L. R. 8 Cal. 975.
(6) (1929) 10 Pat. L. T. 207.
(7) (1942) 199 Ind. Cas. 421.

defendant no. 7 in the suit, are the grandsons of Ramdhari and the sons of Chauki Das who was Ramdhari's son. The case made out by the plaintiff was that Bihari Tanti, the father of the defendant third-party abandoned his holding about 40 or 45 years ago with the result that the landlords took possession of it and settled 5 bighas 4 dhurs out of it including the land in suit with Ramdhari about 35 or 38 years ago. The allegation was that the land in suit which originally formed part of the holding of Jhonti, and 2 kathas 15 dhurs out of the abandoned holding of one Mahesh Tanti were settled together at a jama of Rs. 17-4-0 and that this jama was amalgamated with the Jama of the ancestral land of the plaintiff. There was a partition between the landlords of the said lands, and in that partition the land in suit was allotted to the patti of the defendants first and fourth parties. The defendants first and 4th parties brought suits for rent against Ganga Das, and when the plaintiff came to know about the suits by them he approached them, and while the defendants fourth-party accepted the rent from him, the defendants first-party did not agree to receive rent from him, and the petition of the plaintiff under Order 1, rule 10 of the Civil Procedure Code, for being impleaded as a party in the rent suit of defendants first-party was rejected. The defendants first-party then took a sale-deed from Ganga Das with regard to the land in suit in the name of the defendant second-party and also executed the decree for rent which had been obtained by them. This led the plaintiff to institute the suit for declaration of his title to and for confirmation of his possession over the land in suit. There was an alternative prayer for recovery of possession.

The suit was resisted by the defendants first, second and third parties whose contention was that the

1951.

SUKAN v. KRISHNA-NAND

NARAYAN, J.

holding had not been abandoned by Bihari, and had not been settled with the plaintiff. It was asserted by them that the land in suit belonged to the defendant third-party and that he had been in possession of it until the transfer in favour of the defendant second-party.

The court of first instance accepted the plaintiff's case that the holding had been abandoned and that the land in suit had been settled with the plaintiff and had been in his possession. The suit was accordingly decreed by the learned Munsif. On appeal by the defendants, the decision was reversed by the learned Subordinate Judge of Muzaffarpur who was of opinion that the plaintiff had been in possession by virtue of an arrangement which had been entered into between him and Ganga Das, the defendant third-party and that his possession would, therefore, be deemed to be permissive, or the possession of a licensee. The plaintiff has, therefore, come up in second appeal.

Mr. Lalnarayan Sinha appearing for the plaintiff-appellant has strenuously contended that the Court below was wrong in holding that the plaintiff had been in possession as a licensee or as a trustee and that the irresistible conclusion from the facts found is that the plaintiff had been in possession in his own right, and had at least acquired title by adverse possession.

The lower appellate court has discredited the case of abandonment and fresh settlement with the plaintiff, and has held that the story of abandonment and re-settlement having not been proved it was not open to the plaintiff to claim title by adverse possession inasmuch as no case of adverse possession had been made out in the plaint. The learned Subordinate Judge accepted the defendants' version and he

1951.

SUKAN v. KRISHNANAND NARAYAN, J.

was therefore of the opinion that the plaintiff's possession was merely permissive.

On behalf of the appellant it has been pointed out that the following two issues had been framed by the Court of first instance and that they cover a case of adverse possession :—

(1) " Whether the story of abandonment and that of settlement of suit land as alleged correct, if so, have the plaintiffs acquired any title to the suit land? "

(2) " Is the story of possession as alleged by the parties correct? "

The appellant's learned Counsel has also submitted that the view of the lower appellate Court that the plea of adverse possession could not be taken up for the first time in appeal was not correct. A Division Bench of this Court in *Musammat Batina Kuer* v. *Raja Ram Pandey*(1) observed as follows:—

" Upon the facts found and upon the facts appearing in the pleadings I am inclined to think that the finding as to adverse possession is well sustainable. Ordinarily the principle no doubt holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but where the fact is so clear and unmistakable that the plaintiff has never been in possession of the land claimed for nearly 22 years and where on the other hand possession is exercised adversely to him as found in the present case, I see no reason for interference. "

Their Lordships in this case relied on a decision of the Calcutta High Court in *Lilabati Misrain* v. *Bishun Chobey*(2) which decision appears to me to be an important decision, especially in view of the submissions which have been made before us by Mr. B. C. De on behalf of the respondents.

(1) (1925) I. L. R. 5 Pat. 441.
(2) (1907) 6 Cal. L. J. 621.

1951.

SUKAN v. KRISHNA-NAND

NARAYAN, J.

Mookerjee, J., has in this case referred to the earlier decisions of the Calcutta High Court on this point on some of which reliance has been placed by Mr. De. The observation in this judgment which is important for our purpose runs as follows:—

"No doubt, title by adverse possession was not explicitly pleaded in the plaint; but as ruled by this Court in *Sundari* v. *Mudhoo*(1), the plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of appeal, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. This view is supported by the observation of their Lordships of the Judicial Committee in *Vavsudeva* v. *Maguni*(2), and may also be defended on the ground that, where, as here, the question reduces to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court, but expedient in the interests of justice to entertain the plea [see *Connecticut Fire Ins. Co.* v. *Kavanagh*(3)] ".

The Allahabad High Court also held in *Municipal Board, Etawah* v. *Mt. Ram Sri*(4), relying on the Privy Council decision (28 Ind. App. 81) that the plea of adverse possession need not be specifically pleaded as it is included in the plea of title. In *Shiro Kumari Devi* v. *Govind Shaw Tanti*(5) on which reliance was placed by Mr. B. C. De, it had been found that the question of twelve years' possession had not been properly raised either in the plaint or in the issues in the case and that the defendant had no proper notice that such a point was going to be raised, and, therefore, their Lordships held that it was not

(1) (1887) I. L. R. 14 Cal. 592.
(2) (1901) L. R. 28 Ind. App. 81.
(3) (1892) App. Cas. 473, 480.
(4) (1931) A. I. R. (All.) 670.
(5) (1877) I. L. R. 2 Cal. 418.

open to the lower appellate Court which had negatived the title alleged by the plaintiff to declare in his favour a title which had not been alleged. In *Joytara Dassee* v. *Mahomed Mobaruck*(1) which is another decision referred to by Mr. De we find the following observations:—

" Then, as to the second point, we think there can be no doubt, and indeed the learned Counsel, Mr. Bell, in his argument, very properly admitted, that the plaintiffs did not make in their plaint any alternative title based upon a twelve years' possession. They do, indeed, say that they were in possession of the land, but they do not say that they were in possession for twelve years, or ' from before, ' or ' for a long time; ' nor do they use any of those other general expressions which are to be found in plaints in this country, and which are at times argued to convey to the party, on the other side, the meaning, that the plaintiff relies upon an undisturbed possession for more than twelve years. This being so, it appears to us that it is impossible to uphold a decree which is based upon a title not stated by the plaintiffs in their plaint, and as to which no issue was framed for trial in the Court below. Cases must be tried and determined *secundum allegata et probata*, and it is contrary to this principle, and may be fraught with injustice, to decide a cause upon a point not raised in the pleadings, nor embodied in an issue, and to which, in consequence, the attention of the parties was not directed at the trial so as to enable them to produce all the evidence relevant thereto which was available to them. "

The Patna ruling reported in *Shaikh Alimuddin* v. *Shaikh Salim*(2) can also be of no assistance to the respondents before us, because in this case it had not been alleged that the land in suit had been in

(1) (1882) I. L. R. 8 Cal. 975.
(2) (1929) 10 Pat. L. T. 207.

1951.

SUKAN v. KRISHNANAND

NARAYAN, J.

plaintiff's possession for more than twelve years prior to the institution of the suit. So far as this case is concerned it is noteworthy that the plaintiff had not only set up an exclusive title to the property, but had also contended that he had been in possession of the property for about 37 or 38 years by virtue of a settlement which had been granted by the landlords. The learned Subordinate Judge while considering the story of abandonment and the story of settlement did not take into consideration the long possession of the plaintiff and his assertion of an independent title to the property. And after having discredited the story of abandonment and settlement he observed that as there was no case of adverse possession, it must be taken that the plaintiff had been in possession by virtue of the arrangement pleaded by Ganga. This was a most unreasonable way of disposing of the contentions of the plaintiff. That the learned Subordinate Judge completely misdirected himself would appear from the following passage in his judgment:—

"As observed above on the failure of plaintiff's story of abandonment and settlement it must be taken that they were in possession by virtue of the arrangement pleaded by Ganga. Plaintiff's possession must therefore be regarded as permissive or something like that of a licensee. The plaintiff must in the circumstances prove that his possession was adverse to the knowledge of Ganga [*vide Phulchand* v. *Natee Mirza*(1).] In other words the plaintiffs must prove by clear evidence that their possession as licensee terminated at a particular time and became from that time adverse by assertion of hostile title."

Section 110 of the Evidence Act lays down that when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the

(1) (1942) 199 Ind. Cas. 421.

1951.

SUKAN v. KRISHNANAND NARAYAN, J.

person who affirms that he is not the owner. Possession of immoveable property is certainly presumptive proof of ownership and the burden of showing that the person in possession is not the owner is on the person who affirms it. As was pointed out in one of the earliest cases, *Biressur Banerjee* v. *Onooda Churn Banerjee*(1), possession of property must always be attributed to a right to the property of the largest possible kind on the part of the person possessing it until it be shewn either that the possessory right really is in another person, and that the present enjoyment is by his permission, or that the possession, although of right, is, so under some limited right to the property. The plaintiff could quite legitimately urge in this case that if he was not able to prove the *factum* of abandonment and the *factum* of settlement by independent evidence as these events happened about 45 years ago, his long possession should be deemed to support his contention that the land had been settled with him many many years back. At any rate, the defendants' version could not be accepted merely because the plaintiff had not been able to prove his story of abandonment and settlement. The conclusion that the plaintiff's possession must be regarded as permissive or like that of a licensee has been arrived at unreasonably, and it was not open to the learned Subordinate Judge to say that the plaintiff must have been in possession by virtue of the arrangement pleaded by Ganga when he has failed to prove his story of abandonment and settlement. The learned Subordinate Judge presumed that when the plaintiff occupied the land, he did so with the permission of Ganga, and he therefore observed that it was for the plaintiff to show that his possession subsequently became adverse and that Ganga had come to know about the assertion of hostile title by him. There was no admission by the

(1) (1865) 3 W. R. 12.

1951.

SUKAN v. KRISHNANAND

NARAYAN, J.

plaintiff in this case that he had occupied the land with the permission of Ganga and that he was a licensee, and consequently it was not for the plaintiff to show that the possession subsequently became adverse to the knowledge of Ganga. The authority quoted by the learned Subordinate Judge, *Phulchand* v. *Natee Mirza*(1) has got no application in this case. It is now an exploded view that the adverse possession should be brought to the knowledge of the true owner. As was observed by the Judicial Committee in *Secretary of State for India in Council* v. *Debendralal Khan*(2) the classical requirement is that the possession should be *nec vi nec clam nec precario*, and adverse possession need not be shown to have been brought to the knowledge of the person affected by it. What is required is that possession should be overt and without concealment, and in this case there was the admission of Ganga Das himself to the effect that there was no concealment by the plaintiff. The following passage from the deposition of Ganga Das has been quoted by the learned Subordinate Judge, though he has again unreasonably refused to give due importance to it.

"The partition among maliks took place in 1929. My father was dead by that time who died in 1329 F. S. Chouki began to make golmal from that year 1929, by executing kebala in 1929 with respect to my land along with his land to Nagina Babu. I protested the same year to Nagina Babu who told me that he has not got his land purchased. I did not protest to other purchasers as well except that I protested before Nagina Babu malik only."

Thus, it is evident that even in the year 1929 Ganga Das had come to know that the plaintiff's father Chauki Das was executing documents with regard to Jhonti's property. It has been pointed out by the learned Munsif that the earliest document executed by Chauki Das is dated 17th September 1925, and even the learned Subordinate Judge says

(1) (1942) 199 Ind. Cas. 421.
(2) (1933) I. L. R. 61 Cal. 262, P. C.

1951.

SUKAN v. KRISHNANAND

NARAYAN, J.

that " the documents of dealings, i.e., mortgages and kebala range from 1929 to 1943 or so ". It was conceded before us that the earliest document is of 1925 and that the learned Subordinate Judge should have said that the documents showing the plaintiff's possession ranged from 1925 to 1943. It was for the defendants to explain this long possession of the plaintiff, and even the Subordinate Judge does not say that the defendants were able to prove the alleged arrangement or trust. In this connection, the learned Subordinate Judge has observed as follows:—

" The story of abandonment and settlement having failed there remains only the story of the defendants that because Bihari and subsequently even Ganga lived at Jainagar in connection with their service the land was entrusted to the plaintiffs for management and cultivation. There may not be as the learned Munsif has observed much evidence in support of it. When however that is the only story left we cannot but accept."

In fact, it appears from the judgment of the learned Munsif that there was no evidence worth the name for proving the alleged arrangement. The only evidence adduced on this point was the oral testimony of the defendant no. 5 which was found to contain contradictory statements and which was thoroughly discredited. I need not repeat that possession is evidence of title and anybody impugning the title of the possessor has to show that his possession arose in some way which has not created any independent title for him. As was pointed out by the Bombay High Court in *Ramchandra Narayan* v. *Narayan Mahadev*(1) possession is evidence of title, and is primarily exclusive, and that it is for him, who impugns this exclusive title, to show that the possession originated in some way which has preserved his own right otherwise we have to attribute a legal origin and the usual incidents to actual, continued, and peaceable enjoyment. I am not usurping the function of the lower appellate

(1) (1886) I. L. R. 11 Bom, 216.

1951.

SUKAN v. KRISHNA-NAND

Court when I say that the long and admitted possession of the plaintiff over this property remains unexplained and that the defendants have failed to prove that his possession was permissive or that of a licensee. The onus could not be shifted in the manner indicated in the judgment of the learned Subordinate Judge, and even from the judgment of the learned Subordinate Judge it is clear that the arrangement alleged by Ganga Das had not been established. It is, therefore, not necessary to remand this case to the lower appellate Court for a fresh decision. The decision of the lower appellate Court must be set aside and that of the Munsif restored.

NARAYAN, J.

In the result, the appeal is allowed, the judgment and the decree of the learned Subordinate Judge are set aside and that of the Munsif restored. The plaintiff will get his costs throughout.

REUBEN, J.—I agree.

Appeal allowed.

K. D.

SUPREME COURT. *

1958.

January, 28.
February, 3.

GAYA ELECTRIC SUPPLY CO., LTD.

v.

STATE OF BIHAR.**

Arbitration Act, 1940 (*Act X of* 1940), *section* 34, *applicability and scope of—court's power to stay suit, when to be exercised—suit arising out of rescission of contract—submission to arbitration limited.*

* Before Hon'ble Shri Mehr Chand Mahajan, Hon'ble Shri Sudhi Ranjan Das and Hon'ble Shri Ghulam Hasan, JJ.

** In the Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal no. 175 of 1951, on appeal by Special Leave from the Order and Decree dated the 30th March, 1951 of the High Court of Judicature at Patna (Ramaswami and Rai, JJ.) in Miscellaneous Appeal no. 19 of 1951 arising out of Order dated the 18th December, 1950 of the Court of the Additional Sub-Judge Second at Gaya in Title Suit no. 47 of 1950. The decision of the High Court is reported as (1951) A. I. R. (Pat.) 157. The decision of the High Court refusing leave to appeal is reported as (1951) I. L. R. 30 Pat. 853.

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

The legal proceeding which is sought to be stayed under section 34 of the Arbitration Act, 1940 must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement.

Where, however, a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse a stay under the section.

Where the arbitration agreement is broad and comprehensive and embraces any dispute between the parties " in respect of " the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself.

Where, however, the party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to as it goes along with the other terms of the contract.

Held, that the scope of the arbitration clause in the case was a very narrow one. It only conferred jurisdiction on the arbitrator on the question of valuation of the undertaking pure and simple and did not say that all disputes arising out of the agreement or in respect of it would be decided by arbitration. Questions in the case related to the breach of contract or its recision, which were beyond the submission and, therefore, the suit could not be stayed under section 34 of the Arbitration Act, 1940.

Heyman v. *Darwins, Ltd.*(1) and *Monro* v. *Bognor Urban Council*(2), applied.

Harinagar Sugar Mills, Ltd. v. *Skoda (India), Ltd.*(3) and *Governor-General in Council* v. *Associated Livestock Farm, Ltd.*(4), distinguished.

Appeal by special leave by the plaintiff-company.

(1) (1942) A. C. 356.
(2) (1915) 3 K. B. 167.
(3) (1936) 41 Cal. W. N. 563.
(4) (1948) A. I. R. (Cal.) 230.

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

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

N. C. Chatterjee, Senior Advocate (*Rameshwar Nath*, Advocate, with him), instructed by *Rajinder Narain*, Agent, for the appellant.

M. C. Setalvad, Attorney-General for India and *Mahabir Prasad*, Advocate-General of Bihar (*H. J. Umrigar*, Advocate, with them), instructed by *P. K. Chatterjee*, Agent, for the respondent.

The Judgment of the Court was delivered by—

MAHAJAN, J.—This appeal by special leave arises out of an application made by the State of Bihar against the Gaya Electric Supply Co., Ltd., under section 34 of the Arbitration Act for stay of proceedings in a suit filed by the company on 28th September 1950. The facts relevant to this enquiry are these:

A licence for the supply of electric energy in the town of Gaya was obtained by one Khandelwal in the year 1928 under the Electricity Act, 1910. With the required sanction of the Government the licence was transferred to the company in 1932. By a notification dated 23rd June 1949 the licence was revoked by the Government with effect from 9th July 1949. Thereupon the company filed a suit against the State for a declaration that the revocation of the licence was arbitrary, *mala fide* and *ultra vires*. During the pendency of the suit negotiations started between the company and the State for a settlement of the dispute and ultimately on 28th October 1949 a deed of agreement was arrived at between them. The effect of the agreement and the correspondence referred to therein was substantially as follows:—

(*a*) That the company would withdraw the suit no. 58 of 1949 unconditionally on 25th October, 1949.

(*b*) That within three days of the withdrawal of the suit the State of Bihar would make an advance payment of rupees five lakhs to the company and simultaneously the company would formally hand over the possession of the undertaking to an authorized officer of the Government.

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

MAHAJAN, J.

(*c*) That both parties will make their respective valuations within three months of taking over the undertaking and any balance of money found due to the company as per Government valuation will be paid to the company and in case of over payment, the excess paid to the company on account of the "on account payment" of rupees five lakhs will be refunded to the Government.

(*d*) That in the case of any difference or dispute between the parties over the payment of the balance which may be found due after valuation *such dispute* shall be submitted to the sole arbitration of a single arbitrator who should be a high Government officer of the Provincial Government of rank equal to or higher than a Divisional Commissioner and his award shall be binding and final on both parties.

The arbitration clause is contained in a letter dated 13th October 1949 and was substantially accepted by the company in its letter dated 17th October 1949. As set out by the State Government in its application under section 34, it runs as follows:—

"In the case of any difference or dispute between the parties over the valuation as arrived at by the Government and that arrived at by the company, *such*

1953.

GAYA ELECTRIC SUPPLY CO., LTD v. STATE OF BIHAR.

difference or dispute, including the claim for additional compensation of 20 per cent shall be referred to arbitration...".

In pursuance of the agreement the respondent took over the undertaking on 28th October 1949 and also made a payment of rupees five lakhs to the company.

MAHAJAN, J.

On the 19th January 1950 the company sent a statement of valuation of the assets amounting to Rs. 22,06,072 to the Chief Electrical Engineer, Bihar. The Chief Electrical Engineer characterized the valuation of 22 lakhs by the company as fantastic and stated that according to a rough valuation the amount would be approximately five lakhs and that the final valuation would be settled after the company had furnished a detailed history of the plants and machineries. The company declined to give any further details and stated that time was of the essence of the contract and it would be extended from 28th January to 15th February 1950. On 6th April 1950 the Chief Electrical Engineer intimated that the valuation amounted to Rs. 5,56,221. No reply to this letter was received and the State Government intimated to the company that as difference and dispute had arisen relating to valuation, Mr. M. S. Rao, I.C.S., was being appointed as sole arbitrator to decide the dispute.

On 28th September 1950 the company instituted the suit, the subject-matter of the application for stay, after necessary notice under section 80 of the Code of Civil Procedure. In the plaint it was alleged that as the State Government had failed and neglected to make its valuation or to make payment to the company by the 15th March 1950, it committed a breach of the agreement and by reason of this breach the company had rescinded the agreement and had forfeited the sum of five lakhs paid as advance by the State. The company prayed *inter alia* for the reliefs

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

MAHAJAN J.

of declaration that the electrical undertaking belonged to them, for damages, for appointment of receiver and for injunction. On the 9th October 1950 the State Government filed the present application under s. 34 of the Arbitration Act. It was stated therein that the company had with a dishonest and *mala fide* motive and with a view to avoid the decision of the matter in dispute in arbitration instituted the suit on incorrect and false allegations that the arbitration agreement was still subsisting and valid and binding on the parties and could not be taken as having been rescinded as alleged by the company, that the cause of action as alleged in the plaint being non-compliance with the agreement, the suit *arose out of and related to* the agreement and was covered by the arbitration clause and that the State Government was ready and willing to have the dispute settled by arbitration. The company denied the allegations of *mala fides* and pleaded that the arbitration clause was no longer in existence and that even assuming it to be in existence, the suit was in no way connected with the same and it was contended that the suit should not be stayed.

The Subordinate Judge hold that the suit was not in respect of any matter agreed to be referred, and that the Court had no jurisdiction to stay the proceedings. In the result the stay application was dismissed. Against this order the State Government appealed to the High Court. The High Court held that the dispute in the suit was one which arose out of or was in respect of the agreement and that the question in the suit was directly within the scope of the arbitration clause. By an order of this Court dated 22nd May 1951 the company was granted special leave under Article 136(1) of the Constitution.

Section 34 of the Arbitration Act runs thus :—

> " Where any party to an arbitration..... commences any legal proceedings

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

MAHAJAN, J.

against any other party to the agreement.....*in respect of any matter agreed to be referred*, any party to such legal proceedings may.....apply to the Judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

From the language of the section it is quite clear that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse a stay. In the words of Viscount Simon, L. C., in *Heyman* v. *Darwins, Ltd.*(1), the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute, and (*b*) what disputes the arbitration clause covers. If the arbitration agreement is broad and comprehensive and embraces any dispute between the parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, the party seeks

(1) (1942) A. C. 356.

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

MAHAJAN, J.

to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to as it goes along with other terms of the contract. In other words, a party cannot rely on a term of the contract to repudiate it, and still say the arbitration clause should not apply. If he relies upon a contract, he must rely on it for all purposes. Where, however, an arbitration clause is not so comprehensive and is not drafted in the broad language which was used in the House of Lords case, namely, " in respect of " any agreement, or " in respect of something arising out of it ", that proposition does not hold good. The arbitration clause is a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to its language and in the light of the circumstances in which it is made.

Now as regards the first question, *viz.*, what is the present dispute about, the answer is to be gathered from paragraphs 14 to 17 of the plaint. It is averred therein that the Government of Bihar committed breach of the agreement and failed to make any valuation of the undertaking or pay the balance of the compensation money, that time being of the essence of the contract, the defendant failed and neglected to complete the valuation within the time originally fixed or the extended time, and that by reason of the breach of contract the plaintiff rescinded the agreement and forfeited the sum of rupees five lakhs and that it is entitled to compensation for the wrongful deprivation of the use of its property. No claim has been made in the plaint for the valuation of the undertaking or for the payment of any compensation for the undertaking; on the other hand, the claim in the suit is founded on the rescission of the agreement containing the arbitration clause and on a breach of that agreement. These are matters which may well be said to arise out of the agreement and if the arbitration clause was broadly worded and stated that all disputes arising out of the agreement would be referred to arbitration, it could then probably have been said that the scope of the suit was within the

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR.

MAHAJAN, J.

ambit of the arbitration clause, but the clause here is differently worded.

The clause here is that if any difference or dispute arises between the parties over *the payment of the balance which may be found due after valuation such dispute* shall be submitted to the sole arbitration of a single arbitrator. The scheme of the agreement is that the Government was to make a valuation as laid down in the Electricity Act within three months of taking over the undertaking and any balance of money found due to the company as per Government valuation was to be paid by the Government, and in case of over-payment, the excess paid to the company on account of the "on account payment" of rupees five lakhs mentioned in para. 1 had to be refunded to Government. In the case of any difference between the parties over the valuation as arrived at by the Government and that arrived at by the company, *such difference or dispute*, including the claim for additional compensation of twenty per cent had to be referred to arbitration. The scope of this arbitration clause is a very narrow one. It only confers jurisdiction on the arbitrator on the question of valuation of the undertaking pure and simple and does not say that all disputes arising out of the agreement or in respect of it will be decided by arbitration. Questions relating to the breach of contract or its rescission are outside the reach of this clause. The arbitrator has not been conferred the power by this clause to pronounce on the issue whether the plaintiff was justified in claiming that time was of the essence of the contract and whether the State Government committed a breach of the contract by not making a valuation within the time specified. This clause is therefore no answer to the company's query "Show me that I have agreed to refer the subject matter of the suit to an arbitrator." Besides this clause in the agreement, there is nothing else which can deprive the court of its jurisdiction to decide the plaintiff's suit as brought.

RAMSWAMI, J., with whom Rai, J. concurred, held that upon a perusal of the terms of contract and of the correspondence it was obvious that no stipulation was made that the compensation money should be paid within the period of three months, and that on the contrary, the intention of the parties was that the Government would pay compensation money only after the award had been made by the arbitrator. Now this is the very point which would be in issue in the suit itself, and the learned Judge was in error in considering and deciding this point in this enquiry under section 34. The validity of the plaintiff's contention in the suit cannot be gone into by that court exercising jurisdiction under this section as its function is a very limited one. The only point in such cases to be decided is whether the claim which is brought whether it is good, bad or indifferent—comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes, L. J. in *Monro* v. *Bognor Urban Council*(1), are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint.

The learned Judges in the High Court seem to have thought that the arbitration clause here had been drafted broadly and that all " disputes arising out of or in respect of the agreements were referable to arbitration ". Their reliance on the decision of the Calcutta High Court in *Harinagar Sugar Mills, Ltd.* v. *Skoda (India), Ltd.*(2) in support of the decision indicates the error. In that case the arbitration

(1) (1915) 3 K. B. 167.
(2) (1936) 41 C. W. N. 563.

1953.

GAYA ELECTRIC SUPPLY CO., LTD. v. STATE OF BIHAR

MAHAJAN, J.

clause was drafted in a comprehensive language and stated that a dispute arising out of the agreement had to be referred to arbitration. Their reference to the case of *Governor-General in Council* v. *Associated Livestock Farm, Ltd.*(1) also shows that they were under the same erroneous impression. In this case the arbitration clause was in these terms :—

> " Any dispute or difference arising out of the contract shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final and binding."

It is obvious that these decisions could have no relevance to the arbitration clause as drawn up in the present case. If the nature of the claim is as we have indicated above, it seems plain that it does not come within the scope of the submission.

In our judgment, therefore, the decision of the learned subordinate judge was right and the Judges of the High Court were in error in reversing it. In the result the only course open to us is to allow the appeal with costs and to say that the plaintiff's claim is not within the scope of the submission and that the petition under section 34 was rightly dismissed by the Subordinate Judge.

Appeal allowed.

S. H.

(1) A. I. R. (1948) Cal. 230.

SUPREME COURT.*

R. P. N. SAHI

v.

STATE OF BIHAR.**

1958.

February, 20.

Sathi Lands (Restoration) Act, 1950 (*Bihar Act XXXIV of* 1950), *whether void—Constitution, Article* 14.

In enacting the Sathi Lands (Restoration) Act, 1950 what the legislature has done is to single out two individuals and deny them the right which every Indian citizen possesses to have his rights adjudicated upon by a judicial tribunal in accordance with the law which applies to his case.

The meanest of citizens has a right of access to a court of law for the redress of his grievances and it is of this right that the two individuals have been deprived by the Act.

It is impossible to conceive of a worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed upon any body eles and against which even the right of complaint is taken away and hence the Act violates the fundamental rights guaranteed under Article 14 of the Constitution and is, therefore, void.

Held, therefore, that a writ under Article 226 of the Constitution in the nature of *mandamus* shall issue directing the Bihar State Government not to take any steps in pursuance of the Sathi Lands (Restoration) Act, 1950 or to interfere in the possesssion of the lessees in respect of the lease referred to in the Act.

---

* Before Hon'ble Shri M. Patanjali Sastri, C. J., Hon'ble Shri Bijan Kumar Mukherjea, Hon'ble Shri Vivian Bose. Hon'ble Shri Ghulam Hasan and Hon'ble Shri N. H. Bhagwati, JJ.

** In the Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal no. 59 of 1952, on appeal from the Judgment and order dated the 3rd January, 1952 of the High Court of Judicature at Patna (Ramaswami and Sarjoo Prosad, JJ.) in application under Article 226 of the Constitution of India registered as Miscellaneous Judicial Case no. 204 of 1950, (with Original Petition no. 20 of 1952 under Article 32 of the Constitution of India praying for onforcement of Fundamental Rights). The Appeal and this Petition, which involved identical questions were called on for hearing together. Since the appeal was allowed by the Court. no separate order was made in the petition. The High Couurt Judgment is reported as (1952) A. I. R, (Pat.) 194.

1953.

R. P. N. SAHI v. STATE OF BIHAR.

What the equal protection guaranteed under Article 14 of the Constitution aims at is to strike down hostile discrimination or oppression of inequality. As the guarantee applies to all persons similarly situated, it is certainly open to the legislature to classify persons and things to achieve particular legislative objects, but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view.

Chiranjit Lal v. *The Union of India*(1), explained.

Gulf Colorado, etc., Co. v. *Ellis*(2) and *Ammerunnissa Begum* v. *Mahboob Begum*(3), applied.

Appeal with the original petition under Article 32 of the Constitution by the petitioners.

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

P. R. Das, Senior Advocate, (*B. Sen*, Advocate, with him), instructed by *I. N. Shroff*, Agent, for the appellants—petitioners.

M. C. Setalvad, Attorney-General for India, and *Mahabir Prasad*, Advocate-General of Bihar, (*G. N. Joshi*, Advocate, with them), instructed by *G. H. Rajadhyaksha*, Agent, for the respondents.

PATANJALI SASTRI, C. J.—I concur in the judgment which my learned brother Mukherjea is about to deliver, but I wish to add a few words in view of the important constitutional issue involved.

The facts are simple. The appellants obtained a settlement of about 200 bighas of land in a village known as Sathi Farm in Bettiah Estate, in Bihar, then and ever since in the management of the Court of Wards on behalf of the disqualified proprietress who is the second respondent in this appeal. The lands were settled at the prevailing rate of rent but the salami or premium payable was fixed at half the

(1) (1) (1950) S. C. R. 869.
(2) (1897) 165 U. S. 150.
(3) (Civil Appeal no. 68 of 1952 decided on 9th December 1953.)

usual rate as a concession to the appellants who are said to be distant relations of the proprietress. The appellants paid the salami and entered into possession of the lands on the 2nd November 1946 and have since been paying the rents regularly. On the 13th June 1950 the Bihar Legislature passed an Act called the Sathi Lands (Restoration) Act, 1950. The genesis of this legislation is thus explained in the counter-affidavit filed on behalf of the State of Bihar, the first respondent herein.

> Report against the settlement of these lands with the petitioners as well as some other lands to Sri Prajapati Mishra and the unlawful manner in which these settlements were brought about, was carried to the Working Committee of the Indian National Congress, which body, after making such enquiry as it thought fit, came to the conclusion that the settlement of these lands with the petitioners was contrary to the provisions of law and public policy and recommended that steps should be taken by the State of Bihar to have these lands restored to the Bettiah Estate. In pursuance thereof a request was made to the petitioners and to the said Prajapati Mishra to return the lands to Bettiah Estate. While Sri Prajapati Mishra returned the land settled with him, the petitioners refused to do so.

The statement of objects and reasons of the Sathi Lands (Restoration) Bill runs thus:

> As it has been held that the settlement of Sathi lands in the District of Champaran under the Court of Wards with Sri Ram Prasad Narayan Sahi and Sri Ram Rekha Prasad Narayan

1952.

R. P. N. SAHI v. STATE OF BIHAR.

PATANJALI SASTRI, C. J.

Sahi is contrary to the provisions of the law and as Sri Ram Prasad Narayan Sahi and Sri Ram Rekha Narayan Sahi have refused to return the lands to the Bettiah Estate, Government have decided to enact a law to restore these lands to the Bettiah Estate.

The impugned Act consists of three sections. Section 2(1) declares that "notwithstanding anything contained in any law for the time being in force", the settlement obtained by the appellants is "null and void", and that "no party to the settlement or his successor in interest shall be deemed to have acquired any right or incurred any liability thereunder". Sub-section (2) provides that the appellants and their successor in interest "shall quit possession of the said land from the date of commencement of this Act and if they fail to do so, the Collector of Champaran shall eject them and restore the lands to the possession of the Bettiah Wards Estate". Sub-section (3) provides for the refund of the amount of salami money and the cost of improvement, if any, to the lessees by the Estate on restoration to it of the lands in question.

In the "case" lodged in this Court for the State of Bihar, the legislation is sought to be justified and its validity maintained on the following grounds:

> It is well settled that a Legislature with plenary powers so long as it enacts laws within the ambit of its powers, is competent to enact a law which may be applicable generally to society or to an individual or a class of individuals only.....It is submitted that grants of the lands belonging to the Bettiah Estate made by the Court of Wards were of doubtful validity; hence they

> have been dealt with by the impugned Act.....No evidence has been adduced by the appellants, except a bare allegation, which has not been substantiated, that about 2,000 acres of land were settled to show that persons in similar circumstances with whom similar settlements were made, were treated differently. It is submitted that in the context the impugned Act has a reasonable basis of classification.

The decision of the majority of this Court in *Chiranjit Lal* v. *The Union of India*(1) is relied on in support of these contentions. In that case, however, the majority felt justified in upholding the legislation, though it adversely affected the rights and interests of the shareholders of a particular joint stock company, because the mismanagement of the company's affairs prejudicially affected the production of an essential commodity and caused serious unemployment amongst a section of the community. Mr. Justice Das and I took the view that legislation directed against a particular named person or corporation was obviously discriminatory and could not constitutionally be justified even if such legislation resulted in some benefit to the public. In a system of government by political parties, I was apprehensive of the danger inherent in special enactments which deprive particular named persons of their liberty or property because the Legislature thinks them guilty of misconduct, and I said in my dissenting opinion:

> Legislation based upon mismanagement or other misconduct as the differentia and made applicable to a specified individual or corporate body is not far removed from the notorious parliamentary procedure formerly employed in

(1) [1950 S. C. R. 869.

1953.

R. P. N. SAHI v. STATE OF BIHAR.

Britain of punishing individual delinquents by passing bills of attainder, and should not, I think, receive judicial encouragement.

PATANJALI SASTRI, C. J.

My apprehensions have come true. Recently we had before us a case from Hyderabad (Civil Appeal no. 63 of 1952—*Ameerunnissa Begum* v. *Mahboob Begum*) where the duly constituted legislative authority of that State intervened in a succession dispute between two sets of rival claimants to the estate of a deceased person and "dismissed" the claim of the one and adjudged the property to the other by making a special "law" to that effect. And now comes this case from Bihar of an essentially similar type. The appellants assert title to certain lands in Bettiah Estate under a settlement which they claim to have lawfully obtained from the Court of Wards, while it is now alleged on behalf of the Estate that the settlement was not for the benefit of the Estate and was contrary to law, as the Court of Wards did not then "apply its mind" to that question. This is purely a dispute between private parties and a matter for determination by duly constituted courts to which is entrusted, in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons, and our Constitution prohibits by Art. 14 every State from denying such protection to anyone. The appellants before us have been denied this protection. A political organisation of the party in power decides after making such enquiry as it thought fit that the settlement in question was "contrary to the provisions of law and public policy", and the State Legislature, basing itself on such decision, purports

to declare the settlement "null and void" and directs the eviction of the appellants and the restoration of the lands to the Estate. The reasons given for this extraordinary procedure are indeed remarkable for their disturbing implications. It is said that "there was agitation amongst the tenantry of the locality and opposition on the part of persons living in the locality against the appellants' possession of the lands which led to breach of the peace and institution of criminal cases". Whenever, then, a section of the people in a locality, in assertion of an adverse claim, disturb a person in the quiet enjoyment of his property, the Bihar Government would seem to think that it is not necessary for the police to step in to protect him in his enjoyment until he is evicted in due course of law, but the Legislature could intervene by making a "law" to oust the person from his possession. Legislation such as we have now before us is calculated to drain the vitality from the Rule of Law which our Cosntitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines.

MUKHERJEA, J.—This appeal, which has come before us on a certificate granted by the High Court of Patna under Article 132(1) of the Constitution, is directed against a judgment of a Division Bench of that court, dated January 3, 1952, by which the learned Judges dismissed a petition of the appellants under Article 226 of the Constitution. The prayer in the petition was for a writ in the nature of *mandamus*, directing the opposite party, not to take any action under an Act passed by the Bihar Legislative Assembly in 1950 and known as The Sathi Lands (Restoration) Act which was challenged as void and unconsitutional.

To appreciate the points in controversy between the parties to the proceeding, it may be necessary to narrate the material facts briefly. Maharani Janki

1953.

R. P. N. SAHI v. STATE OF BIHAR

MUKHERJEA, J.

Koer, the respondent no. 2 in the appeal, is the present proprietress of an extensive estate in Bihar known by the name of Bettiah Raj, which is held and managed on her behalf by the Court of Wards, Bihar, constituted under Bengal Act IX of 1879. On July 19, 1946 the appellants, who are two brothers and are distantly related to the Maharani, made a representation to the Government of Bihar through the Manager of the Estate, praying for settlement in raiyati right, of 200 bighas of land preferably in Sathi farm or Materia farm along with a certain quantity of waste lands. On July 20, 1946 the then Manager of the Wards Estate wrote a letter to the Collector of Champaran recommending that the applicants might be given settlement of the lands as prayed for, without payment of any *selami*. The Collector, however, did not agree to this proposal, nor did the Commissioner of the Tirhut Division, and the matter then came up for consideration before the Board of Revenue which recommended that settlement might be made with the applicants provided they were agreeable to pay *selami* at half the usual rates. On October 14, 1946 the recommendation of the Revenue Board was accepted by the Provincial Government and six days later the Court of Wards accepted a cheque for Rs. 5,000 from one of the lessees, towards payment of the *selami* money and rent for the year 1354 F.S. On the 2nd November 1946, possession of the lands was given to the appellants and on the 18th of November following the Manager of the Court of Wards recorded a formal order fixing the *selami* of the land at Rs. 3,988 annas odd and rent at Rs. 797 annas odd per year. On the same day, a *Hisab Bandobasti* form, which is the usual form employed in the Estate for raiyati settlements, was signed by the Circle Officer on behalf of the Court of Wards and by one of the lessees for himself as well as the constituted Attorney of the other lessees. It is not disputed that the lessees continued to possess the lands since then on payment of the stipulated rent.

1953.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

On the 3rd June 1950 the Bihar Legislative Assembly passed an Act known as the Sathi Lands (Restoration) Act which received the assent of the Governor on the 13th June 1950. The object of the Act, as stated in the preamble, is to provide for restoration of certain lands belonging to the Bettiah Wards Estate which were settled contrary to the provisions of law in favour of certain individuals. Section 2, which is the only material section in the Act, enacts in the first sub-section that the settlement of Sathi lands (described in the schedule to the Act) on behalf of the Bettiah Court of Wards Estate with the appellants, as per order of the Manager of the Estate dated the 18th November 1946, is declared null and void and no party to the settlement or his successor-in-interest shall be deemed to have acquired any right or incur any liability under the same. The second sub-section embodies a direction to the effect that the said lessees and their successor-in-interest shall quit possession of the lands from the date of the commencement of the Act and if they fail to do so, the Collector of Champaran shall eject them and restore the lands to the possession of the Bettiah Estate. The third and the last sub-section provides that the Bettiah Wards Estate shall on restoration to it of the lands pay to the lessees the *selami* money paid by them and also such amount as might have been spent by them in making improvements on the lands prior to the commencement of the Act.

In substance, therefore, the Act declared the lease granted by the Bettiah Wards Estate to the appellants on the 18th of November 1946 to be illegal and inoperative and prescribed the mode in which this declaration was to be given effect to and the lessees evicted from the lands.

On the 28th August 1950, the appellants filed the petition, out of which this appeal arises, under Article 226 of the Constitution in the High Court of Patna, challenging the validity of the Sathi Lands

1953.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

Act and praying for a writ upon the respondents restraining them from taking any steps under the said Act, or from interfering with the possession of the appellants in respect of the lands comprised in the lease. It was asserted by the petitioners that in passing the impugned legislation the Bihar Legislature actually usurped the power of the judiciary and the enactment was not a law at all in the proper sense of the expression. The other material contentions raised were that the legislation was void as it conflicted with the fundamental rights of the petitioners guaranteed under Articles 14, 19(1) (*f*) and 31 of the Constitution.

The respondents opposite parties in resisting the petitioners' prayer stated *inter alia* in their counter-affidavit that the settlement of the lands in question with the appellants by the Court of Wards, was not for the benefit of the estate or advantage of the Ward and that the transaction was entered into by the Wards Estate without properly applying their mind to it. It was stated further that after the settlement was made, there was a good deal of agitation among the tenants in the locality which led to the institution of certain criminal proceedings. In these circumstances, the matter was brought to the notice of the Working Committee of the Indian National Congress and the Working Committee was of opinion that the settlement of these lands was against public interest. The lessees, therefore, were asked to vacate the lands and on their refusal the legislation in question was passed.

The petition was heard by a Division Bench consisting of Ramaswami and Sarjoo Prosad, JJ.; Ramaswami, J., decided all the points raised by the petitioners against them and held that the Act was neither *ultra vires* the Bihar Legislature nor was void under Article 13 (1) of the Constitution. The learned Judge was further of opinion that it was not a fit case for interference by the High Court under Article 226 of the Constitution . The other learned Judge

expressed considerable doubts as to whether a legislation of this type, which in form and substance was a decree of a court of law, was within the competence of the legislature and warranted by the Constitution. He agreed, however, with his learned colleague that the case was not such as to justify an interference of the High Court in exercise of its discretionary powers under Article 226 of the Constitution. The remedy of the petitioners might lie, according to him, in a regularly constituted suit. The result, therefore, was that the appellants' petition was dismissed and it is the propriety of this judgment that has been assailed before us in this appeal.

Mr. P. R. Das, who appeared in support of the appeal, put forward at the forefront of his arguments, the contention raised on behalf of his client in the court below that the impugned legislation was void by reason of its violating the fundamental rights of the appellants under Article 14 of the Constitution. The point appeared to us to be of substance and after hearing the learned Attorney-General on this point we were satisfied that the contention of Mr. Das was well-founded and entitled to prevail, irrespective of any other ground that might be raised in this appeal.

There have been a number of decisions by this court where the question regarding the nature and scope of the guarantee implied in the equal protection clause of the Constitution came up for consideration and the general principles can be taken to be fairly well settled. What this clause aims at is to strike down hostile discrimination or oppression of inequality. As the guarantee applies to all persons similarly situated, it is certainly open to the legislature to classify persons and things to achieve particular legislative objects; but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view. It cannot be

1953.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

disputed that the legislation in the present case has singled out two individuals and one solitary transaction entered into between them and another private party, namely, the Bettiah Wards Estate and has declared the transaction to be a nullity on the ground that it is contrary to the provisions of law, although there has been no adjudication on this point by any judicial tribunal. It is not necessary for our present purpose to embark upon a discussion as to how far the doctrine of 'separation of powers' has been recognised in our Constitution and whether the legislature can arrogate to itself the powers of the judiciary and proceed to decide disputes between private parties by making a declaration of the rights of one against the other. It is also unnecessary to attempt to specify the limits within which any legislation, dealing with private rights, is possible within the purview of our Constitution. On one point our Constitution is clear and explicit, namely, that no law is valid which takes away or abridges the fundamental rights guaranteed under Part III of the Constitution. There can be no question, therefore, that if the legislation in the present case comes within the mischief of Article 14 of the Constitution, it has got to be declared invalid. This leads us to the question as to whether the impugned enactment is, in fact, discriminatory and if so, whether the discrimination made by it can be justified on any principle of reasonable classification?

The appellants, it is not disputed, are only two amongst numerous lease-holders who hold lands in raiyati right under the Bettiah Wards Estate. It cannot also be disputed that the lands were settled with them on the recommendation of the Board of Revenue after due consideration of the respective views put forward by the Manager of the Estate on the one hand and the Collector and the Divisional Commissioner on the other. The appellants are admittedly paying rents which are normally assessed on lands of similar

1953.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

description in the locality. The learned Attorney-General refers us in this connection to the provisions of section 18 of the Court of Wards Act and argues that the lease in dispute was granted in contravention of that section. Section 18 of the Court of Wards Act provides as follows:

> "The Court may sanction the giving of leases or farms of any property, under its charge.....and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the Ward".

Apparently it makes the Court of Wards the sole judge of the benefit to the estate or advantage of the ward. But it is said that the Court of Wards did not apply its mind properly to this matter when it granted lease to the appellants at half the usual rate of *selami*. The Wards Estate thus suffered loss to the extent of nearly Rs. 4,000 which could legitimately have been recovered from any other lessee. This contention does not impress us much; the utmost that can be said is that this could have been put forward, for what it is worth and with what result, nobody can say, as a ground for setting aside the lease in a court of law. But that is not the question which is relevant for our present purpose at all; we were not called upon to decide whether or not the lease was a proper one or beneficial to the estate. The question for our decision is, whether the statute contains discriminatory provisions so far as the appellants are concerned and if so, whether these discriminations could be reasonably justified? It is clearly stated in paragraph 9 of the affidavit made by the appellants in support of their petition that there are numerous other persons to whom leases on similar terms were granted by the

1953.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

Bettiah Wards Estate. Clauses (*b*), (*c*) and (*d*) of paragraph 9 of the affidavit stand thus:

"(*b*) In this long course of management by the Court of Wards, leases or settlement of lands used to be made without any selami, on proper rent. This state of affairs continued down to recent times during which period thousands of bighas were so settled with numerous persons;

(*c*) in 1945 the authorities decided to make settlements on large scale with war returned soldiers on a selami equal to 5 times the average rent prevailing in the locality for similar lands;

(*d*) in 1946, 1947, 1948 and 1949 a good number of settlements covering about 2,000 acres of lands were settled on the basis of 10 years' rental obtaining in the locality and in some cases for good reasons, at five years' rental."

In paragraph 12 of the counter-affidavit put in on behalf of the respondents, these statements are not denied. In fact, they are admitted and the only thing said is, that these leases were granted in due course of management. Ramaswami, J. has dismissed this part of the case by simply remarking that no details of these settlements were furnished by the appellants; but no details were at all necessary when the correctness of the statements was not challenged by the respondents. It will be interesting to note that the respondents themselves in paragraph 10 of their counter-affidavit mentioned the name of Shri Prajapati Mishra as one of the persons with whom similar settlement of lands was made by the Bettiah Estate. It is stated in that paragraph that the cases of the appellants as well as of Prajapati Mishra were brought to the notice of the Working Committee of

the Indian National Congress and the Committee came to the conclusion that both the settlements were contrary to the provisions of law. Thereupon a request was made to both these sets of lessees to restore their lands to the Estate, but whereas Prajapati Mishra returned his lands to the Bettiah Estate, the appellants refused to do so. In reply to this statement, the appellants stated in their rejoinder that the said Prajapati Mishra did not vacate the lands but created a trust in respect of the same, he being the Chairman of the board of trustees and the lands were still in possession of the board of trustees. Strangely, as it seems, the State of Bihar raked up this matter again in a further affidavit where it was admitted that the said Prajapati Mishra did execute a trust and that the trustees took possession of the property. It was stated, however, that Prajapati Mishra, who was one of the trustees, did actually surrender the lands in two instalments but the other trustees did not, and hence legal advice was being taken to find out ways and means of recovering the property from them. The whole thing smacks of disingenuousness and the State of Bihar, it seems, was not well advised in relying upon facts like these in their attempt to repel the appellants' attack on the legislation on the ground of discrimination.

Be that as it may, there is no doubt that the appellants were not the only lessees under the Bettiah Estate who got settlement of lands at a *selami* of five years' rental. On the sworn statements of the appellants, which are not challenged by the other side, it appears that there are numerous persons occupying the same position as the appellants, who however were not subjected to this expropriatory legislation. But the vice in this legislation goes much deeper than this. It is not merely a question of treating the appellants differently from the other lessees under the Wards Estate, with whom settlements of land have been made on similar or identical terms. If a lease has

1954.

R. P. N. SAHI v. STATE OF BIHAR.

MUKHERJEA, J.

been given by a Court of Wards, which is not for the benefit of the Estate or advantage of the ward, it is for a court of law to decide whether it is warranted by the terms of the Court of Wards Act. If the lessor proceeds to cancel the lease, the lessee has a legal right to defend his claim and satisfy the court that the lease is not in contravention of law. If, on the other hand, the lessee is actually dispossessed, he has a right to sue in court for recovery of possession of the property on establishing that he has been illegally turned out. The dispute here, is a legal dispute pure and simple between two private parties. What the legislature has done is to single out these two individuals and deny them the right which every Indian citizen possesses to have his rights adjudicated upon by a judicial tribunal in accordance with the law which applies to his case. The meanest of citizens has a right of access to a court of law for the redress of his just grievances and it is from this right that the appellants have been deprived, by this Act. It is impossible to conceive of a worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed upon anybody else and against which even the right of complaint is taken away. The learned Attorney-General, who placed his case with his usual fairness and ability, could not put forward any convincing or satisfactory reason upon which this legislation could be justified. It is true that the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that a legislature understands and correctly appreciates the needs of its own people. But when on the face of a statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, this presumption is of little or

no assistance to the State. We may repeat with profit what was said by Mr. Justice Brewer in *Gulf Colorado etc., Co.* v. *Ellis*(1) that "to carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the Fourteenth Amendment a mere rope of sand". In our opinion, the present case comes directly within the principle enunciated by this court in *Ameerunnissa Begum* v. *Mahboob Begum* (Civil Appeal no. 63 of 1952 decided on 9th December 1952).

The result is that we allow the appeal and set aside the judgment of the High Court. A writ in the nature of *mandamus* shall issue directing the respondents not to take any steps in pursuance of the Sathi Lands (Restoration) Act of 1950 or to interfere with the possession of the appellants in respect to the lands comprised in the lease referred to in that Act. The appellants will have their costs in both courts.

VIVIAN BOSE, J.—I am in entire agreement with my Lord the Chief Justice and with my learned brother Mukherjea.

GHULAM HASAN, J.—I agree with my Lord the Chief Justice and with my brother Mukherjea.

N. H. BHAGWATI, J.—I entirely agree with the judgment just delivered by my Lord the Chief Justice and my brother Mukherjea and there is nothing which I can usefully add.

Appeal allowed.

K. D. and S. H.

(1) (1897) 165 U. S. 150.

REVISIONAL CIVIL.

Before Ramaswami and Jamuar, JJ.

1953.

March, 4

DR. S. VERMA

v.

DR. H. PD.*

Bihar and Orissa Municipal Act, 1922 (*B. & O. Municipal Act VII of* 1922), *section* 19, *rules framed thereunder—rule* 5(1), *whether mandatory—Election Commissioner, whether has jurisdiction to entertain election petition beyond the period of limitation prescribed—Election Commissioner, whether is a 'court' within the meaning of section* 115, *Code of Civil Procedure*, 1908 (*Act V of* 1908).

The Election Commissioner is a 'court' within the meaning of section 115, Code of Civil Procedure, 1908, and the High Court is competent to deal with an application in revision against the order of the Election Commissioner constituted under the rules framed by the State Government by virtue of section 19 of the Bihar and Orissa Municipal Act, 1922.

Abdul v. *Kuldip*(1) and *Jamuna* v. *Jogendra*(2), relied on.

The period of limitation prescribed by rule 5(1) of the rules framed by the Provincial Government under section 19, Bihar and Orissa Municipal Act, 1922, is not merely a directory provision. It is a preliminary condition for the exercise of jurisdiction of the Election Commissioner.

Therefore, the Election Commissioner acted beyond his jurisdiction in condoning the delay in entertaining an election petition presented before him beyond the period of 14 days prescribed by rule 5(1).

---

* Miscellaneous Judicial Case no. 410 of 1952 and Civil Revision no. 751 of 1952, in the matter of an application under Article 226 of the Constitution, and against an order of Mr. Nasiruddin Khan, District Judge of Champaran and *ex-officio* Election Commissioner of Motihari Municipality, dated the 11th November, 1952.

(1) (1943) I. L. R. 22 Pat. 577.
(2) (1950) I. L. R. 29 Pat. 581.

1953.

DR. S. VERMA v. DR. H. PD.

Nusserwanjee Pestonjee v. *Noor Mynoodeen Khan Wullud Keer Sudroedeen Khan Bahadur*(1), *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(2), *Jainandan Ram Tewari* v. *Ruria Oraon*(3) and *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*(4), referred to.

Application in revision and an application under Article 226 of the Constitution by the petitioner.

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

Lalnarain Sinha and *Balbhadra Prasad Singh* in M. J. C. 410/52 and *Padmanand Jha* in C. R. 751/52, for the petitioner.

Mahabir Prasad and *Shambhu Saran*, for the opposite party.

RAMASWAMI, J.—The question to be determined in this case is whether the Election Commissioner of Champaran acted in excess of his jurisdiction in entertaining the election petition filed by the opposite party, Dr. Shyamakant Verma, beyond the period of fourteen days from the date of the election as prescribed by rule 5(1) of the rules framed by the Provincial Government under section 19 of the Bihar and Orissa Municipal Act, 1922.

The material facts are not controverted. In March 1952 there was an election of the commissioners of the Motihari Municipality at which the petitioner, the opposite party and twenty other persons were elected as commissioners. A notification publishing the names of the commissioners so elected was duly published in an issue of the *Bihar Gazette*, dated the 30th April, 1952. On the 20th of August, 1952, five more persons were nominated by the State Government as municipal commissioners of the Motihari

(1) (1855) 6 Moo. Ind. App. 134.
(2) (1936) I. L. R. 15 Pat. 698.
(3) (1933) I. L. R. 12 Pat. 626, P. C.
(4) (1949) L. R. 76 Ind. App. 181.

1953.

DR. S. VERMA v. DR. H. PD. RAMASWAMI, J.

Municipality. It is stated that on the 8th of September, 1952, there was a meeting of the commissioners for electing a chairman. The petitioner and the opposite party each secured an equal number of votes, but the President gave his casting vote in favour of the petitioner who was declared duly elected as Chairman of the Municipality. As there was an apprehension of the breach of the peace, the District Magistrate directed the petitioner not to take charge of the office of the Chairman pending an enquiry. On the 21st of October, 1952, the District Magistrate informed the petitioner that he had received instructions from Government and that the petitioner would be permitted to take charge as the Chairman of the Motihari Municipality from Jagannath Chaudhury who had been officiating as Chairman. This order was communicated to the opposite party, Dr. Harishanker Prasad, on the same date. On the 27th October, 1952, the opposite party filed an application before the Election Commissioner praying that the election of the petitioner, Dr. Shyamakant Verma, be declared as null and void on the ground that the entire election proceedings were illegal. An objection was raised on behalf of the petitioner to the effect that the election petition ought to have been filed within fourteen days from the date of the election, and the election petition not being filed within the time fixed, it ought to be rejected by the Election Commissioner. The objection was overruled by the Election Commissioner on the ground that the opposite party had sufficient cause for not filing the election petition within the prescribed period and the delay should be condoned.

Against this order the petitioner has filed an application under section 115 of the Civil Procedure Code. He has also filed an application under Article 226 of the Constitution as a matter of precaution.

At the commencement of the argument in the case Mr. Lal Narain Sinha pointed out that there

1953.

DR. S. VERMA v. DR. H. PD. RAMASWAMI, J.

are two decisions of a Division Bench of this Court holding that an Election Commissioner is a " Court " within the meaning of section 115 of the Civil Procedure Code, and that the High Court was competent to deal with an application in revision under section 115 of the Code against the order of the Election Commissioner constituted under the rules made by the State Government by virtue of section 19 of the Bihar and Orissa Municipal Act, 1922, [*see Abdul* v. *Kuldip*(1) and *Jamuna* v. *Jogendra*(2)]. These authorities are binding upon this Court, and in view of this circumstance the learned Advocate-General conceded that the petitioner could maintain an application in revision in the present case.

The principal question, therefore, is whether the Election Commissioner acted in excess of his jurisdiction in holding that the election petition filed by the opposite party could be entertained even beyond the period of fourteen days prescribed by rule 5. To put it in other words, the question is whether the period of limitation prescribed by rule 5 is merely a directory provision, or whether it is a preliminary condition for the exercise of jurisdiction of the Election Commissioner in this case. On behalf of the petitioner Mr. Lal Narain Sinha contended that the rule of limitation prescribed in rule 5 was a condition of jurisdiction and not a mere matter of procedure. It was pointed out by learned Counsel that the jurisdiction conferred by the rules was a special jurisdiction which must be exercised subject to the conditions prescribed by the same rules. Learned Counsel relied upon the familiar principle that wherever a special jurisdiction is conferred on a Court or Tribunal by a statute and the special jurisdiction is conferred upon terms, it is essential that the terms must be complied with in order to create the special

(1) (1943) I. L. R. 22 Pat. 577.
(2) (1950) I. L. R. 29 Pat. 581.

1953.

DR. S. VERMA v. DR. H. PD. RAMASWAMI, J.

jurisdiction. In my opinion, the argument of learned Counsel for the petitioner is well founded. The matter really turns upon the construction of rule 5(1) in the setting and the context of the other relevant rules. Rule 5(1) states that—

"an election petition against a returned candidate shall be presented to the Election Commissioner within fourteen days or within fourteen days from the date of the election held under sub-section (1) of section 20, section 23 and section 28 of the Act, as the case may be."

Rule 3 is also important. Rule 3 states that—

"no election shall be called in question except by an election petition presented in accordance with these rules."

Rule 4 provides that—

"an election petition against any returned candidate may be presented to the Election Commissioner by any candidate or elector."

Rule 5(2) states that—

"when the period prescribed by sub-rule (1) for the presentation of an election petition expires on a day which is a public holiday within the meaning of section 25 of the Negotiable Instruments Act, 1881, or has been notified by the Governor or by the High Court of Judicature at Patna to be observed as a holiday in Government offices or courts, the petition shall be considered as having been presented in due time if it is presented on the next succeeding day which is neither such a public holiday or a day so notified."

Rule 10(1) is as follows:—

"If there is any failure to comply with any of the provisions of rule 5, sub-rule (1) and clause (a) of sub-rule (2) of rule 7 and rule 8 or 9, the Election Commissioner shall summarily dismiss the petition."

If rule 5(1) is construed in the context of rules 2, 3 and 10, it is clear that the limitation of time prescribed by rule 5(1) is not a mere matter of procedure but it is a condition of jurisdiction of the Election Commissioner to deal with the election petition. In this connection it was argued by the learned Advocate-General appearing on behalf of the opposite party that rule 24 conferred a general discretion upon the Election Commissioner to condone the delay made in

filing the election petition in the present case. Rule 24 states:—

1958.

DR. S. VERMA v. DR. H. PD. RAMASWAMI, J.

"In respect of any matter not specifically provided for in these rules, the Election Commissioner shall proceed in such manner as he considers proper in the circumstances of the case."

It was argued by the learned Advocate-General that there is no specific rule dealing with condonation of delay, and rule 24 was, therefore, applicable in the circumstances of the case. I am not able to accept this argument. Rule 5(1) prescribes a specific period of limitation and rule 5(2) prescribes that in certain exceptional cases the delay in filing the election petition should be condoned by the Election Commissioner. There are specific provisions, therefore, for prescribing the period of filing the election petition and for prescribing on what conditions a delay may be condoned. There is hence no warrant or justification for the argument of the learned Advocate-General that there is a general discretion conferred upon the Election Commissioner by virtue of rule 24, and that it was open to the Election Commissioner to entertain an election petition beyond the period prescribed in rule 5(1) or rule 5(2) of the rules. On the contrary, I hold, for the reasons already indicated, that the limitation of time prescribed by rule 5(1) is a matter of jurisdiction, and that if the Election Commissioner entertains an election petition beyond the period prescribed by rule 5(1), he will be acting in excess of his jurisdiction.

The principle is illustrated by a line of authorities of which the decision in *Nussarwanjee Pestonjee* v. *Noor Mynoodeen Khan Wullud Keer Sudroodeen Khan Bahadur*(1) is a leading example. In that case the question raised was whether an award made upon a submission to arbitration was within the provisions of Bombay Regulation no. VII of 1928 so as to entitle it to the force of a decree of court or had

(1) (1885) 6 Moo. I. A. 134.

1953.

DR. S. VERMA v. DR. H. PD. RAMASWAMI, J.

the effect of only an ordinary award. Section 3, clause 1 of this Regulation enacted, among other things, that the deed of reference must contain " the time within which the award is to be given ". It was held by the Judicial Committee that since the deed of submission contained no provision for time, the award made by the arbitrator was bad, and an award made under it, which had been ordered to be enforced as a decree of Court should be taken off the file, as the Court had no jurisdiction except upon the fulfilment of the requirements of the Regulation. The same principle is repeated in *Jagdishwar Dayal Singh* v. *Pathak Dwarka Singh*(1) in which it was held that in order to justify a sale of a tenure under section 208 of the Chota Nagpur Tenancy Act, 1908, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. If all the parties are not joined or represented, the Revenue Court had no jurisdiction to order a sale of the holding under section 208 of the Chota Nagpur Tenancy Act, and the jurisdiction of the Civil Court to question the sale was not excluded by section 214 of the Act. To the similar effect is the decision in *Jainandan Ram Tewary* v. *Ruria Uraon*(2) in which the holding of a certain tenant was sold in execution of a rent decree under section 208 of the Chota Nagpur Tenancy Act and the tenant deposited the amount due, but two days after the statutory period had expired under section 212 of the Act. The Rent Suit Deputy Collector, in spite of the expiry of the statutory period, accepted the amount and set aside the sale. It was held by the High Court that the deposit made under section 212 after the expiry of the statutory period was of no avail, and the Rent Suit Deputy Collector had no jurisdiction to make an order setting aside the sale. The principle

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1936) I. L. R. 15 Pat. 698.

has been affirmed by the Judicial Committee in *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*(1) in which the Subordinate Judge had upon a misconstruction of section 2(4) of the Bengal Money-lenders Act held that the transaction in question was not a commercial loan and refused to interfere with the terms of the mortgage decree. It was held by Sir John Beaumont upon these facts that the learned Subordinate Judge by a wrong decision on a question of law had refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under sub-section (*b*) of section 115 of the Civil Procedure Code. Applying the principle illustrated by these authorities, it is clear that the condition of limitation prescribed in rule 5(1) is a preliminary condition upon which the jurisdiction of the Election Commissioner rests. Since the election petition had been presented in this case beyond the period of fourteen days prescribed by rule 5(1), it must be held that the Election Commissioner acted beyond his jurisdiction in condoning the delay and in entertaining the election petition.

For these reasons I would make the rule absolute and set aside the order of the Election Commissioner, dated the 11th November, 1952, admitting the election petition filed by the opposite party. The application in revision is accordingly allowed with costs: hearing fee five gold mohurs.

Miscellaneous Judicial Case no. 410 of 1952 under Article 226 of the Constitution is not pressed and is accordingly dismissed.

JAMUAR, J.—I agree.

Order accordingly.

K. D.

(1) (1949) L. R. 76 Ind. App. 131.

APPLICATION FOR LEAVE TO APPEAL

Before Ramaswami and Jamuar, JJ.

1953.

March, 5.

N. P. SUKUL

v.

R. K. MISRA.*

Supreme Court Appeal—valuation of subject matter in dispute found to be Rs. 11,915*—suit instituted before the passing of the Constitution—Constitution, Article* 133(1)*, whether applicable or case governed by the old law—Code of Civil Procedure,* 1908 *(Act V of* 1908*), section* 110.

Where a suit was filed before the passing of the Constitution and was found in value to be less than Rs. 20,000 but more than Rs. 10,000, *held*, that the application for leave to appeal to the Supreme Court was not incompetent on the ground of valuation. The question of valuation was governed by the old law, i.e., section 110, Code of Civil Procedure, 1908, and not by Article 133(1), Constitution. The Article had no retrospective effect.

Dajisaheb v. *Shankarrao*(1), *The Colonial Sugar Refining Co., Ltd.* v. *Irving*(2) and *Sadar Ali* v. *Dalmuddin*(3), referred to.

Application for leave to appeal to the Supreme Court by defendant no. 1.

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

S. C. Ghosh and *Murtaza Fazl Ali*, for the petitioner.

S. C. Mazumdar and *Nakuleshwar Prasad*, for the opposite-party.

RAMASWAMI AND JAMUAR, JJ.—This application is for leave to appeal to the Supreme Court on behalf

* Supreme Court Appeal no. 113 of 1951, in the matter of an application under Order XLV read with section 110 of the Code of Civil Procedure for leave to appeal to the Supreme Court.

(1) (1952) A. I. R. (Bom.) 303.
(2) (1905) App. Cas. 369.
(3) (1928) I. L. R. 56 Cal. 512, S. B.

of defendant no. 1 against a judgment of the High Court in second appeal, dated the 13th of April, 1951. The dispute relates to a building in the Purulia town known as Pratap Natya Mandir. According to the case of the plaintiffs, defendant no. 2 had executed a lease, dated the 3rd of November, 1941, in their favour, which was registered on the 15th of November, 1941. The plaintiffs brought the suit on the 30th of August, 1943, asking for a declaration and also for permanent injunction against defendant no. 1 from executing the decree which the latter had obtained in Second Appeal no. 66 of 1943. The case of the petitioner was that, on the 5th of April, 1940, defendant no. 2 executed a registered lease in his favour, and, upon the basis of this transaction, defendant no. 1 had brought a suit against defendants nos. 2 and 3 for recovery of possession of the building in dispute. The suit was decreed, and the decree was affirmed in appeal by the District Judge, and, in second appeal, the High Court affirmed the decree on the 6th of May, 1943, with certain modifications. Upon a consideration of the rival contentions in the present case, the Subordinate Judge decreed the suit of the plaintiffs which was affirmed by the District Judge in appeal. On the 26th of April, 1943, defendant no. 1 preferred a second appeal in the High Court which was valued at Rs. 2,100. The Stamp Reporter objected that the valuation was Rs. 9,000, and a first appeal ought to have been preferred. On the 9th of February, 1948, the second appeal was converted into a first appeal by the order of the High Court. On the 4th of August, 1948, a Full Bench of the Court decided in *Ramdeo* v. *Raj Narain*(1) that clauses (*a*) and (*b*) of sub-section (1) of section 11 of the Suits Valuation Act, 1887, were disjunctive and not conjunctive, and that under section 11 of the Act the disposal of

(1) (1948) I. L. R. 27 Pat. 1091, F. B.

1953.

N. P. SUKUL v. R. K. MISRA.

RAMASWAMI AND JAMUAR, JJ.

the appeal by the lower appellate Court could not be questioned as being without jurisdiction on the ground of the valuation being beyond the pecuniary jurisdiction of that Court. It was further held by the Full Bench that simply because the lower appellate Court had no pecuniary jurisdiction over the appeal, which should have been heard as a first appeal in this Court, would not by itself amount to prejudice in the disposal of the case on merits. After the decision of the Full Bench, the Stamp Reporter said that the present suit should be treated as second appeal. Accordingly, on the 11th of March, 1949, a Bench of this Court ordered that the first appeal would be reconverted into a second appeal. On the 13th of April, 1951, the case was treated and heard as second appeal and was dismissed.

When this matter came up before the High Court in the first instance, we directed that the case should be remanded to the Subordinate Judge of Purulia for making an enquiry into the question of valuation. The Subordinate Judge has now made a report stating that the valuation of the subject-matter of the suit was Rs. 11,915 on the 30th of August, 1943, and the valuation of the subject-matter at present in dispute is of the same extent. Mr. S. C. Ghosh, who appears on behalf of the petitioner, contended that the petitioner had a right of appeal under section 110, Civil Procedure Code, before the promulgation of the Constitution of India, and that that right of appeal was a vested right, and would continue irrespective of the fact that Article 133(1) stipulates that the valuation of the subject-matter in dispute should be not less than twenty thousand rupees. In support of this argument, learned Counsel relied on a decision of the Bombay High Court, *Dajisaheb* v. *Shankarrao*(1). We think that the contention of Mr. S. C. Ghosh on

(1) (1952) A. I. R. (Bom.) 303.

1953.

N. P. SUKUL v. R. K. MISRA.

RAMASWAMI AND JAGGAR, JJ.

this point is well-founded. In the present case, the learned Subordinate Judge has valued the subject-matter in dispute at a sum of Rs. 11,915. On behalf of the opposite party, Mr. Mazumdar raised several objections to the report of the Subordinate Judge. Learned Counsel said that the valuation has been made on a wrong principle. But no such objection was raised before the Subordinate Judge before whom the opposite party appeared and contested the valuation. Counsel also stated that the valuation has been made on the profits from the cinema business, and not on the rental paid. This objection also was not raised before the learned Subordinate Judge, who said that there was no evidence produced by the parties to show what was the profit from the cinema business. The objections of Mr. Mazumdar must, therefore, be overruled, and the report of the learned Subordinate Judge must be accepted as correct, and the valuation of the subject-matter in dispute must be taken to be a sum of Rs. 11,915 at the time of the institution of the suit and at the present moment when leave to appeal to the Supreme Court is sought. If that is the position, it is clear that, under section 110 of the Civil Procedure Code, the petitioner had a right of appeal either to the Federal Court or to the Judicial Committee of the Privy Council at the time when the suit was instituted. Article 133(1) of the Constitution provides that an appeal lies to the Supreme Court only in a case where the amount or value of the subject-matter in dispute is over twenty thousand rupees. The question that arises in this case is whether Article 133(1) has retrospective effect, and whether it takes away the right of appeal which the petitioner had. In our opinion there is nothing in Article 133(1) to suggest that the right of appeal which had already vested in the petitioner is adversely affected. It is well settled that a right of appeal is not a mere matter of procedure, but it is a substantive right which cannot be taken away

1953.

N. P. SUKUL v. R. K. MISRA.

RAMASWAMI AND JAMUAR, JJ.

retrospectively unless the legislation clearly states, either expressly or by necessary implication, that the vested right has been taken away [see *The Colonial Sugar Refining Co., Ltd.* v. *Irving*(1)]. But when did the right of appeal vest in the petitioner in this case? It was pointed out on behalf of the opposite party that the second appeal before the High Court was dismissed on 30th April 1951. But that is not the date for the purpose of determining when the right of appeal arises. The reasoning of Lord Macnaghten in 1905 Appeal Cases 369 is conclusive authority to show that the right of appeal is not a mere matter of procedure and that the right to enter the superior court is deemed to arise to a litigant on the date of the institution of the suit even before any decision has been given by the inferior court. The reason is that a suit and all appeals from that decree made therein are regarded as one "legal proceeding" and in *Sadar Ali* v. *Dalimuddin*(2) it was held by a Special Bench of the Calcutta High Court that the right of appeal is deemed to arise to the litigant at the date of the institution of the suit and that the amendment of the Letters Patent which came into effect on 14th January 1928, could not be given retrospective effect. Applying the principle to the present case it is clear the suit was brought by the plaintiff on the 30th August 1943 and the right to appeal to the Federal Court and to His Majesty in Council arose on that date. There are important considerations in the present case which suggest that this right of appeal, which the petitioner had, has been clearly saved. In the first place, it is important to state that after the passing of the Indian Independence Act, and before the commencement of the Constitution, the jurisdiction of the Federal Court was enlarged and the appellate jurisdiction of the Privy Council in civil cases was transferred to the

(1) (1905) App. Cas. 369.
(2) (1928) I. L. R. 56 Cal. 512, S. B.

Federal Court by the Federal Court (Enlargement of Jurisdiction) Act (Act I of 1948). Under this Act, appeals in all civil cases from which a direct appeal could have been taken to His Majesty in Council either with or without special leave could lie to the Federal Court under the provisions of the Code of Civil Procedure of 1908. After the Constitution of India was promulgated, the appellate jurisdiction of the Federal Court was transferred to the Supreme Court. Article 135 of the Constitution states:

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law".

In this connection Article 374(2) is also important. Article 374(2) states:

"All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court".

Upon an examination of Articles 374(2) and 135 it is clear that though the Supreme Court may have no jurisdiction under Articles 133 and 134 still if in respect of that matter the Federal Court had jurisdiction, the Supreme Court also would by reason of Article 135 have the same jurisdiction in respect of that matter. There is a further consideration. By the Adaptation of Laws Order, 1950, section 110 of the Civil Procedure Code was adapted to bring it into conformity with Article 133(1) and the sum of Rs. 20,000 was substituted for the sum of Rs. 10,000 in section 110 and other consequential amendments were made. Section 27 of the Adaptation of Laws

1953

N. P. SUKUL v. R. K. MISRA.

RAMASWAMI AND JAMUAR, JJ.

Order, 1950, is very significant. Section 27 states, that

"Nothing in this Order shall affect the previous operation of or anything duly done or suffered under, any existing law, or any right, privilege, obligation or liability already acquired,..."

For these reasons, we think that the petitioner has a right of appeal to the Supreme Court in this case under section 110, Civil Procedure Code, provided he makes out that a substantial point of law is involved.

It was contended by Mr. S. C. Ghosh that the appeal ought to have been treated by the High Court as a first appeal, and not as a second appeal, and that the decision of the Full Bench in *Ramdeo v. Raj Narain*(1) requires reconsideration. After having heard Mr. Mazumdar, who appears on behalf of the opposite party, we are inclined to think that there is a substantial question of law involved in this case, and that the requirements of section 110 of the Civil Procedure Code have been complied with.

We, accordingly, allow this application, and grant a certificate to the petitioner for leave to appeal to the Supreme Court under section 110, Civil Procedure Code, read with Article 135 of the Constitution. The petitioner is entitled to his costs: hearing fee five gold mohars.

Application allowed.

K. D.

(1) (1948) I. L. R. 27 Pat. 1091, F. B.

MISCELLANEOUS CRIMINAL.

Before Das and Sinha, JJ.

GANGA

v.

BHABICHHAN.*

March, 6.

Bihar Panchayat Raj Act, 1947 (*Bihar Act VII of* 1948), *section* 57, *delegation of power to stranger for enquiry, whether vitiates decision of the Gram Cutcherry—rules* 58 *and* 59 *under the Act laying down a quorum to constitute a full bench, whether repugnant to section* 67.

A decision of a bench of the Gram Cutcherry is not vitiated by reason of the consideration of a report of a preliminary enquiry made by a stranger, provided the bench does not delegate its power of making the final enquiry and receiving such evidence as it considers necessary, under section 59 of the Bihar Panchayat Raj Act, 1947.

Sant Prasad v. *State*(1), distinguished.

Rules 58 and 59 of the Bihar Panchayat Raj Act, 1947 so far as they lay down a quorum to constitute the full bench and make the decision of the majority of the Punches present the decision of the full bench do not travel beyond the scope of and are not inconsistent with the words used in section 67 of the Act;

Held, therefore, that an appeal against the decision of the Gram Cutcherry can be heard under section 67 of the Act by twelve Punches of the Gram Cutcherry.

Ram Narayan Sukul v. *Lakhan Sah*(2), followed.

Application under Article 227, Constitution of India.

Rajeshwar Kumar and *Mrs. Helga Kumar* for the petitioner.

G. C. Banerji, for the opposite party.

DAS, J.—This is a petition for quashing an order of conviction and a sentence of fine imposed upon the

* Criminal Miscellaneous no. 426 of 1952, in the matter of an application under Article 227 of the Constitution of India.

(1) (1952) A. I. R. (All.) 785.

(2) (Original Criminal Miscellaneous Case no. 7 of 1952).

1953.

GANGA v. RAMBICHHAN.

DAS, J.

petitioner by a bench of the Gram Cutcherry by an order dated the 26th of November, 1951. The application is for an exercise of the power of superintendence vested in this Court under Article 227 of the Constitution of India. The petitioner was convicted of the offence under section 323 of the Penal Code and sentenced to pay a fine of Rs. 22 or in default simple imprisonment for two weeks by a bench of the Gram Cutcherry at Haripur Pusa in the district of Darbhanga, constituted under section 57 of the Bihar Panchayat Raj Act, 1947. There was an appeal to the full bench of the Gram Cutcherry under section 67 of the said Act which was heard by twelve Panches on the 30th of June, 1952. The Panches, with one dissentient member, dismissed the appeal.

We have heard learned Counsel for the petitioner as also learned Counsel for the opposite party, the complainants, on whose complaint the case against the petitioner was instituted. Learned Counsel for the petitioner has urged four points in support of the rule. His first point is that offence as disclosed by the petition of complaint was one under section 342 of the Penal Code and the Gram Cutcherry had no jurisdiction to try that offence. Learned Counsel has referred us to the provisions of section 62 of the Bihar Panchayat Raj Act, 1947. Having perused the petition of complaint, which was placed before us by learned Counsel for the petitioner, I am satisfied that the allegations which the opposite party made were substantially allegations of an offence under section 323 of the Penal Code. Under section 62 of the Bihar Panchayat Raj Act, 1947, a bench of the Gram Cutcherry had jurisdiction to try an offence under section 323 of the Penal Code committed within the local limits of their jurisdiction. The first point urged on behalf of the petitioner must, therefore, be overruled.

Secondly, it has been contended that in the appeal, which was preferred to the full bench of the Gram Cutcherry, the appellant was not heard and a decision was

1953.

GANGA v. BHABICHHAN.

DAS, J.

given without hearing the appellant. When we pointed out to learned Counsel for the petitioner that the order-sheet of the Gram Cutcherry dated 30th of June, 1952, clearly showed that appellant was duly heard by the twelve Panches who decided the appeal, learned Counsel was candid enough to concede that he was not in a position to press his second point. I may state here that by mistake the word ' badi ' has been translated as the complainant. The name of the appellant (petitioner before us) was Ganga Ram Jha and his name was clearly mentioned as the *badi* (appellant) who was heard by the Panches. The second point mooted by learned Counsel for the petitioner probably arose out of the wrong translation made here of the word ' badi '.

The third point urged on behalf of the petitioner is that the Panches, who constituted a bench of the Gram Cutcherry, directed a preliminary enquiry by one Mahendra Thakur, who was not a member of the bench, and in their judgment the Panches had referred to the report of the enquiring officer; and it is contended that the provisions of the Bihar Panchayat Raj Act, 1947 do not contemplate an enquiry by an officer who is not a member of the bench and the decision of the bench is vitiated by reason of the delegation of its power of enquiry to a stranger. Learned Counsel has relied on a decision of the Allahabad High Court in *Sant Prasad* v. *State*(1). It is necessary to point out, however, that in the case before us the Panches who constituted the bench of the Gram Cutcherry did not associate any stranger or non-member either with the final investigation or trial of the case. The relevant sections of the Bihar Panchayat Raj Act, 1947, which have a bearing on this question, are sections 59 and 60. Section 59, *inter alia*, states that a bench of the Gram Cutcherry

"shall make an enquiry, receive such evidence as it considers necessary and record its judgment and in the event of the members of the bench disagreeing, the decision of the majority shall prevail."

(1) (1952) A. I. R. (All.) 785.

1953.

GANGA v. BHABICHHAN DAS, J.

Section 60 states, *inter alia*, that

" subject to the provisions of this Act and to any rules or directions that may be made or issued by the Government in this behalf, the procedure to be followed by a bench of the Gram Cutcherry shall be such as it may consider just and convenient and the bench shall not be bound to follow any laws of evidence or procedure other than the procedure prescribed by or under this Act."

There is nothing in the Act which prevents the bench from directing a preliminary enquiry by another officer, provided the bench does not delegate its own power of making the final enquiry and receiving such evidence as it considers necessary. In the Allahabad case on which learned Counsel for the petitioner has relied, what happened was that the Panches associated certain other persons with the investigation and trial of the case. It was pointed out that there was no provision in the U. P. Panchayat Raj Act which empowered a Panchayati Adalat to take the help of outsiders in investigating the matters which arose in the cases coming up before the Adalat for determination. It was pointed out that the relevant section in the U. P. Act provided that the Panchayati Adalat itself might make local investigation in the village to which the dispute related. There is a further point of distinction between the Allahabad case and the case before us. In the case before us the bench of the Gram Cutcherry, which decided the case against the petitioner, itself recorded and considered the evidence. The bench did not proceed to found its decision solely on the report of the enquiring officer; nor did the bench base its decision mainly on that report. All that the bench said was that the report of the enquiring officer supported the statements of the complainants and their witnesses, which statements were made before the bench. I do not think that in the circumstances mentioned above the fact that the bench referred to the report of the enquiring officer vitiates the trial or renders the decision of the bench invalid or without jurisdiction.

1953.

GANGA v. BHABICHHAN.

DAS, J.

The last point urged by learned Counsel for the petitioner is more important and, it must be conceded, involves some difficulty of interpretation. I have already stated that the appeal which the petitioner preferred was heard by twelve Panches. Learned Counsel for the petitioner has contended before us that the petitioner's appeal was not heard by the full bench as required by section 67 of the Act, therefore, the order of conviction should be quashed and a direction should be made that the appeal of the petitioner must now be heard as required by section 67 of the Act. In order to appreciate the point urged on behalf of the petitioner, it is necessary to read section 67. Section 67 reads:

"An appeal against any order or decision of a bench of the Gram Cutcherry shall be preferred within a period of thirty days after the date of the passing of such order or decision to the full bench of the Gram Cutcherry consisting of the Sarpanch and all the Panches and shall be heard by it in the prescribed manner. The decision of the full bench on any such appeal shall be final."

The point taken before us is that under section 67 the appeal has to be preferred to the full bench of the Gram Cutcherry consisting of the Sarpanch and all the Panches and the appeal shall also be heard by it, namely, the Sarpanch and all the Panches. It is contended that the words 'in the prescribed manner' relate not to the constitution of the full bench but to procedural matters only. The State Government have made rules under various clauses of section 80(2) of the Bihar Panchayat Raj Act, 1947. Rules 57, 58 and 59 of the said rules are relevant for our purpose. These rules are:

"57. (1) After a memorandum of appeal which shall be in duplicate has been filed by a party and the requisite fee has been paid, the Sarpanch shall issue a notice together with a copy of the memorandum of appeal to the opposite party and to all the Panches of the Gram Cutcherry to attend a sitting of the full bench at the office of the Panchayat on a date not later than the 15th day from the filing of the appeal.

(2) The exact time of sitting shall also be specified in the notice.

58. (1) Not less than eight Panches shall form the quorum for the purpose of constituting a full bench for the purpose of hearing an appeal under these rules.

1953.

GANGA v. BHABICHHAN-DAS, J.

(2) No appeal shall be heard unless a quorum is present.

59. (1) On the date fixed for hearing, the full bench shall peruse the records of the case and shall hear the parties and do any other thing to meet the ends of justice and may uphold, modify or set aside the order passed by the original bench, or pass such order as may be just and convenient in the circumstances of the case.

(2) The decision of the full bench shall be according to the opinion of the majority of Panches in session and where the opinion is equally divided, the Sarpanch shall have a casting vote.

(3) The dissenting Panches may deliver a dissentient judgment."

The argument of learned Counsel for the petitioner is that rule 58 in so far as it lays down a quorum for the purpose of constituting a full bench for hearing an appeal under section 67 of the Act travels beyond and is inconsistent with the terms of section 67 and is, therefore, *ultra vires*. He has also contended that rule 59(2) in so far as it lays down that the decision of the full bench shall be according to the opinion of the majority of Panches in session is also *ultra vires* for the same reason. The point which is now urged before us was considered by a Division Bench of this Court in *Ram Narayan Sukul* v. *Lakhan Sah*(1), decided on the 15th of January, 1953. There also the point taken was that the appeal was heard by thirteen Panches, though the full bench of the Gram Cutcherry consisted of fifteen members. It was pointed out in that decision that section 67 dealt with two matters, namely, the forum where the appeal is to be preferred and the forum which has to hear the appeal. The view expressed was that the first part of the section dealt with the forum to which the appeal has to be preferred and the second part dealt with the hearing of the appeal and the expression ' in the prescribed manner ' entitled the State Government to make rules and in view of the rules made by the State Government the appeal could be heard by thirteen Panches. Learned Counsel for the petitioner has submitted to us that the argument which he is now urging, namely, that rules 58 and 59 are inconsistent

(1) Org. Cr. Misc. case no. 7 of 1952 (unreported).

1953.

GANGA v. BHABICHHAN-DAS, J.

with section 67, was not presented to the Division Bench in the manner in which it is now presented before us; and learned Counsel has contended that the decision in Original Criminal Miscellaneous Case no. 7 of 1952 cannot be held to have disposed of the argument which he has now advanced. He has suggested that we should not consider ourselves bound by the authority of that decision; and if we are now inclined to differ from that decision, we should refer this case to a larger Bench for consideration of the argument which has now been urged by learned Counsel, namely, that rules 58 and 59 in so far as they lay down a quorum to constitute the full bench and make the decision of the majority of the Panches in session the decision of the full bench, travel beyond the scope of and are inconsistent with the words used in section 67 of the Bihar Panchayat Raj Act, 1947.

The argument of learned Counsel for the opposite party is that the decision in Original Criminal Miscellaneous Case no. 7 of 1952 is correct and that the whole of the second part of section 67 should be read together and, if so read, it authorises the State Government to prescribe a quorum for the full bench of the Gram Cutcherry.

I must concede that section 67 is not very artistically drafted. It consists of three parts: the first part states in effect that an appeal shall be preferred within a particular time to the full bench of the Gram Cutcherry consisting of the Sarpanch and all the Panches; the second part states that the appeal shall be heard by it (the relative pronoun ' it ' must mean, I think, the full bench) in the prescribed manner; and the third part states that the decision of the full bench on any such appeal shall be final. Learned Counsel for the petitioner has laid great emphasis on the words ' by it ' occurring in the second part of the section, and he has contended that the section lays down beyond any ambiguity that the appeal shall be heard by the full bench consisting of the Sarpanch and all the

1953.

GANGA
v.
BHAGCHHAN
DAS, J.

Panches; therefore, it was not open to the rule making authority to take away by rules what the section itself has laid down. The contrary contention on behalf of the opposite party is that the second part should be read as a whole and the qualifying clause in the prescribed manner' should be construed in the setting of all the words used in the second part and so construed, it would include the power to make rules with regard to what should be the quorum of the full bench as also matters of procedure in connection with the hearing of an appeal.

I must say that the point is not entirely free from difficulty. The expression 'by it' must, I think, mean the full bench, and I am not prepared to treat the expression as a mere surplusage. The expression 'in the prescribed manner' must also be given its due weight. The word 'prescribed' is defined in the Act and means "prescribed by this Act" or rules made thereunder". The difficulty of accepting the interpretation put by learned Counsel for the petitioner is that, on that interpretation, the section will become almost unworkable; at least the third part of the section will be completely unworkable. If there is no power to fix the quorum which will constitute the full bench, then the appeal must be heard by all the fifteen Panches and the decision must also be the decision of the full bench, that is, of the fifteen Panches. Any one Panch can then hold up the hearing or decision of the appeal by mere absence on the day on which the appeal is set down for hearing. It is well established that unless the words used in the section compel us to do so, an interpretation which leads to an absurdity or to an apparent impracticability in the working of the section should not be adopted. I would, therefore, prefer to give the expression 'in the prescribed manner', occurring in the second part of the section, such amplitude of meaning as to make the section workable. For these reasons, I do not think that we should depart from the interpretation of the section given by another Division Bench of this

1953.

GANGA v. BHAGICHHAR LADAU J.

Court, though the argument advanced on that occasion did not take the shape which it has taken before us. As at present advised, I am inclined to accept as correct the interpretation which was put on section 67 of the Act by the Bench which decided Original Criminal Miscellaneous Case no. 7 of 1952. I do not think that rules 58 and 59 are invalid for the reasons given by learned Counsel for the petitioner.

I must say a few words about another decision of the Allahabad High Court in *Jiqa Ram* v. *Panchaiti Adalat, Gursena*(1) on which learned Counsel for the petitioner has strongly relied. That was a decision which turned upon the interpretation of section 49 of the U. P. Panchayat Raj Act. It is unfortunate that a copy of the U. P. Panchayat Raj Act is not available to us; but the report of the decision shows that section 49 of the U. P. Panchayat Raj Act lays down that a bench of five Panches has to be constituted to hear a case under the Act; these five Panches are to be selected by the Sarpanch out of a panel of Panches elected under section 43 by the Gaon Sabhas in a circle. The case which was the subject-matter of decision in the Allahabad High Court was taken cognisance of by five persons as it should have been under section 49 of the U. P. Act. But the decision of the case was given by three Panches only. In support of that decision rule 87A of the Rules framed under the Act was brought in aid. That rule provided that three Panches of Panchayati Adalat shall constitute the quorum for any bench. It was pointed out by their Lordships that the rules made under the Act must be consistent with the Act and that section 49 of the Act clearly laid down that a bench must consist of five Panches. It was not open to the State Government to fix a quorum which was not consistent with the Act. I have already pointed out that section 67 of the Bihar Panchayat Raj Act, 1947, does not specifically and beyond any ambiguity lay down that the appeal must

(1) [illegible]

1958.

GANGA
v.
BHABICHHAN.

DAS, J.

also be heard by all the fifteen Panches; it merely lays down that an appeal shall be heard by the full bench in the prescribed manner. In other words, we come back to the same point, namely, whether the expression ' in the prescribed manner ', in the context in which it occurs in the second part of section 67, has such amplitude of meaning as to enable the State Government to lay down the quorum for the full bench. If it does, then rules 58 and 59 made by the State Government cannot be said to be inconsistent with section 67. It is to be remembered that the quorum of eight members constitutes for the purpose of section 67 the full bench, and the appeal is heard by the full bench when the necessary quorum of eight members hear it. It cannot, therefore, be said that the appeal is not heard by the full bench when it is heard by only eight members and not by the entire body of fifteen members. Their Lordships of the Allahabad High Court themselves pointed out:

" If the Act itself had not provided for the constitution of a bench to hear cases, the constitution of benches could be left to the rule making authority, and in that case a quorum of Panches for hearing a case could be fixed under the rules."

Therefore, we come back to where we started, namely, what is the true scope and meaning of section 67 of the Bihar Panchayat Raj Act, 1947. I have already said that, as at present advised, I am not inclined to depart from the meaning given to the section by a Division Bench of this Court in Original Criminal Miscellaneous Case no. 7 of 1952.

For the reasons given above I would dismiss the present application.

SINHA, J.—I agree. I had my doubts about the interpretation of section 67 of the Bihar Panchayat Raj Act, 1947, but the language used is such that it cannot be said that the interpretation given to that section could not have been given.

Application dismissed.

S. H.

APPELLATE CIVIL.

Before Ramaswami and Jamuar, JJ.

THAKUR PD.

v.

BALESHWAR.*

1953.

February. 25.

March, 16.

Arbitration Act, 1940 (*Act X of* 1940), *section* 2(*c*), *word* '*court*' *in*, *whether includes* '*appellate court*'—*section* 21, *appellate court*, *whether may pass order for reference to arbitration.*

The term 'court' in section 2(*c*) of the Arbitration Act, 1940, must be construed to include an appellate court. Therefore, the appellate court may also pass an order for reference to arbitration under section 21 of the Act.

Munni Lal v. *Kishun Prasad*(1) and *Lakshmi Narain* v. *Ram Babu*(2), relied on.

Abani Bhusan Chakravarty v. *Hem Chandra Chakravarty*(3) and *Shukrullah* v. *Rahmat Bibi*(4), not followed.

In the matter of an application under section 21 of the Arbitration Act, 1940.

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

The case in the first instance came before Rai, J. sitting single who referred it to a Division Bench.

On this reference.

A. B. N. Sinha, for the appellant.

A. B. Saran, *R. K. Saran* and *K. N. Chaturvedy*, for the respondents.

* Appeal from Appellate Decree no. 444 of 1951, in the matter of an application under section 21 of the Arbitration Act (X of 1940).

(1) (1948) A. I. R. (All.) 443.
(2) (1953) A. I. R. (All.) 9.
(3) (1947) A. I. R. (Cal.) 93.
(4) (1947) A. I. R. (All.) 304.

1953.

THAKUR PD. v. BALESHWAR.

Advocate-General, for the State.

JAMUAR, J.—During the pendency of this appeal before this Court, the parties have filed applications stating that they have agreed that the matter in difference between them should be referred to arbitration, and, in pursuance of that agreement, they have executed a deed of agreement, which has been duly registered, to refer that matter to arbitration. Accordingly, under section 21 of the Arbitration Act (X of 1940), they have prayed for an order of reference.

The important question for consideration is whether an order of reference under section 21 of the Arbitration Act can be made by an appellate Court. As there appears to be a divergence of opinion on this point between the Calcutta and the Allahabad High Courts, and there being no decision of this Court, this question has been referred to a Division Bench.

Section 21 of the Arbitration Act is as follows:—

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

The term "Court" has been defined in section 2(*c*) of the Act, and it is in the following terms:—

"'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court."

The point which arises for consideration is whether the term "Court" includes an appellate Court.

The Calcutta view has been expressed in *Abani Bhusan Chakravarty* v. *Hem Chandra Chakravarty*(1). There it was pointed out that the question was not free

(1) (1947) A. I. R. (Cal.) 93.

from difficulty and required careful consideration, and it was held that the term " Court " as defined in the Arbitration Act does not include an appellate Court, and, consequently, there is nothing in the Arbitration Act which enables an appellate Court to refer to arbitration matters in dispute between the parties.

It will be useful to examine the legal position before the passing of the Arbitration Act, 1940. The general provisions for arbitration were then contained in paragraph 1 of the Second Schedule to the Code of Civil Procedure, 1908. The Second Schedule was repealed as a result of the passing of the Arbitration Act. Paragraph 1(1) of the Second Schedule was as follows:—

" Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference."

It will be noticed that the only difference between this paragraph of the repealed Second Schedule and section 21 of the Arbitration Act is that, in the latter, there appear the words " in the suit " after the words " between them ". There is no doubt that the addition of the words " in the suit " in section 21 of the Arbitration Act is in order to emphasise that the differences which can be referred to arbitration must be confined to differences in the suit, and matters which are outside the scope of the suit must be excluded.

Paragraph 1 of the Second Schedule of the Civil Procedure Code, 1908, was construed to apply to appellate Courts as well, and that was because of the terms of section 107(2) of the Code which are as follows :—

" .....the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

In the Calcutta case, refered to above, it was pointed out that it was by reason of the provisions of

1953.

THAKUR PD. v. BALESHWAR

JAMUAR, J.

section 107 of the Civil Procedure Code, 1908, that the appellate Court was enabled to exercise the powers which were conferred upon the original Court in paragraph 1 of the Second Schedule to the Civil Procedure Code, 1908, and, as no provision of the nature of section 107, Civil Procedure Code, 1908, has been made in the Arbitration Act, 1940, to enable such references to be made at the appellate stage, under the Arbitration Act such references cannot be made by the appellate Court. It was, accordingly, held that the term " Court " as defined in the Arbitration Act did not include an appellate Court, and, consequently, there was nothing in the Act which enabled an appellate Court to refer to arbitration the matters in dispute between the parties.

There appears to be a divergence of opinion in the Allahabad High Court. In *Shukrullah* v. *Mt. Rahmat Bibi*(1), it was held that an appellate Court had no power to make any reference to arbitration in respect of the subject-matter of an appeal pending before it. In this case also it was pointed out that, though under section 107(2), Civil Procedure Code, an appellate Court was empowered to make an order of reference, that section ceased to have any application to matters falling within the ambit of the Arbitration Act, and it was interpreted that the word " suit " in section 2 had the more technical and restricted meaning in a proceeding instituted in a Court of first instance on a plaint or such other manner as may be prescribed. Accordingly, it was held that, under section 21 of the Arbitration Act, it is only the parties to the suit who are competent to apply for a reference to arbitration, and that parties to an appeal are not so authorised.

In a later case of the Allahabad High Court, namely, *Munni Lal* v. *Kishun Prasad*(2), a contrary view was taken. It was there held that it was not

(1) (1947) A. I. R. (All.) 304.
(2) (1948) A. I. R. (All.) 443.

1953.

THAKUR PD. v. BALESHWAR. JAMUAR, J.

necessary to give such a restricted meaning to the word " suit " in section 21 of the Arbitration Act, and their Lordships expressed the opinion that that term would not exclude execution proceedings or *appeals* or other proceedings before a Civil Court which are in the nature of suits and in which Civil Courts decide disputes between the parties of a civil nature.

Again, in a recent case of the same High Court, *Lakshmi Narain* v. *Ram Babu*(1), the view expressed in the case of *Munni Lal* v. *Kishun Prasad*(2) was approved.

There is no specific provision made in the Arbitration Act for a reference to arbitration at the appellate stage: hence, it is necessary to construe some of the provisions of the Act to discern whether such a course is forbidden.

Section 21 of the Arbitration Act speaks of parties to a suit and matters in difference between them in the suit. It enables such parties to apply in writing to the Court, before judgment is pronounced, for an order of reference. Examining the definition of the term " Court " as given in section 2(*c*) of the Arbitration Act, quoted above, there seems no valid ground for holding that it excludes an appellate Court. Just as a Court of first instance has

> " jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit ",

so also an appellate Court has the same

> " jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been subject-matter of a suit ".

This is the function of an appellate Court as well. I see, therefore, no reason why a restricted meaning should be given to the word " suit " as used in section 21 of the Arbitration Act. In my opinion, the term " suit " in that section ought not to be taken to

(1) (1953) A. I. R. (All.) 9.
(2) (1948) A. I. R. (All.) 443.

1953.

THAKUR PO. v. BALESHWAR JAMUAR, J.

exclude an appeal. I, for myself, find no good ground for the legislature, while giving power to the Court of original jurisdiction to make an order of reference under section 21 of the Arbitration Act, to exclude an appellate Court from making such an order.

The Arbitration Act, 1940, was an Act passed mainly to consolidate the law relating to arbitration. I have already pointed out that, before the passing of this Act, the law had been that an appellate Court had the power to make an order for reference to arbitration. This power has not been specifically taken away by the legislature while passing the Arbitration Act, 1940. It is always to be assumed that the legislature knows the law, even in technical matters. It is the rule that, where words and expressions in a statute are plainly taken from earlier statutes *in pari materia* which have received judicial interpretation, it must be assumed that the legislature was aware of such interpretation, and intended it to be followed in later enactments. I would, accordingly, conclude that it may be inferred that the legislature intended the words used in section 21 of the Arbitration Act, 1940, to be understood as they were understood in their previously accepted meaning. There would seem to be no basis for the view that the legislature intended to deprive the parties to a civil litigation from settling their disputes by arbitration after the termination of a suit and when an appeal is pending. The distinction between statutes which codify and those which consolidate the law has been well summarised in paragraphs 770 and 771 of Volume 31 of Halsbury's Laws of England (Hailsham 2nd Edition):—

"770. In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning. It is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to

1953.

THAKUR PD v. BALESHWAR.

JAMUAR, J.

leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. After the language has been examined without presumptions, resort may be had to the previous state of the law for the construction of provisions of doubtful import, or of words which have acquired a technical meaning. The same words used in different codes may have different meanings, in each code according to the intentions of the statutes having regard to the mischiefs which they are designed to prevent.

" 771. If a distinction is to be drawn between statutes which codify and those which consolidate the law, it is that in construing the latter there is a presumption that the law was not intended to be altered, but this presumption must yield to plain words to the contrary. Where a consolidating statute re-enacts sections that have come into existence at different previous dates, the statute must be construed on the same principles as one which enacts the provisions in question for the first time....."

I am of the opinion that the term " Court " in section 2(*c*) of the Arbitration Act, 1940, must be construed to include an appellate Court, and that, therefore, the appellate Court may also pass an order for reference to arbitration under section 21 of the Act.

I would, accordingly, upon the applications made to this Court under section 21 of the Arbitration Act, 1940, by the parties to this appeal, refer the entire dispute, which is the subject-matter of the appeal, to the arbitrators named in the petitions for arbitration in accordance with the agreement arrived at between the parties. The arbitrators should submit their award to this Court by the 20th July, 1953.

RAMASWAMI, J.—I agree.

Order accordingly.

K. D.

REVISIONAL CRIMINAL.

1953.

March, 13, 16.

Before Das and Sinha, JJ.

NARAIN

v.

RAMDHARI.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 250, *Magistrate empowered under section* 30, *whether has power to order compensation.*

When a Magistrate vested with powers under section 30, Code of Criminal Procedure, 1898, tries an accused person of an offence which is triable by the court of session under column 8 of schedule II of the Code, he is not empowered under section 250 of the Code to pass an order of compensation.

The Crown v. *Hamir Chand*(1), *Ram Ditta* v. *Qadu*(2), *Muhammad Heyat* v. *Bhola*(3) and *Amin Lal* v. *Emperor*(4), relied on.

Mt. Daropti v. *Paras Ram*(5) and *Ma Sin* v. *Maung Maung Law*(6), discussed and not followed.

Application in revision by the complainant.

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

The case in the first instance came before Das, J., sitting single and he referred it to a Division Bench.

On this reference.

Bajrang Sahai, for the petitioner.

DAS, J.—This application in revision raises an interesting question of some importance. The question is if a magistrate vested with powers under section 30 of the Code of Criminal Procedure can

* Criminal Revision no. 641 of 1952, against an order of Mr. M. Yahya, Sessions Judge of Hazaribagh, dated the 9th June 1952, affirming the order of Mr. S. F. Azam, Special Magistrate, Hazaribagh, dated the 29th October, 1951.

(1) (1902) 14 Punjab Record, 39.
(2) (1902) 26 Punjab Record 74.
(3) (1918) 49 Ind. Cas. 173.
(4) (1930) A. I. R. (Lah.) 482.
(5) (1941) A. I. R. (Lah.) 19.
(6) (1936) A. I. R. (Rang.) 230.

award compensation to the accused person under the provisions of section 250 of the Code of Criminal Procedure, when the offence he tries is an offence which is triable by the court of session under the eighth column of Schedule II of the Code of Criminal Procedure.

1953.

NARAIN
v.
RAMDHARI.

DAS, J.

The material facts are the following. On the 29th of April, 1951, the petitioner Narain Hazam lodged a first information at Dhanwar police-station against four persons, opposite party before us, in which he accused Ramdhari Singh, opposite party no. 1, of having set fire to his house and Mahabir Singh, Suba Singh and Mathura Singh, opposite parties 2 to 4, with having abetted Ramdhari Singh in the commission of the offence of arson. On the basis of the first information, the local police made an investigation and submitted a charge-sheet against the opposite party. Ramdhari Singh was charged with an offence under section 436 of the Penal Code and Mahabir Singh, Suba Singh and Mathura Singh were charged with abetment of the said offence. Mr. S. F. Azam, a magistrate vested with powers under section 30 of the Code of the Criminal Procedure, tried the opposite party. He found, on a consideration of the evidence, that the accusation against the opposite party was false and frivolous. He acquitted the four members of the opposite party, and asked the petitioner to show cause why he should not be directed to pay compensation to the accused persons. The petitioner showed cause. The learned magistrate was not satisfied with it, and made an order under the provisions of section 250 of the Code of Criminal Procedure that the petitioner should pay a sum of Rs. 50 to each of the four members of the opposite party. Against the order of the learned magistrate there was an appeal to the learned Sessions Judge of Hazaribagh. The learned Sessions Judge upheld the order of the learned magistrate and dismissed the appeal.

We have heard learned Counsel for the petitioner. It is unfortunate that the opposite party did not enter appearance; and in spite of notice to the Deputy Commissioner, the State has not been represented before us,

1953.

NARAIN v. RAMDHARI.

DAS, J.

The only question which has been agitated before us is that the offence under section 436 of the Penal Code and abetment thereof being offences not triable by a magistrate under the eighth column of Schedule II of the Code of Criminal Procedure, section 250 of the Code of Criminal Procedure did not apply, and the learned magistrate vested with powers under section 30 of the Code of Criminal Procedure had no jurisdiction to pass an order of compensation against the petitioner. Before I refer to the case law on the subject, it is necessary to read some of the sections in the Code of Criminal Procedure bearing on the question at issue. Section 250 of the Code of Criminal Procedure is headed, " Frivolous Accusations in Summons and Warrant Cases ", and the relevant portion of the section is in these terms:

> " Section 250(1). If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused, etc.".

Sub-section (2) of the section lays down that if, after considering any cause which is shown by the complainant, the Magistrate is satisfied that the accusation was false and either frivolous or vexatious, he may, for reasons to be recorded, direct that compensation to such amount not exceeding Rs. 100 be paid by such complainant. Sub-section (1) of section 250, which I have quoted above in *extenso*, can be divided into three parts. The part with which we are concerned in the present case is the second part which includes the clause " of any offence triable by a Magistrate ". The question is what that clause means. Learned Counsel for the petitioner has contended before us that the clause " triable by a Magistrate " is a qualifying clause which relates to the offence of which a person before the Magistrate is accused. He has referred us to sections 28 and 29 of the Code of Criminal Procedure which occur in

1953.

NARAIN v. RAMDHARI.

DAS, J.

Chapter III and the heading of which is—" Description of Offences cognisable by each Court ". Section 28 is in these terms:

" Subject to the other provisions of this Code any offence under the Indian Penal Code may be tried—

(*a*) by the High Court, or

(*b*) by the Court of Session, or

(*c*) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable ".

Section 29 states:

" Subject to the other provisions of this Code, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.".

It is not necessary to refer to sub-section (2) of section 29 in the context in which we are considering the provisions of that section. The argument of learned Counsel for the petitioner is that the clause " triable by a Magistrate " has reference to clause (*c*) of section 28 and, therefore, takes one to the eighth column of Schedule II of the Code of Criminal Procedure. The view which the learned Counsel for the petitioner has canvassed before us has the support of several decisions of the Lahore High Court. So far as we have been able to ascertain, the earliest decision on the subject is *The Crown* v. *Hamir Chand*(1). The judgment of Reid, C. J. in that case was a very short one and merely stated that the offence charged was under section 477 of the Penal Code, which was not triable by a Magistrate under the eighth column of the second schedule of the Code of Criminal Procedure and was, therefore, not an offence which came within the terms of section 250 of the Code. This decision was followed in *Crown* through *Ram Ditta* v. *Qadu*(2) where Reid, C.J., again expressed the view that the words " triable by a Magistrate " occurring in section 250 meant triable under section 28 of the Code by a Magistrate, and that the cases provided for by section 250 were those specified in the eighth column of the schedule as triable by a Magistrate. This decision was followed

(1) (1902) 14 Punjab Record, 39.
(2) (1902) 26 Punjab, Record, 74.

1953.

NARAIN v. RAMDHARI.

DAS, J.

in *Muhammad Hayat* v. *Bhola*(1). A Division Bench of the Lahore High Court accepted that view in *Amin Lal* v. *Emperor*(2). Referring to the argument that section 250 of the Code of Criminal Procedure makes no distinction between a Magistrate empowered under section 30 and one not so empowered and that an offence shown in column 8 of Schedule II of the Code of Criminal Procedure as triable by a court of session should be deemed to be triable by a Magistrate for the purposes of section 250 where it has actually been tried by a Magistrate with powers under section 30 of the Code, His Lordship Zafar Ali, J. expressed himself as follows:

"This argument is seemingly plausible, because the term 'Magistrate' in the expression 'an offence triable by a Magistrate' which occurs in section 250, would seem to be applicable to any Magistrate whether empowered under section 30 or not. But in the light of the phraseology of Schedule 2 it appears repugnant to the general sense of that expression to interpret the word 'Magistrate' there in its wider significance, and it has never been so interpreted."

A discordant note was however struck in the same High Court in *Mt. Daropti* v. *Paras Ram*(3). Skemp, J., referred to the earlier bench decision in *Amin Lal* v. *Emperor*(2), and then to a Bench decision of the Rangoon High Court in *Ma Sin* v. *Maung Maung Lay*(4). He said that the view which Baguley, J., expressed in the Rangoon case was the view which he would have followed. Baguley, J., expressed the following view in the matter. He pointed out that section 28 of the Code of Criminal Procedure expressly stated that it was subject to the other provisions of the Code; therefore, it was subject to section 30. Section 30 states, *inter alia*, that in certain States in which there are Deputy Commissioners or Assistant Commissioners the State Government may notwithstanding anything contained in section 28 or section 29 invest the District Magistrate or any Magistrate of the first class with

(1) (1918) 49 Ind. Cas. 173.
(2) (1930) A. I. R. (Lah.) 482.
(3) (1941) A. I. R. (Lah.) 19.
(4) (1936) A. I. R. Rang. 230.

1953.

NARAIN v. RAMDHARI.

DAS, J.

power to try as a Magistrate all offences not punishable with death. Baguley, J. thought that the earlier rulings with regard to the interpretation of section 250 of the Code of Criminal Procedure, overlooked the opening clause of section 28 which made the section subject to the other provisions of the Code including the provisions in section 30. He then expressed himself as follows:

" I can see no point of principle involved. Why a man who charges another with being a petty thief, can be made liable to pay compensation, whereas, if he charges him with being a dacoit, he should be free from all liability, I entirely fail to understand. The principle which I deduce from section 250 is that the Magistrate can only pass the order if he is able to dispose of the case himself personally; in other words, if he is able to end the case by passing an order which operates to the detriment of the accused, then he is equally able to end the case by passing an order which is to the detriment of the complainant."

From the point of view of logic there is, perhaps, much to be said in favour of the view expressed by Baguley, J.; but law is not always logic, and the question before us is giving the relevant words in section 250 of the Code of Criminal Procedure their plain meaning. There can be no doubt that the words " triable by a Magistrate " occurring in section 250 of the Code of Criminal Procedure are important words. If those words were not there, then a Magistrate who discharges an accused person in an enquiry under Chapter XVIII of the Code of Criminal Procedure would be entited to award compensation. It is, however, well settled that section 250 of the Code of Criminal Procedure does not authorise the Sessions Judge to pass an order of compensation when he acquits the accused persons. One obvious reason for the exclusion of the Sessions Judge may be that a case comes to the court of session only after it has been committed by a Magistrate on an enquiry conducted in accordance with the provisions in Chapter XVIII of the Code. It is also well settled and is now beyond

1958.

NARAIN v. RAMDHARI.

DAS, J.

doubt that section 250 of the Code of Criminal Procedure does not authorise a Magistrate discharging an accused person under section 209 of the Code of Criminal Procedure in an enquiry under Chapter XVIII of the Code, to award compensation to the accused person. This exclusion of a Magistrate who merely holds an enquiry and does not try the accused person is clearly referable to the clause " of any offence triable by a Magistrate " occurring in the section. When a Magistrate enquires into a case which is triable by the court of session, the person before him is not accused of an offence triable by a Magistrate; on the contrary, the person before him is accused of an offence triable by a court of session. When an offence is characterised as " triable by a Magistrate " or " triable by the court of session ", such characterisation can have reference only to section 28 of the Code and the eighth column of the second schedule.

Learned Counsel for the petitioner has submitted, rightly in my opinion, that there is a distinction between the words " triable by a Magistrate " and such words as " tried by a Magistrate ". The expression " triable by a Magistrate " must, I think, be taken as qualifying the word ' offence ' and in that view it must refer to the classification of offences given in the eighth column of Schedule II, read with section 28, of the Code. It is worthy of note that section 30 of the Code of Criminal Procedure does not change the nature of the offence; the very words of section 30 of the Code of Criminal Procedure show that it merely enables the State Government to invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death. The nature of the offence remains the same; only a particular Magistrate gets enhanced powers to try certain offences. This is clear from the further fact that in an area where there is a Magistrate vested with powers under section 30 of the Code of Criminal Procedure, it is still open to the Magistrate concerned to resort to a commitment proceeding in respect of an offence triable by the court of session; and if an offence triable by the court of session is committed to that court, the Sessions Judge can try the

accused of that offence. In other words, the offence still remains an offence triable by the court of session, though a Magistrate vested with powers under section 30 can try that offence. My view, therefore, is that the Code itself recognises a distinction between an offence "triable by a Magistrate" and an offence "triable by the court of session" but actually tried by a Magistrate vested with powers under section 30 of the Code of Criminal Procedure.

If the intention were to make section 250 applicable to any and every offence actually tried by a Magistrate, whether the Magistrate be an ordinary first class Magistrate or a Magistrate vested with powers under section 30 of the Code of Criminal Procedure, nothing could have been easier than to draft sub-section (1) of section 250 so as to read that the Magistrate by whom the case is tried can award compensation to the accused person when the Magistrate discharges or acquits him. The section is not, however, drafted in those terms; on the contrary, it is drafted in such a way as to make the words "triable by a Magistrate" an adjectival phrase qualifying the word 'offence' going before it. If any anomalous result follows from the use of those adjectival words in the section, that anomaly is the result of the section as it has been drafted. It may be that the Legislature advisedly omitted graver offences, ordinarily tried by the court of session, from the purview of section 250. I have looked into the course of legislation on this subject, with reference to Act X of 1872 and Act X of 1882. The corresponding section in those Acts confined it to complaint cases or summons cases only. The section was greatly restricted in scope, and was gradually enlarged to include other cases. However, we are not concerned with the ultimate intention or purpose of the Legislature, but with the intention as expressed in the words used in the section.

With very great respect, it seems to me that the principle to which Baguley, J. has referred is open to the following objection. If the principle is that a Magistrate who is able to dispose of the case himself is also authorised to pass an order of compensation, then there is no reason why a Magistrate who discharges an accused person under section 209 of the

1953.

NARAIN v. RAMDHARI.

DAS, J.

Code of Criminal Procedure in an enquiry under Chapter XVIII of the Code should not be authorised to pass an order of compensation. So far as the case before the Magistrate is concerned, the order of discharge terminates the case. It is well settled, however, that a Magistrate discharging an accused person in an enquiry into a case triable by the court of session or by the High Court is not empowered under section 250 of the Code of Criminal Procedure to pass an order of compensation. There is a long line of decisions in support of this view, and the only reason that can be given in support of the view is that the words " triable by a Magistrate " occurring in sub-section (1) of section 250 relate to an offence which is triable by a Magistrate in accordance with section 28 read with column 8 of Schedule II of the Code of Criminal Procedure.

For the reasons given above, I am of the view that when a Magistrate vested with powers under section 30 of the Code of Criminal Procedure tries an accused person of an offence which is triable by the court of session under column 8 of Schedule II of the Code of Criminal Procedure, he is not empowered under section 250 of the Code of Criminal Procedure to pass an order of compensation. The learned Magistrate who acquitted the accused persons in the case under our consideration was, no doubt, a Magistrate vested with powers under section 30 of the Code of Criminal Procedure and he was competent to try an offence under section 436 of the Penal Code as a Magistrate; but the offence was not an offence triable by a Magistrate within the meaning of section 28 read with column 8 of the second schedule of the Code of Criminal Procedure; therefore, the offence was not " triable by a Magistrate " within the meaning of section 250 of the Code of Criminal Procedure. The result, therefore, is that the application in revision is allowed, the rule is made absolute and the order of the learned Magistrate directing the payment of compensation by the petitioner is set aside.

SINHA, J.—I agree.

Application allowed.

K. D.

REVISIONAL CRIMINAL.

Before Imam and Misra, JJ.

SHEONARAIN

v.

LACHMI.*

1952.

December, 11.

Bihar Panchayat Raj Act, 1947 (*Bihar Act VII of* 1948), *section* 73(2), *effect of—remand order by Subdivisional Officer, whether without jurisdiction—interference by High Court—Constitution, Article* 227.

Where a Subdivisional Magistrate set aside an order of conviction passed by a Gram Cutchery and remanded the case for retrial;

Held, on an application under Article 227 of the Constitution, that the order of the Subdivisional Magistrate remanding the case to the Gram Cutchery for retrial was without jurisdiction in view of the provisions contained in section 73(2) of the Bihar Panchayat Raj Act, 1947 and, therefore, the High Court has power to set aside the order.

Application under Article 227 of the Constitution.

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

Raghosaran Lall, for the petitioners.

IMAM, J.—This is an application under Article 227 of the Constitution, it appears that the petitioners were convicted by a Gram Cutchery constituted under the Bihar Panchayat Raj Act, 1947 (Bihar Act VII of 1948). The conviction purported to be under the Cattle Trespass Act. The Subdivisional Magistrate, however, purporting to act under section 73 of the Act set aside the order of conviction and remanded to the Gram Cutchery the case for retrial.

*Criminal Revision no. 473 of 1952, against an order of Mr. S. K. Varma, Subdivisional Magistrate, Daltonganj, dated the 20th March, 1952.

1952.

SHEO-NARAIN v. LACHMI.

IMAM, J.

It was contended on behalf of the petitioners that if the Subdivisional Magistrate purported to set aside the order of the Gram Cutchery convicting the petitioners under section 73(1) of the Act, then he had no jurisdiction to send the case back to the Gram Cutchery for retrial because under sub-section (2) where a Subdivisional Magistrate makes an order under sub-section (1) the complainant may institute a case afresh in the court of the Subdivisional Magistrate. It is best at this stage to quote sub-sections (1) and (2) of section 73 of the Act.

"73. (1) If there has been a miscarriage of justice or if there is an apprehension of miscarriage of justice, in any case or suit, the Subdivisional Magistrate in respect of any case and the Munsif in respect of any suit may on the application of any party or his own motion, at any time during the pendency of the suit or case and within 60 days from the date of a decree or order, call for the record from a bench of the Gram Cutchery and may for reasons to be recorded in writing—

(*a*) cancel the jurisdiction of the bench with regard to the suit or case; or

(*b*) quash any proceedings of the bench at any stage; or

(*c*) cancel any order or decree passed by the bench.

(2) When an order has been passed by a Munsif or the Subdivisional Magistrate under sub-section (1) in respect of any suit or case, as the case may be the complainant or plaintiff, as the case may be, may institute the case or suit afresh in the court of the Subdivisional Magistrate or a Munsif of competent jurisdiction."

It will be seen, therefore, that section 73 makes no provision for retrial of a case by a Gram Cutchery where a Subdivisional Magistrate or a Munsif has acted under sub-section (1). Sub-section (2) makes it perfectly clear that where a Subdivisional Magistrate or a Munsif has acted under sub-section (1) it is open to the complainant or the plaintiff to institute a case afresh, but this time either before the Subdivisional Magistrate or the Munsif and not the Gram Chechery. The reason for this provision seems to be indicated in sub-section (1). Sub-section (1) clearly states that where there has been a miscarriage of justice or where

there is an apprehension of miscarriage of justice, power is given to the Subdivisional Magistrate or the Munsif, as the case may be to call for the records from a Bench of the Gram Cutchery and, for reasons to be recorded to quash its proceedings or cancel any order made by it. As I read this section, it seems to me that the intention of the Legislature was that where the Subdivisional Magistrate or the Munsif was satisfied that there was a miscarriage of justice or the likelihood of miscarriage of justice in any case being tried or triable by a Gram Cutchery, then its proceedings could be either quashed or any order made by the Gram Cutchery could be set aside. Obviously, when any such proceeding is quashed or an order is set aside the intention was that the Gram Cutchery should no longer have jurisdiction to try that case. It is for this reason that the complainant or the plaintiff, as the case may be has been given the right to institute afresh a case either before the Subdivisional Magistrate or the Munsif. I am not concerned in this particular case as to whether the reasons given by the Subdivisional Magistrate establish the position indicated in sub-section (1) of section 73. He had, however, specifically stated that he was setting aside the order of the Gram Cutchery under section 73 of the Act. I must accordingly read his order to mean that there was either a miscarriage of justice or there was an apprehension of miscarriage of justice in his mind.

1952.

SHEO NARAIN v. LACHMI.

JHA, J.

The question which now arises is as to what are the powers of this court in rectifying an order made by the Subdivisional Magistrate which is entirely illegal having regard to the provisions of section 73(2). I must regard the order of retrial by the Gram Cutchery made by the Subdivisional Magistrate as being an order without jurisdiction and such being the position, I am satisfied that under the power of superintendence under Article 227 of the Constitution

1952.

SHEO-NARAIN v. LACHMI.

IMAM, J.

this court can intervene. The power of Superintendence of this Court would be meaningless if it did not carry with it the jurisdiction to set aside an order of a court or Tribunal which had passed the order without jurisdiction. I would accordingly allow the application and set aside that part of the order of the Subdivisional Magistrate whereby he ordered the case to be retried by the Gram Cutchery. The order of conviction having been set aside by the Subdivisional Magistrate, the only course which the complainant in the case can take is that indicated in sub-section (2) of section 73 of the Act.

MISRA J.—I agree.

Application allowed.

S. H.

REVISIONAL CRIMINAL.

Before Imam and Misra, JJ.

1952.

December, 15, 16, 17, 23.

NIVAS

v.

AMAR.*

Bihar Panchayat Raj Act, 1947 (*Bihar Act VII of* 1948), *sections* 57, 59, 62 *and rule* 13(1), *scope of—trial of compoundable offence by Gram Cutchery—no effort to bring about settlement—trial, whether without jurisdiction—offence under section* 506 *of the Penal Code*, 1860 (*Act XLV of* 1860) *whether triable by Gram Cutchery—panches not nominated by parties within period allowed, sarpanch, whether can nominate —trial by panches so nominated, whether without jurisdiction—Constitution, Articles* 226, 227.

*Criminal Revision nos. 687 and 688 of 1952, in the matter of an application under Articles 226 and 227 of the Constitution.

1952.

NIVAS
v.
AMAR.

In a case arising out of a compoundable offence, it is the duty of the bench of a Gram Cutcherry under section 58 read with section 59 and rule 13(1) of the Bihar Panchayat Raj Act to bring about an amicable settlement in the first instance before it can try the case. It is only on failure to so settle the case that the Gram Cutcherry acquires jurisdiction to proceed with the trial of the case

Where a bench of the Gram Cutcherry proceeded to try a compoundable offence without making effort to bring about an amicable settlement and convicted the accused;

Held, on an application for *writ* of *certiorari*, that the proceeding was without jurisdiction.

Held, further, that a bench of a Gram Cutcherry has jurisdiction under section 62 of the Bihar Panchayat Raj Act, 1947 to try an offence committed under section 506 of the Penal Code subject to this that the bench can pass a sentence which a third class Magistrate can pass.

Held, also, that a sarpanch has jurisdiction under section 57(1) of the Bihar Panchayat Raj Act, 1947 to nominate a panch from the panel to be a member of the bench of Gram Cutcherry to try a case if the parties to the case fail to nominate one within the period prescribed for such nomination and the trial by a bench so constituted is not without jurisdiction under section 57 of the Act.

Query :—Whether a judgment of the full bench of a Gram Cutcherry should be signed by all the panches constituting the full bench?

In the matter of an application under Articles 226 and 227, Constitution.

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

Indrabhanu Singh, for the petitioner.

IMAM, J.—This is an application under Articles 226 and 227 of the Constitution in the mater of a *writ* in the nature of *certiorari*. The petitioner was convicted by the Gram Cutchery of Samayagarh for

1952.

NIVAS
v.
AMAR.

IMAM, J.

offences punishable under section 504 and section 506 of the Penal Code, and sentenced to pay a fine under each section. An appeal to the full bench of the Gram Cutchery was dismissed. The Subdivisional Magistrate, however, was moved, presumably under section 73 of the Bihar Panchayat Raj Act, 1947 (Act VII of 1948). The Subdivisional Magistrate was of the opinion that there was no case made out under section 504, and he set aside the conviction. He, however, upheld the conviction under section 506 of the Penal Code.

The case of the complainant before the Gram Cutchery was that the petitioner had sent his son Kedar Singh to the complainant with a slip bearing his signature asking him to send 10 seers of Khajoor. The complainant refused to supply, as it was against the rules of the ration shop to give more than two seers of Khajoor to anybody. On this, the petitioner's son Kedar Singh went back and informed the petitioner accordingly. The petitioner came and began to abuse the complainant. The petitioner ran after the complainant with brickbats, but he was seized by other persons standing there. Thereafter, the petitioner said that he would have killed the complainant but for the fact that his son was ill.

The petitioner's case was that a false case had been instituted by the complainant. The complainant owed to the petitioner Rs. 600 which he refused to repay on demand made by the petitioner, and in order to put pressure upon the petitioner, the complainant began to abuse the petitioner as a result of which there was exchange of hot words in the course of which the complainant threatened to assault the petitioner with a *gdrasa*. A totally false case had been brought against the petitioner in order to put pressure upon him.

1952.

NIVAS v. AMAR.

IMAM, J.

I am not placing in the order of importance the point raised by the learned Advocate for the petitioner. The first point that I will deal with is as to whether section 506 was triable by a bench of the Gram Cutchery under the Bihar Panchayat Raj Act. Section 62 of the Act specifically provides that notwithstanding anything contained in the Code of Criminal Procedure, 1898, and subject to the provisions of the Act, a bench of the Gram Cutchery shall have jurisdiction concurrent with that of the Criminal Court within the local limits of whose jurisdiction the bench is situate for the trial of the offences mentioned in clauses (*a*), (*b*), (*c*) (*d*) and (*e*). In clause (*a*) which concern the Penal Code section 506 is clearly stated. It was, however, argued that under section 63 of the Act, a bench of the Gram Cutchery is only vested with the powers of a Magistrate of the third class. According to the Criminal Procedure Code, schedule 2 prepared under section 28 of the Code, an offence under section 506 of the Penal Code is not triable by a third class Magistrate. A Magistrate with second class powers is the lowest grade of Magistrate who can try such an offence. The submission of the learned Advocate is, in my opinion, erroneous because section 62 of the Act gives jurisdiction to a bench of the Gram Cutchery to try cases punishable under section 506. Reliance, however, was placed on the words to the effect "and subject to the provisions of this Act" for the purpose of showing that as a bench of the Gram Cutchery was vested only with the powers of a Magistrate of the third class, such a bench had no jurisdiction to try an offence under section 506 of the Penal Code. I do not agree with this submission. The words on which reliance has been placed mean no more than this when read in the context of the words stated in section 62, namely, that a bench of the Gram Cutchery shall have jurisdiction to try an offence under section 506 subject to this that the bench will be

1952.

NIVAS v. AMAR.

exercising the powers which are exercised by a Magistrate of the third class, that is to say, on conviction the sentence can be no more than what a third class Magistrate could pass.

IMAM, J.

It was next contended that the full bench of the Gram Cutchery must consist of 15 persons having regard to the provisions of section 49 of the Act. The judgment of the full bench which dismissed the petitioner's appeal shows that it was signed by only ten panches. In the petition filed before this Court, it has nowhere been asserted that the appeal was not heard by the full bench of the Gram Cutchery consisting of the sarpanch and all the panches as required by section 67. Merely because the judgment had been signed by ten of them and not by the others would not necessarily show that all the panches had not heard the appeal. Indeed, nowhere in the petition filed in this Court have any facts been stated to show that the judgment of the full bench was not in accordance with the provisions of section 67. The argument was made, however, in Court. The judgment of the full bench no doubt shows that it has been signed only by ten panches, and a very debatable question might well arise as to whether the appeal of the petitioner has been properly disposed of on account of the failure of all the panches to sign the judgment of the appeal court. Normally one would suppose that the judgment of a court of appeal should be signed by all its members irrespective of there being dissenting views or not. When such a judgment has not been signed by all the members of the appeal court, the question might well arise as to whether the appeal has been properly disposed of.

It was next contended that the trial before the bench of the Gram Cutchery was without jurisdiction as this bench had not complied with the provisions of section 58 of the Act and rule 13(1) of the rules

framed under section 80 of the Act published in the *Bihar Gazette*, dated the 23rd May 1949, no. 7901-L S.-G. Section 58 of the Act requires a bench of the Gram Cutchery, while hearing a suit or trying a case under the provisions of the Act, in the case of a compoundable offence, to endeavour to bring about an amicable settlement between the parties and to do all such lawful things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement, and where such a settlement is brought about, the bench shall record the same and give its decision accordingly. Section 59 of the Act states that where a bench of the Gram Cutchery does not succeed in bringing about an amicable settlement under the preceding section, or otherwise takes up the hearing or trial of a suit or case, it shall make an enquiry, receive such evidence as it considers necessary and record its judgment and in the event of the members of the bench disagreeing, the decision of the majority shall prevail. Reading these two sections together, it would appear as if in a case arising out of a compoundable offence, which sections 504 and 506, Penal Code, undoubtedly are, a bench of the Gram Cutchery shall make an endeavour to bring about an amicable settlement, and if such a settlement is arrived at, it shall give its decision accordingly. Where there has been a failure to bring about an amicable settlement, then it may commence to try the case. Rule 13(1) of the rules framed under the Act states that if the bench does not succeed in bringing about an amicable settlement between the parties, the bench will proceed with the hearing of the suit or the case from day to day until the hearing thereof is finished. In exceptional circumstances, such as occasioned by the illness of the accused or absence of any material witness, the hearing of the case may be adjourned. This rule has obviously been framed under section 80(2)(*s*), namely, the procedure to be followed by a bench of the Gram

1952.

NIVAS v. AMAR.

IMAM, J.

Cutchery in deciding suits and cases. *Prima facie*, reading the two sections and the rule, it seems to me that in a case arising out of a compoundable offence, it is the bounden duty of the bench of the Gram Cutchery to bring about an amicable settlement in the first instance before it can try the case. It is only on failure to so settle the case that it can be said that the bench of the Gram Cutchery has jurisdiction to proceed with the trial of the case. Some question may arise on the words "or otherwise takes up the hearing" to mean that even if no attempt has been made to bring about an amicable settlement, a bench of the Gram Cutchery has jurisdiction to proceed with the trial. I think, however, that if this were the proper interpretation to be given to these words, then there was no occasion for the preceding words in section 59. Furthermore, the words "or otherwise takes up" may refer to cases arising out of a non-compoundable offence in which case the provisions of section 58 would have no application. Furthermore, under section 69 of the Act, a Magistrate or Munsif may transfer a case before him where it appears that such a case or suit is triable by a bench of the Gram Cutchery and that he is satisfied that such a suit or case is fit to be tried by the said bench. When a case is so transferred, it would be taken up by a bench of the Gram Cutchery for trial, and such a case may be covered by the words "or otherwise takes up the hearing or trial of a suit or case". The petitioner asserts in his petition on affidavit, which remains uncontroverted, that the bench of the Gram Cutchery made no endeavour to bring about an amicable settlement between the parties as required by the provisions of the Act. Sections 504 and 506 are compoundable offences, and in my opinion, the bench of the Gram Cutchery should have acted in accordance with the provisions of section 58 and rule 13(1) of the rules framed under the Act. Failure to do so is, in my opinion, to proceed

1952.

BAIJNATH NIVAS v. RAMAN [IMAM, J.]

with the trial without having complied with the mandatory provision of the law arising under the Bihar Panchayat Raj Act. The whole object of the provisions of sections 58 and 59 appears to me to be that a bench of the Gram Cutchery in a case arising out of a compoundable offence must bring about an amicable settlement, if it can, in the first instance and not to try the case straightway. The purpose behind these provisions was that the panches forming the bench of the Gram Cutchery would bring about harmony and peaceful relations which were so essential for the development of community life in villages. I am inclined to the view that where a bench of the Gram Cutchery has not complied with the provisions of section 58 and has proceeded to try the case straightway it has proceeded without jurisdiction.

Another submission which was made was that the provisions of section 57 of the Act had not been complied with. It appears that according to the petition, the complainant named a panch and the petitioner named a panch, but that individual refused to be a panch in the case. The petitioner then named another person as panch who also refused to be a panch. Upon this, the sarpanch named one Harihar Gope to be a panch. It is argued that under section 57 the petitioner has the right to nominate a panch to be a member of the bench of the Gram Cutchery to try the case. Although the two persons nominated by him had refused to be panches, the sarpanch had no jurisdiction to nominate a person who had not been nominated by the petitioner. There is, however, a very important proviso to section 57, viz., proviso (i), which states that if any party does not nominate a panch within such time as may be prescribed the sarpanch shall nominate a panch from the panel. This obviously means that within a certain time the parties have to nominate their panches, and if within the

1952.

NIVAS v. AMAR.

IMAM, J.

prescribed time they have not done so, the sarpanch shall have the authority to nominate a panch from the panel. The petitioner failed to persuade two persons to accept his nomination. It was open to him to proceed to nominate another within the time allowed. If he did not do so, obviously the sarpanch was authorised to nominate one. It is not asserted in the petition that the sarpanch nominated Harihar Gope before the time had expired within which the petitioner could have nominated another person as a panch. In my opinion, this contention on behalf of the petitioner must be rejected.

It was also argued that the facts alleged by the complainant, even if accepted, do not disclose an offence punishable under section 506 of the Penal Code. In my opinion, this argument has no valid foundation. Whether the facts alleged by the complainant are true or not is not a matter with which I am concerned in this case. The facts alleged, however, make it quite clear that the petitioner so abused the complainant that he began to run away and was pursued by the petitioner with a brickbat in his hand. It was only the intervention of others that prevented the petitioner doing anything further. His conduct, however, did amount, in my opinion, to a threat which caused an alarm to the complainant, leading him to apprehend that he might be assaulted. This, in my opinion, was clearly criminal intimidation.

Having regard to the view I take concerning the provisions contained in sections 58 and 59 of the Act and rule 13(1) of the rules framed under the Act, I am of the opinion that the trial of the petitioner was without jurisdiction, and I would accordingly quash his conviction and sentence.

MISRA, J.—I agree.

Conviction and sentence quashed.

S. H.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Ramaswami and Jamuar, JJ.

H. CHANDUNMUL

v.

COMMISSIONER OF INCOME-TAX, B. & O.*

1953.

March, 16, 20.

Income-tax Act, 1922 (*Act XI of* 1922), *section* 5*A*(7) *scope of—difference between members of the Tribunal—reference to the President—point of difference not formulated—reference, whether competent—order of the President on such reference, whether without jurisdiction.*

Where on a difference of opinion between members of the Income-tax Appellate Tribunal the case was referred to the President of the Tribunal for decision without formulating the point or points of difference;

Held, that the reference to the President was incompetent under section 5A(7) of the Income-tax Act, 1922 and the order passed by the President on such reference was without jurisdiction;

Held, further, that when there is difference of opinion between the members of the Tribunal as to the quantum of assessment the President or the third member to whom the case is referred is bound to agree with the opinion of one of the members.

Reference under section 66(1) Income-tax Act, 1922.

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

R. J. Bahadur for the petitioner.

Gopal Prasad for the opposite-party.

RAMASWAMI AND JAMUAR JJ.—The assessee is a firm Hanutram Chandanmul of Kishunganj. The books of account for the year ending Chait Sudi 8,

*Miscellaneous Judicial Case no. 264 of 1952, reference under section 66(1) of the Income-tax Act of 1922 by the Income-tax Appellate Tribunal.

1953.

H. CHANDUNMUL v. COMMISSIONER OF INCOME-TAX, B. & O.

RAMASWAMI AND JAMUAR, JJ.

2004 Samvat disclosed sales of silver to the extent of Rs. 2,04,545 and of gold to the extent of Rs. 2,34,344. The account books disclosed a gross profits of Rs. 9,710. The Income-tax Officer however, rejected the books of account and estimated the total sales of bullion at Rs. 4,50,000 and profit at 5 per cent. In result, the Income-tax Officer added a sum of Rs. 12,800 to the income as disclosed by the books of account. The assessee took an appeal to the Appellate Assistant Commissioner but the appeal was dismissed. A further appeal was taken to the Income-tax Appellate Tribunal. The Judicial Member was of opinion that the Income-tax Officer was right in applying the proviso to section 13, but the Accountant Member stated as follows:

"I am inclined to the view that in the circumstances of the case, the books should not have been rejected as has been done by the Income-tax authorities but on the other hand should have formed the basis of the assessment with such adjustments as may be found necessary for any shortage claimed which may appear to be in excess of the usual percentages in the trade.

The stock records, viz the daily stock register as well as the melting records, disclosed, as observed above, only small discrepancies which have to be, in the nature of things, arithmetical in character. The book of original entry, the Kachi Roker contains all the materials available for a proper quantitative tally. The final shortage ascertained on the basis of the inventory after due allowance for a reasonable normal shortage requires to be adjusted in the assessment. In the facts of the case, such additions do not appear to be of such considerable proportion as to require any accurate working. The shortage of 5 tolas of gold and 100 tolas of silver as revealed in the final inventory cannot amount to more than Rs. 700. Counting in other possible minor discrepancies from day to day, I am of opinion that an overall addition of say Rs. 2,800 on this account will more than adequately cover the requirements of the case, instead of Rs. 12,800 as at present in the assessment, so that a modification of the assessment to the extent of Rs. 10,000 is necessary".

As there was difference of opinion the case was referred to the President of the Income-tax Appellate Tribunal under section 5A(7) of the Income-tax Act. The order of reference was in the following terms:

"As there is a difference of opinion between us on the only contention in this appeal, we hereby refer the appeal to the President under section 5A(7) of the Income-tax Act".

1953.

H. CHANPUNMUL v. COMMISSIONER OF INCOME-TAX, B. & O.

RAMASWAMI AND JAMUAR, JJ.

The President heard the appeal and formed the opinion that the Income-tax Officer was right in taking recourses to the provision of section 13 of the Income-tax Act. The President, however, directed that in order to compute the profits of the assessee a rate of 3 per cent, should be applied to the sales of silver amounting to Rs. 2,04,545 and the rate of 5 per cent to the sales of gold amounting to Rs. 2,34,344. According to this direction the amount to be added to the assessee's income as disclosed by the books was Rs. 8,143.

At the instance of the assessee the Income-tax Appellate Tribunal has formulated the following questions of law for the opinion of the High Court:

(1) Whether the order of the President of the Tribunal is in accordance with law? and (2) Whether the assessment can be legally completed in accordance with the direction contained in the order of the President of the Tribunal?

As regards the first question, it was pointed out by Mr. R. J. Bahadur who presented the case of the assessee that the two members of the Tribunal who heard the appeal in the first instance did not formulate the point or points on which they differed. The order of reference merely states that

> there was a difference of opinion between the two Members of the Tribunal on the only contention in the appeal.

The point on which difference of opinion arose has not been formulated by the Tribunal in the order of reference. It was argued by Mr. R. J. Bahadur that it was the duty of the members of the Tribunal to formulate clearly the point or points on which they differed and only then the case may be properly referred to the President of the Tribunal. In our opinion the argument of Mr. R. J. Bahadur is well-founded. Section 5A of the Income-tax Act which deals with constitution, function and power of the Appellate Tribunal states in sub-section (7) that

1953.

H. CHANDUNMUL v. COMMISSIONER OF INCOME-TAX, B. & O.

RAMASWAMI AND JAMUAR, JJ

if the members of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it. In the present case the two members of the Tribunal who heard the appeal in the first instance have failed to comply with the statutory provision that they shall state the point or points on which they differ before they make reference to the President of the Tribunal. This failure to comply with the requirement of section 5A(7) is not a mere procedural defect nor it is a matter of mere formality but it is a matter which is a condition of the validity of the reference itself. Until the two members of the Tribunal formulate the point or points on which they differ we do not think that the President to whom the case is referred or the other member of the Tribunal to whom the case is sent by the President has competence to hear the reference or express any opinion on the points on which the members who originally heard the appeal differed. The reason is that the jurisdiction conferred by section 5A(7) is jurisdiction of a special character and it is a well-known principle that the special jurisdiction does not arise until all the preliminary conditions are strictly satisfied. In the present case, therefore, we think that the President to whom the case was referred by the two members of the Tribunal had no jurisdiction to hear the reference and the order he has passed cannot be held to be in accordance with law.

There is also another reason why the order of the President cannot be held to be legally valid. In this

1953.

H. CHANDUNMUL v. COMMISSIONER OF INCOME-TAX, B. & O.

RAMASWAMI AND JAMUAR, JJ.

case the Judicial Member of the Appellate Tribunal formed the opinion that a sum of Rs. 12,800 should be added to the income as disclosed by the books of account. But the Accountant Member was inclined to the view that addition of Rs. 2,800 only should be made to the income as disclosed from the books of account. The President before whom the matter, came on reference decided that an amount of Rs. 8,143 should be added to the assessee's income as disclosed by the books of account. Section 5A of the Income-tax Act requires that if the members of the Tribunal are equally divided they should state the point on which they differ and the case shall be referred to the President of the Tribunal for hearing on such point by one or more of the other members of the Tribunal and

> " such point shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case including those who first heard it ".

In the present case it is manifest that as regards quantum of assessment not only two members of the Appellate Tribunal but also the President have each of them taken a different view. It is manifest that there is no majority opinion in favour of any particular figure of assessment. In a matter of this description where there is difference of opinion as to the quantum of assessment, we think that the President or the third member to whom the case is referred is legally bound to agree with the figure of assessment either according to the Accountant Member or according to the Judicial Member. It is not open to the President or the third member to take a different view as to the quantum of assessment. The only course open to him is to agree with the figure of assessment according to the opinion of the Judicial Member or the opinion of the Accountant Member. The reason is that if the President takes a different view as to the

1953.

H. CHANDUNMUL v. COMM'R-SIONER OF INCOME-TAX, B. & O.

RAMASWAMI AND JAMUAR, JJ.

quantum of assessment there is no majority opinion in favour of any particular figure of assessment and the machinery provided by section 5A(7) would become unworkable. It was suggested by Mr. Gopal Prasad during the course of argument that the majority opinion in this case is for the assessment of Rs. 8,143. This argument proceeds on the basis that when there is a judgment for Rs. 8,143, the judgment must for the purpose of section 5A(7) be regarded as given in respect of each rupee or groups of tens or hundreds of rupees. If the judgment of the three members of the Tribunal is so dissected, it was argued that there is a majority opinion in favour of Rs. 8,143 which was the quantum of assessment according to the view taken by the President. We are unable to accept this view. It is not permissible on a correct interpretation of section 5A(7) to divide the opinions of the members of the Tribunal into compartments and to make apportionment piecemeal of the figure of assessment which each of the members of the Tribunal has adopted. There is of course an obvious difficulty in applying the principle of the section in a case where there is difference of opinion between the members as regards quantum of assessment. In this respect there is a lacuna in the statute. But it is not the function of a Court to fill in the gap left in an Act of the Legislature, and to speculate with what material the legislature would if it had discovered the gap, filled it in. As section 5A(7) stands at present, we think that the correct interpretation is that the President or the third member to whom the case is referred may only agree with the quantum of assessment taken by one or other of the two differing members and it is not open to him to take a third view as regards quantum of assessment.

For these reasons we think that the opinion of the President in this case is not legally valid and that the assessment cannot be legally completed in accordance

with the direction contained in the order of the President of the Appellate Tribunal. The two questions formulated in the statement of the case must be answered to the above effect.

The result therefore is that the reference under section 5A(7) to the President of the Tribunal is incompetent and the case must now go back to the Income-tax Appellate Tribunal for being dealt with and disposed of in accordance with law.

In the special circumstances of this case we do not propose to make any order as to the costs of this reference.

Reference answered.

S. H.

APPELLATE CRIMINAL.

Before Reuben, C. J. and Misra, J.

STATE OF BIHAR

v.

S. N. MANDAL.*

1953.

January, 14, 15, 16, 19, 21, 22, 23, 27, *March*, 25.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 276, *scope of—Jury, constitution of—legality—Patna High Court General Rules and Circular Orders* (*Criminal*), 1916, *rule* 26—*Appeal against acquittal—appellate court, whether can examine evidence.*

Fifteen persons whose names were drawn by lots from the list of jurors were summoned to attend court to serve as jurors. Out of the persons summoned only three turned up and of them one was excused to serve on the ground of illness. The Judge then constituted a jury of five persons consisting of the two summoned persons and three others who happened to be present in court and whose names appeared in the list of jurors. Trial was held with the aid of the jury so

* Government Appeals nos. 28 and 29 of 1951, from a decision of Mr. Damodar Prasad, Additional Sessions Judge, Monghyr, dated the 17th March, 1951.

1953.

STATE OF BIHAR. v. S. N. MANDAL.

constituted and ended in acquittal. On an appeal against acquittal the legality of the trial was questioned on the ground that the jury was not properly constituted;

Held, that there was no illegality or irregularity in the constitution of the jury within the meaning of section 276 of the Code of Criminal Procedure, 1898 and rule 26 of the Patna High Court General Rules and Circular Orders (Criminal), 1916.

Kedar Nath Mahto v. *Emperor*(1), relied on.

Tajali Mian v. *King Emperor*(2), not followed.

Akbar Ali v. *King Emperor*(3), discussed.

Jhubboo Mahto, In re.-(4), referred to.

Held, further, on a consideration of the charge to the jury that there has been misdirection by the Additional Sessions Judge in charging the jury.

Held, also, on a consideration of the evidence in the case that the misdirection by the Additional Sessions Judge in charging the jury has not led to an erroneous verdict by the jury.

Abdul Rahim v. *King Emperor*(5), relied on.

In an appeal under section 417 of the Code of Criminal Procedure, 1898 the power of the appellate court is the same as in ordinary appeal and, therefore, the High Court can examine the evidence adduced in a case tried by a jury to decide whether the alleged misdirection has led to an erroneous verdict by the jury. In exercising the power of examining the evidence conferred by the Code of Criminal Procedure and before reaching its conclusion upon facts the High Court should and will always give proper weight and consideration to such matters as, (1) the views of the trial judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt,

(1) (1927) I. L. R. 55 Cal. 371, F. B.
(2) (1927) I. L. R. 7 Pat. 50.
(3) (1927) I. L. R. 7 Pat. 61. S. B.
(4) (1883) I. L. R. 8 Cal. 739.
(5) (1946) 50 Cal. W. N. 692, P. C.

1953.

STATE OF BIHAR.
v.
S. N. MANDAL.

and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Sheo Swarup v. *King Emperor*(1), relied on.

Appeals by the State of Bihar under section 417, Code of Criminal Procedure, 1908.

The facts of the cases material to this report are set out in the judgment of Reuben, C. J.

S. C. Chakraverty, for the State.

Baldeo Prasad Singh, *K. K. Sinha*, *U. C. Sharma*, *Ramdeo Prasad Singh* and *Madhusudan Singh*, for the respondent.

REUBEN, C. J.—These are appeals under section 417 of the Code of Criminal Procedure. They arise out of an occurrence said to have taken place at village Kachhaut in the jurisdiction of Police-Station Bakhtiarpur. The prosecution account is that on the 6th May, 1950, Rampadarath Gir, accused, was taking the mare of Tafazzul Hussain (P. W. 1) in order to impound it. Tafazzul intercepted him and Rampadarath released the mare. Soon after, Rampadarath came with a mob of 50 to 60 persons and there was a likelihood of a clash between them and supporters of Tafazzul. People intervened and the mob withdrew. This was at about noon. An hour or two later Rampadarath came back with a mob of 400 to 500 persons including residents of nearby villages such as Mahadeo Math, Bahuarwa and Harpur. There was an exchange of brickbats, and Tafazzul and his supporters fled. The mob then entered the village, set fire to several houses and killed Tafazzul's son Mosarraf, Tafazzul's father Moharram, Tafazzul's wife Habo, and three other villagers Modo Mian, Sakhawat Mian and Taflu Mian. The bodies of Mosarraf and Sakhawat were cut into pieces and thrown into the river Nagda. Habo was cast alive

(1) (1934) L. R. 61 Ind. App. 398 at 404.

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

into the stream and allowed to drown. Ornaments were extorted from Habo and one Musammat Pachia. Pachia was abducted and property of Tafazzul and his neighbours was looted.

Charges were framed against the accused persons under sections 302/34, 147, 148, 302/149, 364, 384, 436 and 436/149, Penal Code. The charges under sections 436 and 436/149 were tried by a jury of five. The other charges were tried with the aid of the jurymen sitting as assessors. The jury returned a unanimous verdict of not guilty which was accepted by the Additional Sessions Judge. The assessors were all of the opinion that none of the other charges was established. Agreeing with them the Additional Sessions Judge acquitted the accused persons under those sections also. One appeal relates to the Jury charges. The other relates to the charges triable with the aid of assessors.

Before I deal with the case as a whole it will be convenient to dispose of certain contentions of Mr. Chakraverty regarding the trial by jury.

He challenges, first of all, the legality of the trial on the ground that the jury was not properly constituted. On the 14th December 1950, having fixed the 11th January for the trial of the case the Additional Sessions Judge drew the numbers of 15 persons by lot from the list of jurors and assessors, and issued a precept to the District Magistrate to summon them for the date fixed. This was in accordance with section 326 of the Code of Criminal Procedure. On the opening day of the trial only three of the summoned persons were present. One of them was excused from serving on the plea of illness. A jury of five was constituted with the remaining two summoned persons and three other persons whose names appear in the jury and assessor list who happened to be present in Court. The appointment of these jurors was made without any challenge on behalf of the prosecution or the defence. It is

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

contended that in choosing the jury in this manner the Additional Sessions Judge acted contrary to the procedure prescribed by law.

Section 276 of the Code provides that

"The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct:

Provided that—

* * * * *

Secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present."

The High Court's provision on the subject is contained in rule 26 at page 12 of Volume I of the General Rules and Circular Orders, Criminal, which is as follows:

"26. In order to nominate a jury for the trial of any prisoner, or other persons to be tried by jury, the Sessions Judge shall cause to be put together in one box, cards, or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day, or for any other cause. Such cards or pieces of paper, shall be, as nearly as may be, of equal size, and each shall bear the name of one person summoned to attend. The Sessions Judge shall then, in open court, draw, or cause to be drawn out of the said box, one after another, as many of the said cards or pieces of paper as may represent the number of jurors required to try the case and if any of the jurors whose names shall be so drawn shall not appear, or if any be objected to, and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case."

Mr. Chakraverty urges that the rule contemplates that after excusing the juryman who was ill the Additional Sessions Judge should have placed the names of the other 14 persons summoned in the box and constituted the jury by drawing the names from the box, making up such deficiency as might subsequently be found as provided in the second proviso to section 276. It may be conceded that reading the rule strictly this is what is intended, and an opinion to this effect was expressed

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

by Allanson, J. in *Akbar Ali* v. *King-Emperor*(1). That was a case in which of the 10 persons summoned only 5 were actually present, and the Sessions Judge followed the strict procedure as prescribed in rule 26. The contention was that the trial was nevertheless vitiated because, there being only 5 persons present, the choice of the jurors, though made by drawing lots, was not really a matter of chance. The contention which was rejected by the majority of the Full Bench was accepted by Wort, J., who delivered a dissentient judgment. The Sessions Judge having followed the strict procedure, it was not necessary for their Lordships to consider the effect of a divergence from the strict procedure. The view that the choice of the jury by lot under section 276 must be a matter of chance was also expressed by Ross and Wort, JJ., in *Tajali Mian* v. *King-Emperor*(2), but in that there was a substantial ground of objection to the constitution of the jury, namely, that a challenge to one of the jurors chosen was wrongly rejected by the Sessions Judge. It was also found that there was misdirection on important points. Further, the view expressed by Wort, J., is inconsistent with the interpretation of Rule 26 approved by the majority of the Full Bench in *Akbar Ali* v. *King-Emperor*(1) and would render the second proviso to section 276 meaningless. The case before us is entirely covered by the decision in *Kedar Nath Mahto v. Emperor*(3), where the Full Bench had before it *inter alia* appeal no. 468 in which 7 summoned persons were present, of whom two were discharged on the ground that they did not understand the language of the Court and a jury of 7 was constituted by empanelling the remaining 5 persons and two other persons present in the Court, there being no choosing by lot. The rule of the Calcutta High Court under section 276 of the Code prescribing the manner in

(1) (1927) I. L. R. 7 Pat. 61, S. B.
(2) (1927) I. L. R. 7 Pat. 50.
(3) (1927) I. L. R. 55 Cal. 371, F. B,

which the choice was to be made was exactly similar to rule 26 of this Court. The leading judgment was delivered by Buckland, J. with whom all the members of the Full Bench agreed. In the course of his judgment he observed:

"In the course of argument, we were informed that it is the practice in District Courts to ascertain beforehand how many of the persons summoned to serve as jurors have attended and thus determine the 'deficiency' to be supplied. If that is the case, in my judgment it is a practice which is not authorised by law and should be discontinued. No doubt, persons summoned as jurors who do not attend are liable to fine. But the stage at which it should be ascertained whether they have attended or not is not reached until their names are called out for the purpose of empanelling a jury."

In spite of this His Lordship observed:

"As regards appeal no. 468 the jury was in effect empanelled as permitted by law from the 5 persons summoned and the two chosen from among the bystanders."

I agree with Allanson, J. and Buckland, J. that literally read the rule required the drawing of lots from all the persons summoned excluding those excused, whether such persons are present or not. I believe, however, that it is a very general practice before the drawing of lots under rule 26 begins to ascertain which of the persons summoned is present and to exclude from the draw the names of persons not in attendance. Buckland, J., says that in effect this is compliance with the rule. I would go further and hold that this is what the rule intends. To my mind, this interpretation has two considerations to recommend it. Firstly, it avoids the force of choosing for service as jurymen persons who are not present in

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

Court and whose absence can readily be ascertained before lots are drawn. It further saves the time of the Court. Secondly, it discourages persons who are summoned from absenting themselves in the hope that their names may not be drawn and their absence may not be discovered. With respect, therefore, I would differ from the views expressed by these learned Judges. I would take the rule to contemplate a draw confined to the persons summoned and in attendance. It follows that there has been no irregularity in the constitution of the jury, and it is not necessary to apply section 537 of the Code as was done in *In re Jhubboo Mahto*(1), which case was approved by the majority of the Full Bench in *Akbar Ali* v. *King-Emperor*(2).

Next it is contended that the verdict of the jury should be set aside on the ground of misdirection.

After setting out the facts of the case and giving the jurymen the usual directions regarding their duty as jurors, the Additional Sessions Judge proceeded to explain the sections under which the accused persons were charged. Regarding section 149 he said:

"Section 149, I. P. C. applies to an unlawful assembly where the accused is a member of that unlawful assembly and that he intentionally joined or continued in that unlawful assembly. The offence with which section 149 is joined, must be committed by a member of that assembly and that it must be committed in prosecution of the common object of such assembly or such as the members of the assembly knew to be likely to be committed in prosecution of the common object.

An unlawful assembly is an assembly of five or more persons having a common object amongst other things to commit mischief or other offence."

It is urged that the Additional Sessions Judge misdirected the jury by not directing them as to the common object charged in this case, namely, "to assault and murder Tafazzul and his men, and to loot and commit arson of their properties." I agree that

(1) (1883) I. L. R. 8 Cal. 739.
(2) (1927) I. L. R. 7 Pat. 61, F. B.

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

there is a misdirection. But it is a misdirection in favour of the prosecution and one about which the accused persons could have made a grievance if they had been convicted. Instead of specifying the common object stated in the charge, about the existence of which common object the jury would have to be satisfied before it could return a verdict of guilty, the Additional Sessions Judge mentioned the wide common object "to commit mischief or other offence". Secondly, the Additional Sessions Judge omitted to mention an important element for the application of section 149, namely, that at the time when the specific offence in question was committed, the accused sought to be made answerable for the specific offence must have been a member of the unlawful assembly.

After explaining sections 436 and 149, Penal Code, the Additional Sessions Judge set out very briefly the relevant evidence and posed the question "whether the houses have been burnt or not". Considering the circumstantial and other evidence there could be only one answer to this. The Additional Sessions Judge then went on to deal with the question whether, assuming that the answer to the first question was in the affirmative, the accused were members of an unlawful assembly that set the houses on fire. He pointed out that while according to the bulk of the prosecution evidence a mob set fire to the houses at about 2 P.M. there were witnesses who saw the fire at 4 to 5 P.M., suggesting that the arson and the other offences accompanying it might be the work of another mob. He expressed the view that the decisive factor for determining this was whether these witnesses were in a position to see the fire earlier if in fact the houses were set on fire earlier than 4 or 5 P.M. In this connection he referred particularly to the evidence of P. W. 4 Dasrath Lal in these terms:

"P. W. 4 is Dasrath Lal, Patwari, residing at Deoki Babu's kutcheri in the village. According to him at about 2-30 or 3 P.M., there was a tumult in the village. He came out of his retirement from his room on the verandah and since then remained there. He did not see

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

any mob during this period. In the evening he saw the verandah and cowshed on fire when the sun was about to set. From 2-30 P.M. till the evening he did not see any flame."

He also made some observations about witnesses Tafazzul Hussain (P. W. 1), Najmul Huda (P. W. 6), Dileshwar Mandal (P. W. 16), Dheyani Gope (P. W. 31) and Asharfi Mandal (P. W. 35) and continued:

"It is for you gentlemen from all these factors to decide whether the houses were set on fire at about 2 P.M. by the same mob of 400 or 500 persons that came there or by some other persons at a later time. That some other persons also arrived in the village subsequent to the mob of 400 or 500 persons is spoken of by P. W. 37 Musammat Malikan. On seeing other people running away she also ran away westwards and hid herself in the jungles. Further, she claims to have seen persons being killed and dragged but she did not see any mob. She *then* saw after some time a mob coming from the west by swimming across the river. They were armed with *bhalas* and *lathis*. According to this witness, these persons who were others than those constituting the mob of 400 or 500 persons also arrived at the village subsequently. If, therefore, you gentlemen believe that the same mob that indulged in brickbats near the bungalow of Tafazzul set fire to the houses and you are satisfied about the identification of these persons in the mob you may find them guilty but if you gentlemen find that some other set of persons set fire to the houses these persons are entitled to a verdict of not guilty."

After this he concluded with a brief reference to the identifying witnesses and the evidence relating to the charges under section 436. The jury returned after a retirement of 8 minutes and delivered their unanimous verdict.

It is urged that the word "then" which I have placed in italics in the extract relating to Musammat Malikan is a clear misdirection as the witness did not say that the mob to which she refers came after the arrival of the second mob. It is true that Malikan did not make expressly such a statement. In fact she does not speak of the arrival of the second mob, and the word "then" really expresses an inference of the Additional Sessions Judge himself from the evidence as a whole. By itself, I would not have attached much importance to this misdirection as affecting the verdict of the jury. This has to be taken, however, with a much more serious misdirection as regards

Dasrath Lal. This man is the Patwari of a local zamindar who has his *kutchery* a short distance to the east of Kachhaut *bustee*. *Prima facie* the witness is a respectable and independent witness to whose evidence much weight should attach, and his statement that he was in the verandah of the *kutchery* from about 2-30 P.M. and did not see the fire till about sunset would be almost conclusive on the point. On looking into the examination-in-chief of this witness, however, we find that he says that at about 2-30 or 3 P.M. there was a tumult in the village, but he did not come out of the room and it was when he came out that he saw the granary, the cowshed and *verandah* (sic) on fire. He made a statement to this effect also in the court of the Committing Magistrate where he said that after the withdrawal of the first mob he went inside the *kutchery* to take a rest, that at 2 P.M. there was *hulla* in the village which stopped after a couple of hours, and in the evening he came out of the *kutchery*, saw women and children running away and houses on fire. He was cross-examined about this before the Committing Magistrate and asserted again that he came out of the house after sunset. These were surely important statements of this witness inconsistent with the statement to which he referred in his charge to the Jury, and they should have been placed before the jury and might have materially affected the verdict.

In these circumstances it becomes necessary for me to examine the evidence for myself in order to decide whether the misdirection has led to an erroneous verdict by the jury [*Abdul Rahim* v. *King-Emperor*(1)], and it is unnecessary to consider a further question which has been canvassed before us, namely, the power of an appellate Court to interfere with the acquittal under the assessor charges if the acquitting verdict of the jury in respect of the other

(1) (1946) 50 Cal. W. N. 692.

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

charges is upheld. I shall, therefore, proceed to examine for the purpose of all the charges the evidence adduced. In doing so it will have to be borne in mind that this is an appeal against acquittal. In such a case the power of the appellate Court is the same as in an ordinary appeal " but in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakned by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." [*Sheo Swarup* v. *King-Emperor*(1)]. In a recent case the Supreme Court observed: " It is well established that in an appeal under section 417, Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons." [*Surajpal Singh* v. *The State*(2)]. It will, therefore, be useful to take note of the reasoning of the Additional Sessions Judge. I shall do this in the proper place.

Several charges were framed. Of these some regarding which the evidence was insufficient or palpably weak were not pressed by Mr. Chakraverty, namely, a charge under section 384 for the robbery of

(1) (1934) L. R. 61 Ind. App. 398, 404.
(2) (1952) A. I. R. (S. C.) 52, 54.

ornaments from Musammat Daho and Musammat Pachia, under section 364 for the abduction of Musammat Pachia and under section 302/34 for the murder of Medo Mian. Coming to the charges which were pressed there are, first of all, the charges under sections 147 and 148 with the common object which I have stated above. Dependent on this is the charge under section 302/149. There are then three charges under section 302/34 in respect of the murders of Musarraf, Habo and Sakhawat, respectively. Finally, there are the charges tried by jury, namely, two charges under section 436 and one under section 436/149.

Kachhaut, which was the scene of the occurrence is situated on a piece of high land. There are two main *bustees* in it, one inhabited mostly by Muhammadans including Tafazzul and another some distance to the north of it inhabited mainly by Hindus, among whom is one Hito Mandar. To the east about 150 yards away is the *kutchery* of Deoki Babu on another piece of high ground. In the low land to the east of the *bustee* is what has been referred to as the Congress Well about a hundred yards away. Mahadeo Math, from which village some of the rioters are said to have come, is one mile to the north of Kachhaut and Bahuarwa about three miles to the north-west. Harpur is on the north and lies east of Mahadeo Math. It is on the way to Khoparia, two miles north-east of Kachhaut, in which place (Khoparia) there is a railway station. On account of the eminence of the site of Kachhaut the fire was visible at Koparia. The railway runs in a north to south direction and passes some distance east of Kachhaut. To the south of Kachhaut at a distance of 300 or 400 yards is the Nagdi river, a branch of the river Kosi. In its earlier course it passes some distance west of the village. The police station, Bakhtiarpur is about nine miles north of the village.

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

In spite of so many of the accused persons belonging to different villages the defence taken is that these are false charges brought against the accused persons through enmity. That this is not a fantastic defence appears from the finding of the Additional Sessions Judge that

> " Not only are the majority of the accused persons related amongst themselves but almost all the accused persons are on inimical terms with the complainant Tafazzul and his relatives and Hialal ".

This Hialal it should be explained is a well-to-do and influential Hindu resident of Kachhaut, now dead, who was examined in the Court of the Committing Magistrate and whose deposition has been put in evidence under section 33 of the Evidence Act. He is related to several of the accused and according to the defence he took a prominent part in engineering the case against the accused persons. The finding of relationship and enmity is not challenged and it will serve no useful purpose to set out the evidence in support of it; it is discussed fully by the Additional Sessions Judge. It is important to bear the enmity in mind for, as the Additional Sessions Judge pertinently observes, the peculiarity of the identifications is that though the mob was composed of more than 300 persons the identifications are confined to enemies of Hialal and Tafazzul. I do not mention this fact as by itself a reason for rejecting the evidence but as an additional reason for caution.

While I am dealing with this point it will be convenient to mention a further reason for caution. There are indications that at least some of the witnesses were induced to depose in circumstances which not only cast a doubt on them but tend to make us look with suspicion at other witnesses examined for the prosecution. I refer to the recording under section 164, Code of Criminal Procedure, of the statements of Uchit Tiar (P. W. 5), Raghubir Poddar (P. W. 7) and Srichand Pasi (P. W. 11). From what Raghubir

and Srichand say it appears that they were detained for three days in Police custody till the statements were recorded. Musammat Kaili (P. W. 34) and her husband Aghanu Musahar (P. W. 13) were subjected to similar pressure if we are to believe Aghanu.

* * * * *

To come to the judgment of the Additional Sessions Judge, he deals in turn with the evidence relating to the several charges under section 302/34 and, pointing out certain improbabilities and discrepancies and the inconsistency with the prosecution account of certain facts observed by the investigating officer (P. W. 41) in his inspection of the spot on the 7th May, concludes that the deaths of the persons alleged to have been murdered, none of whose bodies has been recovered, have not been established. Having disbelieved the witnesses deposing to the alleged murders it was unnecessary for him to examine the evidence identifying particular accused persons as having taken part in the alleged murders. He did so however and came to the conclusion that the evidence was unreliable. He proceeded similarly and with similar results as regards the charges under sections 364 and 384. Coming to the charges of rioting he has held that only the common object of committing arson was proved, and addressed himself to the question whether the arson was the work of the second mob. For the reasons already suggested by him to the jury he came to the conclusion that it might be the work of another mob attracted to the village by rumours that there was trouble between Hindus and Muhammadans at Kachhaut. A large number of witnesses supported the prosecution story and the circumstantial evidence was such that the Additional Sessions Judge conceded that a serious occurrence, involving possibly the loss of one or more lives, took place. It is evident from his judgment that the decisive factor was his finding that the arson occurred in the evening by which

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

time the second mob, to which the accused persons are said to have belonged, must have withdrawn. I shall, therefore, briefly deal with the oral and other evidence, and consider particularly evidence bearing on the question of the time when the occurrence took place.

The first intimation of the occurrence was given to the authorities by a telegram Ex. 2(*d*) sent by Tafazzul at 4-35 P.M. on the 6th May from Koparia Station. It was addressed to the Sub-Inspector of Police at Bakhtiarpur and said:

"500 men Gang attacked to my house about 14 hours date. Life danger. Take action."

The prosecution case is the Tafazzul escaped from Kachhaut while an interchange of brickbats was in progress between his supporters and the second mob, and in Court he has named 25 persons as having been identified by him in the mob. It is noticeable that in the telegram he mentions no names and gives no particulars as to where the rioters came from. His explanation is that he had not enough money with him. It is also noticeable that there is no mention of arson. It was the month of May and houses of the type that one finds in villages would blaze up readily. Tafazzul had to go from the station and bring a scribe Dileshwar Mandal (P. W. 16) to write the message for him. So he was moving about and if the arson was committed as early as the prosecution make out we would expect him to have seen it.

The next message to the authorities was sent at 5-10 P.M. [Ext. 2(*e*)], again in the form of a telegram addressed to the Sub-Inspector of Police at Bakhtiarpur. It says:

"My house burnt by villagers of Mahadeomath, Bahuapur and Kachhaut."

It is said that this telegram was sent by Tafazzul immediately after the earlier telegram on the arrival of his son-in-law Najmul Huda (P. W. 6). This time

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

we find a mention of arson, and he tells us in his deposition that " I saw fire coming out of the village." The prosecution account is that Najmul Huda left the village some time after the mob committed violence, and he has deposed as an eye-witness to the dragging of Musarraf's body to the river and to the casting of Musarraf's leg into the river after severing it from the rest of the body. He also deposes to having seen Sakhawat's body being dragged to the river. He tells us that when he came to the station he had 15 to 20 rupees with him. Nevertheless, we do not find in the telegram any particulars of the persons responsible, nor do we find any mention of murder. The scribe for the second telegram was again Dileshwar Mandal. His evidence is relevant with reference to the time when the arson occurred.

* * * * *

That the flames were prominent enough to attract attention at Koparia is indicated by a statement which he makes in cross-examination that

" passengers that had come shouted that there was fire."

The witness speaks of Tafazzul having mentioned some names to him on the occasion when he scribed the first telegram, but cannot say whether on the second occasion he wanted any names to be mentioned in addition to the names of the three villages. The evidence of the Assistant Stationmaster Anil Ranjan Ghose (P. W. 14) is not quite consistent with this, for his deposition is:

" I told Tafazzul to send telegrams to the Collector giving names. He said he had fled away and did not recognise anybody, Najmul Huda too did not name anybody."

The witness further depose that Najmul Huda did not, in his presence, either before or after the second telegram was sent, mention that there had been murder. It was commented with reference to this witness that an application by the prosecution for permission to cross-examine him was disallowed by the Court. The

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

power to allow a party to cross-examine his own witness is discretionary. A party is not entitled to cross-examine its own witness merely because something which the witness says is inconsistent with the case of that party. Hence, I cannot say that the discretion was wrongly exercised by the Additional Sessions Judge.

It is said that after sunset Tafazzul and Najmul Huda returned to the village. The only man they met there was Tafazzul's son Jasim (P. W. 38). This witness, according to the prosecution, ran south when the mob entered the village and crossing the river, took shelter on the other side. From there, he deposes, he saw fire in the village and watched the bodies of Musarraf and Sakhawat being brought to the river, cut into pieces and thrown into the water. It is said that Tafazzul and Huda after ascertaining details from Jasim set out for the police station. On the way they stopped at the telegraph office in Simri-Bakhtiarpur and sent two more telegrams. The messages were written at about midnight by Muhammad Ahtasamuddin (P. W. 2). One of these telegrams (Ext. 2) is addressed to the Subdivisional Officer, Khagaria, and says :

> "Muslims of village Kachout, thana Bakhtiarpur looted, houses burnt and killed to-day by Hindu mob stop. Muslims in danger immediate action solicited."

The other telegram [Ext. 2(*a*)] addressed to the Collector and the Superintendent of Police, Monghyr, is in exactly similar terms. Once more we find an absence of names. Further, what according to the prosecution is merely an occurrence between two lots of people between whom there has for a considerable time been ill-feeling is represented in these telegrams as an attack by Hindus upon Muslims. Actually, there are two Muhammadans among the accused persons and there are 9 or 10 Hindus among the eye-witnesses to the occurrence. The explanation

suggested to us, namely, that the colour of a Hindu Muslim riot was given to the affair in order to induce the authorities to act quickly, is not entirely satisfactory for Muhammad Ahtasamuddin deposes that he understood from the talk which he had with Tafazzul and Najmul Huda

> " that there was a Hindu-Muslim riot of a serious type."

This observation of the witness has to be weighed in the light of his further statement that

> " it took him about one hour to hear the occurrence and write out the telegrams ".

that is to say, the impression formed by the witness was not the result of a hasty talk.

The two telegrams sent by Tafazzul from Koparia railway station arrived at the police station when literate constable J. C. Jadav (P. W. 46) was in charge. He made entries about them in the station diary and sent word to Assistant Sub-Inspector Jainarain Lal (P. W. 44) who, on his return, treated the telegrams as a first information report and instituted a case under section 143/436 [Ext. 1(*a*)]. Having done so, he was about to proceed to the spot when at about 1-30 A.M. Tafazzul and Najmul Huda arrived at the police-station. He proceeded to record their statements under section 162 of the Code of Criminal Procedure. For some reason the Assistant Sub-Inspector's note of Tafazzul's statement (Ext. 1) although clearly marked by him as taken under section 162 of the Criminal Procedure Code has been treated as part of the first information report. It was rightly treated by the Assistant Sub-Inspector as a statement taken in the course of an investigation and is at best available to the defence for purposes of contradiction. It is relevant in this connection to notice that regarding Najmul Huda Tafazzul says in this statement that on his arrival at Koparia " he said that the rioters had set fire to the house " and that he

1953.

STATE OF BIHAR v. S. N. MANDAL.

(Tafazzul) learnt of the murders from Jasim. It is noticeable further that in giving a list of the persons killed by the mob he does not mention Sakhawat, although his informant Jasim deposes to having seen Sakhawat's body cut up and thrown into the river.

REUBEN, C. J.

Information of apprehended trouble at Kachhaut had been brought to the police-station sometime on the 6th by *chaukidar* Behari Tiar (P. W. 39) who deposes that he went to *dafadar* Md. Ataul Haque (P. W. 43) immediately after the dispersal of the first mob and, as the *dafadar* was ill, proceeded to the police-station. He reported to literate constable J. C. Jadav and returned to the village with constable Shaikh Sattar (P. W. 26) at about 10 P.M. that night. The Assistant Sub-Inspector arrived at about 6 A.M. on the 7th. He found the village practically deserted. Houses had been burnt and the fire was still burning. Before he could do much Sub-Inspector R. Prasad (P. W. 41) arrived and took charge of the investigation at 7-30 A.M.

Sub-Inspector Prasad found several houses in the Muhammadan *bustee* burnt. In a burnt *kothi* near the house of Tafazzul was the dead body of Taflu Mian whose death is attributed in the post mortem report to shock by burning. Near the house of Tafazzul there were some blood stains. By the river, about 50 yards to the east of Mohana Ghat he found some more blood stains and marks of scraping with a spade. There were marks of dragging leading north from this place and some blood stains were found in the trail of dragging. About 100 yards further east there was another mark of dragging. The trails of dragging extended for a distance of 10 to 12 paces. Fifty yards further east the Sub-Inspector found a *bhala* and a sword. The *bhala* was sent to the Chemical Examiner and was found to have some blood on it but too little for serological tests. The Sub-Inspector collected stains from three different places noted by him as

blood stained. These stains have been found to contain human blood. A more vivid picture of the scene of the occurrence is given by the Subdivisional Officer L. N. Singh (P. W. 23) who reached the spot at 5-30 P.M. on the 7th. He, however, spoke not from written notes but from memory. He deposed:

* * * * *

The indications appeared to be of a serious occurrence in which one or more people were killed. The Sub-Inspector searched in all likely places but found no traces of a dead body. The only signs of violence to the persons found by him were scratches and a swelling on two women who refused to go to the hospital for medical examination. The village was deserted. On the 7th the Sub-Inspector examined only three witnesses in addition to Tafazzul and Najmul Huda. On the 8th seven other eye-witnesses appeared before him. On the 9th he examined 11 more Dasrath Lal was not examined till the 10th.

I come now to the eye-witnesses and begin with Tafazzul and Najmul Huda. I have already noted that in his first telegram Tafazzul gave no details, and that Anil Ranjan Ghose deposes that he spoke of having run away and recognised no one. It has also been noted that it was not till just before sending the second telegram that Tafazzul saw the fire at Kachhaut. Najmul Huda deposes that he hid near the river for some time after the arrival of the second mob and that he saw the dead bodies of Musarraf and Sakhawat being dragged to the bank. It is significant, however, that the second telegram sent by Tafazzul did not mention murder. The account Najmul Huda gives of the occurrence in his examination-in-chief is significant in another respect. When the mob came he ran away. He hid near the river. 15 to 20 minutes after reaching there he saw the incident relating to Musarraf and Sakhawat. Then he fled. He first mentions the fire when he is talking of his return to Kachhaut that night. This remark

1953.

STATE OF BIHAR v. S. N. MANDAL.

REUBEN, C. J.

applies also to his deposition before the Committing Magistrate. Deposing about his return to the village that night he says:

"Then we came to the village in the night. We found the houses are on fire."

We know that Najmul arrived at the Railway Station some time after Tafazzul. The added details in the second telegram suggest that he left the village later than Tafazzul. The peculiarity I have noticed in his evidence suggests that although he left later than Tafazzul the arson had not yet been committed.

Most of the evidence deals with the dragging of the bodies of Musarraf and Sakhawat to the river, the cutting up of the bodies into portions and the throwing of the pieces into the stream. The Additional Sessions Judge has dealt with the discrepancies in the accounts given by the different witnesses and I shall not repeat what he has said. Comparatively few persons, according to the witnesses, were concerned in dragging the bodies to the spot and very few of them took part in the chopping up. Nevertheless, there are discrepancies in several particulars regarding which we might have expected the evidence to be fairly consistent. The evidence regarding these incidents is given by witnesses who took shelter near the river. Of these I have already referred to Uchit Tiar (P. W. 5) who is said to have been detained in police custody for several days before his statement under section 164 was recorded. In the course of his evidence he deposes that the train from Mansi to Koparia was passing at the time when Musarraf was brought to the river. The train timings were verified from a railway time-table and it was found that, leaving Mansi at 3-50 P.M., the train is due at Koparia twelve miles away at 4-57 P.M. According to this witness, therefore, the body of Musarraf was brought to the river shortly before 5 P.M. Other witnesses who

deposed to having seen the occurrence from the southern side of the river are Muhammad Anis (P. W. 8), Bhikha Tiar (P. W. 10), Shaikh Nathuni (P. W. 27), Galimat Mian (P. W. 15), Shaikh Nabij (P. W. 25), Fahim Mian (P. W. 30) and Hia Lal, deceased, whose deposition has been taken in evidence under section 33 of the Evidence Act. Md. Anis deposes that he ran southwards from the *bustee* and swam across the stream, a distance of fifty yards, and when he sat on the opposite bank he saw the fire. Five to seven minutes later he saw the body of Musarraf being dragged down. Galimat deposes:

* * * * *

Shaikh Nabij deposes:

* * * * *

Fahim is one of those who fled from the village on the arrival of the second mob and crossed the river. He says that the bodies of Musarraf and Sakhawat were brought to the bank within half an hour of his sitting on the other side.

Santi Hajam (P. W. 9) fled towards the west and rested by a *dhatura* tree 500 yards away. His account is:

* * * * *

Other witnesses who fled in this direction are Musammat Sabo (P. W. 22), mother of Anis, Musammat Dahu (P. W. 36), daughter of Tafazzul, and Musammat Malikan (P. W. 37) to whom reference has already been made. Sabo deposes to the kidnapping of Pachia and mentions among others Bhuneswar, accused, as being present on horse-back. Daho, who deposes to the murder of her mother Habo, the snatching of ornaments from her own person and the kidnapping of Pachia, mentions Karelal, accused, as being mounted on a horse in addition to Bhuneswar. Yet Malikan who deposes to the murder of Habo says

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

that she saw no one on horse-back. She is the witness who speaks of a mob coming from the west. This cannot be either of the mobs described by the other prosecution witnesses. It is unlikely that what the witness said was misunderstood and wrongly recorded for she speaks of the mob at two different places in her cross-examination. She also gives an important indication of the time when she says:

"I saw Habo dragged when the train was passing."

Another statement of hers to be noted is:

"Pacho sat near me for about an hour. Then I saw the fire."

This suggests that the fire occurred some time after the arrival of the second mob.

Finally there are some witnesses who depose to happenings in the village after the arrival of the second mob, namely, Raghubir Poddar (P. W. 7), Srichand Pasi (P. W. 11), Nabij Kunjra (P. W. 19), Kailu Tiar (P. W. 21), Sahid Mian (P. W. 28), Musammat Adulan (P. W. 32), Musammat Kari (P. W. 33), Musammat Kaili (P. W. 34), Aghanu Musahar (P. W. 13). I have already spoken of Raghubir Poddar. After mentioning the arrival of the second mob and naming those he recognised in it he continues:

* * * * *

His account gives one the impression of something that took a comparatively short time. Srichand Pasi has also been mentioned before. Sahid Mian gives a very fanciful account. On the arrival of the mob he, his brother Taflu, Musarraf and Sakhawat took shelter in a room of Tafazzul's house. The mob pushed at the door. Two persons got on the roof, and began to remove the tiles. The witness struck one of them with a *bhala*. The mob began to set the house on fire. Musarraf and Sakhawat opened the door and went out and were caught and assaulted by the mob. The witness and his brother remained inside.

1953.

STATE OF BIHAR. v. S. N. MANDAL. REUBEN C. J.

Part of the roof of the room got burnt and fell down. The witness and his brother climbed on to the roof and got into the courtyard. The witness went into the kitchen and did not see his brother alive again. In the kitchen there were two *degchis* of water and one *thali*. With the *thali* he kept on sprinkling water about him and spent all night in the burning house. In corroboration of his story a reference has been made to an injury found on the person of Bundelal Mandal, accused, but there is no certain connection between the two, and Bandelal was not given any chance in his examination under section 342, Criminal Procedure Code, to explain how he came by the injury. Sahid Mian was present when the Sub-Inspector arrived in the morning. He was also there when the Sub-Inspector inspected the house and discovered the dead body of Taflu. Yet he said nothing about his own experiences and did not point out the place where he spent the night. In fact he gave the Sub-Inspector no inkling that he saw anything and he was sent with the dead body as an identifier, when it was despatched for post mortem examination. As we have seen the Sub-Inspector was having difficulty in getting witnesses. Therefore he cannot have failed to inquire from Sahid if he knew anything about the occurrence. Regarding this man's story there is another point which occurs to one, namely, that it appears from the evidence that Taflu Mian was not on good terms with Tafazzul and in proceedings under section 144 had been ranged with Hamid Mian, accused, against Tafazzul and his sons. According to the prosecution story before the second mob entered the village there was an exchange of bricks for some time. It would have been an easy matter, therefore, for Taflu to get away from the village during the interchange of brickbats and, even if he did not leave the village, there was no reason why he should not have remained in the open as some of the Hindu witnesses seem to have done instead of hiding from the mob. Musammat

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

Kaili and her husband Aghanu Musahar have already been mentioned by me in another connection. In the very first sentence of her examination-in-chief Musammat Kaili said that the arson occurred at 4 P.M. The effect of this damaging admission was mitigated by an immediate question as to what the time was at the moment the witness was deposing, the answer to which was that she did not know the time. It is interesting, however, to compare her evidence with that of her husband. The prosecution story is that Musammat Habo took shelter in the house of these people before she was caught and taken away by the mob. Musammat Daho (P. W. 36) deposes that she and her mother Habo fled to Musahar *tola* during the exchange of brickbats. There she separated from her mother and hid in the jungle to the west of the village. The evidence of Aghanu relating to Habo is:

* * * * *

It would, therefore, appear from the evidence of Aghanu that Habo came to his house at about one *pahar* day remaining and remained there for a considerable time before she was taken away by the mob.

In my analysis of the evidence I have dealt with all the eye-witnesses except Dasrath Lal (P. W. 4) whose evidence I shall discuss presently and Habib Mian (P. W. 18) and Feku Lal (P. W. 20) who were tendered for cross-examination and did not say anything of importance. It is perhaps relevant to mention that Habib Mian, an employee of the estate of Raja Deokinandan which is under the management of the Court of Wards, was present at Kachhaut on the day of the occurrence. He is a man of Bakhtiarpur and is apparently an independent witness. But it was not though necessary to examine him as a principal witness. I have already referred to the discrepant statements made by

Dasrath Lal regarding the circumstances in which he first saw the fire in Kachhaut *bustee*. According to one account he retired inside the *kutchery* for rest after the withdrawal of the first mob and, although he heard an uproar at about 2 P.M., he did not come out through fear and he saw the fire at sunset when he did emerge. According to the other account he came to the verandah at about 2-30 P.M. when he did not see any mob and in the evening, when the sun was setting, saw the fire; throughout the intervening period he remained in the verandah. Whichever account is accepted the story of this witness is that he first saw the fire in the evening. It is difficult to accept the story of this witness about his being afraid to come out and see what was happening. The *kutchery* is on a piece of high land at a distance of 150 yards from Kachhaut *bustee*, and there is no suggestion that the mob showed any hostility towards Dasrath Lal or anybody at the *kutchery*. It is unlikely, therefore, that when there was all this uproar and excitement Dasrath Lal would not be sufficiently interested even to peep out and ascertain what was happening.

The prosecution account is that the second mob came to Kachhaut in overwhelming numbers and entered the village after a very brief resistance by the supporters of Tafazzul. Thereafter they had things all their own way. The offences which the prosecution witnesses attribute to this mob would not take long to commit and the general impression that one gathers from the prosecution evidence is that the arson, the murders and the other offences took place more or less at the same time. We would, therefore, not expect the second mob to remain in the village for a long time. The offences, according to the prosecution, were committed in pursuance of private enmity. In such circumstances it is usual for the offenders to get away from the place as soon as their object is accomplished. On the other hand, there are

1953.

STATE OF BIHAR. v. S. N. MANDAL.

REUBEN, C. J.

several passages in the evidence which suggest that the arson and the offences took place long after the arrival of the second mob. This supports the theory put forward by the Additional Sessions Judge that the offences in question might be the work of another mob attracted to the spot by rumours about there being trouble between Hindus and Muhammadans in this village. That such a mob came to the spot finds some support in the evidence of Musammat Malikan. It also finds support from the behaviour attributed to the mob responsible for these crimes, namely, that instead of making itself scarce immediately after committing the offences in question it seemed to revel in the committing of these crimes. It is also noticeable that the persons responsible for these offences directed their violence against the person and property of Muhammadan residents of Kachhaut. I have also noticed that in the messages sent on the 6th night from Simri-Bakhtiarpur Tafazzul gave the affair a communal aspect. His explanation is that this was intended to make the authorities move quickly in the matter. Surely the seriousness of an occurrence in which a large number of houses had been burnt and five or six lives lost was sufficient by itself to make the authorities take immediate steps. Instead, we find that even on the 8th evening telegrams giving the affair a communal aspect were sent by Najmul Huda [Ext. 2(*b*) and 2(*c*)], although the Sub-Inspector of Police arrived at Kachhaut in the morning of the 7th and the Subdivisional Magistrate was at the village by the evening of that day.

The oral evidence which has not been relied on by the Additional Sessions Judge and the jury is not entitled to special weight, and there is considerable support for the Additional Sessions Judge's theory of the commission of these crimes by another mob at a later time. In the circumstances I am unable to hold that there are substantive and compelling reasons

for taking a different view from that of the Additional Sessions Judge and the jury.

1953.

STATE OF BIHAR v. S. N. MANDAL.

For the reasons I have given I dismiss the appeals.

* * * *

REUBEN, C. J.

MISRA, J.—I concur in the judgment of my Lord the Chief Justice that the appeals must be dismissed, but I propose to add a few words of my own. Mr. S. C. Chakraverty for the State contends that the present trial is vitiated as the jury in the case was not properly constituted. The details of the formation of the jury and the objection of Mr. Chakraverty to its validity are set out in the judgment of my Lord the Chief Justice and I need not refer to them. Some of the decisions on the point deprecate the practice of Sessions Judges ascertaining in advance which one of the persons summoned are actually present and to proceed to draw lots only when the number attending exceeds the number required. In case the number of persons answering to the summons falls short of the requisite number, the Judge takes recourse to clause two of section 276 of the Code of Criminal Procedure, and subject to any objection by the parties concerned, fills up the deficiency from among the bystanders in court who are otherwise suitable. This practice, which is styled the roll-call system, is held as unwarranted by the terms of section 276 of the Code of Criminal Procedure and it is laid down that the correct procedure in any event is to draw lots. With great respect to the Hon'ble Judges who have expressed this opinion, I can see nothing in the words used in section 276 of the Code of Criminal Procedure to warrant the view. Clause one of section 276 of the Code of Criminal Procedure, no doubt, provides that "the jurors shall be chosen by lot from the persons summoned....." and read literally and as the governing clause of the whole section, the roll-call method, in strict view of the matter is procedurally erroneous.

1953.

STATE OF BIHAR. v. S. N. MANDAL.

MISRA, J.

It is, however, to be borne in mind that clause one is not the governing clause of the whole section. It is only one of the clauses. In fact this clause obviously postulates that the number of persons present in response to the summons is larger than the required number, as every one who is summoned is presumed to be present according to the summons, or, at any rate, the Sessions Judge is not aware that the number present does not exceed the number required or is even less than that.

In the latter contingency, clause two of the section really comes into play. This is obviously independent of clause one and provides for a different situation which is one of deficiency of number. There is nothing in this clause to indicate that the Court cannot ascertain the deficiency by calling out the names of the persons present. This method is a more practical and convenient method than the formality of casting lots in every case irrespective of the number of persons attending in accordance with the summons. In my opinion, neither section 276 of the Code of Criminal Procedure nor the General Rules and Circular Orders on the point put any legal barrier to the adoption of the procedure referred to above.

S. H.

Appeals dismissed.

MISCELLANEOUS CRIMINAL.

Before Das and Sinha, JJ.

1953.

March 6, 9, 10, 26.

KARAMVIR

v.

STATE OF BIHAR.*

Preventive Detention Act, 1950 (Act IV of 1950), section 13(2) as amended in 1951, scope and applicability of—

*Criminal Miscellaneous no. 32 of 1953, in the matter of an application under Article 226 of the Constitution of India and section 491 of the Code of Criminal Procedure.

1953.

KARAMVIR v. STATE OF BIHAR.

detention of a person held illegal—order passed on same facts thereafter, whether legal– Constitution, Article 226—Code of Criminal Procedure, 1898 (Act V of 1898), section 491.

The word 'expiry' in section 13(2) of the Preventive Detention Act, 1950 as amended in 1951 refer to time. A fresh order can only be passed if fresh facts have arisen after the expiry or revocation of the previous order.

An order of detention passed against a person was held illegal by the High Court and he was ordered to be released but inspite of the order of the High Court he was not released. A fresh order of detention was passed against him based on the same facts on which the previous order had been made. On an application for a *writ* questioning the legality of the order.

Held, (*i*) that the order of the High Court declaring previous order of detention illegal did not amout to expiry of the order of detention within the meaning of section 13(2) of the Preventive Detention Act, 1950 as amended in 1951 and, therefore, the second order of detention did not require fresh facts to support the order and the order was legal,

(*ii*) that the order of detention was not *mala fide*; and

(*iii*) that no relief could, therefore, be granted under article 226 of the Constitution, 1950, or under section 491 of the Code of Criminal Procedure, 1898.

In the matter of an application under Article 226 of the Constitution and section 491, Code of Criminal Procedure.

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

B. C. Ghosh and *R. B. Singh* for the petitioner.

Advocate-General, Standing Counsel, and S. C. Chakravarty for the State.

SINHA, J.—This is an application under Article 226 of the Constitution of India and section 491 of the Code of Criminal Procedure.

An order for the detention of the petitioner, Karamvir Singh, under the Preventive Detention Act

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

(Act IV of 1950), was passed on the 20th of September, 1952, and he was arrested on the 22nd September. The grounds of detention were served upon him on the 26th of September, 1952. He had made an application to this Court under Article 226 of the Constitution of India and section 491 of the Code of Criminal Procedure (Criminal Miscellaneous no. 403 of 1952). It appears that he had also filed an application for *habeas corpus* from jail (Criminal Miscellaneous no. 351 of 1952). Both these applications were heard by this Court on the 2nd of December, 1952, and the judgment was delivered on the 19th of December, 1952. This Court held that, in view of the amendment of the Act (Act IV of 1951), the reference by the State Government to the Advisory Board was bad because at the time the reference was made, the Chairman of the Advisory Board had not been appointed and therefore the Advisory Board had not been properly constituted. Accordingly, the detenu was ordered to be released from preventive detention. A fresh order of detention was, however, passed on the 20th of December, 1952, and was served upon the petitioner on the 23rd of December, 1952.

It was contended on behalf of the petitioner that, in spite of the order of release by this Court holding that the detention of the petitioner was illegal, this petitioner was not released. The Jailor of the Central Jail, Hazaribagh, where the petitioner was detained and is under detention, has filed an affidavit in this Court. According to the affidavit, the order of this Court releasing the petitioner from detention was received by the Superintendent, Central Jail, Hazaribagh, on the 22nd of December, 1952, and the detenu was released forthwith. But, as two intermediate custody warrants, dated the 2nd and the 16th of December, 1952, had been issued from the Court of Sri C. N. Tewari, Magistrate, 1st Class, Hazaribagh, in respect of two pending cases under section 186 of

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

the Penal Code, and as no bail had been granted, the petitioner was not actually released from custody on the 22nd of December, 1952, in spite of his release from detention. It is further stated in the affidavit that a fresh order of detention, dated the 20th of December, 1952 (no. A/D—1—1402/52 SS—C. D. 2) issued by the Governor of Bihar was served on the petitioner at 10-30 A.M., on the 23rd of December, 1952, and since then he is detained in pursuance of that order. It is also stated that on the 23rd of December, 1952, at 5-55 P.M., orders releasing the petitioner from jail custody as undertrial prisoner in the two cases mentioned above were received by the Jail Superintendent, Hazaribagh, but as the detention order, referred to above, had already been served on the petitioner, he was not released from jail custody.

Mr. Ghosh, on behalf of the petitioner, has contended that, under the amended section 13(2) of the Preventive Detention Act, the detention of the petitioner is illegal because no fresh facts could have arisen after the previous order of detention was held illegal by this Court, as the man was never released and was throughout in jail. The amended section 13 of the Preventive Detention Act, 1950, runs as follows:—

"(1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897, (X of 1897), a detention order may at any time be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (2) of section 3, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government, by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made."

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

The questions which fall to be considered under sub-clause (2), referred to above, are :—

(1) whether the order of this Court holding the detention of the petitioner, under the previous detention order, as illegal amounts to expiry of the order, and

(2) if the order of this Court amounts to ' expiry ', whether fresh facts, since the expiry of the order, have arisen.

Mr. Ghosh contends that the effect of the order of this Court will, in law, amount to expiry of the previous order of detention. and, therefore, fresh facts were needed to enable the State Government to issue a fresh order of detention. It is conceded on behalf of the State that no fresh facts have arisen since the previous order of detention was held illegal by this Court as the petitioner was not released from jail custody after the order of this Court, dated the 19th of December, 1952, and the petitioner was not out of jail for a single moment before the fresh order of detention was served upon him. The only question, therefore, is whether the order of this Court will have the effect of ' expiry ' of the order of detention passed on the 20th of September, 1952. If the previous order can be said to expire as a result of the order of this Court, a fresh order of detention cannot be passed without fresh facts under section 13(2) of the Act. The word ' expiry ' has not been defined anywhere in the Act. The word ' expiry ' must, therefore, be understood in the popular and the dictionary sense. The word ' expire ', according to the Chambers's Twentieth Century Dictionary, means ' to breathe out, to emit or throw out from the lungs.....to breathe out the breath of life, to die out.....to come to an end "; and the word ' expiry ' means ' the end or termination '. The word ' expiry ', therefore, connotes termination, but, in my opinion, the idea of time

is implicit in termination by expiry. Whether the termination is by efflux of time or by operation of law, in either case, ' expiry ' must have reference to time as opposed to invalidity or any illegality which may have the effect of putting an end to the order. Mr. Ghosh contended that since the order of this Court was passed holding that the detention was illegal, the detention order came to an end. I agree that the order of detention being held illegal by this Court, came to an end; it did not, however, die a natural death by having run its full span of life; it only ceased to have effect. The word ' expiry ' as such has not been commented upon in Craies on Statute Law (Fifth Edition), but some guidance may be had from the several meanings of the expression ' ceased to be in force ' used with reference to enactments at page 328 of the book, where we find the following :—

" For the purposes of the schedule, six different classes of enactments are considered as having ceased to be in force, although not expressly and specifically repealed; namely, such enactments as are—

1. *Expired*—that is, enactments which, having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for periods now gone by effluxion of time;

2. *Spent*—that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required;

3. *Repealed in general terms*—that is, repealed by the operation of an enactment expressed only in general terms as distinguished from an enactment specifying the Acts on which it is to operate;

4. *Virtually repealed*—where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;

5. *Superseded*—where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;

6. *Obsolete*—where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances. "

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

In the same book at page 377, with reference to temporary Acts, the word 'expiration' has been commented upon as follows:—

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect."

In my judgment, the word 'expiry' must necessarily have reference to time. If an order or an Act is held illegal, it becomes invalid as if it never existed. If an order or an Act is said to expire, it must convey the idea that the order or the Act has run out its full course with reference to time. I would, accordingly, hold that the declaration by this Court that the detention of the petitioner was illegal did not amount to expiry of the order of detention; it was merely held illegal, invalid and of no effect. The intention of the legislature appears to be that in cases where the order of detention has run out its course by efflux of time, or the authorities have revoked the order, a fresh order can only be passed if fresh facts have arisen after the expiry or revocation of the previous order. In either case, the old grounds based on facts existing before expiry or revocation of the order would not justify a fresh order, and the reason is obvious. In the one (in case of expiry), the detention for a particular period was considered sufficient on the grounds then available, and, after the period had expired, there could be no justification for extending the period by issuing fresh orders on those very grounds; and in the other (in case of revocation) though the detaining authority had decided to issue detention order, on further consideration, it decided to revoke the order which may be because on reconsideration the authority did not feel satisfied about the sufficiency or adequacy of the grounds. It will thus be seen that in either case fresh grounds were essential. Under the original section 13, as it stood before the amendment, the detaining authority was entitled, in law, to issue fresh

orders of detention even upon the facts existing when the previous order was passed. This was a lacuna which has been filled up by the amendment of 1951 (Act IV of 1951). Under the present law, therefore, there can be no fresh order of detention without fresh facts having come into existence after the expiry or revocation of the previous order. The present case not being one of expiry or revocation of the order, the fresh order of detention did not require fresh facts. The contention of Mr. Ghosh must, therefore, be rejected, and section 13(2) of the Act must be held to have no application.

His next contention is that the order of detention is *mala fide*. It was suggested that the reference to the custody warrants in the pending cases under section 186 of the Penal Code was merely to explain away the reason why the petitioner was not released as per order of this Court, dated the 19th of December, 1952. The order-sheets of the two cases, referred to in the affidavit of the Jailor, Central Jail, Hazaribagh, have been sent to this Court. The crucial question is whether on the 22nd of December, 1952, when the order of this Court was received by the Superintendent of the Central Jail, Hazaribagh, the petitioner was an undertrial prisoner in some pending case or not; in other words, whether his custody was legal. There were two cases pending against the petitioner on the 22nd of December, 1952, under section 186 of the Penal Code. One of these cases (63/T 164 of 52/52) was started on the 26th of May, 1952. It appears, on the 9th of July, 1952, order for releasing him on bail was passed, and on the subsequent dates the accused was present in Court. On the 6th of October, the accused was absent, and it was reported by the Bench Clerk that the accused was in jail in connection with some other case, and production warrant for the 11th of October was ordered to be issued. The accused was produced on that date in custody and he was

1953.

RAMVIR v. STATE OF BIHAR.

SINHA, J.

produced before the Court from day to day. On the 16th of December, 1952, statement of the accused was taken and a certain defence witness was ordered to be summoned for the 4th of January, 1953. The order in the order-sheet, dated the 22nd of December, 1952, runs as follows :—

" Bail bond furnished, but it does not bear the signature of the accd. Inform the bailor to get it signed by the accd.....".

On the 23rd of December, 1952, release order was ordered to be issued after the bail bond had been accepted, and the order seems to have been issued on that date. From the order-sheet of this case it appears that bail was granted, but there is no indication whether the petitioner was actually released on bail or whether the bail bond offered was properly executed or not; the defect in the bail bond is pointed out on the 22nd of December as mentioned above. On the 23rd of December, perhaps, the bail bond was signed by the accused and it was accepted and the accused was ordered to be released. The second case (90/Tr. 156 of 52/52) was started on the 20th of November, 1952, when the petitioner was undergoing detention. On the next date, that is, the 16th of December, 1952, the accused was produced in custody, and an order for bail was passed on that very date. Again, in this case also, as the petitioner had not signed the bail bond, the bailor was directed on the 22nd of December to be informed to have the bail bond signed by the accused. The order of release was passed in this case on the 23rd of December, 1952. From the order-sheet of the first case it does not appear that the man was not released on bail when the order for bail was passed on the 9th of July, 1952. From the order of the 22nd of December, it appears that the bail bond had not been signed by the petitioner. It is, however, clear from the order-sheet of the second case that the petitioner was produced in custody on the 16th of December after the cognizance of the case under section 186 of

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

the Penal Code was taken and he was directed to be released on bail of Rs. 300 on the 22nd of December, 1952. The bail bond was signed by the petitioner, and he was ordered to be released on the 23rd of December, as on the 22nd of December the presiding officer was on leave. It is thus clear that on the 22nd of December, 1952, the petitioner was an undertrial prisoner without proper bail bond having been furnished, either in one case or in both, and, therefore, he could not have been released on the 22nd of December when the order of this Court was received by the Superintendent of the Central Jail, Hazaribagh, and that he was in legal custody even after the receipt of the order of this Court by the Jail Superintendent on the 22nd of December, 1952.

No other fact has been brought to the notice of this Court to show that there was any *mala fide* on the part of the State Government. It was contended that the fact that the man was an undertrial prisoner should have been brought to the notice of this Court when the application for *habeas corpus* was heard by this Court on the 2nd of December, 1952, and it was said that this fact was not brought to the notice of the Court. From the judgment of this Court it does not appear that this fact was brought to the Court's notice, but I find from the record of Criminal Miscellaneous no. 403 of 1952 that there is a document purporting to be a reply to the grounds taken. In paragraph 7 of that document, there is a reference to two cases under section 186 of the Penal Code being pending against the petitioner. To show *mala fide* on the part of the State Government, the onus lay heavy on the petitioner, and there are no facts, other than those already mentioned, to show that there was any *mala fide* on the part of the State Government.

It was faintly contended that if the previous order of detention was declared invalid by this Court, it was

1953.

KARAMVIR v. STATE OF BIHAR.

SINHA, J.

mala fide on the part of the authorities to have issued another order of detention on the same facts. I am unable to subscribe to this view. There can be no reason to hold that the subsequent order of detention is *mala fide* merely because it is based on the same facts which were declared invalid on some formal grounds. Where the earlier order of detention is held invalid on more or less formal grounds, there is nothing, in law, to prevent a proper order of detention being passed on the same grounds, and the mere fact that the subsequent detention order has been passed on the grounds as were mentioned in the previous order cannot lead the Court to hold that the detaining authorities acted *mala fide*.

I would, accordingly, hold that there is no merit in this application, and it must be dismissed.

DAS, J.—I agree.

Application dismissed.

S. H.

REVISIONAL CRIMINAL.

1953.

March 12, 13, 27.

Before Reuben, C. J., and Misra, J.

M. HOMI.

v.

DY. COMMISSIONER, SINGHBHUM.*

Criminal Trial—surety bond, taken by Government, whether one under the Code of Criminal Procedure, 1898 (Act V. of 1898), section 401—proceeding for forfeiture, whether without jurisdiction—section 514, scope of.

Bonds taken from persons who stand surety to a security bond as ordered by the State Government under section 401, Code of Criminal Procedure, 1898, are not bonds of the nature

*Criminal Revision no. 1290 of 1951, against an order of Mr. S. P. Singh, Sessions Judge of Manbhum-Singhbhum, dated the 12th November 1951, refusing to quash the proceedings under section 514 of the Code of Criminal Procedure started by Mr. R. P. Singh, Deputy Commissioner of Singhbhum.

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

contemplated by section 514 of the Code and a proceeding initiated for their forfeiture under the Code is without jurisdiction.

Section 514 of the Code of Criminal Procedure, 1898 refers to two classes of bonds: firstly, a bond under the Code taken by a Court, and secondly, a bond for appearance before a Court. The first class is subject to two limitations, viz., the bond must be taken by a Court and it must be taken under the Code. Bonds of the second class must be for appearance before a Court. They may be taken by some one other than a Court under the provisions of the Code.

Hubert Crawford, In re.(1), *Ballabhdas Motiram Gupta* v. *Emperor*(2), *Karali Charan Chatterji* v. *The King*(3), *Rameshwar Bhartia* v. *The State of Assam*(4) and *Emperor* v. *Chintaran*(5), distinguished.

Application in revision by the sureties.

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

The case in the first instance came before Ramaswami, J., and he referred it to a Division Bench.

On this reference.

R. S. Chatterji and N. N. Roy, for the petitioners.

Advocate-General and the Standing Counsel for the opposite party.

MISRA, J.—This petition is filed on behalf of two persons, M. Homi and Syed Taffajul Karim, who stood sureties on behalf of one Aly Khan. Aly Khan was fined a sum of Rs. 1,00,000 and was sentenced also to undergo rigorous imprisonment for four years by the 1st Special Tribunal, Calcutta. He filed an appeal against his conviction and sentence in this Court which was dismissed. Aly Khan tried thereafter to

(1) (1918) I. L. R. 42 Bom. 400.
(2) (1943) A. I. R. (Bom.) 178.
(3) (1949) A. I. R. (Pat.) 196.
(4) (1952) A. I. R. (S. C.) 405, 408.
(5) (1936) A. I. R. (Nag.) 243.

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

move the Judicial Committee of the Privy Council and applied to the Provincial Government under section 401 of the Code of Criminal Procedure for suspension of the sentence passed on him pending the disposal of his appeal in the Privy Council. The Government of Bihar by a Resolution, dated the 17th October, 1946, suspended the sentence and imposed certain conditions on Aly Khan. He was asked to furnish security worth Rs. 50,000 with two sureties of Rs. 25,000 each to the satisfaction of either the Subdivisional Officer, Jamshedpur, or the Deputy Commissioner of Singhbhum and undertaking to furnish proof by the 1st of December, 1946, of his having taken all necessary steps for the filing of his appeal and also to surrender to the Deputy Commissioner of Singhbhum within three days of the receipt of the notice of the order or judgment of the Judicial Committee of the Privy Council if by the said order or judgment, the sentence was upheld wholly or in part. Aly Khan preferred his appeal to the Privy Council and furnished proof thereof to the Provincial Government as required under the first condition of his release. Aly Khan expressed his desire to be present personally in England to instruct his Counsel and applied to the Government for a passport to enable him to undertake the journey. The Government was pleased to grant him the necessary passport, being no. 13030, dated the 31st January, 1949. In compliance with condition no. 2 of the Resolution, Aly Khan executed a bond for Rs. 50,000 and induced the petitioners to act as sureties for him. The petitioners accordingly executed two surety bonds of Rs. 25,000 each before the Deputy Commissioner of Singhbhum. The application of Aly Khan for a passport was granted by the Provincial Government without any reference to the present petitioners.

The appeal of Aly Khan to the Privy Council, which was admitted by special leave, was, however, not disposed of, as in the meantime, the Act abolishing the

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM

MISRA, J.

jurisdiction of the Privy Council was passed and all Indian Appeals pending in the Privy Council were transferred to the Supreme Court of India. It appears that the appeal of Aly Khan was dismissed by the Supreme Court sometime in November, 1950. Thereafter the Deputy Commissioner of Singhbhum issued a notice on the 8th of December, 1950, to the petitioners to procure the surrender of Aly Khan within three days of the receipt of the notice, failing which the petitioners were threatened with action under section 514 of the Code of Criminal Procedure. On the 16th of December, 1950, the petitioners showed cause stating that they had undertaken to produce Aly Khan after the decision of the appeal by the Judicial Committee, and since the appeal was actually decided by the Supreme Court, they were not bound by the terms of the bail bond. It was also contended that Aly Khan was given a passport by the Bihar Government, and as such the petitioners were not bound to produce him. Certain other points of a technical nature were also pressed in the show cause petition. The learned Deputy Commissioner of Singhbhum proceeded to hear the matter after due notice to the State when on the 13th of March, 1951 he received a memo. from the Sessions Judge of Manbhum-Singhbhum calling for the records of the case and staying further proceedings pending the disposal of the Criminal Revision filed in his court. It appears that the petitioners moved the learned Sessions Judge for the quashing of the proceedings started by the Deputy Commissioner against the petitioners. The proceedings were accordingly stayed.

The learned Sessions Judge of Manbhum-Singhbhum by his order dated the 12th November, 1951, dismissed the application of the petitioners holding that the Deputy Commissioner of Singhbhum had jurisdiction to start proceedings for forfeiture of the bail bonds. The petitioners thereafter moved this

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

Court. In the meantime the judgment of the learned Sessions Judge in the Criminal Revision application referred to above was communicated to the Deputy Commissioner of Singhbhum, who resumed further hearing in the proceedings against the petitioners and held that the petitioners were liable to forfeit their surety bonds, because the objection that on account of the transfer of the case from the Privy Council to the Supreme Court they were not bound to produce Aly Khan in terms of the surety bond was not entertainable. It was also held that it appeared that the accused Aly Khan had absconded and was probably now in Pakistan and since they were liable to produce him within three days after the receipt of the notice of the order or judgment of the Supreme Court and they had failed to do so, the bail bonds executed by the two petitioners had been forfeited. He called upon them either to pay Rs. 25,000 each or to show cause why it should not be paid—the cause was to be shown by the 5th of December, 1951. The present application in this Court came up for disposal before Ramaswami, J., who by his order dated the 8th of January, 1952, was pleased to refer it for decision by a Division Bench.

Mr. R. S. Chatterji, who appears on behalf of the petitioners, contends that the learned Deputy Commissioner had no jurisdiction to proceed in the matter as the suspension of the sentence passed on Aly Khan by the Government of Bihar was evidently made in exercise of the powers conferred under section 401 of the Code of Criminal Procedure. To such a case the provisions of section 514 of the Code of Criminal Procedure will not apply. What is sought to be made out is that the authority of the Executive Government to exercise any of the powers conferred under section 401 of the Code of Criminal Procedure does not fall within the ambit of this section. The bail bonds contemplated under section 514 of the Code of Criminal Procedure

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

in relation to which alone there is provision for forfeiture, must be bonds which are executed under the Code of Criminal Procedure and must be taken by a court. Section 514 of the Code of Criminal Procedure, in so far as it is relevant for the present purpose, reads as follows :—

" Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid. "

The surety bonds executed by the petitioners are neither bonds executed under the Code of Criminal Procedure taken by a court, nor do they belong to the category, nor do they relate to a situation in which the forfeiture of these bonds could be considered only by the Court of the Presidency Magistrate or a court of Magistrate of the first class. He has referred in this connection to the case of *In re Hubert Crawford*(1) wherein it was held that a bond taken by the police under the City of Bombay Police Act was not a bond taken in accordance with the provisions of the Code of Criminal Procedure and as such section 514 of the Code would not apply. The facts of that case were clearly distinguishable from the present one, because there the bond was taken by a police officer under a distinct enactment and not under the Code of Criminal Procedure.

It was obvious, therefore, that the provisions of section 514 of the Code of Criminal Procedure could not be attracted to that case. He has next invited our attention to the case of *Ballabhdas Motiram Gupta* v.

(1) (1918) I. L. R. 42 Bom. 400.

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

Emperor(1) which was followed in *Karali Charan Chatterji* v. *The King*(2) for the proposition that it is the Court before whom the bailor is to produce the accused person which is alone competent to forfeit the bail bond in the case of the failure of the latter to comply with its condition. If, however, the case is transferred to some other Court, the bailor is not bound to produce him in that Court, and such a Court is not competent to order the forfeiture of the bail bond. Thus, it appears that neither the case reported in A. I. R., 1943 Bombay, 178, nor the one in A. I. R., 1949 Patna, 196, can have any application to the principle involved in the present case. Neither of these cases had occasion to consider the relation of section 401 of the Code of Criminal Procedure to section 514 of the Code and it is not contended even on behalf of the State that the Deputy Commissioner is competent to forfeit the bail bonds as a court different from the one before whom the bailor was to produce the accused person. Learned Counsel has next drawn our attention to a decision of the Supreme Court in *Rameshwar Bhartia* v. *The State of Assam*(3) where it was held:

"The High Court was in error in thinking that section 514, Criminal Procedure Code applied. Action could be taken only when the bond is taken by the Court under the provisions of the Code such as section 91 for appearance, the several security sections or those relating to bail. Clause (1) of section 514 runs:

> 'whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class, or when the bond is for

(1) (1943) A. I. R. (Bom.) 173.
(2) (1949) A. I. R. (Pat.) 196.
(3) (1952) A. I. R. (S. C.) 405, 408.

appearance before a Court, to the satisfation of such Court, that such bond has been forfeited; the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.'

The language is perfectly clear; the power to forfeit and the imposition of the penalty provided for in the later parts of the section arise only if the preliminary conditions are satisfied".

On facts, however, it would appear that this was also an undertaking given to the Procurement Inspector under a Jimmenama or security bond executed in his favour by the accused person in that case. Hence it was held by their Lordships:

"It is true that it contained the undertaking that the seized paddy would be produced before the Court, but still it was a promise made to the particular official and not to the court."

This decision, therefore, does not apply to the facts of the present case. These being the only cases referred to on behalf of the petitioners, it appears that the present case is one of first impression, and we have to decide it on a plain reading of the two sections of the Code of Criminal Procedure in question.

The learned Advocate-General in reply has contended that section 514 of the Code would apply to the present case as well as it would do to any other case of bail bond. He has endeavoured to establish this with reference to the terms of section 514 that the words used in the first clause of sub-section (1) of section 514 are sufficiently comprehensive to include bail bond of any kind, whether executed under the provisions of this Code or otherwise. His contention is that the

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

bail bond furnished under the provisions of the Code would be confined to the Court by which the bond under this Code has been taken and whenever there is any bail bond executed outside the purview of this Code, the forfeiture or otherwise in relation thereto would be determined by the Court of the Presidency Magistrate, or Magistrate of the first class, as the case may be. He has cited no authority in support of this contention but put forward the viewpoint on the terms of the section itself. It is difficult for me, however, to accept this contention inasmuch as it could not have been the intention of the Legislature to include a bond executed otherwise than under the provisions of this Code to be governed by the Code of Criminal Procedure. The Code is complete by itself, and if any bond could be executed outside the provisions of this Code, it is difficult to conceive that it might be governed by this Code. It is clear that if a bond is to be executed under any such enactment, relevant provisions are made in its terms or there would be a clause in the Act itself laying down that the Code of Criminal Procedure would apply either in whole or in part to that Act. It is only in such an event that section 514 of the Code can be deemed to apply to a case of bond arising under any other enactment as well. As a matter of fact, to hold otherwise would be to give jurisdiction to the Court of the Presidency Magistrate or a Magistrate of the first class over a bond, whatever its nature may be, which would be manifestly unreasonable. This contention on behalf of the State is, therefore, rejected.

It is next argued by the learned Advocate-General that section 401 of the Code refers to suspension of sentence, which power is given to the Governor-General and the local Government, and in the present case it was the execution of the sentence on Aly Khan which was suspended by the Government of Bihar on condition that he would produce two sureties to furnish the

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

necessary surety bonds. The petitioners did so of their own accord and undertook the burden of producing Aly Khan after the decision of his appeal by the Privy Council on pain of forfeiture of the bonds in case of their failure. They brought themselves thus within the terms of section 514 because, after the decision of his appeal, Aly Khan had to surrender in the court of the Deputy Commissioner of Singhbhum, being a resident of Jamshedpur. The bond he furnished was in accordance with the condition imposed under section 401 of the Code and as such it was a bond executed in accordance with the Code of Criminal Procedure and which was for appearance before a Court. Intriguing though the situation is, I find it difficult to accede to this argument as well. It is no doubt peculiar that when Aly Khan applied for suspension of the sentence on agreeing to furnish security bonds to be left at large in accordance with the provisions of section 401 of the Code and the sureties knew what they were undertaking to do, they should now be permitted, when the question of forfeiture arises, to say that the Code does not apply to them or that it was not for appearance before a Court. The fact, however, remains that section 514 being in the nature of a penal forfeiture it has to be given a strict construction. The word ' bond ' has not been referred to in section 401, and if at all it can come under the term ' conditions ' and not otherwise. The various bonds executable under the Code have been referred to in the relevant provisions being either bail bonds or security bonds or under section 91 of the Code of Criminal Procedure in the various contexts executed before a court or for appearance before a court. The present bonds, however, were executed by the petitioners for producing Aly Khan in accordance with the condition imposed by the Provincial Government in the imposition of which no court had any hand. It might thus be an agreement between the Executive Government and the accused

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

MISRA, J.

person and the sureties. In that view the bonds furnished to the Deputy Commissioner of Singhbhum were not furnished to a court, but the Deputy Commissioner acted merely as an agent of the Executive Government and it was accidental that a District Magistrate had to perform the function of taking the bonds. It was not in accordance with the direction of any court of law in its criminal jurisdiction governed by this Code. Mr. R. S. Chatterji's argument, therefore, that the taking of the bonds by the Deputy Commissioner should be deemed to be an act done on the executive side appears to be sound. If this contention is accepted, it is clear that section 514 of the Code of Criminal Procedure cannot be invoked to support the forfeiture proceedings. It may be that the State Government has been put in a very awkward situation by the act of the petitioners on whose surety bonds alone the Government allowed Aly Khan to be left at large to proceed to England, and now that he has absconded it is deprived of the heavy fine to which he was liable and he has escaped the punishment of imprisonment as well. It is really unfortunate that it should be so. It may be that in future the Executive Government may find it very difficult to suspend the execution of a sentence where it might be inclined to do so on certain conditions because if the conditions are not enforceable in accordance with the Code of Criminal Procedure, there will be a practical cessation of the use of this power by the Executive Government. It may be that the Government may realise the amount under the surety bonds under the provisions of the Public Demands Recovery Act or otherwise. We are, however, not concerned with the latter contingency. It is for the Law Officers of the State to think out. It may even be that section 401 of the Code of Criminal Procedure may have to be suitably amended to bring in such bonds as having been executed under the provisions of the Code so as to obviate a position like

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

the one that has arisen in the present case. As a matter of fact, various High Courts in the past in different cases have made suggestions for suitable amendment of this section. The facts of the present application also point in the same direction.

In view of the conclusions of law arrived at, the application must be allowed and the forfeiture proceedings in the court of the Deputy Commissioner of Singhbhum must be held to be without jurisdiction.

MISRA, J.

REUBEN, C. J.—I agree with my learned Brother that the application must be allowed, and that the proceedings before the Deputy Commissioner must be quashed. As the case is one of first impression and involves points of importance and interest I give my reasons in my own words.

The question for consideration is whether section 514 of the Criminal Procedure Code applies to the forfeiture of the bond requiring Ali Khan " to surrender to the Deputy Commissioner of Singhbhum within three days of the receipt of the notice of the order or judgment of the Judicial Committee if by the said order or judgment the sentence is upheld either partly or wholly. " In the constitutional changes which have occurred since the appeal was filed the order of dismissal was passed, not by the Judicial Committee, but by the Supreme Court. It is not necessary to consider whether the fact that the appeal was disposed of by a tribunal other than the Judicial Committee affects the liability of the petitioners under the bond.

The relevant portion of section 514 runs as follows :—

" Whenever it is proved to the satisfaction of *the Court by which a bond under this Code has been taken*, or of the Court of a Presidency Magistrate or Magistrate of the first class; or, *when the bond is for appearance before a Court*, to the satisfaction of such Court, that *such bond* has been forfeited, the Court shall etc., etc. "

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

REUBEN, C. J.

The italics are mine. The section expressly refers to two classes of bonds: firstly, a bond under the Code taken by a Court, and secondly, a bond for appearance before a Court. The first class is subject to two limitations, the bond must be taken by a Court and it must be taken under the Code. It may be for appearance before a Court, for example a bond taken by a Magistrate under section 86 of the Code; or for some other purpose, for example, a bond taken under section 107 to be of good behaviour. Bonds of the second class must be for appearance before a Court. They may be taken by some one other than a Court, for example, a District Superintendent or Commissioner of Police under section 86 of the Code. It is possible that this class includes bonds taken under a provision of law other than the Code for appearance before a Court governed by the Code but it is not necessary to decide that point here. The words " such bond " relate back to the two kinds of bonds mentioned and the problem before us resolves itself into the question whether the bond given by the petitioners is a bond of either of these two classes.

I would answer this question in the negative The bond is not a bond of the first class because it is taken by the Provincial Government and not by a Court. The actual steps for getting the bond executed were taken by the Deputy Commissioner who is also the District Magistrate. But he did so merely as the agent of the Government, and he cannot be treated as having taken the bond in his capacity as a District Magistrate. Further, although the bond was taken in pursuance of an order passed in exercise of a power conferred on the Provincial Government by the Code, I am doubtful whether it can be described as being " a bond taken under the Code ". For the reason which I have already given, namely, that in this matter the Deputy Commissioner cannot be regarded as acting as a Court, I do not think that the

bond is a bond of the second class. The fact that the form used for the bond is the form of bail bond prescribed for accused persons released on bail by a Court of Criminal Appeal makes no difference. The recitals therein contained about the appellate Court having passed an order for Ali Khan's release on bail are obviously inappropriate. Nor does the undertaking by the petitioners at the foot of the bond that the accused shall attend " if so required by the said Court, in the said or any other Court, and that he shall, if under the said decision any sentence remains to be undergone by him, surrender to the trying Magistrate on being called upon to do so by the District Magistrate " make any difference. Merely by referring to the Deputy Commissioner as a Court the petitioners could not make him a Court, if in this matter he was not functioning as a Court. The fact is that the Assistant Sub-Inspector of Police, on whom was put the duty of drawing up the bond, used the form prescribed for an accused person released by an appellate Court, and the petitioners signed the form without considering what was the exact meaning conveyed by the words of the form. The district authorities were aware that this form was not in accordance with the Government order, and therefore took a separate bond on a stamped paper of Rs. 10 in which the petitioners stood surety for the amount specified and bound " ourselves, our heirs, executors and successors " to the Government of Bihar to pay Rs. 50,000 in case Ali Khan—

" fails to .....surrender to the Deputy Commissioner of Singhbhum within three days of the receipt of the notice of the order or judgment of the Judicial Committee etc. "

In this bond the Deputy Commissioner is not described as a Court.

The learned Advocate-General has urged that section 514 contemplates three and not merely two classes of bonds. He would infer the third class of

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

REUBEN, C. J.

bonds from the words " of the Court of a Presidency Magistrate or Magistrate of the first class". This class, he argues, consists of bonds which are not for appearance before a Court and which are not taken by a Court under the Code. With respect I am unable to accept this contention. According to this interpretation the third class would be an omnibus class including all bonds taken by any person or authority under any provision of law. It appears to me that the provision relating to " the Court of a Presidency Magistrate or Magistrate of the first class " is intended to empower such Magistrates to deal with the two kinds of bonds which I have described. The reason for such a provision is easy to see. Where a bond under the Code has been taken by a Court it may happen that it is more convenient for some other Court to deal with the forfeiture of the bond. To take only one instance, it may be that the Court which took the bond has been abolished. Exactly the same reasoning would apply to a bond for appearance before a Court. Ordinarily it is convenient that the Court before which the person bound is due to appear should deal with the forfeiture of the bond. It is for this reason that that Court is empowered to deal with forfeiture, independent whether it is the Court of a Presidency Magistrate or a Magistrate of the first class. But it may happen that the Court has been abolished or has ceased to exercise jurisdiction after the forfeiture of the bond and before an order enforcing the forfeiture has been passed, as seems to have happened in the case of *Karali Charan Chatterji* v. *The King*(1). In such circumstances, if the bond which is forfeited has been taken by an officer who is not a Court, provision is necessary for some other Court to deal with the matter of forfeiture. Even where the bond has been taken by a Court it may be more convenient for some other Court to deal with it, or it may be that the Court

(1) (1949) A. I. R. (Pat.) 196.

which took the bond has also been abolished. It is to meet these contingencies that a Presidency Magistrate or a Magistrate of the first class has been empowered to deal with such matters.

I am aware that a different view was expressed by Beaumont, C. J. in *Ballabhdas Motiram Gupta* v. *Emperor*(1) but the case was decided on a different point, namely, that whereas the bond required the accused to attend in the Court of the Chief Presidency Magistrate, the forfeiture was said to have been incurred by his failure to attend before the 8th Presidency Magistrate. The view expressed by Beaumont, C. J. was followed by Agarwalla, C. J. in *Karali Charan Chatterji* v. *King*(2). According to him in the absence of the Court before which the accused was bound to appear, the proper Court to deal with the forfeiture of the bond is the Court by which the bond was taken. With respect, I would observe that His Lordship's attention was not directed to the words " of the Court of a Presidency Magistrate or Magistrate of the first class " in sub-section (1) of section 514. If the special provision in this sub-section relating to bonds for appearance before a Court does not prevent the Court by which the bond was taken from dealing with the forfeiture of the bond I do not see why it should be held to prevent a Presidency Magistrate, or a Magistrate of the first class from dealing with the forfeiture of such a bond. Sub-section (1) of section 514 empowers three classes of Courts to deal with matters of forfeiture of bonds: Courts which have taken bonds under the Code, Courts of Presidency Magistrates, and Courts of 1st class Magistrates. The special provision relating to bonds for appearance before a Court empowered a fourth class; it was not intended to restrict the general power given to the other three classes of Courts.

(1) (1943) A. I. R. (Bom.) 178.
(2) (1949) A. I. R. (Pat.) 196.

1953.

M. HOMI v. DY. COMMISSIONER, SINGHBHUM.

REUBEN, C. J.

Secondly, the learned Advocate-General has argued that the suspension of the sentence under sub-section (1) of section 401 had the effect of restoring the *status quo* before the decision of the High Court dismissing the appeal and, therefore, gave the Court the power to demand bail with sureties. There is no authority for this contention. Section 401 confines the power of the Government to the suspension of the execution of the sentence or the remission of the whole or any part of the punishment. The conviction under which the sentence is imposed remains unaffected. The accused, therefore, was not by the order of suspension relegated to the position of an appellant before the High Court. The proceedings before the High Court were at an end and the accused, in accordance with the sentence which was upheld by the High Court, was in the custody of the executive authorities. Government in exercise of the discretion vested in it under section 401 thought proper to suspend his sentence and to release him on bail. The order of the Government was given effect to by the Deputy Commissioner acting as the Agent of the Government, and the bond which was executed provided that in the event of the final decision requiring his further confinement Ali Khan would surrender to the Deputy Commissioner, so that he might be reconveyed to jail custody. The Deputy Commissioner throughout was merely the agent of the Government, and the bond cannot be taken to be one to which section 514 applies.

Neither *In re Hubert Crawford*(1) nor *Rameshwar Bhartia* v. *The State of Assam*(2) is of any help. In both these cases the bond was not taken under the Code and it was not a bond for appearance before a

(1) (1918) I. L. R. 42 Bom. 400.
(2) (1952) A. I. R. (S. C.) 405.

1953.

M. HOMI
v.
DY. COMMISSIONER, SINGHBHUM.

Court. *Emperor* v. *Chintaran*(1) is equally unhelpful. It relates to a bond for appearance which was drawn up in such a slovenly fashion that there was no mention of the Court in which the accused was to appear.

Application allowed.

REUBEN, C. J.

S. H.

CIVIL REVIEW.

Before Reuben, C. J. and Rai, J.

USMAN

v.

SAMAWATI.*

1953.

April, 7, 22.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* 47, *rule* 1—*appeal having been dismissed as infructuous—respondent, whether entitled to file a review.*

When an appeal is disposed of as having become infructuous it is not open to a respondent to say that the order passed is an order "made against him" within the meaning of sub-rule (1) of rule 1 of Order 47 of the Code of Civil Procedure, 1908, and that sub-rule (2) of rule 1 of Order 47 of the Code had no application to such a case.

Hence, the review application was not maintainable.

Aryalpurath Randupurayil Kunhimayan v. *Kautilat Cheekaladen Ahmed Kuth Haji*(2), not followed.

Application for review by a respondent.

The facts of the case material to this report are set out in the order of the court.

Dr. Sultan Ahmed; *M. Rahman* and *Amin Ahmed*, for the petitioner.

---

*Civil Review no. 6 of 1953.

(1) (1936) A. I. R. (Nag.) 248.
(2) (1909) 2 Ind. Cas. 204.

1953.

USMAN
v.
SAMAVATI.

Respondent no. 37, the son of respondent no. 38, and respondents nos. 39 to 42 have filed this application for review of our judgment and order dated the 9th December, 1952, by which we held that First Appeal no. 115 of 1946 had become infructuous by virtue of its having abated as against the heirs of respondent no. 24 (plaintiff no. 24) and respondent no. 28 (plaintiff no. 28) and as against two of the heirs of respondent no. 32 (plaintiff no. 31). The plaintiffs had succeeded in the trial court which had held that the lands in suit formed part of the plaintiffs' village Mahoba, *tauzi* no. 653, and that it did not form part of village Tetrabad, *tauzi* no. 2679, which was owned by the Government of Bihar. The petitioners had been impleaded as defendants in the suit as settlement-holders from the Government of Bihar. The First Appeal to this Court was filed only by the Government of Bihar through the Collector of Monghyr, and the petitioners were arrayed as respondents in the appeal which was dismissed on 9th December 1952 as having become infructuous.

In our opinion the petitioners have no right to file the petition of review. They did not file an appeal against the decree of the Court below and were apparently content with it. Our order declaring the appeal filed by the Government of Bihar to have become infructuous was passed in the presence of the petitioners and did not decide the appeal on its merits. It has been urged before us that, being parties to the order before us, the petitioners are entitled to file a petition for review since they stood to gain if the appeal had succeeded and, therefore, can be regarded as aggrieved by our order within the meaning of rule 1 of Order 47 of the Code of Civil Procedure. That rule, however, does not entitle an aggrieved person to apply in review against all orders by which he is aggrieved, but only against an order " made against him ". Where an appeal is disposed of as having become infructuous it

1953.

USMAN
v.
SAMAVATI.

is not open to a respondent to say that the order passed is an order " made against him ". He is, therefore, not entitled under rule 1 of Order 47 to file a petition in review. The terms of rule 1 of Order 47 were not considered in the case of *Aryalpurath Randupurayil Kunhimayan* v. *Kautilat Cheekaladen Ahmad Kuth Haji*(1) and the facts of the case do not appear from the report. With all respect, therefore, we are unable to accept that case as an authority that the petitioners are entitled to maintain this petition.

A reference has also been made to sub-rule (2) of rule 1 of Order 47, but we do not think that sub-rule helps the petitioners. That sub-rule is concerned with the effect of an appeal against the decree or order of which review is desired, and provides that in certain cases the effect is to prevent the filing of a petition in review, namely, where the ground of such appeal is common to the applicant and the appellant or when, being respondent in the appeal, the applicant can present to the appellate Court the case on which he applies for the review. In other words, sub-rule (2) merely places a restriction on the right to apply in review which is given by sub-rule (1). In the case before us sub-rule (2) has no application and only sub-rule (1) is relevant for determining whether the petitioners are entitled to maintain this petition.

The petition is dismissed.

Application dismissed.

S. H.

(1) (1909) 2 Ind. Cas. 204.

REVISIONAL CIVIL.

1953.

April, 21, 22.

Before Ramaswami and Jamuar, JJ

L. N. SUKHANI

v.

K. N. SINGH.*

Court fee, whether payable on a claim of equitable set off in the written statement.

Article 1, Schedule 1, Court-fees Act, 1870, as amended in 1908, applies both to the case of an equitable set off and the case of a legal set off and court-fee is payable by the defendant in a case of either description.

Jessie George v. *Shakuntla*(1), relied on.

Wilrow v. *Mahadeo Govind*(2), *Sadasheo Krishnarao Buty* v. *Nathu Bala Mahar*(3) and *A. Z. M. Reazul Karim* v. *Mohammad Israil Ostagar*(4), referred to.

Ram Das v. *Dwarka Das*(5), *Nand Ram* v. *Ram Prasad*(6) *and Basheshar Nath Khanna and Sons* v. *Grindlay and Co.*(7), dissented from.

Held, that though a specified sum was roughly mentioned in the written statement on which set off was claimed, it was an equitable set off.

Application in revision by the defendants.

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

K. Dayal and *Girijanandan Prasad*, for the petitioners.

Lakshman Saran Sinha, for the State.

RAMASWAMI AND JAMUAR, JJ.—The question that arises in this case is whether the learned Subordinate

*Civil Revision no. 332 of 1951, against an order of Mr. S. N. Karim, Subordinate Judge, Hazaribagh, dated the 28th April, 1951.

(1) (1950) A. I. R. (E. P.) 225, F. B.
(2) (1943) A. I. R. (Bom.) 227.
(3) (1943) A. I. R. (Nag.) 314.
(4) (1939) A. I. R. (Cal.) 415.
(5) (1930) A. I. R. (All.) 875.
(6) (1904) I. L. R. 27 All. 145.
(7) (1937) A. I. R. (Lah.) 78.

Judge of Hazaribagh was right in asking the petitioners to pay court fee on the amount of Rs. 70,000 which the petitioners claim as a set off in the written statement.

The opposite party instituted Money Suit no. 13 of 1950 in the Court of the Subordinate Judge claiming a sum of Rs. 1,00,000 as principal and a sum of Rs. 15,000 as interest from the petitioners, alleging that there was a breach of contract and they were, therefore, entitled to the amount claimed by way of damages for the breach of the contract. The case of the opposite party was that they had advanced a sum of Rs. 6,50,000 to the petitioners for the purpose of floating a company on certain terms and conditions. The contract was not performed as the company was not floated and no action was taken to implement the terms and conditions on which the company was to be floated. The opposite party admitted that a sum of Rs. 5,50,000 was returned by the petitioners. The suit was, therefore, instituted for the balance of Rs. 1,00,000 which was still in deposit with the petitioners and for the interest due thereon.

The defence of the petitioners was that the opposite party was not entitled to refund of any money. The petitioners said that they had committed no breach of contract but there was a breach of contract on the part of the opposite party and, on account of this breach, the petitioners had suffered damages to the extent of Rs. 70,000. The petitioners also claimed that the opposite party had maliciously lodged a false criminal case against the petitioners and, on account of these criminal proceedings, the petitioners claim damages to the extent of Rs. 1,00,000.

The learned Subordinate Judge held that the claim for damages on account of malicious prosecution cannot be legally entertained by way of set off. The

1953.

L. N. SUKHANI v. K. N. SINGH

RAMASWAMI AND JAMUAR, JJ.

petitioners' claim on this point was, therefore, disallowed. As regards the claim for set off to the extent of Rs. 70,000 on account of damages for breach of contract, the Subordinate Judge was of the opinion that the defendants must pay court fee on this amount, failing which the claim for set off would be rejected. Against this order, the petitioners have obtained a rule from this Court.

The first submission of Mr. Kameshwar Dayal is that the amount of Rs. 70,000 which the petitioners claim was a claim by way of an equitable set off and the Subordinate Judge was not justified in requiring the petitioners to pay court fee on this amount. Counsel pointed to the fact that the Subordinate Judge said that the claim "cannot be treated as equitable set off and the defendants cannot claim exemption in the matter of court fee ". Mr. Kameshwar Dayal was right in contending that the claim which the petitioners set up was not in the nature of legal set off but in the nature of an equitable set off. The reason is that the claim which the petitioners made was a claim in respect of an unascertained sum by way of damages for a breach of contract. It is true that the petitioners roughly estimated the damages to be a sum of Rs. 70,000. But the nature of the claim made is the nature of a claim by way of damages for a breach of contract and, therefore, it is wrong to say that the set off which the petitioners claimed is in the nature of a legal set off. The question, however, in the present case is not whether the claim set up by the petitioners is a claim in the nature of a legal set off or whether it is a claim in the nature of an equitable set off. The question on the other hand is whether the petitioners are liable to pay court fee on the amount which they claim as set off. On this point, Mr. Kameshwar Dayal argued that court fee is payable only on a claim of a

1953.

L. N. SUKHANI v. K. N. SINGH.

RAMASWAMI AND JAMUAR, JJ.

a legal set off coming within the ambit of Order VIII, rule 6 of the Code of Civil Procedure. The argument of learned counsel is that the matter is not governed by the Court-fees Act and the defendant in such a case should not be required to pay any court fee on the amount of set off which is claimed. We are unable to accept this argument. Article I of Schedule I, Court-fees Act, states that court-fee is payable on written statements pleading a set off which should be assessed in the same way as a claim in a suit. The Article makes no distinction between a legal and an equitable set off .There is also no reason why a written statement pleading a legal set off should have to bear court fee and one pleading an equitable set off should not be liable to do so. It is conceivable that in the former case there is a very small amount involved and in the latter case it is a large amount. We see, therefore, no warrant for construing the provisions of Article I, Schedule I, Court-fees Act in a restricted manner. There is no reason why the expression " set off " should not be construed in its plain meaning and there is nothing in the context of the section to suggest that the expression should be construed in a qualified sense. In our opinion, therefore, the expression used in Article I, Schedule I, applies both to the case of an equitable set off and the case of a legal set off and court-fee is payable by the defendant in a case of either description. This construction of Article I, Schedule I, Court-fees Act is supported by the decision of a Full Bench of the East Punjab High Court in *Jessie George* v. *Shakuntla*(1). On this point, Mr. Kameshwar Dayal referred to *Ram Das* v. *Dwarka Das*(2), in which Sulaiman, J., observed that an equitable set off can be claimed independently of the specific provisions of the Civil Procedure Code and it was not necessary to demand court fees on this account. But the authority

(1) (1950) A. I. R. (E. P.) 225, F. B.
(2) (1930) A. I. R. (All.) 875.

1955.

L. N. SUKHANI v. K. N. SINGH.

RAMASWAMI AND JAMUAR, JJ.

of this case is doubtful because Sulaiman, J. placed reliance upon an earlier case of the Allahabad High Court [*Nand Ram* v. *Ram Prasad*(1)]. The learned Judge made no reference to the amendment in the Court-fees Act, Schedule I, introduced by Schedule 4 of the Code of Civil Procedure of 1908. Mr. Kameshwar Dayal also referred to *Basheshar Nath Khanna and Sons* ..v. *Grindlay and Co.*(2) but the authority of this case also is much shaken by the decision of the Full Bench in *Jessie George's case,*(3) to which we have already referred. In *Wilrow* v. *Mahadeo Govind*(4), the Bombay High Court has taken the view that the expression " set off " used in Article I of Schedule I of the Court-fees Act, as amended, includes an equitable set off and the necessary court fee must be paid thereon. The same view was adopted by Bose, J., in *Sadasheo Krishnarao Buty* v. *Nathu Bala Mahar*(5) In *A. Z. M. Reazai Karim* v. *Mohammad Israil Ostagar*(6), a Division Bench of the Calcutta High Court consisting of Derbyshire, C. J., and Nazim Ali, J., expressed the view that the word " set off " in Schedule I, Article I, not having been qualified in any way must include not only a legal set off but also an equitable set off.

We are, therefore, of the opinion that the argument of the petitioners must fail, and that the court fee on the amount of Rs. 70,000 which they claim as an equitable set off in the written statement must be paid.

We accordingly discharge the rule and dismiss the application with costs to the contesting respondent, namely, the State of Bihar. Hearing fee one gold mohur.

Rule discharged.

K. D.

(1) (1904) I. L. R. 27 All. 145.
(2) (1937) A. I. R. (Lah.) 78.
(3) (1950) A. I. R. (E. P.) 225, F. B.
(4) (1943) A. I. R. (Bom.) 227.
(5) (1943) A. I. R. (Nag.) 314.
(6) (1939) A. I. R. (Cal.) 415.

REVISIONAL CRIMINAL.

Before Das and Sinha, JJ.

NEHAL CHAND

v.

STATE OF BIHAR.*

1953.

March, 26, 27, 30.
April, 16.

Penal Code, 1860 (*Act XLV of* 1860), *section* 482, *scope and applicability of—person using trade mark resembling that of another—test of deception—question of fact—registration of offending trade mark under Trade Marks Act*, 1940 (*Act V of* 1940)—*effect—persons acting as stockists or selling agents, if guilty of abetment.*

In cases under section 482 of the Penal Code, 1860, the question to be determined is whether the alleged false trade mark was likely to deceive the buyers in thinking that they were buying the goods of the actual manufacturer although in fact they were buying goods of some other manufacturer. The test in such cases is not that the trade mark in question is an exact or substantial copy of the trade mark used by the complainant, but whether the imitation of the trade mark of the complainant has been done in a manner likely to cause the trade mark in question to be mistaken for the trade mark of the complainant by the class of persons who generally buy such goods. It would be sufficient for the complainant to show that the trade mark employed by the accused bears such close resemblance to the trade mark employed by him as to be reasonably calculated to deceive the public. It is the totality of impression which is likely to be left in the mind of the probable purchaser that has to be considered. The difference of non-essential points are not important, what is important is the main idea conveyed to the mind of the purchasers by the two trade marks.

The test of comparison of the marks side by side is not a sound one since a purchaser will seldom have the two marks actually before him when he makes his purchase, and marks with many differences may yet have an element of similarity which will cause deception more specially when

* Criminal Revision no. 585 of 1952, against a decision of Mr. H. R. Kazimi, Sessions Judge of Muzaffarpur, dated the 30th April, 1952, modifying a decision of Mr. S. M. Sulaiman, Subdivisional Magistrate of Muzaffarpur, dated the 30th August, 1951.

1953

NEHAL CHAND v. STATE OF BIHAR.

goods are in practice asked for by a name which denotes the mark or the device on it.

The question whether the case or package was marked in a manner reasonably calculated to deceive the buyers and whether the person who so marked the case or package acted without intent to defraud are questions of fact.

The fact that the offending trade mark has been registered under the Trade Marks Act, 1940, is no answer to the offence of using false trade mark as defined in section 480 of the Penal Code, the real question before the Court being whether the trade mark in question was likely to cause deception.

When *A* had used trade mark similar in colour and design to the trade mark used by *B*, though these two trade marks differed in detail, and where *C* and *D* were the stockists and selling agents of *A*;

Held, that *A* was guilty under section 480, Penal Code, and *C* and *D* were not guilty.

The definition of false trade mark in section 480, Penal Code, refers to the marking of goods or the receptacle containing goods with a trade mark and using the case or package or any other receptacle with a mark on it and, therefore, persons acting as selling agents or stockists are not guilty of abetment under section 482/109, Penal Code.

Seixo v. *Provezende*(1), *Schweppes, Ld.* v. *Gibbens*(2), *Bryant and May, Ld.* v. *United Match Industries, Ld.*(3), *Thomas Bear and Sons (India), Ltd.* v. *Prayag Narain*(4) and *Chhotu Sao* v. *Bansi Lal*(5), relied on.

Giridhari Lal Marwari v. *The King Emperor*(6), explained.

The Dunlop Pneumatic Tyre Company, Limited v. *The Dunlop Motor Company*(7) and *A. M. Malumiar and Company* v. *Finlay Flaming and Company*(8), distinguished.

(1) (1866) L. R. 1 Ch. 192.
(2) (1905) 22 R. P. C. at 607.
(3) (1933) 50 R. P. C. at 18.
(4) (1940) A. I. R. (P. C.) 86.
(5) (1943) I. L. R. 22 Pat. 702.
(6) (1936) 17 Pat. L. T. 667.
(7) (1907) App. Cas. 430.
(8) (1929) I. L. R. 7 Rang. 169.

1953.

NEHAL CHAND v. STATE OF BIHAR.

Byramjee Cowasjee v. *Vera Somabhai*[1], referred to.

Application in revision by the accused persons.

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

The case in first instance came before Jamuar, J., and he referred it to a Division Bench.

On this reference

Awadhesh Nandan Sahay, Bisheshwar Prasad Sinha and *S. L. Nandkeolyar*, for the petitioners.

S. N. Sahay, Tribhuwan Sahay and *Mrs. D. Lall*, for the opposite party.

SINHA, J.—Petitioner no. 1 Nehal Chand has been convicted under section 482 of the Penal Code, and has been sentenced to pay a fine of Rs. 1,000, in default, to undergo rigorous imprisonment for three months. The other two petitioners, Parmanand Verma and Ramautar Sah, have been convicted under section 482 read with section 109 of the Penal Code, and each one of them has been sentenced to pay a fine of Rs. 250, in default, to undergo rigorous imprisonment for one month.

P. W. 18, the complainant in this case is the manager of the Muzaffarpur Branch of Messrs. Moolji Bhai Mathur Bhai, manufacturers and sellers of *biris*. On or about the 25th of February, 1950, the complainant noticed a large consignment of *biris* at the Muzaffarpur Railway Station, and discovered that these *biris* were wrapped up with labels, which, according to him, were colourable and obvious imitation of the label used for *biris* maunfactured by his firm. It was also discovered that the petitioner Parmanand, who, at one time, happened to be in the service of the complainant's firm, was in the service of Ramautar as his agent.

(1) (1916) 10 B. L. T. 63.

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

A large number of persons, including the petitioners, were put on trial, but they have been acquitted by the learned Magistrate. Parmanand appears to be the selling agent working under Ramautar, who is alleged to be the stockist at Muzaffarpur of the *biris* manufactured by Nehal Chand.

The defence was that the labels used by Nehal Chand were not false trade marks within the meaning of section 480 of the Penal Code, which defines marking and using a false trade mark. There were other defences made at the trial with which this Court is not concerned as they were not pressed before this Court or even before the Court below.

The label used by the firm of Messrs. Moolji Bhai Mathur Bhai is marked Exhibit I and that used by Nehal Chand is marked Exhibit III. Section 482 of the Penal Code runs as follows:—

"Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

We are not concerned with marking or using a false property mark. Using of false trade mark is defined in section 480 of the Code which runs as follows:—

"Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, have a connection in the course of trade with a person with whom they have not any such connection, is said to use a false trade mark."

In this case there is no question that the goods were marked or that any case, package, or other receptacle meant to contain goods manufactured by other persons had been used. Here we are concerned with the marking of case or package. According to the prosecution case, the petitioner Nehal Chand had marked the case or package of *biris* manufactured by him in a manner which might reasonably be calculated to deceive the purchasers into believing that the *biris* they were buying were the *biris* manufactured

by the complainant's firm. The question to be decided in this case is, firstly, as to whether Nehal Chand marked the case or package of his *biris* in a manner reasonably calculated to deceive the buyers into believing that the *biris* contained in those cases or packages were the *biris* manufactured by the complainant's firm and that the other petitioners, Parmanand and Ramautar, abetted Nehal Chand in so doing; and, secondly, whether these petitioners have proved that they acted without any intent to defraud.

Both these questions are questions of fact, and on both these points we have got the findings of the final Court of fact against the petitioners. We have, however, heard the parties at some length as it was contended that the Court below has misapplied the law in arriving at its decision. The learned Magistrate has, in a clear and lucid judgment, mentioned the points of difference and the points of similarity between the two labels Exhibits I and III, and on those facts he has found that Exhibit III constituted a colourable imitation of Exhibit I. He has held.

> "No doubt the two labels are not identical and different in minor details but in essential matters, i.e., to say as regards the general appearance, the prominent portion of the device and the colouring, the two sets of trade marks are similar. In other words, the resemblance is too close to be noticed by illiterate or unwary customers. Ordinarily Biri smokers are drawn from such class of society where it cannot be expected that they will be able to distinguish between the two."

The learned Judge accepted the findings of the first Court in regard to the differences and the similarities in the two labels, and he also was of the opinion that the label used by the petitioner Nehal Chand was a colourable imitation of the label used by the complainant's firm. During the pendency of the appeal in the Court below, Nehal Chand has got his trade mark registered under the Trade Marks Act of 1940, and it was contended on behalf of the petitioners that, in view of the registration of the trade mark of Nehal Chand, it cannot be held that his trade mark represented by Exhibit III could be regarded as a colourable

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

imitation of Exhibit I. The learned Judge rightly pointed out that the mere fact that the trade mark in question was registered after the offence had been committed, Nehal Chand was not justified in using the offending label Exhibit III before its registration. Upon the question of *bona fides* of Nehal Chand, the Court below held that it was with a view to capture the market that the present label Exhibit III was used by Nehal Chand, and, therefore, there could be no question of any *bona fide* intention in this case.

I do not propose to mention all the differences and all the similarities between the two labels because they have been already pointed out by the learned Magistrate, and his finding has been affirmed by the Court below.

The question in all such cases is whether the alleged false trade mark was likely to deceive the buyers in thinking that they were buying the goods of the actual manufacturer though in fact they were buying goods of some other manufacturer. The test in such cases is not that the trade mark in question is an exact or substantial copy of the trade mark used by the complainant, but whether the imitation of the trade mark of the complainant has been done in a manner likely to cause the trade mark in question to be mistaken for the trade mark of the complainant. " What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *a priori*. All that courts of justice can do, is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers purchasing with ordinary caution are likely to be misled." [*Per* Cranworth, L.C., in *Seixo* v. *Provezende*(1).] It would be sufficient for the complainant to show that the trade mark employed by the accused bears such close resemblance to the mark employed by him as to be reasonably calculated to deceive the public. In fact, it need not be an exact copy of the other, but the

(1) (1866) L. R. 1 Ch. 192.

similarity should be such as a Court would hold, in the circumstances, to be calculated to deceive. It is the totality of impression which is likely to be left in the mind of a probable purchaser that has to be considered. The differences on non-essential points are not important; what is important is the main idea conveyed to the mind by the two trade marks. If a buyer is in the habit of buying a particular article manufactured by a particular firm and if he asks for the same and he is offered an article manufactured by another firm, whether he would be able to detect the differences in the labels of the goods of the two manufacturers and be able to say that it was not the article he wanted. If the marking on the goods or on the package, in which the goods are marketed, are similar in design, shape, size and colour scheme with the markings of the complainant, it must be held that, although there may be differences in details between the two markings, the markings used by the accused were calculated to mislead the buyers. At the time a purchaser is buying some goods, he has not got the two goods placed side by side and he is not in a position to compare the two and then make up his mind whether to buy the one or the other, and the Court must have in view, while deciding, as to whether or not the trade mark complained of is likely to deceive the buyers or the class of buyers which generally buys such goods. "If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent." [(1866) L. R. 1 Ch. 192.] As Lord Halsbury said in *Schweppes, Ld.* v. *Gibbens*(1), "The whole question in these cases is whether the thing taken in its entirety, looking at the whole thing—is such that in the ordinary course of things a person with reasonable apprehension and proper eyesight would be deceived." It was pointed out in

(1) (1905) 22 R. P. C. at 607.

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

Bryant and May, Ld. v. *United Match Industries, Ld.*(1) that " one must regard to the net impression, the main idea left on the mind by a casual look ".

Mr. A. N. Sahay for the petitioners contended that the test laid down in some of the earlier cases and adopted by Khaja Mohammad Noor, J. in *Giridhari Lal Marwari* v. *The King Emperor*(2) to the effect that the Court must come to its own conclusion after having placed itself in the position of an " unwary customer " should not be the test. The word ' unwary ', when used with reference to purchasers, only means that the class of purchasers which generally buys the goods in question is such that would not care to exercise extra caution which some other person might exercise in selecting the goods he buys, and, I think, Khaja Mohammad Noor, J., used that word in that sense. In that case also his Lordship was dealing with two contending trade marks on labels of *biris* manufactured by two firms, and he said, " No doubt, if the two labels are placed side by side an observer will mark the difference, but for a man who has not carefully noticed the features too closely it will be difficult to distinguish the one from the other." In my opinion, he only meant to suggest that the class of persons which buys *biris* is not expected to exercise meticulous care in distinguishing the one from the other. Such class of persons will naturally be guided by the impression left on their mind from a casual look at the label which they were accustomed to see when buying goods under that particular label. Mr. Sahay placed great reliance upon the case of *The Dunlop Pneumatic Tyre Company, Limited* v. *The Dunlop Motor Company*(3). There, the case was between two companies, the one styled as the Dunlop Motor Company, the principle business of which firm was of selling and repairing motors, motor cycles and the parts thereof, and the other company known as the Dunlop Pneumatic Tyre Company, which

(1) (1933) 50 R. P. C. at 19.
(2) (1936) 17 Pat. L. T. 667.
(3) (1907) App. Cas. 430.

firm dealt in tyres, pumps, and other adjuncts of motors and other vehicles. It was contended in that case that the Dunlop Motor Company was not entitled to use the word ' Dunlop ' in the name of their company because the other manufacturers (The Dunlop Pneumatic Tyre Company) had used that word in the name of their company. It was held in that case that, in the first instance, the main objects of the two businesses were different and that the Dunlop Pneumatic Tyre Company had no exclusive right in connection with the sale of their articles to the use of the name ' Dunlop '; and, secondly, that an ordinary business person could not be misled, which fact was admitted. It was, however, alleged that the ' unwary ' would be so misled, and in answer to that contention, it was said that there might be many ' unwary ' people in this world, but " a man who employs his own name in carrying on his business has the right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought; ..... ' Any one who took the trouble to think about the matter would see that the respondents' company was a motor company and the complainers' a tyre company '..... I do not think that the average citizen of Kilmarnock would be deceived, and I cannot speculate upon the degree of unwariness that would induce the confusion necessary to support the appellants' claim." In my opinion, as has been said, it is not safe to rely upon the decisions of another country where the conditions of life are so different from the other. An ' average citizen of Kilmarnock ' may not represent the average citizen of our country, and the learned Magistrate has pointedly said that

" Ordinarily Biri smokers are drawn from such class of society where it cannot be expected that they will be able to distinguish between the two."

The other case on which some emphasis was laid is the case of *A. M. Malumiar and Company* v. *Finlay Fleming and Company*(1). The facts of that case were

(1) (1929) I. L. R. 7 Rang. 169.

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

entirely different and the learned Judge in that case said, " It has not, in fact, been suggested that there is anything in the appearance of the two marks to lead to confusion ". If there were no such markings in appearance as to lead to confusion, there could be no question of anybody being liable to be deceived. In that case, the following passage from 27 Halsbury's Laws of England 766, which had been adopted by Sir Charles Fox in *Byramjee Cowasjee* v. *Vera Somabhai*(1), was quoted with approval:—

" The proper test is whether the ' get up ' of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's ' get up ' but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought."

It was finally held in that case that the trade-mark in question was not reasonably calculated to cause it to be believed that the goods of the accused were in fact the merchandise of the complainant. In my opinion, that case offers no guidance. The principle, however, appears to be settled by the latest decision of the Privy Council in *Thomas Bear and Sons (India), Ltd.* v. *Prayag Narain*(2). It was laid down in that case that " the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him " when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it..... Their Lordships however are not to be understood as saying that the differences in get-up are immaterial; for they must inevitably form an element in considering the

(1) (1916) 10 B. L. T. 63.
(2) (1940) A. I. R. (P. C.) 86.

question of probability of deception by the use of the mark ". In *Chhotu Sao* v. *Bansi Lal*(1), which was an action for passing-off, it was held that the questions whether a suitor has obtained a right of property in the trade mark and whether the use of the trade mark by the defendant on his goods will amount to false representation were both questions of fact and the test of comparison by putting the two contending trade marks side by side was not a sound one. I do not think that it is profitable to consider any other case on this point.

Upon a consideration of the facts and the circumstances of this case and the principle of law applicable to such cases, I am of the opinion that, in spite of the differences in the two contending labels, the label Exhibit III is likely to be mistaken for the label of the complainant Exhibit I.

There is another aspect of the matter. Evidence was led to show that the *biris* manufactured by the complainant's firm had obtained reputation of being sold by the name of ' Golden Biri ' or ' Sonahla Biri '. After having a look at the two sets of labels, I am of the opinion that because of the general get-up, the size and the colour scheme of the two sets of labels, the *biris* manufactured by Nehal Chand could be easily mistaken to be the ' Golden Biri ' or ' Sonahla Biri ' manufactured by the complainant's firm. This is an additional ground to hold that the use of the trade mark in question by Nehal Chand is reasonably calculated to mislead the buyers.

It appears that before the introduction of the trade mark in question by the petitioner Nehal Chand, he had another trade mark which was of green colour; and after the introduction of the present label, he had much greater sale of the *biris* manufactured by him There is no doubt, therefore, that Nehal Chand had the requisite intention of defrauding the buyers, and there is no circumstance, or evidence, or any other

(1) (1943) I. L. R. 22 Pat. 702.

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

material from which it could be shown that Nehal Chand has proved that he was acting without any such intent.

It was contended further that after Nehal Chand had been able to get his trade mark in question registered under the Trade Marks Act, 1940, it could not be said that he had used that trade mark in a manner reasonably calculated to mislead people. In my opinion, the fact that that trade mark has been registered is no answer to the offence of using false trade mark as defined in section 480 of the Penal Code. Even in cases where a trade mark has been registered under the Trade Marks Act, 1940, the Court is not bound by any opinion, express or implied, of the officer empowered to register the trade mark: the Court must come to its own conclusions as to whether or not the trade mark in question was likely to cause deception. In my opinion, there is no merit in this contention.

I would, accordingly, affirm the conviction of Nehal Chand under section 482 of the Penal Code for using a false trade mark.

So far as the other two petitioners, Parmanand and Ramautar, are concerned, there does not appear to be any material on the record from which it could be shown that they were guilty of an offence of abetment under section 109 read with section 482 of the Penal Code. The offence of Nehal Chand was that he had marked the case or covering of his *biris* in a manner capable of deceiving people into believing that the *biris* manufactured by him were the *biris* manufactured by the complainant's firm. Section 109 of the Penal Code says that if anybody abets any offence in consequence of which the offence is committed, the abettor must be punished for the offence which he abetted. Explanation to section 109 reads as follows:—

"An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment."

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

In this case, there is no material on record to show that these two petitioners either instigated or were parties to any conspiracy or that they aided the marking of the cover of the *biris* with the trade mark in question. Evidence was led to the effect that one of them was a salesman and the other was a stockist of the *biris* of Nehal Chand. In my opinion, these allegations are not at all relevant for a finding that these two petitioners were the abettors of Nehal Chand in the offence of using a false trade mark. Mr. S. N. Sahay for the opposite party contended that as these persons used the case or package with the trade mark in question, the one by being the selling agent and the other by being the stockist, they have committed the offence of using a false trade mark as defined in section 480 of the Penal Code. Section 480 speaks of (1) marking any goods, (2) marking any case, package or any other receptacle containing goods and (3) using any case, package or other receptacle with any mark thereon in a manner reasonably calculated to cause deception. In my opinion, the first two relate to the marking of goods or the receptacle containing goods with a trade mark which might resemble the trade mark of another manufacturer, and the third only speaks of using the case, package or any other receptacle with a mark on it. It is clear that so far as the last category of the offence is concerned, there is no question of putting any mark on the goods or on the case or package; here a marked case or package or receptacle is used in a manner which may lead people to believe that the goods contained in that case or package or receptacle were the goods of the manufacturer whose trade mark is borne on that case, package or receptacle. The meaning can be well illustrated with reference to some of the spurious drugs which are sold in the market in cases bearing the trade mark of the original manufacturer. Mr. S. N. Sahay contended that the two petitioners had committed the offence of the third category mentioned above, but I do not agree. In the present case, it cannot be said that the cases, packages or receptacles, having mark thereon, were used by the two petitioners

1953.

NEHAL CHAND v. STATE OF BIHAR.

SINHA, J.

in a manner calculated to cause people to believe that the goods so contained in such receptacle so marked were the goods manufactured by the manufacturer whose trade mark those cases, packages or receptacles bore. It is nobody's case that these two petitioners tried to pass-off *biris* manufactured by other persons as the *biris* manufactured by the complainant's firm by using cases, packages or other receptacles marked with the label of the complainant. In my opinion, it cannot be held that these two petitioners either committed the offence themselves or abetted the commission of the offence under section 480 of the Penal Code by mere selling or stocking the *biris* in question. In that view of the matter, in my opinion, their conviction under section 482/109 of the Penal Code cannot possibly be upheld. They are, therefore, entitled to be acquitted. I would, therefore, set aside their conviction and sentence.

The only question now remains is in regard to the sentence upon Nehal Chand. It has been brought to our notice that, when the complaint was filed, a very large stock of *biris* manufactured by Nehal Chand, found in various shops, was attached and, under the orders of the Court, they have been forfeited to the State. Considering that fact, in my opinion, the law will be fully vindicated if the fine on Nehal Chand is reduced to a sum of Rs. 500 only, and I direct accordingly. In default of payment of fine, he is directed to suffer rigorous imprisonment for two months. In the event of the fine being realised, a sum of Rs. 250 will be paid to the complainant's firm.

In the result, the application of Nehal Chand is dismissed with the modification in the amount of fine, as already indicated, and the application of the other two petitioners, Parmanand and Ramautar, is allowed, their conviction and sentence set aside and the rule is made absolute.

DAS, J.—I agree.

Order accordingly.

K. D.

SUPREME COURT.*

MOTIPUR ZAMINDARI CO., LTD.

v.

STATE OF BIHAR.†

1953.

March, 25, 26.
April, 17.

Bihar Land Reforms Act, 1950 (*Bihar Act XXX of* 1950), *section* 2(*o*), ' *proprietor* ', *whether includes incorporated company holding zamindari estate—section* 41, *whether precludes application of the Act to such estate—nothing repugnant in the subject or context of the Act—Act, whether applies to assets of such company situate both in Bihar and Bengal.*

' Proprietor ' as defined by section 2(*o*), Bihar Land Reforms Act, 1950, covers a company.

Upon a notification being issued under section 3, the *zamindari* estate of an incorporated company will vest in the State and the company will cease to have any interest in it. Its only right will be to receive compensation. In case of winding up the liquidator will have to pursue the remedy provided by the Act.

Section 41 of the Act does not necessarily preclude the application of the Act to incorporated companies.

Indeed there is not only nothing repugnant in the subject or context of the Act which should prevent the inclusion of a company owning estate within the definition of ' proprietor ' such inclusion is necessary in order to give full effect to the very object of the Act.

Pharmaceutical Society v. *The London and Provincial Supply Association, Limited*(1), discussed.

---

* PRESENT: Hon'ble Shri M. Patanjali Sastri, C.J., Hon'ble Shri Bijan Kumar Mukherjea, Hon'ble Shri Sudhi Ranjan Das, Hon'ble Shri Ghulam Hasan and Hon'ble Shri N. H. Bhagwati, JJ.

† In the Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal no. 62 of 1953. Motipur Zamindari Co., Ltd. v. The State of Bihar and another and Civil Appeal no. 63 of 1953—Raja Jankinath Roy and Narendra Nath Roy and Co., Ltd. *v.* The State of Bihar and another. [Appeals under Article 132(1) of the Constitution of India from the judgment and order, dated the 22nd December, 1952, of the High Court of Judicature at Patna (Ramaswami and Sarjoo Prasad, JJ.) in Miscellaneous Judicial Cases nos. 238 and 242 of 1952.] The High Court judgment is reported as (1953) I. L. R. 32 Pat. 71.

(1) (1880) L. R. 5 A. C. 857.

1953.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR.

Director of Public Prosecutions v. *Kent and Sussex Contractors, Limited*(1), *Rex* v. *I. C. R. Haulage, Limited and another*(2) *and State of Bihar* v. *Kameshwar Singh*(3), referred to.

Where a *zamindari* estate of a company was situate both in Bihar and Bengal and Government revenue was payable jointly and that the lands were held in *patni* lease for which one single rent was paid, *held*, that the Bihar Land Reforms Act, 1950, was applicable and the only question was of apportionment of the revenue and the rent.

Motipur Zamindari Co. v. *State of Bihar*(4), affirmed.

Appeals by the incorporated companies.

The facts of the cases material to this report are set out in the judgment of their Lordships of the Supreme Court.

P. R. Das, Senior Advocate (*J. C. Sinha* and *L. K. Chaudhry*, Advocates, with him), instructed by *R. R. Biswas*, Agent, for the appellants.

M. C. Setalvad, Attorney-General for India (*L. N. Sinha* and *Bajrang Sahai*, Advocates with him), instructed by *G. H. Rajadhyaksha*, Agent, for the respondents.

The judgment of the Court was delivered by

DAS, J.—This judgment disposes of Civil Appeals nos. 62 of 1953 and 63 of 1953 which have been heard together.

The Motipur Zamindari Company, Ltd., the appellant in Civil Appeal no. 62 of 1953, was incorporated in 1932 under the Indian Companies Act and has its registered office in Bengal. It supplies sugarcane to a sister concern named Motipur Sugar Factory, Ltd., Raja Jankinath Roy and Narendra Nath Roy and Co., Ltd., the appellant in Civil Appeal no. 63

(1) (1944) 1 K. B. 146.
(2) (1944) 1 K. B. 551.
(3) (1952) S. C. R. 889 at 941.
(4) (1953) I. L. R. 32 Pat. 71.

of 1953, was incorporated in 1933 under the Indian Companies Act and also has its registered office in Bengal. This company owns zamindari properties in Purnea in the State of Bihar as well as in Malda in the State of West Bengal. It carries on business amongst others, as banker and financier.

On the 30th December 1949 a Bill entitled the Bihar Land Reforms Bill was passed by the Bihar Legislature and having been reserved for the consideration of the President received his assent on the 11th September 1950. The Act so passed and assented to was published in the *Bihar Gazette* on the 25th September 1950 and was brought into force on the same day by a notification made by the State Government in exercise of powers conferred on it by section 1(3) of the Act. Many of the proprietors and tenure-holders of zamindari estates took proceedings against the State of Bihar for appropriate orders restraining the State Government from taking over the estates under the provisions of the Act which they claimed to be beyond the legislative competency of the Bihar Legislature and otherwise void. On the 12th March 1951 a Special Bench of the Patna High Court held that the Act was unconstitutional on account of its contravention of Article 14 of the Constitution. The State of Bihar appealed to this Court. Pending that appeal, the provisional Parliament passed the Constitution (First Amendment) Act, 1951. The respondents in the main appeal took proceedings in this Court contending that the Act amending the Constitution was invalid. This Court, however, on 5th October 1951, upheld the validity of the amending Act. On 6th November 1951 notifications were issued under section 3 of the Bihar Act declaring that certain Touzies belonging to the appellants specified in the notification had passed to and become vested in the State. Both the appellants made separate applications to the Patna High Court under Article 226 of the Constitution praying for *mandamus* or suitable direction or order restraining the respondent from taking possession of

1953.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR.

DAS, J.

their respective estates or tenures by virtue of the said notifications and for other ancillary reliefs. The appeals filed by the State of Bihar against the order of the Special Bench declaring the Act to be void came up for hearing before this Court and this Court upheld the validity of the Act, except as to a few provisions mentioned in the majority judgment which were held to be severable. Thereafter, the two applications made by the two appellants under Article 226 before the Patna High Court came up for hearing and were dismissed by a Bench of that Court on the 22nd December 1952. The present appeals have been filed with leave of the Patna High Court against the said dismissal.

The question raised before the High Court was whether the Act was, on its true construction, intended to apply to zamindari estate of companies incorporated under the Indian Companies Act. In support of the appellants' contention that it was not, it was urged that the Bihar Legislature had no authority to legislate with respect to trading corporations or non-trading corporations whose objects were not confined to one State. Reference was made to entries 43, 44 and 45 of List I to show that it was Parliament alone which was authorized to make law with respect to matters set forth in those entries. The contention was that the Bihar Legislature in enacting the Act invaded the Union field and so the Act was invalid. This argument was sought to be reinforced by reference to the provisions of the Act and the winding up provisions of the Companies Act. The Patna High Court overruled this contention and Mr. P. R. Das appearing in support of these appeals has not challenged this part of the decision of the Patna High Court.

The main point urged by Mr. P. R. Das is that even if the Bihar Legislature could make a law for acquiring zamindari estates of incorporated companies it did not, by the Act, in fact do so. Section 3

authorises the State Government to declare by notification that the estates or tenures of a proprietor or tenure-holder have passed to and become vested in the State. It will be recalled that it was under this section that the State Government on the 6th November 1951 issued the notifications with respect to the estates of the appellants situate within the State. Mr. P. R. Das's principal contention is that the appellant companies do not come within the terms " proprietor " or " tenure-holder " as defined by the Act and consequently no part of their estates were intended to be vested or did in fact vest in the State. " Proprietor " is defined by section 2(*o*) as meaning a person holding in trust or owning for his own benefit an estate or a part of an estate and includes the heirs and successors-in-interest of a proprietor and, where a proprietor is a minor or of unsound mind or an idiot, his guardian, committee or other legal curator. Tenure-holder is defined by section 2(*r*) as meaning a person who has acquired from a proprietor or from any tenure-holder a right to hold land, etc. The argument is that the word " person " in the two definitions referred to above does not, in the context of the Act, include a company. It is conceded that under section 4(40) of the Bihar General Clauses Act the word " person " would ordinarily include a company, but it is urged by Mr. P. R. Das that the definitions given in that section apply only where there is nothing repugnant in the subject or context. His contention is that the definition of " proprietor " and " tenure-holder " indicates that a company which owns zamindaries is not covered by that definition. We are unable to accept this contention. It is not disputed that a company can own an estate or a part of an estate and, indeed, the appellant companies are fighting these appeals only to protect the estates they own. Therefore, they come within the first part of the definition. The definition after stating what the word " means " proceeds to state what else the definition would include under certain specified circumstances, namely,

1953.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR.

DAS, J.

the heirs and successors-in-interest, etc. The word "heir" certainly is inappropriate with regard to a company but there is nothing inappropriate in the company having a successor-in-interest. It is pointed out that there is no provision in the definition of proprietor to include the directors, managing agents and, in case of winding up, the liquidator of the company. This circumstance does not appear to us to be a cogent reason for holding that the word "proprietor" as defined does not cover a company. It is to be noted that agent or, in case of insolvency, the official assignee or receiver of an individual proprietor are also not included in the definition. Reference to proprietor who is a minor or of unsound mind or an idiot and his guardian, etc., was obviously necessary because those proprietors suffer from legal disabilities.

Mr. P. R. Das refers us to various sections and rules framed under section 43 of the Act to show that only natural persons were intended to be affected by the Act, because, he urges, the company is not competent to do the acts therein referred to. It is not disputed by Mr. P. R. Das that there is no difficulty on the part of an incorporated company to do all these acts by its directors or managing agents or other officers empowered in that behalf by its articles of association, but his contention is that the provisions of the Indian Companies Act should not be imported into the consideration of the provisions of this Act. He relies primarily on the case of *Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited*(1) where it was held that a corporation did not come within the word "person" used in the Pharmacy Act, 1868 (31 & 32 Vic. Chap. 121). Reliance was placed upon the observations of Lord Selborne, L.C., at p. 863. The preamble to that Act recited, amongst other things, that it was "expedient for the safety of the public that persons keeping open shop for the retailing, dispensing or compounding of poisons, and persons known as chemists and druggists should possess a competent practical knowledge of

(1) (1880) L. R. 5 A. C. 857.

their business ". This clearly contemplated persons skilled in matters pharmaceutical and not impersonal corporate bodies which would know nothing about that particular business. Indeed, Lord Blackburn in his speech in the House of Lords in the *Pharmaceutical Society's case*(1) referred to this preamble and observed at p. 870:—

" Stopping there, it is quite plain that those who used that language were not thinking of corporations. A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself. The metaphysical entity, the legal " person ", the corporation cannot possibly have a competent knowlege. Nor, I think, can a corporation be supposed to be a ' person known as a chemist and druggist '."

His Lordship then referred to the provisions of sections 1 and 15 of that Act and came to the conclusion that the word " person " in that Act meant a natural person. The effect of that case is that whether the word " person " in a statute can be treated as including a corporation must depend on a consideration of the object of the statute and of the enactments passed with a view to carry that object into effect. In view of the object of that Act as recited in the preamble there could be no manner of doubt that the word " person " in that Act could not possibly include a corporation. Lord Selborne towards the end of p. 863 indicated, by reference to the 18th section, that the Legislature by the word " person " referred only to individual persons as it was clearly repugnant to the subject of that Act to include a corporation within the word " person " as used in that Act. Mr. P. R. Das urges that the judgment of Lord Selborne was founded on the fact that the corporation could not come within the term " person "

(1) (1880) L. R. 5 A. C, 857.

1958.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR

DAS, J.

on the ground that it could not make an application in writing signed by it. From this Mr. P. R. Das urges that the necessary implication of this part of the judgment of Lord Selborne is that it was not permissible to take the provisions of the Companies Act into consideration for construing another Act. If that were the implication of the speech of Lord Selborne, with respect, we are unable to accept the same. Indeed, one cannot think of a company unless one has in view the provisions of the Companies Act, for a company is the creature of the Companies Act. Its existence, powers and rights are all regulated by that Act. The trend of the speeches of the noble Lords in the case relied on by Mr. P. R. Das is that the object of the particular Act under consideration was entirely repugnant to the word " corporation " being included within the term " person " as used in that Act, and as we apprehend it, that decision lays down nothing beyond that.

In support of his contention that a company owning an estate was never intended to be affected by the Act, Mr. P. R. Das draws our attention to the winding up sections of the Indian Companies Act and urges that it is not possible to fit in the scheme of winding up into the scheme of the Bihar Act. If the zamindari assets of the company are taken over and compensation is paid by non-transferable bonds it will, he contends, be impossible to apply the Law of winding up in case the company goes into liquidation. There will, according to him, be conflict of jurisdiction between the Court where the winding up is proceeding, which may conceivably be in another State, and the Bihar Government and its officers. We see no force in this contention. Upon a notification being issued under section 3, the zamindari estate will vest in the State and the company will cease to have any interest in it. Its only right will be to receive compensation. In case of winding up the liquidator will have to pursue the remedy provided by this Act. He or the company will be in no

1953.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR.

DAS, J.

worse position than the official assignee or official receiver of an individual proprietor who may happen to become insolvent in another State.

Finally, Mr. P. R. Das strongly relies on section 41 of the Act and contends that that section would be wholly inapplicable to a company and that circumstance by itself would indicate that the Bihar Legislature did not intend that a company owning an estate should be governed by this Act. A corporation, it is true, cannot be made liable for treason, felony or any misdemeanour involving personal violence or for any offence for which the only penalty is imprisonment or corporal punishment. (Halsbury, 2nd Edn. Vol. IX, Art. 5, p. 14). Section 41 does not prescribe punishment by imprisonment only. Mr. P. R. Das suggests that the infliction of imprisonment or fine would depend upon the gravity of the offence and not on the character of the offender. This argument, however, would seem to run counter to the opinion of Lord Blackburn set-forth at pp. 869-870 of the Report of the very case relied on by Mr. P. R. Das. The recent cases of *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Limited*(1) *and Rex* v. *I. C. R. Haulage, Limited and another*(2), seem to indicate that a corporation may be convicted even of an offence requiring an act of will or a state of mind. Apart, however, from the consideration whether a company may be held guilty of wilful failure or neglect, as to which we need not express any definite opinion on this occasion, there can be no difficulty in applying the provisions of section 41 to the officers or agents of the company. On a notification under section 3(1) being published the estate vests in the State. Section 4 sets out the consequences of such vesting. Clause (*g*) of that section empowers the Collector by written order served in the prescribed manner to require any person in

(1) (1944) 1 K. B. 146.

(2) (1944) 1 K. B. 551.

1953.

MOTIPUR ZAMINDARI CO., LTD. v. STATE OF BIHAR.

DAS, J.

possession of such an estate or tenure or any part thereof to give up possession of the same by a date specified in the order and to take such steps or use such force as may be necessary for securing compliance with the said order. If any officer or agent of the company in the possession of the estate wilfully fails or ignores to comply with such lawful order, then surely he can be proceeded against under section 41. Likewise, under section 40, the officers therein mentioned are authorized at any time before or after the date of vesting by a written order served in the prescribed manner to require a proprietor or tenure-holder or any other person in possession of such an estate or tenure or any agents or employees of such proprietor, tenure-holder or other person to produce at a time and place specified in the order such documents, papers or registers or to furnish such information relating to such estate or tenure as such officer may from time to time require for any of the purposes of this Act. A wilful failure or neglect to comply with such order would clearly bring the recalcitrant officer or agent of the company within the penalty provided under section 41. Section 41, therefore, does not necessarily preclude the application of the Act to incorporated companies.

It cannot be denied that a company is competent to own and hold property. The whole object of the impugned Act is thus stated by Mahajan, J. in the *State of Bihar* v. *Kameshwar Singh*(1).

" Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as

(1) (1952) S. C. R. 889, 941.

possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised."

In view of this purpose there is no reason to differentiate between an individual proprietor and a company which owns estates or tenures. Indeed, there is not only nothing repugnant in the subject or context of the Act which should prevent the inclusion of a company owning estate within the definition of "proprietor", such inclusion is necessary in order to give full effect to the very object of the Act.

In Appeal no. 63 of 1953 Mr. P. R. Das raises an additional point, namely, that the appellant company in that appeal owns estates which are situate in Purnea in the district of Bihar and in Malda in the district of West Bengal but it has to pay a single Government revenue at Purnea. It is further alleged that the appellant company has let out portions of the estates on Patni leases, each of the Patnis comprising land situate both within and outside Bihar. The acquisition of that part of the estate which is situate in Bihar has made it difficult, if not impossible, for the appellant company to pay its revenue or recover its rent. That part of the estate which is in Bihar cannot be severed from the rest and therefore the notification covering only the portion of the estate situate in Bihar is invalid. We do not think there is any substance in this argument. As stated by the High Court it is a simple case of apportionment of the revenue and also apportionment of the rent. The necessity for such apportionment cannot possibly affect the validity of the notification.

For reasons stated above these appeals fail and must be dismissed with costs.

Appeals dismissed.

K. D.

APPELLATE CIVIL.

Before Ramaswami and Choudhary, JJ.

1953.

April 7, 8, 9, 28.

M. K. KHANNA

v.

RAJA RAM.*

Jurisdiction—decree passed under a provincial Act transferred for execution to a court in another province—transferee court, whether has jurisdiction to execute the decree—United Provinces Encumbered Estates Act, 1934 (U. P. Act XXV of 1934), section 14(7), scope of—Government of India Act, 1919 (5 & 6 Geo. V, Ch. 61), section 80A.

A decree passed by a Special Judge under the provisions of the United Provinces Encumbered Estates Act, 1934, was transferred for execution to a Court outside the province within which the property of the judgment-debtor was situate;

Held, that section 14(7) of the United Provinces Encumbered Estates Act, 1934, cannot be construed to mean that the decree of a Special Judge is deemed to be the decree of a Civil Court of competent jurisdiction even beyond the territorial jurisdiction of the State Legislature and, therefore, the transferee court had no jurisdiction to execute the decree;

Held, further, that the Legislature of the United Provinces has no power under section 80A of the Government of India Act, 1919, to make laws which would have extra-territorial application or which would affect person or property outside the province.

McDonald v. *Mabee*(1), *Sardar Gurdial Singh* v. *Maharaja of Faridkote*(2), *St. Louis* v. *The Ferry Co.*(3) and *Macleod v. Attorney General for New South Wales*(4), relied on.

* Appeals from Original Order nos. 89 and 90 of 1949, from an order of Mr. R. N. Prasad, Subordinate Judge of Purnea, dated the 25th January, 1949.

(1) (1917) 37 S. C. 343.
(2) (1894) App. Cas. 670.
(3) (1870) 11 Wall. 423, 430.
(4) (1891) App. Cas. 455.

1953.

M. K. KHANNA v. RAJA RAM.

Appeals by the judgment-debtor.

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

S. N. Dutta and *S. S. Rakshit*, for the appellant.

Advocate-General and *Balbhadra Prasad Singh*, for the respondents.

RAMASWAMI, J.—These appeals are presented on behalf of the judgment-debtor Maharaja Kishore Khanna against the order of the learned Subordinate Judge of Purnea overruling certain objections to the execution of a decree granted by the Special Judge of Benares under the United Provinces Encumbered Estates Act.

In the year 1929 the Bank of Benares brought a suit against Maharaja Kishore Khanna for recovery of certain money claims. The Allahabad Bank and certain other creditors were also joined as parties to the suit. A decree was obtained by the Benares Bank but on 6th March 1936 Maharaja Kishore Khanna filed an application under section 4 of the United Provinces Encumbered Estates Act before the Collector of Benares. The Collector passed an order under section 6 of the Act and forwarded the application to the Special Judge. On 21st March 1940 the Special Judge passed four decrees in favour of the Benares Bank and certain other creditors for a total amount of Rs. 11 lacs. The decrees were sent by the Special Judge to the Collector of Benares for execution. While the execution was pending the Allahabad Bank applied to the Collector for appointment of a receiver in respect of the entire property of the judgment-debtor. It is necessary to note that some properties of the judgment-debtor are located in the State of Bihar. The Collector allowed the application of the Allahabad Bank and appointed a receiver with respect to the properties in Bihar and United Provinces under section 9C of the Encumbered Estates Act. An appeal was taken by the

1958.

M. K. KHANNA v. RAJA RAM. RAMASWAMI, J.

judgment-debtor to the Additional Commissioner who held that section 9C was not applicable but as regards the Benares properties a receiver should be appointed under section 9D of the Act and as regards the properties situated in Bihar a receiver should be appointed under Order 40, rule 1, Civil Procedure Code. The matter was taken in revision to the Board of Revenue who confirmed the order of the Additional Commissioner with respect to the appointment of a receiver for the landed properties located in Benares but the Board of Revenue set aside the order of the Additional Commissioner appointing a receiver for the properties situated in Bihar. While the revision application was pending before the Board of Revenue the Collector of Benares filed an execution petition before the Subordinate Judge of Purnea asking that a sum of Rs. 12,54,636 and odd due under the decree should be realised from the judgment-debtor by the sale of the Somapur estate and other properties situated in the district of Purnea. The decree was sent direct by the Civil Judge, Benares, to the Subordinate Judge of Purnea under Order 21, rule 5, Civil Procedure Code, together with a certificate of non-satisfaction of the decree. The decree-holder applied to the Subordinate Judge of Purnea for an order of attachment under Order 21, rule 52, Civil Procedure Code of the amount of Rs. 25,000 lying in the hands of the Additional Collector of Benares. The application was allowed and the Subordinate Judge issued an order of attachment under Order 21, rule 52, Civil Procedure Code, requiring the Additional Collector of Benares to withhold payment of the sum of Rs. 25,000 which was the amount collected by the receiver from the Somapur estate in the district of Purnea for the period he was in charge.

The judgment-debtor objected to the execution of the decree on the ground that the Subordinate Judge of Purnea had no jurisdiction to execute the decree which was passed by the Special Judge of Benares appointed under the United Provinces Encumbered

Estates Act. The judgment-debtor further objected that the provisions of Order 21, rule 5 were not complied with and that the decree was barred by limitation. These objections were overruled by the learned Subordinate Judge of Purnea. As regards attachment of the amount of Rs. 25,000 in the hands of the Additional Collector of Benares the judgment-debtor filed a protest on the ground that the Subordinate Judge had no jurisdiction to make such an order as the property sought to be attached was outside the territorial limit of the State of Bihar. This objection was also overruled by the learned Subordinate Judge and the application filed by the judgment-debtor in this behalf was dismissed.

Miscellaneous Appeal no. 89 of 1949 relates to the order of the Subordinate Judge rejecting the objection of the judgment-debtor that the Court had no jurisdiction to attach under Order 21, rule 52, the amount of Rs. 25,000 lying in the hands of the Additional Collector of Benares. Miscellaneous Appeal no. 90 of 1949 is preferred against the order of the Subordinate Judge overruling the objection of the judgment-debtor that the Civil Court of Purnea had no jurisdiction to execute the decree passed by the Special Judge of Benares under the United Provinces Encumbered Estates Act.

The first question raised by Mr. S. N. Dutt on behalf of the appellant is whether the Subordinate Judge of Purnea had jurisdiction to execute the money decree granted by the Special Judge of Benares in favour of the Benares Bank and the other creditors. The submission of the learned counsel is that the United Provinces Legislature has jurisdiction to legislate only with respect to property within its jurisdiction and that the United Provinces Legislature cannot by any legislation affect property situated in another province. It was argued that if any provision of the United Provinces Encumbered Estates Act had any extra-territorial effect, the legislation would be unconstitutional and void. In my opinion, the

1955.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

proposition for which Mr. Dutt contends is correct. The United Provinces Encumbered Estates Act was passed by the Provincial Legislature acting under the authority conferred by section 80A of the Government of India Act, 1919. That section empowered the Provincial Legislature to make laws for peace and good government of the territories for the time being constituting the province. The language of section 80A makes it clear that the Provincial Legislature could not legislate for territories outside its jurisdiction or promulgate laws that may have extra-territorial application or affect person or properties beyond its jurisdiction. The general principle is that the exercise of civil jurisdiction is conditioned by territorial limits. The basis of civil jurisdiction is the principle of effectiveness—or to borrow the language of Mr. Justice Holmes " the foundation of jurisdiction is physical power " [*McDonald* v. *Mabee*(1)]. The position was clearly stated by Lord Salborne in the leading case of *Sardar Gurdial Singh* v. *Maharaja of Faridkote*(2): " All jurisdiction is properly territorial and *extra-territorium jus dicenti impune non-paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory." The principle applies not merely to the jurisdiction of a judicial tribunal but to exercise of legislative jurisdiction. It is relevant in this connection to quote a passage from the judgment of the Supreme Court of America in *St. Louis* v. *The Ferry Co.*(3): " If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its

(1) (1917) 37 S. C. 343.
(2) (1894) A. C. 670.
(3) (1870) 11 Wall. 423, 430, 20 L. ed. 192.

own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action". In the light of this principle and specially in the light of section 80A of the Government of India Act, 1919, it must be held that the Legislature of the United Provinces has no power to make laws which would have extra-territorial application or which would affect person or property outside its jurisdiction.

Keeping this principle in view it is necessary to examine the scheme and purpose of the United Provinces Encumbered Estates Act. The preamble states that the object of the Act is to " provide for the relief of Encumbered Estates in the United Provinces ". Section 2(*d*) of the Act defines ' land ' to consist of ' a share of or interest in a mahal in the United Provinces '. Section 2(*g*) defines ' landlord ' to mean ' a proprietor of a mahal or of a share of or interest in a mahal '. The Local Government of the United Provinces are authorised under section 3 of the Act to appoint any civil judicial officer to be a ' special judge ' who is to have jurisdiction within the area specified. Under section 4 a landlord whose immovable property is encumbered with private debts may apply to the Collector of the district where his land is situated requesting that the provisions of the Act may be applied to him. He is also required under the section to give a list of his debts, private or public, both decreed and undecreed. After the Collector has passed order under section 6 and forwarded the application to the Special Judge

" all proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject.....shall be stayed "

according to section 7(1) of the Act. Section 14 of the Act is important. It refers to the examination of claim made in pursance of the notice published under section 9 and to the determination of the amount of

1958.

M. K. KHANNA v. RAJA RAM. RAMASWAMI J.

debts. After the Special Judge examines the claims and determines the amount of debt he grants under section 14(7) a simple money decree for such amount together with any costs in respect of the proceedings in his Court together with *pendente lite* and future interest. Section 14(7) provides that

> " such decree shall be deemed to be a decree of a civil court of competent jurisdiction but no decree against the landlord shall be executable within the United Provinces except under the provisions of this Act ".

Another important section is section 24(1) which provides for the sale of the debtor's attachable property other than his proprietary interests in land and his residential house and furniture, and for the distribution of the sale proceeds amongst the claimants in accordance with the priority laid down under section 16 of the Act. Section 24(4) states that

> " for realizing the value of the debtor's property under this section the Collector may exercise all the powers of a civil court for the execution of a decree ".

Section 24(3) is also important. Section 24(3) states that

> " for the purpose of execution against property outside the United Provinces the decrees passed by the Special Judge shall be deemed to be decrees in favour of the Collector ".

On behalf of the respondent the Advocate-General conceded the principle that a Provincial Legislature cannot promulgate laws having extra-territorial effect but he submitted that by enacting section 24(3) the Provincial Legislature was merely providing that the decrees passed by the Special Judge shall be deemed to be decrees in favour of the Collector. Learned counsel referred to section 14(7) of the Act which states that

> " the decree passed by the Special Judge shall be deemed to be a decree of a civil court of competent jurisdiction ".

The Advocate-General contended that section 24(3) must be read along with section 14(7) of the Act. He argued that if the decree of the Special Judge had the force of a decree passed by a civil court of competent jurisdiction the decree could be validly transferred for

execution to the Subordinate Judge of Purnea under section 39 of the Civil Procedure Code. The argument of the Advocate-General proceeds on the assumption that the language of section 14(7) should be construed in a wide sense and that the decree passed by the Special Judge should be deemed to be a decree of a civil court of competent jurisdiction not only within the territorial limits of the United Provinces but also in other provinces where the Civil Procedure Code is applicable. But the argument of the Advocate-General is open to the strong objection that the Legislature cannot be permitted to do indirectly what it dare not to do directly. If the Legislature of the United Provinces cannot legislate directly for property outside its territorial limit the Legislature cannot by a process of fiction treat the decree of the Special Judge as a decree of a civil court of competent jurisdiction and make such decree executable against immovable property outside its territorial limits by taking recourse to the provisions of the Civil Procedure Code which is a Central Act. It is manifest that such an interpretation would make the operation of the Act *ultra vires*. On the other hand, if section 14(7) is construed to mean that the decree of the Special Judge will be deemed to be a decree of the civil court only within the territory of the United Provinces the operation of the Act would be *ultra vires*. In a matter of this description the principle to be applied is clear. The principle is that if two constructions of a statute are possible, one of which would make it *intra vires* and the other *ultra vires*, the Court must lean to that construction which would make the operation of the Act *intra vires*. The reason is that no intention can be imputed to the Legislature that it would exceed its own jurisdiction. On the contrary the Court must presume that the Legislature in enacting the statute was dealing with things or person within its own jurisdiction. In *Macleod* v. *Attorney General for New South Wales*(1), the Legislature of New South

(1) (1891) A. C. 455.

1958.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

Wales had enacted a law providing that " whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years ". The appellant who had during the lifetime of his wife married another woman in the United States of America, contended that the Court had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be *ultra vires*. The Judicial Committee observed that if the statute was constructed as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. The Judicial Committee observed: " It appears to their Lordships that the effect of giving the wider interpretation to this statute necessay to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony."

Applying the principle in the present case it is clear that section 14(7) of the Act cannot be construed to mean that the decree of a special judge is deemed

1953.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

to be the decree of a civil court of competent jurisdiction even beyond the territorial jurisdiction of the State Legislature. In other words, the decree passed by the Special Judge of Benares has not the effect of a decree of a civil court outside the territorial limits of United Provinces. It follows that the Subordinate Judge of Purnea has no jurisdiction to execute the decree or to direct that the properties of the judgment-debtor in Purnea should be attached in execution of the decree. In my opinion, the contention of the appellant on this point is correct and the execution proceeding should be dismissed on the ground that the Subordinate Judge of Purnea has no jurisdiction to execute the decree.

The point was taken on behalf of the respondent that the judgment-debtor had applied under section 4 of the United Provinces Encumbered Estates Act to the Collector of Benares and had submitted to the jurisdiction of the Collector and the Special Judge of Benares who passed the decree under section 14(7) of the Act in favour of the various creditors. It was argued on behalf of the respondent that the judgment-debtor having submitted to the jurisdiction is estopped from raising the objection that the decree passed by the Special Judge has no extra-territorial effect or that the Subordinate Judge of Purnea to whom the decree was sent for execution has no jurisdiction in the matter. In my opinion, this contention has no merit. I have already held that the Legislature of the United Provinces had no power to legislate in respect of the property situated in another province and in the absence of such authority no amount of consent or acquiescence can confer jurisdiction on the Court of the Special Judge of Benares or on the Court of the Subordinate Judge of Purnea. The principle is well-established that submission cannot give any court jurisdiction to entertain an action or proceeding which in itself lies beyond the competence or authority of the Court. In *Farquharson* v. *Morgan*(1) Lord

(1) (1894) 1 Q. B. 552.

1958.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

Justice Davey states: "The other principle is correlative to the first: it is that the parties cannot by agreement confer upon any Court or judge a coercive jurisdiction which the Court or judge does not by law possess. To do so would be an usurpation of the prerogative of the Crown, and it has always been the policy of our law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction: *see* the judgment of the Common Pleas in *Worthington* v. *Jeffries*(1). It follows that a party may, notwithstanding that he has contracted to have the dispute decided, or a decision in the matter enforced, by a Court not possessing by law jurisdiction, refuse to be bound by his contract and object to the jurisdiction subject to the provisions embodied in the Arbitration Act, 1889, so far as applicable. It also follows that jurisdiction cannot be given by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority."

The question may be examined from another aspect. If the decree passed by the Special Judge cannot be effective outside the United Provinces the submission of the judgment-debtor alone cannot be the basis for the exercise of the jurisdiction. To put it differently, if there is a conflict between the principle of submission and the principle of effectiveness, that is to say, if the judgment of the court cannot be effective against the party who has submitted to it, the principle of effectiveness prevails and the court will not exercise jurisdiction. This proposition is supported by the decision of Lord Merivale in *Tallack* v. *Tallack*(2) in which it was held that an appearance "qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction could 'not with any propriety be regarded as a submission to the exercise of the jurisdiction so derived'. It was also held that even if the steps taken by the respondent

(1) (1875) L. R. 10 C. P. 379.
(2) (1927) P. D. 211.

in the proceedings amounted to submission, the Court had no jurisdiction to adjudicate upon the claim for having regard to the law of Holland (where the respondent's property was situate) a decree directing a settlement of the wife's property would be an idle and wholly ineffectual process ".

On this part of the case, therefore, my conclusion is that the Subordinate Judge of Purnea had no jurisdiction to execute the decree granted by the Special Judge of Benares under section 14 of the Encumbered Estates Act.

This conclusion is sufficient to dispose of Miscellaneous Appeal no. 90 of 1949 but it is right that I should indicate my views on two other questions which were fully argued by learned counsel for parties. It was contended in the first place that the decree of the Special Judge has not been validly transferred to the Subordinate Judge of Purnea and the requirements of Order 21 rule 5 have not been complied with. On behalf of the appellant Mr. Dutt pointed out that Order 21 rule 5 provides that where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed. In the present case the decree was sent direct to the Subordinate Judge and not to the District Judge of Purnea as required by Order 21 rule 5. Mr. Dutt submitted on behalf of the appellant that the proceeding before the Subordinate Judge was therefore void and without jurisdiction. I am unable to accept this argument. The jurisdiction to transfer a decree for execution from one court to another arises not under Order 21 rule 5 but under section 39, Civil Procedure Code. Order 21 rules 5 and 8 merely prescribe the procedure by which the transfer is to be carried out. It is clear that failure to observe the provisions of Order 21 rule 5 or rule 8 is a mere irregularity and does not affect the jurisdiction of the Subordinate Judge of Purnea

1953.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

to execute the decree. Mr. Dutt referred in support of his argument to the decision in *Kunja Bihari Singh* v. *Tarapada Mitra*(1) in which it was held that the Subordinate Judge had no jurisdiction to execute the decree sent to him for execution and the decree should have been sent in the first instance to the District Judge. This decision is not authoritative in view of the later decision of the Judicial Committee in *Jang Bahadur* v. *Bank of Upper India, Ltd.*(2) where a distinction has been drawn between complete absence of jurisdiction and irregular exercise of jurisdiction. In that case an application under section 50 of the Code of Civil Procedure, which should have been made to the Court which passed the decree, was in fact made to the Court executing it. The Court was allowed to proceed until the last moment when the property was being actually put up for sale. The Judicial Committee held that the provisions of section 50 were merely matters of procedure. Before execution can proceed against the legal representative of a deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. "This", they say, "is a matter of procedure and not of jurisdiction. Jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure, the defect might be waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings". In *Inderdeo Prasad Rai* v. *Deonarayan Mahton*(3) it was held by a Division Bench of this Court in consonance with the decision of the Judicial Committee that non-compliance with the provisions of Order 21, rule 5, was a mere irregularity and that it did not touch the jurisdiction of the transferee court to execute the

(1) (1918) 4 Pat. L. J. 49.
(2) (1928) L. R. 55 Ind. App. 227.
(3) (1945) I. L. R. 25 Pat. 50.

decree. The contention of Mr. Dutt on this point must therefore be overruled.

The question was also raised whether the execution of the decree by the Court of the Subordinate Judge of Purnea is barred by limitation. It was pointed out on behalf of the appellant that the decree was passed by the Special Judge on the 21st March 1940 and that transfer of the decree to the court of the Subordinate Judge of Purnea was made on 4th January 1947 more than three years after the passing of the decree. From the record it appears that the Special Judge had sent the decree to the Collector for execution on the 29th May 1940. The argument on behalf of the appellant is that the period during which the decree was being executed in the Court of the Collector cannot be deducted since the Collector was not a proper Court within the meaning of Article 182 of the Limitation Act and any application on behalf of the creditor made before the Collector would not be a step-in-aid of the execution within the meaning of Article 182(5) of the Limitation Act. I think that the argument addressed on behalf of the appellant is not sound. No question of limitation arises in this case for the execution proceeding in Purnea Court is merely a continuation of the execution proceeding pending before the Collector of Benares. It appears that on 29th May 1940 the Special Judge had sent the decree to the Collector of Benares for being executed and that from 29th May 1940 till up-to-date the decree is under execution before the Collector of Benares. The application made to the Purnea Court in the present case is not an application to initiate a new execution but it is an application which is intended to revive and carry through a pending execution. The proper article applicable in this case is Article 181 and not Article 182 of the Limitation Act. In a case of this description the right to file an application to continue the execution accrues from day to day and the right will not be barred until three years have elapsed after the proceedings have ceased

1953.

M. K. KHANNA v. RAJA RAM.

RAMASWAMI, J.

to be pending. This view is supported by the decision in *Subba Chariar* v. *Muthuveeran Pillai*(1). A similar view is enunciated by a Division Bench of this Court in *Mussamat Kaniz Zohra* v. *Boondi Sahu*(2). In my opinion, therefore, the argument of the appellant on the question of limitation must be rejected and it must be held that the execution proceeding pending in the court of the Subordinate Judge of Purnea is not time-barred.

But for the reasons I have already expressed I hold that the Subordinate Judge of Purnea has no jurisdiction to execute the decree or to attach the properties of the judgment-debtor located in the district of Purnea. In this view of the matter I would allow Miscellaneous Appeal no. 90 of 1949 and set aside the judgment of the learned Subordinate Judge.

As regards Miscellaneous Appeal no. 89 of 1949 it was pointed out on behalf of the respondent that the receiver against whom the order of attachment was issued has deposited the amount of Rs. 25,000 in bank in the name of the Additional Collector of Benares. The report of the Receiver, Krishna Bihari Lal, dated the 28th September 1948, is printed at page 35 of the paper-book. Counsel for the respondent, however, conceded that the order of the learned Subordinate Judge attaching the money in the hands of the receiver was illegal. It cannot be disputed that the jurisdiction of a Court in enforcing execution of a decree is restricted by its territorial limits. If a Court desires to seize or attach property of a judgment-debtor outside its jurisdiction it can only reach the property by means of the recognised legal procedure, viz., the decree to be executed must be transferred to the Court within whose local limits the property sought to be attached is for the time being situate. The principle was laid down by the Calcutta High Court

(1) (1912) I. L. R. 36 Mad. 553, 556.

(2) (1916) 2 Pat. L. J. 115.

in *Begg, Dunlop & Co.* v. *Jagannath Marwari*(1) in which all the authorities have been reviewed. The principle has been repeated by a Division Bench of this Court in *Bank of Bengal* v. *Sarat Chandra Mitra*(2). Applying the principle it is obvious that the Subordinate Judge of Purnea had no jurisdiction to issue order of attachment against the Receiver Krishna Bihari Lal or against the Additional Collector of Benares with respect to the amount of Rs. 25,000 collected from the Semapore estate. It is manifest that Miscellaneous Appeal no. 89 of 1949 preferred on behalf of the judgment-debtor must be allowed.

1953.

M. E. KHANNA v. RAJA RAM. RAMASWAMI, J.

For the reasons stated I would set aside the judgment of the Subordinate Judge of Purnea, dated the 25th January 1949, and allow both Miscellaneous Appeals 89 and 90 of 1949 with costs.

CHOUDHARY, J.—I agree.

Appeals allowed.

S. H.

APPELLATE CIVIL.

Before Das and Sinha, JJ.

J. C. DEO DHABAL DEB

v.

COPPER CORPORATION, LTD.*

1953.

April, 8, 9, 10, 30.

Ad medium filum acquae, *nature of—rule, whether applies to land acquisition proceedings—Land Acquisition Act*, 1894 (*Act I of* 1894), *sections* 6, 8, 40, 41—*riparian owner, whether has right to take sand from the bed of river abutting his property—Limitation, suit, whether barred.*

The rule of *ad medium filum acquæ* is a rule of presumption depending on the intention of the parties.

This rule of presumption is rebuttable one.

* Appeal from Original Decree no. 220 of 1947, from a decision of Mr. Bhagwan Prasad, Subordinate Judge of Chaibassa, dated the 17th February, 1947.

(1) (1911) I. L. R. 39 Cal. 104.

(2) (1918) 4 Pat. L. J. 141.

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION,

Micklethwait v. *Nowlay Bridge Company*(1) *and Mary Lord* v. *The Commissioners for the City of Sydney*(2), referred to.

There is, however, no room for the application of such a rule in land acquisition proceedings which do not depend on the intention of the parties but on the requirement of the acquiring authority.

In a conveyance to which there are two parties, the question whether it is useless to a vendor to retain an adjoining strip of land forming half the bed of a river may be a very relevant consideration. But that consideration cannot arise in a land acquisition proceeding where the acquiring authority acquires such land as he requires, irrespective of any consideration whether it is useful or useless to the person from whom the land is acquired. Such acquisition has to be considered with reference to the provisions of the Land Acquisition Act, 1894.

Held, on a consideration of the provisions of the Land Acquisition Act and the notification published thereunder, that Government did not acquire half the bed of the river.

The ordinary and regular course of nature which is the foundation for a natural riparian right cannot be said to extend to firm sand deposited on the bed of the river. Therefore, a riparian owner has not the natural right to take away sand deposited on the bed of the river abutting on his property.

William Lyon v. *The Wardens, &c. of the Fishmongers Company and the Conservatros of the River Thames*(3), relied on.

The suit having been instituted within three years of the wrongful removal of the sand was not barred by limitation.

Kumar Pramath Nath Malia v. *A. J. Meik*(4), referred to.

Appeal by the plaintiffs.

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

(1) (1886) L. R. 33 Chancery Div. 133.
(2) (1859) 14 Eng. Rep. 991, P. C.
(3) (1875-6) L. R. 1 App. Cas. 662.
(4) (1920) 5 Pat. L. J. 273.

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD..

DAS, J.

P. R. Das, Jyotirmoy Ghosh and *S. S. Rakshit*, for the appellants.

B. N. Mitter and *Nripendra Nath Roy*, for the respondents.

DAS, J.—This is a first appeal by the plaintiff, who was the proprietor of what is popularly known as the Dhalbhum estate. The estate has now been taken over by the State of Bihar, which has been added as a party to this appeal. The appeal was, however, argued before us on behalf of the plaintiff-appellant, and no separate argument was advanced on behalf of the State of Bihar. The defendants were the Indian Copper Corporation, Limited, and a contractor working under the said Corporation. They are the respondents before us.

The appellant brought the suit for a declaration that the sand on the bed of river Subarnarekha adjoining village Moubhandar, was the appellant's property and the respondents had no right to take the sand or appropriate it. He also asked for a decree for damages or compensation for the sand which had been removed by the respondents in January, 1940, and from January, 1942, to June, 1942. It was stated that 50,000 cubic feet of sand were removed in January, 1940, and another 50,000 cubic feet of sand were removed from January, 1942, to June, 1942. The appellant asked for compensation at the rate of Re. 1 per hundred cubic feet, the total claim for compensation being laid at Rs. 1,000 only. The appellant alleged that the river Subarnarekha passes through the appellant's estate and the entire bed is the property of the appellant; the whole of the bed of the said river, so far as it adjoined village Moubhandar, was recorded in the name of the appellant in plots 154, 155, 156 and 397 in the recent revisional survey and settlement. According to the appellant, the respondent Corporation, which was a sub-lessee in respect of certain mineral rights in the Dhalbhum estate and on whose behalf a block of land belonging to the appellant in village Moubhandar was

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD..

DAS, J.

acquired by Government under the provisions of the Land Acquisition Act, 1894, had no right to take sand from the bed of the river adjoining Moubhandar, and the rule *of ad medium filum acquæ* did not apply.

The respondent Corporation contested the claim of the appellant, and alleged that since the acquisition of the land in Moubhandar under the provisions of the Land Acquisition Act, 1894, in pursuance of an agreement, dated the 29th of June, 1925, the land was made over to the possession of the respondent Corporation, and on the 26th of April, 1934, the Secretary of State for India in Council conveyed and transferred to the Corporation the land described and set forth in Part III of the first schedule appended to the document; that schedule described the land as situate in village Moubhadar, measuring more or less 453.59 acres with the following boundaries:—

North—By the Bengal Nagpur Railway line.

East—By Nallah Hathijabrakhal.

South—By river Subarnarekha.

West—By a straight line drawn at right angles at a point where the boundary line between villages Moubhandar and Kitadih crosses the railway line to meet the Subarnarekha river.

The important boundary is the southern boundary, namely, river Subarnarekha. The case of the respondent Corporation was that, as a riparian owner, they had the right to take sand from river Subarnarekha abutting on their property; they also alleged that they had a proprietary right in the bed of the river up to the midstream adjoining their property on the rule of *ad medium filum acquæ*. They said that they had been exercising the right of taking sand from the northern half of the river bed openly, continuously and uninterruptedly since 1927 when the land was acquired and made over to the Corporation. It was also pleaded that the claim of the appellant was barred by limitation, because so far back as in 1932 the appellant made certain complaints to the respondent Corporation with regard to the removal of sand from the bed of river Subarnarekha and the

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

respondent Corporation clearly and unequivocally told the appellant on the 19th of July, 1932, that they had the right to take sand from the northern half of the bed of river Subarnarekha.

Several issues were framed of which the important issues were issues nos. 4 and 5. Issue no. 4 related to the plea of limitation, and issue no. 5 related to the question of title, namely, whether the appellant had title, or right of property, to the sand of river Subarnarekha adjoining the land of the respondent Corporation. Issue no. 6 related to the question of compensation—whether the appellant was entitled to compensation and, if so, to what extent. The learned Subordinate Judge of Chaibassa who tried the suit dismissed the claim of the appellant by his judgment, dated the 17th of February, 1947. On the principal issues, namely, issues 4 and 5, the learned Subordinate Judge came to the following findings; firstly, he found that the then Government of Bihar and Orissa intended to, and did in fact, acquire a block of land in village Moubhandar along with the bed of the river up to the midstream adjoining the land so acquired, and when the land was later conveyed to the respondent Corporation, the latter obtained a proprietary right in the land up to the midstream of river Subarnarekha; secondly, he found that by virtue of the conveyance in favour of the respondent Corporation, the latter became a riparian owner, and as a riparian owner the Corporation had a nautral right to take sand which came along with the water of the river and was left in deposit on the bed; and thirdly and lastly, the learned Subordinate Judge found that Article 120 of the Limitation Act was applicable to the case and inasmuch as the respondent Corporation had unequivocally denied the appellant's title and asserted their own right to remove the sand to the knowledge of the appellant in 1932, the suit was barred by time. I may state here that the suit was filed on the 1st of September, 1942, more than six years after 1932.

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

Mr. P. R. Das, who has argued the case on behalf of the plaintiff-appellant, has contested the correctness of all the three findings of the learned Subordinate Judge. Before I proceed to consider the arguments of Mr. P. R. Das, it is necessary to state clearly how a certain block of land in village Moubhandar came to be acquired by the then Government of Bihar and Orissa and was later conveyed by the Secretary of State for India in Council to the Indian Copper Corporation, Limited, on the 26th of April, 1934.

On the 4th of July, 1925, an agreement between the Secretary of State for India in Council and the Indian Copper Corporation, Limited, was published under section 41 of the Land Acquisition Act, 1894. This agreement recited that the Corporation had applied to the Governor of Bihar and Orissa in Council for the acquisition of certain lands, described in the schedule and delineated in a map, for the purpose of erection of smelting and refining plants and other works connected with the business and undertaking of the Corporation, expressly including the erection of houses, sheds and other buildings necessary for such business and undertaking and the improvement of their sanitary condition; it further recited that Government on being satisfied by an enquiry held under section 40 of the Land Acquisition Act, 1894, that the acquisition was necessary for the construction of the works mentioned above and that such works were likely to prove useful to the public, had consented to the acquisition on condition that the Corporation entered into an agreement with the Government embodying certain terms therein. The agreement then mentioned the terms, of which term no. 3 is important for our purpose. This term reads:—

"The company shall use the said land for the business or some of the business of converting, concentrating and manufacturing copper and of manufacturing any by-products of copper and for erection of smelting and refining plants, power plant and any houses, sheds and other buildings and any other works necessary for or incidental to such

business, and to quarry, dig and use stone, gravel, sand and clay, etc., i.e., building materials such as may be necessary for use in the construction of work for the purpose of which the said lands are being or intended to be acquired."

This term has been referred to in the course of the arguments before us and I shall advert to it in due course. The boundaries of the lands proposed to be acquired were given at the foot of the document. We are concerned with block A which lay in village Moubhandar. The boundaries of block A mentioned in the agreement were the same as those mentioned in the later conveyance, dated the 26th of April 1934, which I have already quoted in an earlier part of this judgment. On the 11th of November, 1925, the Government of Bihar and Orissa made a declaration under section 6 of the Land Acquisition Act of 1894 and section 3, clause (1), of Act XVIII of 1885. This declaration stated that land was required to be taken by Government at the expense of the Indian Copper Corporation, Limited, for the erection of smelting and refining plants and other works in village Moubhandar and other villages. A reference was made to block A, with the same boundaries, situate in village Moubhandar. As I have already stated, the southern boundary of block A was river Subarnarekha. At the foot of the declaration it was stated:—

> "Mines of coal, iron-stone, slate or other minerals lying under the land, or any particular portion of the land, except only such parts of the mines and minerals as it may be necessary to dig, or carry away or use in the construction of the work for the purpose of which the land is being acquired are not needed."

It is not clear from the documents in the record when actually the Collector took possession of the land under section 16 of the Land Acquisition Act, 1894. It appears, however, from the recitals in the deed of conveyance, dated the 26th April, 1934, that part of the land which was the subject of the declaration, dated the 11th November, 1925, was subsequently released and withdrawn from acquisition; the Collector duly made awards in respect of the acquired land and possession of the acquired land was given by the

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

Secretary of State to the Corporation on the latter paying the necessary amounts; then on the 26th of April, 1934, the Secretary of State conveyed the acquired land to the Corporation with all rights which Government had acquired by the acquisition proceedings. The above gives, in brief, the history of the acquisition proceedings by which block A in village Moubhandar was acquired for the Indian Copper Corporation, Limited, and later conveyed to them by the Secretary of State for India in Council.

The first question which falls for consideration is whether as a result of the acquisition proceedings Government acquired not merely the land of block A with the boundaries mentioned in the declaration, but also the bed of river Subarnarekha up to the midstream abutting on the land.

One point must be made clear at the outset. It is the admitted position that river Subarnarekha is neither a tidal nor a navigable river and its bed can be the subject of private ownership. The learned Subordinate Judge has said in his judgment that the river is not a tidal or navigable river and dries up in November or December, though there is water in the rainy season. He has further referred to the evidence of a witness who said that the sand flows with the water in the rainy season, but later settles down when the water flows away. It was not seriously disputed before us that prior to the acquisition, the appellant had a right of property in the bed of river Subarnarekha, and the bed was recorded in the name of the appellant in the record-of-rights. The position in English law seems to be well settled and has been summarised at page 93 in L. M. Doss's Law of Riparian Rights, Alluvion and Fishery (Tagore Law Lectures—1889), where the learned author states that the rules may be shortly formulated thus:—

"(*a*) The ownership of the soil of the alveus or bed of a non-tidal stream, whether it be navigable or not, *prima facie* belongs to the riparian proprietors

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

on both sides, not in common, but in severalty, the *medium filum aquæ* or the middle thread of the stream, being the dividing line between the shares of the two proprietors respectively.

(*b*) As a corollary of this rule, if the course of such a stream be permanently diverted, and the old alveus or bed be left dry, each riparian proprietor becomes entitled to it up to the line which coincides with what was the middle thread of the stream.

(*c*) When the lands on both banks of such a stream belong to the same person, the presumption of law (though rebuttable) is that the ownership of the whole alveus or bed belongs to him.

(*d*) The ownership of the alveus or bed of such a stream may be claimed by a person who does not own land on either bank of it, though this is generally not the case."

As to rule (*a*), the test of tidality is not strictly applicable in India where the bed of a navigable river is regarded as public domain or public territory. There is no doubt, however, that the rule that the beds of small and shallow rivers or streams or of those portions of rivers which are above the point where navigability ceases *prima facie* belong to the riparian proprietors, *ad medium filum aquæ*, has been accepted and applied in India (*see* 5 Calcutta Law Reports, 97; I. L. R. 17 Calcutta, 814; and other decisions referred to at pages 113-114 of Doss's Law of Riparian Rights, Alluvion and Fishery). Therefore, there can be no doubt that prior to the acquisition by Government, the ownership of the bed of river Subarnarekha abutting on the land of village Moubhandar was with the plaintiff-appellant. The question is—did Government acquire the land along with the bed of the river up to the midstream? The learned Subordinate Judge answered the question in the affirmative. Mr. Das's contention is that the learned Subordinate Judge is wrong in thinking that Government acquired the northern bed of river Subarnarekha

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

up to the midstream. I proceed now to consider the argument of Mr. P. R. Das on this part of the case.

In Micklethwait v. *Newlay Bridge Company*(1), the conveyance on which the plaintiffs relied comprised the lands specified and marked out by metes and bounds but it described the land as bounded on the north by a river and the question was whether this conveyance of a piece of land described by quantity of yards, and described as being bounded on the north by a river, carried with it as part of that which was conveyed the right to the soil *ad medium filum aquæ*. Cotton, L.J., observed:—

"In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted. In my opinion, you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river. There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the

(1) (1886) L. R. 33 Chancery Div. 133.

general presumption should apply, but in my opinion it is not sufficient that circumstances which afterwards occur show it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road."

Lindley, L.J., observed:—

"From that time down to this the rule has been laid down and acted upon as an ordinary rule of conveyancing, a well-settled law of real property, and it has been expressed in various ways by the Courts when necessity has arisen to discuss it, and nowhere that I know of better than in *Berridge* v. *Ward* [10 C. B. (N. S.) 400] and *Dwyer* v. *Rich* (Irish Reports 6 C. L. 144). There are other cases which are collected by Mr. Elphinstone and at which I have looked, but I think it is needless to refer to them, because they all go one way, and they all show this, that upon such a conveyance as we have to deal with here half of the bed of the river passes to the grantee unless circumstances can be shown which will exclude the application of that rule."

The same rule of construction was applied when the subject-matter was a grant from the Crown [*Mary Lord* v. *The Commissioners for the City of Sydney*(1)], and it was observed by their Lordships that the question was a question of intention, to be collected from the language used with reference to the surrounding circumstances. It was further observed:—

"If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable."

(1) (1859) 14 Eng. Rep. 991, P. C.

1958.

DHABAL DEO DHABAL DEO v. COPPER CORPORATION, LTD.

DAS, J.

The position has been thus summarised in Halsbury's Laws of England (Hailsham edition, Volume 33, page 562, paragraph 954):—

"954. A grant or lease of land described as abutting on a river made by a person who is in a position to part with the soil of the bed is sufficient to pass half the bed of the river without any reference in the document to the river, and the fact that the river is of great breadth does not affect the case.

The presumption may be rebutted by showing (1) that there exists over the bed of the moiety in question a several fishery not belonging to the grantor, because the presumption that the owner of a several fishery is owner of the bed displaces the presumption that arises in favour of the riparian owners; or (2) that at the time of the grant of the riparian land there was no intention on the grantor's part to part with the bed *ad medium filum acquæ*; to ascertain this, the facts known to the parties at the time of the conveyance may be investigated, but not circumstances which afterwards occur; or (3) that the grantor had not the bed of the river to convey. The riparian presumption refers only to the origin of title, for the right to the bed of the river is not inseparably bound up for ever with the right to the land, and an owner may retain one and part with the other."

Mr. Das has not challenged the correctness of the rule laid down in *Micklethwait* v. *Newlay Bridge Company*(1). His argument, however, is that the rule, which is a rule of presumption, has no application in the present case for two reasons; his first reason is that in view of certain circumstances, to which I shall presently refer, the presumption, if any, of half the bed of the river passing with the land acquired by Government stands rebutted; his second reason is that the rule of presumption which Lindley, L.J., called a rule of conveyancing can have no application to land acquisition proceedings under the Land Acquisition

(1) (1886) L. R. 33 Chancery Div. 133.

Act of 1894. As to his first reason, Mr. Das relied on the decision in the *Duke of Devonshire and others* v. *Pattinson and the Mayor, Aldermen, and Citizens of Carlisle*(1), where it was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants;; under all these circumstances it was held in that case that the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees. Mr. Das drew our attention to the evidence of some of the witnesses examined on behalf of the plaintiff-appellant who said that the appellant had leased out ferry and fishery rights in the river from time to time. Some of the witnesses said that they had taken settlement of the ferry and fishery in river Subarnarekha from the appellant. Mr. Das also drew our attention to exhibits 1(*a*) to 1(*m*) printed at pages 40—43 of the paperbook. Those documents showed, however, that the right of fishery or ferrying in river Subarnarekha adjoining village Moubhandar was given by the appellant in 1934 to 1936, that is, sometime after the acquisition and conveyance of the land acquired in favour of the respondent Corporation. As was pointed out by Cotton, L.J., in *Mickleth wait's case*(2), it was not sufficient to rebut the general presumption that circumstances which afterwards occurred showed it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road. The first reason in support of the argument of Mr. P. R. Das is, in my opinion, not tenable.

1958.

J. C. DEO DHABAI. DEB v. COPPER CORPORATION, LTD.

DAS, J.

I think, however, that Mr. Das is on much firmer ground with regard to his second reason. In all the decisions which have been placed before us on the

(1) (1888) L. R. 20 Q. B.. 263.
(2) (1886) L. R. 33 Chancery Div. 133.

1953.

J. C. DEO DHABAL DEO v. COPPER CORPORATION, LTD.

DAS, J.

subject, the rule has been characterised as a rule of presumption, a rule of construction of grants, a rule of conveyancing as Lindley, L.J., put it. It depended on the intention of the parties, and as was observed in *Mary Lord's case*(1) " it is always a question of intention to be collected from the language used with reference to the surrounding circumstances." Mr. Das's contention is that there is no room for the application of such a rule in land acquisition proceedings which do not depend upon the intention of parties but rather on what the acquiring authority wishes to take compulsorily from another person. So far as this aspect is concerned, the present case is a case of first impression and no decision bearing on this part of the case has been brought to our notice. In *Micklethwait's case*(2) it was argued by Mr. Romer (as he then was) that the rule of presumption could only have arisen from its being useless to a vendor, when parting with his property, to retain an adjoining strip of land forming half the bed of a river or half the soil of a road. Cotton, L.J., said:—

" I think very likely that such was the origin of the rule, but when the rule is once established as a rule of construction, we are not at liberty to depart from it merely because it is shown that it would have been to the interest of the vendor to retain the half of the bed of the river."

In a conveyance to which there are two parties, the question whether it is useless to a vendor to retain an adjoining strip of land forming half the bed of a river may be a very relevant consideration. But that consideration cannot arise in a land acquisition proceeding where the acquiring authority acquires such land as he requires, irrespective of any consideration whether it is useful or useless to the person from whom the land is acquired. The presumption has been said to be a rebuttable presumption; the question of

(1) (1859) 14 Eng. Rep. 991, P. C.
(2) (1886) L. R. 33 Chancery Div. 199.

1953.

J. C. DEB
v.
COPPER CORPORATION, LTD.

DAS, J.

rebutting such a presumption cannot arise in a compulsory acquisition of land. In my opinion, Mr. P. R. Das is right when he contends that compulsory acquisition of land has to be considered with reference to the provisions of the Land Acquisition Act, 1894, and there is no room for the application of any presumption or rule of construction or a conveyancing rule. Under section 6 of the Land Acquisition Act, a declaration has to be made about the "particular land" which is needed for a public purpose or for a company. Under section 8, the land is to be marked out, measured and planned. Under section 40, Government can give their consent to the acquisition of land on behalf of a company (*a*) when the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith, or (*b*) when such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public. Mr. Das has contended that the taking of sand from the bed of river Subarnarekha did not come within the purposes mentioned in section 40 and Government could not have given consent to the acquisition of the river bed for the purpose of the company. Mr. B. N. Mitter, appearing for the respondent Corporation, emphasised term no. 3 of the agreement published under section 41, which I have already quoted in an earlier part of this judgment. That term, no doubt, refers to the taking of building materials, such as stone, gravel, sand, etc. Mr. Das's contention, however, is that the term refers to the land which was acquired where such minerals might be found but not to the river bed. The boundaries of the land, which was the subject of the declaration under section 6, as also the map prepared under section 8, did not show that the northern half of the bed of the river Subarnarekha was also sought to be acquired, and unless there is a presumption that half the bed went with the land, the land acquired must be within the four corners of the boundaries given and as marked

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

out, measured and planned in the map prepared under section 8 of the Act. My view is that there is no room for the application of a presumption, such as is referred to in *Micklethwait's case*(1) and other cases, in the matter of compulsory acquisition of land abutting on a river under the Land Acquisition Act, 1894. The learned Subordinate Judge has said that the appellant did not prove that he got no compensation for half the bed of the river. I do not think that it was for the appellant to prove what compensation he got. The respondent Corporation could not get more than what Government had acquired for them. If Government had not acquired half the bed of the river, the respondent Corporation could not get what Government had not acquired. It would be a case where the grantor had not the bed of the river to convey. My conclusion, therefore, is that the learned Subordinate Judge wrongly found that Government did intend to acquire, or in fact acquired, half the bed of river Subarnarekha.

The second question is if the respondent Corporation as a riparian owner has a natural right to take sand from the bed of river Subarnarekha abutting on their property. It is to be observed that the natural right of a riparian owner is independent of the ownership of the bed of the river, and a right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. In *Secretary of State* v. *Sannidhiraju Subbarayudu and others*(2) Viscount Dunedin observed:—

"Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it."

In Gala on Easements (twelfth edition, page 231) the learned author has said that the natural rights of a riparian owner may be shortly defined as threefold; first, he has a right of user. He can use the water for

(1) (1886) L. R. 33 Chancery Div. 133.
(2) (1932) A. I. R. (P. C.) 16.

certain purposes. Secondly, he has right of flow. He is entitled to have the water come to him and go from him without obstruction. Thirdly, he has a right of purity. He is entitled to have the water come to him unpolluted. A distinction has sometimes been drawn between ordinary user and extraordinary user, the test in the latter case being one of reasonableness. But no decision has been brought to our notice in which it has been held that a riparian owner has the natural right to take away sand deposited on the bed of the river abutting on his property. In *William Lyon* v. *The Wardens, &c., of the Fishmongere Company and the Conservators of the river Thames*(1) Lord Selborne said :—

" With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word ' riparian ' is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law."

He further said that the title to the soil constituting the bed of a river did not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by everyone having a right of access to it. The ordinary and regular course of nature which is the foundation for a natural riparian right cannot be said to extend to firm sand deposited on the bed of the river; that, in my opinion, will be an unwarranted extension of unnatural riparian right. The learned Subordinate Judge wrongly held that the respondent Corporation had a natural right to take sand from the bed of river Subarnarekha abutting on their property.

Lastly, there is the question of limitation. Mr. Das has contended that it was a case of continuing wrong independent of contract and a fresh period of limitation ran at every moment of the time

(1) (1875) 6 L. R. 1 A. C. 662.

1953.

J. C. DEO DHABAL DEB v. COPPER CORPORATION, LTD.

DAS, J.

during which the wrong continued. There may be some doubt whether the removal of sand on different isolated occasions can be said to be a continuing wrong within the meaning of section 23 of the Limitation Act. The suit which the appellant brought was a suit for a declaration that the sand on the bed of river Subarnarekha adjoining Moubhandar was the property of the appellant, and the respondents had no right to take away the sand; the appellant further claimed compensation for removal of sand in January, 1940, and January, 1942, to June, 1942. Mr. Das has contended that it was unnecessary to ask for a declaration in specific terms and it was open to the appellant to claim compensation for the removal of specific movable property. Mr. B. N. Mitter, appearing for the respondent Corporation, referred us to Articles 48 and 49 of the Limitation Act. If it be held that those Articles apply, the appellant is clearly within time, as he has brought the suit within three years of the wrongful taking or wrongful possession of the specific property removed. Even if Article 120 applied by reason of the declaration asked for by the appellant, it seems to me that the right to sue will accrue on every fresh invasion by the respondent Corporation on the property of the appellant. In *Kumar Pramatha Nath Malia* v. *A. J. Meik*(1) Dawson Miller, C.J., said as follows:—

"In regard to the first prayer it was contended by the appellant that a suit for a declaration is barred after six years from the time when the right to sue accrued, under Article 120 of the Limitation Act, and that the right to sue accrued more than six years before the institution of the suit. In our opinion this contention cannot prevail as the appellant acquired no prescriptive right to the minerals beyond the quantity actually removed at any particular time. It follows that a fresh cause of action arose when any particular portion of the coal was removed."

In my opinion, the same principle will apply and a fresh cause of action arose when a particular portion of the sand was removed by the respondent Corporation. The appellant asked for compensation for such

(1) (1920) 5 Pat. L. J. 273.

removal as took place within three years, and I do not think that the claim of the appellant was barred by time.

The last question is the quantum of compensation. Unfortunately, the learned Subordinate Judge did not give any finding on this question. He said that in view of his findings on the other two issues, he would find the issue in the negative. As the decision of the learned Subordinate Judge was subject to an appeal, it was necessary for the learned Subordinate Judge to give his finding on all the issues involved in the suit. We have examined the evidence in the record on this question. Witness no. 1 for the plaintiff-appellant said that the royalty for a hundred cubic feet of sand was Re. 1. Another witness, namely, witness no. 5, said that he used to take sand from the river Subarnarekha and that he got permits from the plaintiff-appellant at the rate of Re. 1 per hundred cubic feet of sand. One witness was examined on behalf of the respondent Corporation who said that in the Kolhan estate, which is a Government Khas Mahal, the royalty for sand was 2 annas per hundred cubic feet up to July, 1944, and thereafter 4 annas per hundred cubic feet. In cross-examination this witness admitted that he did not know about the rate of royalty for sand in the Dhalbhum estate. On the evidence in the record there is no doubt that the respondent Corporation did remove the quantity of sand in January, 1940, and January to June, 1942. This was not seriously disputed before us. The evidence further establishes that the royalty for sand per hundred cubic feet was as claimed by the appellant.

The result, therefore, is that the appeal succeeds. The decision of the learned Subordinate Judge dismissing the claim of the appellant is set aside. The appellant will now get a decree for compensation for Rs. 1,000 on account of the sand removed, and will also get costs throughout against the respondent Corporation.

SINHA, J.—I entirely agree and have nothing to add.

Appeal allowed.

K. D.

FULL BENCH.

Before Imam, Rai and Choudhary, JJ.

D. N. SINGH

v.

STATE.*

1958.

April, 22.
May, 1.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section 476B, appeal under, whether criminal appeal—such appeal, whether governed by the provisions of the Code.*

An appeal under section 476B, Code of Criminal Procedure, 1898, from an order passed under section 476 of the Code by a Civil Court must be deemed to be a criminal appeal, and the provisions of the Code of Criminal Procedure, 1898, so far as they are applicable to appeals apply to such an appeal.

Deonandan v. *Ramlakan*(1), discussed.

Appeal under section 476B, Code of Criminal Procedure, 1898.

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

As directed by Hon'ble the Chief Justice the case was placed before the Full Bench for hearing.

D. N. Varma and *Dineshwar Pd.* for the appellant.

Standing Counsel, for the State.

IMAM, J.—This Bench was constituted to consider the nature of appeals filed under section 476B of the Code of Criminal Procedure where a complaint has been filed by a Civil Court under section 476 of the Code of Criminal Procedure; in other words, whether such appeals are in the nature of civil appeals or criminal appeals.

The District Judge of Shahabad filed a complaint under section 476 of the Code of Criminal Procedure against Dhup Narain Singh under sections 197, 199

* Criminal Appeal no. 1 of 1953, in the matter of an application under section 476B of the Code of Criminal Procedure.

(1) (1947) I. L. R. 27 Pat. 52, F. B.

and 471 of the Penal Code, alleged to have been committed by Dhup Narain Singh in the course of Probate Case no. 17 of 1950 (Title Suit no. 4 of 1952) in the court of the District Judge. An appeal under section 476B of the Code has been filed by him in this Court.

The court of the District Judge is undoubtedly a Civil Court and not a Criminal Court, although the District Judge in this State also exercises the powers of a Sessions Judge. When the District Judge is exercising the powers of a Sessions Judge, he is undoubtedly a Criminal Court. Section 476 of the Code of Criminal Procedure has given authority to every Civil, Revenue or Criminal Court to make a complaint, if it is expedient in the interest of justice, concerning any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*) of the Code of Criminal Procedure which appears to have been committed in or in relation to a proceeding in that court. This authority or power has been given expressly by a statutory provision, although it is to be found in the Code of Criminal Procedure. The Code of Criminal Procedure is a statute, and if it contains a provision of the kind to be found in section 476 of the Code, a Civil, Revenue or Criminal Court is entitled to proceed under it in given circumstances. When a Court, however, proceeds to act under section 476 of the Code, it does not lose its character as a Civil, Revenue or Criminal Court, as the case may be, that is to say, a Civil Court acting under section 476 of the Code does not cease to be a Civil Court, although it is exercising a power given to it under the Code of Criminal Procedure. Similarly, a Revenue Court does not lose its character as a Revenue Court merely because it exercises a power conferred by a statute. Whatever may be thought as to the nature of the proceedings under section 476 of the Code, when such proceedings take place in a Civil Court, that Court continues to be a Civil Court and does not become a Criminal Court.

1953.

D. N. SINGH v. STATE.

IMAM, J.

An appeal is provided under section 476B from an order making a complaint or refusing to make a complaint by a Civil, Revenue or Criminal Court under section 476, and the appeal lies to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3) of the Code, and the appellate Court, after notice to the parties concerned, may either direct withdrawal of the complaint or may itself make the complaint which the subordinate Court might have made under section 476. Section 195, sub-section (3) states:—

"For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate.

Provided that—

(*a*) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; and

(*b*) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

Having regard to this provision, an appeal from the Court of a Munsif would lie to the District Judge, and an appeal from the Court of a Subordinate Judge would lie to the District Judge or to the High Court, as the case may be, depending upon the valuation of the suit or proceeding in such a Court. An appeal from the Court of a District Judge would lie to the High Court. In such cases an appeal to the District Judge would be to a Civil Court, and to the High Court in its Civil Jurisdiction. Looking at the matter from this aspect, *prima facie*, it might appear that an appeal under section 476B of the Code of Criminal Procedure was in the nature of a civil appeal. It has, however, to be borne in mind that although a Civil Court which is hearing an appeal under section 476B of the Code of Criminal Procedure does not become a Criminal Court, it acts, as a Civil Court, exercising a

power conferred upon it by a statute, namely, the Code of Criminal Procedure. The appeal is not under the Code of Civil Procedure, as that Code contains no such provision. It is to be further noticed that section 476B of the Code of Criminal Procedure contains no provision, as some other statutes, to the effect that the provisions of the Code of Civil Procedure shall apply to an appeal under section 476B. As an example, reference may be made to section 299 of the Succession Act which does contain such a provision. When an appeal lies under a statute, generally the statute does not designate it as a civil appeal or a criminal appeal, and I think where there is no reference in the statute to the Civil Procedure Code or the Criminal Procedure Code and the statute itself is silent as to what procedure is to be followed in the matter of filing admission, hearing and disposal of an appeal, one may have to look at the nature of the proceeding in which the order appealed against was made and the character of the Court which made the order and the Court to which the appeal lay; for instance, in an insolvency proceeding obviously an appeal filed could, in no sense, be regarded as a criminal appeal. It is necessary, therefore, to see what tests one can apply in judging as to whether an appeal under section 476B of the Code of Criminal Procedure from the order of a District Judge to this Court is a criminal appeal or a civil appeal. In my opinion, one of the tests would be that the appeal is certainly not under any provision of the Code of Civil Procedure but is certainly one under a provision of the Code of Criminal Procedure. If an appeal lies under a provision of the Code of Criminal Procedure, logically speaking it should be termed as a criminal appeal and not a civil appeal for the simple reason that it is an appeal provided by the Code of Criminal Procedure. Another test would be as to what would be the period of limitation applicable to an appeal under section 476B of the Code of Criminal Procedure. Article 155 of the Limitation Act provides a period of 60 days from the date of the sentence or order appealed

1953

D. N. SINGH v. STATE.

IMAM, J.

1953.

D. N. SINGH v. STATE.

IMAM, J.

from when an appeal is made under the Code of Criminal Procedure, 1898, to a High Court, and under Article 154, 30 days to any other Court. An appeal under section 476B is certainly one under the Code of Criminal Procedure, and the provisions of Articles 154 and 155 of the Limitation Act would apply to such an appeal. Article 156 of the Limitation Act, on the other hand, provides for 90 days as the time within which to file an appeal under the Code of Civil Procedure, 1908, to a High Court from the date of the decree or order appealed from, and under Article 152, 30 days under the said Code to the Court of a District Judge. It will be noticed that for the purposes of limitation there is a clear difference in the matter of time in which to appeal to the High Court under the provisions of the Code of Civil Procedure from that in which to appeal to the High Court under the Code of Criminal Procedure. If an appeal under section 476B of the Code of Criminal Procedure be regarded in the nature of a civil appeal, then the provisions of Order 41 and Order 43 of the Code of Civil Procedure would apply, and one would be forced to the conclusion that the time in which to appeal to the High Court must be 90 days. But this would be contrary to the provisions of the Limitation Act. It seems to me, therefore, that an appeal under section 476B of the Code of Criminal Procedure being an appeal under the said Code, the limitation for filing such an appeal to the High Court must be 60 days and to any other Court, 30 days. That being so, there is, for the purposes of filing an appeal, no distinction, so far as limitation is concerned, between an appeal filed under section 476B of the Code of Criminal Procedure and that filed under any other provision of the said Code. If there is no distinction in this respect, then obviously every appeal under the provisions of the Code of Criminal Procedure must be regarded in the nature of a criminal appeal.

One may ask what is the justification for the view that in an appeal under section 476B of the Code of

Criminal Procedure to the District Judge or the High Court from a Court exercising civil jurisdiction, the appeal Court must exercise jurisdiction according to the provisions of the Code of Civil Procedure relating to appeals. There is no express provision under section 476B of the Code of Criminal Procedure to the effect that such an appeal shall be governed by the provisions of the Code of Civil Procedure. If, therefore, one takes the view that such an appeal must be governed by the provisions of the Code of Civil Procedure, then one holds the view without the authority of any express provision of law in support of it. Surely, the criterion cannot be that because the Court which passed an order under section 476 of the Code of Criminal Procedure was a civil court, therefore, an appeal under section 476B must be governed by the provisions of the Code of Civil Procedure. The Court which passed the order under section 476 of the Code of Criminal Procedure, although a civil court, acted under a provision of the Code of Criminal Procedure and not under any provision of the Code of Civil Procedure. Similarly, an appeal under section 476B of the Code of Criminal Procedure is an appeal under the Code of Criminal Procedure and not under the Code of Civil Procedure. My own view is that in the absence of any express provision in section 476B of the Code of Criminal Procedure, the provisions of the Code of Civil Procedure relating to appeals will not apply. It would be more logical to take the view that an appeal under the Code of Criminal Procedure should be governed, as far as applicable, by the provisions of the Code of Criminal Procedure relating to appeals. Certainly such a view is not contrary to any provision in section 476B of the Code of Criminal Procedure. Having regard to the view I take, for the purposes of filing, admission and disposal of an appeal under section 476B of the Code of Criminal Procedure, the provisions of sections 419, 421, 422 and 423 of the said Code are not so worded as to entirely prevent them being applicable to an appeal under section 476B.

1958.

D. N. SINGH v. STATE.

IMAM, J.

In the case of *Deonandan* v. *Ramlakan*(1) it was held by a Full Bench of this Court that an application in revision against an appellate order of the District Judge under section 476B of the Code of Criminal Procedure, 1898, is governed not by section 439 of the said Code but by section 115 of the Code of Civil Procedure, 1908. The opinion which I have expressed above is not inconsistent, in any way, with the decision of the Full Bench in *Deonandan's case*(1), as it has been expressed in that decision that section 439 of the Code of Criminal Procedure must be read with section 435 of the said Code, and the revisional jurisdiction which the High Court exercises under section 439 of the said Code is with reference to criminal Courts inferior to the High Court. Merely because a civil court is exercising powers under section 476 or section 476B of the Code of Criminal Procedure, it does not make that Court a criminal court. Consequently, the power of revision which the High Court has over such a Court is not under section 439 of the Code of Criminal Procedure but under section 115 of the Code of Civil Procedure.

Consequently, I would decide the point for which this Bench was constituted that an appeal under section 476B of the Code of Criminal Procedure from an order passed under section 476 of the said Code by a civil court must be deemed to be a criminal appeal, and the provisions of the Code of Criminal Procedure, so far as they are applicable relating to appeals under the said Code, apply to such an appeal.

The appeal filed under section 476B of the Code of Criminal Procedure should now be disposed of in due course.

RAI, J.—I agree.

CHOUDHARY, J.—I agree.

Order accordingly.

K. D.

(1) (1947) I. L. R. 27 Pat. 52, F. B.

APPELLATE CIVIL.

Before Ramaswami and Jamuar, JJ.

RAGHUBIR

v.

BASUDEVANAND.*

1953.

April, 27, 28, 29. *May*, 8.

Bihar Land Reforms Act, 1950 (*Bihar Act XXX of* 1950), *section* 4(*d*), *scope of—section, whether applicable to a case where money is secured by a mortgage—compensation money awarded by Central Government—estate notified under section* 3*—mortgagee-decree-holder, whether entitled to attach compensation money in execution.*

Section 4(*d*) of the Bihar Land Reforms Act, 1950, is not applicable to a case where money is secured by a mortgage or charge on estates, some of which are notified under section 3 of the Act and the others are not notified. In such a case section 4(*d*) will be a bar to the suit or execution proceedings so far as the vested estates are concerned, but the creditor will be entitled to prosecute the suit or execution proceedings as regards the estates or portion of estates which are not vested in the State.

Acting under the powers conferred by rule 75A(2), Defence of India Rules the Central Government acquired four villages out of a mortgaged Mahal and granted an award in favour of the proprietor for the compensation money and thereafter the Mahal was notified under section 3 of the Bihar Land Reforms Act, 1950. The mortgagee in execution of his mortgage decree sought to attach the compensation money;

Held, that section 4(*d*) of the Bihar Land Reforms Act, 1950, was not a bar to the execution and the decree-holder was entitled to execute the decree by attaching the amount of compensation money paid by the Central Government for the four villages of the Mahal.

Appeal by the decree-holder.

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

* Appeal from Original Order no. 13 of 1953 from an order of Mr. K. K. Bose, Subordinate Judge, Hazaribagh, dated the 8th December, 1952.

1958.

RAGHUBIR v. BASU-DEVANAND.

K. D. Chatterji and *Chuni Lal*, for the appellant.

S. C. Sinha, for the respondents.

RAMASWAMI, J.—This appeal is presented on behalf of the decree-holder against an order of the Subordinate Judge of Hazaribagh dated the 8th December 1952, dismissing an execution case.

The history of the litigation is long and complicated. On 5th August, 1938, the proprietors of Mahal Gaddi Masnodih, touzi no. 32 of Hazaribagh Collectorate, executed a mortgage deed with respect to 3 annas 3 pies share of Mahal Gaddi Masnodih, touzi no. 32, in favour of the Chota Nagpur Banking Association. The mortgage was subsequently assigned in favour of Brijraj Rastogi, father of the appellant. On 17th August, 1952, the Central Government acting under the powers conferred by rule 75A(2) of the Defence of India Rules acquired 16 annas share of four villages out of Mahal Gaddi Masnodih. Later on the assignee of the mortgagee instituted a mortgage suit in the court of the Subordinate Judge of Hazaribagh. On 14th August, 1944, a preliminary decree was granted in the suit against the judgment-debtors, D. N. Banerji, U. N. Banerji, Shamal Ram Surekha and Narhari Gir. On the 20th March, 1945, Narhari Gir executed a sale deed in favour of Kaviraj Basudevanand with respect to 3 annas 3 pies share of Mahal Gaddi Masnodih. It is stated on behalf of the appellant that Narhari Gir acquired in some way the interest of the other decree-holders and was competent to execute the sale deed. This fact is not challenged by the respondents. Final decree was prepared in the mortgage suit on 26th January 1946. It is necessary to state that while the mortgage suit was pending there was a reference under section 19 of the Defence of India Act with respect to the four villages acquired by the Central Government. An award of

1953.

RAGHUBIR v. BASU-DEVANAND.

RAMASWAMI, J.

Rs. 4,52,000 was granted as compensation to the proprietors on 31st May, 1944. The defendants in the mortgage suit preferred an appeal to the High Court against the preliminary dec .he appeal was dismissed by the High Court but there was modification of the preliminary decree to the effect that the decree-holder was to proceed in the first instance against the compensation money payable by the Government in respect of the acquisition of four villages. On 15th November, 1949, Kaviraj Basudevanand put the award into execution under the provisions of Order 21, rule 15, Civil Procedure Code, in the court of the District Judge of Patna. The amount of Rs. 4,52,000 was deposited by the Government in this execution case in favour of Kaviraj Basudevanand. On 15th June, 1950, the decree-holder Raghubir Saran Rastogi took out execution of the final mortgage decree in the court of the Subordinate Judge of Hazaribagh. The execution case was contested and the Subordinate Judge held that the decree was not executable against the compensation money payable by the Central Government for the four villages. An appeal was taken by the decree-holder to the High Court against the order of the Subordinate Judge. On 9th August 1951 the appeal was allowed by the High Court and it was held that the decree could be validly executed against the compensation money. The decree-holder thereafter moved the Subordinate Judge of Hazaribagh who on the 29th August, 1952, issued a precept to the District Judge of Patna for attachment of the amount of Rs. 83,000 which was the proportionate compensation for the 3 annas 3 pies share which was actually mortgaged. At this stage an important event happened. A notification was issued by the State Government under section 3 of the Bihar Land Reforms Act declaring that the entire Mahal of Gaddi Masnodih had passed to and become vested in the State. The notification was published in the Gazette on the 27th October 1952. Subsequently Kaviraj Basudevanand moved the District Judge of Patna stating that the mortgagee decree-holder cannot

1953.

RAGHUBIR v. BASU-DEVANAND.

RAMASWAMI, J.

attach the amount of Rs. 83,000 lying in deposit, and that section 4(*d*) of the Bihar Land Reforms Act was a bar to the execution. On the 6th December, 1952, the District Judge of Patna rejected the prayer of Kaviraj Basudevanand holding that section 4(*d*) of the Land Reforms Act did not apply to the execution case and that the precept of the Subordinate Judge should be complied with. Two days later the same matter was raised before the Subordinate Judge of Hazaribagh who took the view that section 4(*d*) of the Land Reforms Act was a bar to the execution of the mortgage decree and therefore the execution proceeding should be dropped. This order was passed by the Subordinate Judge of Hazaribagh on the 8th December, 1952.

The question at issue in this appeal is whether section 4(*d*) of the Bihar Land Reforms Act is a bar to the attachment of the sum of Rs. 83,000 in execution of the final mortgage decree.

The question turns upon the proper construction of section 4(*d*) of the Land Reforms Act. Before considering the provision of section 4(*d*), it is however necessary to refer to other important sections of the Bihar Land Reforms Act. Section 3(1) enacts that the—

> " State Government may, from time to time, by notification, declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State ".

Section 4 deals with consequences of the vesting of the estate or tenure in the State. Section 4(*a*) provides that such estate or tenure including the interest of the proprietor or tenure-holder in any building used as office or cutchery and his interest in all subsoil including any right in mines and minerals shall with effect from the date of vesting, vest absolutely in the State free of all incumbrances. Section 4(*d*) then proceeds to state that

> " No suit shall lie in any civil court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of or is a charge on such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped ".

The contention of Mr. S. C. Sinha on behalf of the respondents is that the sub-section must be construed in its plain grammatical meaning and if such a construction is adopted the present case would fall within the ambit of the sub-section. It was conceded by the learned counsel that the notification under section 3 of the Bihar Land Reforms Act could have no reference to the four villages which had been acquired by the Central Government under rule 75A(2) of the Defence of India Rules on the 17th August, 1942. Learned counsel further conceded that under section 73(2) of the Transfer of Property Act the appellant is entitled to claim payment of the mortgage money out of the amount of compensation. But the argument of the respondents is that the mortgage decree and the execution proceeding referred not merely to the compensation money but also to estates notified under section 3 of the Bihar Land Reforms Act. It was therefore contended that the payment of the money was partly, though not in whole, secured by mortgage of vested estates and the case fell within the purview of section 4(*d*) of the Land Reforms Act. Grammatically the language of section 4(*d*) may admit of the interpretation contended for the respondent, but the consequence of such an interpretation would be startling and unjust. For example, section 4(*d*) would on such an interpretation prohibit a mortgagee from enforcing the personal covenant. If a purely grammatical construction is adopted the mortgagee would be deprived not merely of his security but he will be prohibited from obtaining even a money decree for the amount he has advanced. To take another example, suppose a debtor has executed a motgage bond with respect to 100 touzis out of which one touzi has been notified by the Government under section 3 of the Bihar Land Reforms Act. If the grammatical construction is right, the mortgagee cannot bring a mortgage suit even for the 99 touzis which have not been notified nor vested in the State Government, and the creditor would be left without any remedy for enforcing his

1958.

RAGHUBIR v. BASU-DEVANAN-RAMASWAMI, J.

security. It cannot be supposed that the Legislature would have contemplated a result so unreasonable and so unjust. It is necessary therefore to put some limi-tation on the general language of section 4(*d*) of the Bihar Land Reforms Act. In a case of this description the principle to be applied is clear. The principle is that the section must be construed in the background of particular subject-matter of the statute. To put it in other words, the wide meaning of the section must be cut down and restricted with reference to the scope and object of the statute. In the classic words of Brett, M.R., " it is not because the words of a statute or the words of any document read in one sense will cover the case that that is the right sense. Grammatically they may cover it; but whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used....." [*Lion Insurance Association* v. *Tucker*(1).] Applying the principle in the present case it is plain enough that in section 4(*d*) the Legislature is intending to deal with estates or tenures which had vested in the State under section 3 and that the object of section 4(*d*) is that no suit should be instituted so far as the vested estates are concerned and any suit or proceeding already instituted should be dropped so far as the vested estates are concerned. In this connection the title of the Act is pertinent. The Act is entitled as an Act

> " to provide for the transference to the State of the interests of proprietors and tenure-holders in land and of the mortgagees and lessees of such interests.....".

The preamble is in the same terms:

> " Whereas it is expedient to provide for the transference to the State of the interests of proprietors and tenure-holders in land and of the mortgagees and lessees of such interests.....".

(1) (1883) 12 Q. B. D. 176, 186.

1953.

RAGHUBIR
v.
BAIJ
DEVANAND
SAMASWAMI,
J.

Section 3 empowers the State Government to declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification have passed to and become vested in the State. Section 3 provides that the State Government may by notification declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State. Section 4 states what are the consequences of the vesting of an estate or a tenure in the State. Section 4(*a*) provides that

"*such* estate or tenure..... shall with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure.....".

Section 4(*d*) then goes on to state that

"No suit shall lie in any civil court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of or is a charge on such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped".

Chapter V relates to the assessment of compensation and sections 23 and 24 of this Chapter specify the principles on which compensation is to be granted to the proprietors and tenure-holders and to the mortgagees and lessees of the proprietary interest. Section 28 relates to the final publication of the compensation assessment roll. Section 32 provides for the manner of payment of compensation to the proprietors, tenure-holders and other persons who are shown in the compensation assessment roll. Upon a review of these provisions it is manifest that the Legislature is enacting a scheme for the acquisition of the interests of the proprietors and tenure-holders in the land and of the mortgagees and lessees of such interests. In my opinion the language of section 4(*d*) of the Act must be given a limited meaning with reference to the scheme of the statute. My conclusion is that section 4(*d*) must be interpreted to mean that no suit shall be brought in any civil court for the recovery of the mortgage money or money secured by a charge *so far as the vested estates are concerned* and if a suit

1953.

RAGHUBIR v. BASU-DEVANAND.

RAMASWAMI, J.

or proceeding is already instituted such suit or proceeding shall be dropped *so far as the vested estates are concerned*. To put it differently, section 4(*d*) will not be applicable to a case where money is secured by a mortgage or charge on estates, some of which are notified under section 3 of the Act and others are not so notified. In such a case section 4(*d*) will be a bar to the suit or execution proceeding so far as the vested estates are concerned, but the creditor will be entitled to prosecute the suit or execution proceeding as regards the estates or portions of estates which are not vested in the State.

In this connection it is important to state that the provisions of section 4(*d*) appear to be redundant for section 4(*a*) provides that all incumbrances shall be extinguished and the estate shall vest absolutely in the Government free of all incumbrances. In view of section 4(*a*) it is difficult to see how a suit or any execution proceeding could be brought to enforce a charge or mortgage on the vested estate. Perhaps section 4(*d*) was inserted in the statute *ex abundante cautela*. In any case, section 4(*d*) must be interpreted in a limited sense as I have already indicated. In this context Mr. S. C. Sinha referred to sections 14 and 16 of the Act. Section 14(1) states that

> " every creditor, whose debt is secured by the mortgage or a charge on any estate or tenure vested in the State under section 3 may, within six months of date of such vesting..... notify in the prescribed manner his claim in writing to a claims officer to be appointed by the State Government for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim ".

Section 16 empowers the claims officer to determine the principal amount justly due to each creditor and the interest (if any) due at the date of such determination in respect of such principal amount. Section 16(2) is important. It gives authority to the claims officer to re-open accounts, irrespective of any order or decree of Court. Under section 16(2)(*b*) the claims officer is required to ascertain the amount of the interest already paid or realised and to set off towards

the principal any amount paid or realised as simple interest in excess of six per centum per annum. Section 16(2)(*d*) states that if the claims officer finds that in any case the creditor has received or realised by way of interest an amount equal to or more than the amount of the principal, he shall not allow any further interest to run on such principal. The argument on behalf of the respondents is that if a limited construction is placed upon section 4(*d*) the creditor could prosecute his remedies in two jurisdictions which would come into conflict. The creditor would be entitled to execute a mortgage decree in the civil court as regards the properties which are not vested in the State but as regards the properties which are vested in the State and the creditor would file a claim under section 14 before the claims officer. If the creditor files such a claim the claims officer is authorised under section 16 to re-open the decree and to take a fresh account and scale down interest to the extent authorised by that section. The contention on behalf of the respondents is that the creditor cannot be permitted to execute the decree of the civil court and at the same time the claims officer cannot re-open the decree for the purpose of determining the claim of the creditor with respect to the estates notified under section 3. Mr. S. C. Sinha therefore argued that the intention was that the creditor must prosecute his claim before the claims officer and that the remedy in the civil court was barred. The argument is attractive, but there are more important considerations which support the view that section 4(*d*) of the Bihar Land Reforms Act must be given a limited construction. The difficulty raised by Mr. S. C. Sinha would be surmounted if sections 14 and 16 are construed in such a manner as to harmonise with the other sections of the statute. It is a familiar principle of construction that a statute must be read as a whole in order to ascertain the true meaning of its several clauses and that the language of each clause must be so interpreted as to bring it into harmony with

1958.

RAGHUBIR v. BASU-DEVANAND. RAMASWAMI, J.

the other provisions of the statute [*see* for instance Lord Davey in *Canada Sugar Refining Company* v. *R*,(1)]. It should be noticed in the first place that section 14 is enacted in a permissive form a secured creditor *may* file a claim within the time prescribed under section 14 to the claims officer but he is not compelled to do so. In a case, therefore, where the mortgage relates to notified estates and to estates which are not notified it is open to the creditor to file a suit or to prosecute an execution case in the civil court, but he cannot pursue his remedy in the civil court so far as vested estates are concerned. It is open to the creditor to make an election as to the choice of his remedies in a case of this description. It is open to him either to give up his right of filing a claim under section 14 with respect to the vested estates and to prosecute the suit or execution proceeding exclusively in civil court. On the other hand, the creditor may give up his remedy in the civil court and prosecute his claim solely under section 14 before the claims officer who will proceed under section 16 to re-open the decree and to grant necessary relief. If sections 14 and 16 are construed in this manner there would be no occasion for conflict of jurisdiction between the claims officer acting under section 16 and a civil court hearing a mortgage suit or executing a mortgage decree. If this interpretation of sections 14 and 16 is adopted there would be no insuperable difficulty in holding that section 4(*d*) of the Act refers only to a case where the mortgage or charge exclusively relates to the estates which are notified under section 3 and which have become vested in the State of Bihar.

My conclusion on this point is that section 4(*d*) does not operate as a bar to the execution of the mortgage decree and that the appellant decree-holder is entitled in this case to obtain an order of attachment against the sum of Rs. 83,000 which is the amount of compensation for the four villages acquired by the Central Government under the Defence of India Rules.

(1) (1898) A. C. 735.

1953.

RAGHUBIR v. BABU DEVANAND.

RAMASWAMI, J.

Mr. K. D. Chattarji on behalf of the appellant also submitted that the principle of constructive *res judicata* applied and the Subordinate Judge was precluded from holding that section 4(*d*) of the Bihar Land Reforms Act was a bar to the execution of the mortgage decree. Learned counsel based his argument on the fact that on 6th December, 1952, the District Judge of Patna held on an application of the respondents that the Bihar Land Reforms Act did not apply to the execution of the mortgage decree and that the precept sent by the Subordinate Judge of Hazaribagh should be executed and the sum of Rs. 83,000 which was compensation money should be attached and sent to the court of the Subordinate Judge. In my opinion the argument of the learned counsel on this point is correct. The order of the District Judge of Patna, dated the 6th December 1952, was an order passed in an earlier stage of the same execution case. The order was passed by the District Judge on an application made by the respondents objecting to the attachment of the amount of Rs. 83,000 in compliance with the precept issued under section 46 of the Civil Procedure Code. The objection was rejected by the District Judge on the ground that section 4(*d*) of the Land Reforms Act did not apply and that the amount of compensation money was liable to be attached. In view of this decision it was not open to the Subordinate Judge of Hazaribagh to come to a different conclusion on this point in his order, dated the 8th December, 1952. In *Ram Kripal Shukul* v. *Mosammat Rup Kuari*[1] a judge had decided in the course of execution proceedings that the decree according to its true construction awarded future mesne profits and it was held by the Judicial Committee that such decision having been or become final was binding between the parties and could not in a later stage of the execution proceedings be set aside and future mesne profits be disallowed. It was observed by Sir Barnes Peacock in pronouncing the

(1) (1883) L. R. 11 Ind. App. 37.

1953.

RAGHUBIR v. BASU-DEVANAND.

RAMASWAMI, J.

opinion of the Judicial Committee that the binding force of such a decision depended upon general principles of law and not upon section 13, Act X of 1877. The same principle has been enunciated in *Ramachandra Rao* v. *Ramchandra Rao*(1). In my opinion the principle of constructive *res judicata* applies to this case and the Subordinate Judge was bound by the decision of the District Judge of Patna, dated the 6th December, 1952, holding that section 4(*d*) of the Bihar Land Reforms Act did not apply to the execution of the mortgage decree.

In view of these considerations I hold that the appellant is entitled to execute the mortgage decree by attaching the amount of Rs. 83,000 being the compensation money paid by the Central Government for the four villages of Mahal Gaddi Masnodih. I think that the order of the learned Subordinate Judge, dated the 8th December 1952, should be set aside and this appeal should be allowed with costs.

JAMUAR, J.—I entirely agree.

Appeal allowed.

S. R.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Jamuar, JJ.

1953.

May, 5, 6, 7, 8, 14.

RAMBHAROSA

v.

STATE OF BIHAR.*

Bengal Ferries Act, 1885 (*Bengal Act I of* 1885), *State Government, whether has* locus standi *to advise District Magistrate to withdraw settlement of a ferry from public auction and to extend the lease in favour of the previous lessee—District Magistrate's action, whether illegal—intending bidder, whether could apply for a* writ *of* mandamus—*previous lessee, whether a proper party—Constitution, Article* 226.

* Miscellaneous Judicial Case no. 92 of 1953, in the matter of an application under Article 225 of the Constitution of India.

(1) (1922) L. R. 49 Ind. App. 129.

1953.

RAMPHAROSA v. STATE OF BIHAR.

Under the Bengal Ferries Act, 1885, as also under the rules framed under it, the State Government has no *locus standi* to advise the District Magistrate to withdraw the settlement of the ferry from public auction or to extend the lease in favour of the previous lessee.

Held, that the act of the District Magistrate in withdrawing the settlement of the tolls from the public auction at the instance of the State Government was in breach of a statutory duty cast upon him by the Bengal Ferries Act, 1885, and that his further action extending the lease in favour of the previous lessee was also illegal.

Commissioner of Police, Bombay v. *Gordhandas Bhanji*(1), referred to.

Held, further, that an intending bidder had sufficient interest to apply under Article 226, Constitution, and that the previous lessee in whose favour the lease was extended was a proper party to the application.

The Queen v. *Bowman*(2), *The King* v. *Manchester Corporation*(3) and *The King* v. *Speyer*(4), referred to.

Whether a person has a legal right to make an application for the issue of a *writ* of *mandamus* must depend upon the facts of each case.

The Queen v. *The Guardians of the Lewisham Union*(5) and *Harris* v. *Nickerson*(6), distinguished.

In the matter of an application under Article 226 of the Constitution of India.

P. R. Das, Balbhadra Prasad Singh, Padmanand Jha, L. M. Sharma and *S. P. Singh*, for the petitioner.

Advocate-General, Dr. *Sultan Ahmad*, K. *B. N. Singh, K. K. Sinha, Purnendu Narayan, Sankat Haran Singh* and *Sarwar Ali*, for the opposite party.

(1) (1952) S. C. R. 135.
(2) (1898) 1 Q. B. D. 663.
(3) (1911) 1 K. B. 560.
(4) (1916) 1 K. B. 595.
(5) (1897) 1 Q. B. D. 498.
(6) (1873) 8 Q. B. D. 286.

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.—This is an application under Article 226 of the Constitution for the issue of an appropriate writ directing the District Magistrate of Patna to lease the tolls of a ferry known as the Patna-Ganges Ferry by public auction, irrespective of the direction of the State Government to the contrary.

The Patna-Ganges Ferry has been declared to be a public ferry under the Bengal Ferries Act, 1885 (Bengal Act I of 1885). The tolls of the ferry had been leased to opposite party no. 5 by public auction for a term of two years, namely, from the 1st April, 1951, to the 31st March, 1953. According to the rules framed in pursuance of the provisions of section 15 of the Bengal Ferries Act, the District Magistrate of Patna advertised to the public in the issue of the *Bihar Gazette*, dated the 3rd September, 1952, fixing the 22nd December, 1952, as the date for holding a public auction for the lease of the tolls of the ferry for a period of three years with effect from the 1st April, 1953. The petitioner intended to bid at this public auction, and he came to Patna for the purpose. Then he found that the District Magistrate had revoked his announcement to lease the tolls of the ferry by public auction in supersession of the advertisement referred to above, and had withdrawn the tolls from public auction under a notice, dated the 19th December, 1952, which was to the following effect:—

> "It is hereby notified for general information that as Government decided to extend the lease of the Patna Ganges Ferries of the present lessee, Sri Nagendra Narain Singh, for a further period of two years with effect from the 1st April, 1953, settlement of the Patna Ganges Ferries by public auction fixed for the 22nd December 1952 is withdrawn and consequently there will be no public auction for the settlement of the ferries in question."

The tolls of the ferry had been leased to Sri Nagendra Narain Singh, opposite party no. 5, for a period of two years commencing from the 1st April, 1951, at an annual rental of Rs. 51,000. On the 22nd December, 1952, the petitioner filed an application before the District Magistrate offering an annual rental of Rs. 1,05,000 as against the previous annual

rental of Rs. 51,000 of the opposite party no. 5. The District Magistrate disposed of that application by endorsing upon it that the notification to hold a public auction had already been withdrawn. It is then stated that the petitioner filed applications before the Commissioner as also before the Governor; but no orders were passed. Hence, on the 6th March, 1953, he filed the present application under Article 226 of the Constitution.

It appears that opposite party no. 5 had made an application before the District Magistrate for an extension of his lease. The District Magistrate had recommended to the Commissioner that the lease might be extended for a period of three years. The Commissioner also moved the Government for an extension of the lease. On the 16th December, 1952, the State Government wrote to the Commissioner that they desired that the lease of opposite party no. 5 might be extended for a further period of two years with effect from the 1st April, 1953, and the same letter stated that the District Magistrate of Patna may be advised to withdraw the ferry from auction under section 9 of the Bengal Ferries Act. It was in pursuance of this direction that the District Magistrate, by the notice quoted above, withdrew the settlement of the ferry from public auction which was fixed for the 22nd December, 1952.

The argument advanced by Mr. P. R. Das in support of this application was that, in the circumstances of this case, the withdrawal of the settlement of the ferry from public auction by the District Magistrate was wholly illegal, and further that the extension of the lease in favour of opposite party no. 5 was, consequently, also illegal and void. The contention was that, under the Bengal Ferries Act as also under the rules framed under it, the State Government had no *locus standi* to advise the District Magistrate to withdraw the settlement of the ferry from public auction or to extend the lease in favour of opposite party no. 5.

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.

In order to appreciate this point, it is necessary to refer to certain provisions of the Bengal Ferries Act. Section 6 of the Act provides that it shall be lawful for the State Government from time to time, amongst other matters, to declare what ferries shall be deemed to be public ferries. The ferry in question, namely, the Patna-Ganges Ferry, has been declared to be a public ferry. There then follow four important sections, namely, sections 7, 8, 9 and 10.

"7. The control of all public ferries shall be vested in the Magistrate of the district, subject to the direction of the Commissioner.

8. The immediate superintendence of every public ferry shall be vested in the Magistrate of the district in which such ferry is situated, or in such other officer as the Provincial Government may, from time to time, either by name or by official designation, appoint.

And such Magistrate or officer shall, except when the tolls at such ferry are leased, make all necessary arrangements for the supply of boats for such ferry, and for the collection of the authorized tolls leviable thereat.

9. The tolls of any public ferry may, from time to time, be leased by public auction for such term as the Magistrate of the district in which such ferry is situated may, with the approval of the Commissioner, direct.

The Magistrate of the district or the officer authorized by him to conduct such auction may, for sufficient reason to be recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.

The lessee of the tolls of every ferry which have been leased under this section shall execute a contract setting forth the conditions on which the tolls of such ferry are to be held, and shall give security for its due fulfilment.

10. When the tolls of a public ferry have been duly leased, the lessee and every servant of the lessee shall be deemed to be legally bound to conform to the rules made under this Act for the management and control of such ferry."

By section 7, the control of all the public ferries has been vested in the District Magistrate, subject to the direction of the Commissioner. Section 8 also vests the immediate superintendence of such a ferry in the District Magistrate, and the second paragraph of this section is important: it provides that the District Magistrate shall either himself make the necessary arrangements for the supply of boats or for

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.

the collection of the tolls or he may lease out the tolls. Under the provisions of section 9, it seems to be clear that, if the District Magistrate chooses to lease out the tolls, he must do so by public auction. The second paragraph of section 9, however, authorises the District Magistrate to refuse to accept the offer of the highest bidder and to accept any other bid or to withdraw the tolls from auction; but, if the District Magistrate chooses to do so, he must do so " for sufficient reason to be recorded in writing ". Section 10 enjoins upon the lessee and every servant of the lessee to be bound to conform to the rules made under the Act for the management and control of the ferry after the tolls of the ferry have been " duly " leased, that is to say, leased at a public auction. It will be noticed that it is the District Magistrate who has been given all these powers subject only to the direction of the Commissioner, and the State Government does not come in the picture at all. It was, accordingly, argued by Mr. P. R. Das that, once the District Magistrate had decided to lease the tolls of the Patna-Ganges Ferry by public auction, he was bound to carry out that decision: he could not withdraw from that decision under the orders of the State Government: he could do so but solely at his own discretion and " for sufficient reason to be recorded in writing ". It will also be noticed that there is no provision made in the Act for the extension of a previous lease granted to a person. The lease may well be given to the same lessee; but this must be at the discretion of the District Magistrate and at a public auction. I may state here an argument advanced by Sir Sultan Ahmad on behalf of opposite party no. 5. He argued that, although the words " public auction " are used in section 9, yet in effect it is no auction at all. He contended that, ordinarily, at an auction it is the offer of the highest bidder which is accepted and not that of any other bidder, so that, when the District Magistrate has been given the power to refuse to accept the offer of the highest bidder and to accept any other bid, it

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.

is not an auction, and the District Magistrate may well extend the lease of a previous lessee without holding any auction at all. I do not feel disposed to accept this argument in face of the words of the section itself. Section 9 enjoins the tolls to be leased by public auction; but the District Magistrate has been given the power "for sufficient reason to be recorded in writing" to refuse to accept the offer of the highest bidder and to accept any other bid or even to withdraw the tolls from auction. One can understand why the Legislature has given such power to the District Magistrate: it may be that the highest bidder may not be a desirable person to whom the tolls should be leased out, and for other similar reasons. On the wording of section 9, it seems to be clear to me that the District Magistrate is not authorised to withdraw the ferry from public auction under orders of the State Government: he can do so on his own initiative, but he must record sufficient reason for doing so. The District Magistrate has not done so in the present case.

Section 15 of the Bengal Ferries Act empowers the District Magistrate, with the approval of the Commissioner, to make rules consistent with this Act. The rules framed are dated the 13th February, 1929, and have been published under notification no. 2184-L.S.-G. in the *Bihar and Orissa Gazette*, dated February 20, 1929. Rule 2 provides:

> "Every Patna-Ganges ferry shall either be held khas by the Magistrate or be leased by public auction."

Thus, the District Magistrate will either hold the ferry "khas", and then the second paragraph of section 8, quoted above, will apply, namely, that the District Magistrate will make all necessary arrangements for the supply of boats, etc., or he may give it on lease; but this must be by public auction. Rule 5 provides:

> "When it has been determined to lease the tolls of any Patna-Ganges ferry by auction under section 9 of Act I of 1885, the Magistrate shall, at least 15 days before the auction is held, cause an advertisement

of such auction to be published both in English and in vernacular, in such place and in such manner as to him shall seem expedient."

The emphasis in this rule is also on the lease being granted by public auction. Rule 7(*d*) provides that the maximum period for which a lease may be granted shall not exceed three years at a time.

Mr. P. R. Das cited the case of *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*(1) in support of his argument that, the Bengal Ferries Act having given the discretion to the District Magistrate only, though subject to the directions of the Commissioner, the District Magistrate acted illegally in acting upon the orders issued by the State Government in this connection. In the case just mentioned, an application had been made by the respondent of that case for permission to build a cinema on a certain site, and it was rejected by the Commissioner of Police of Bombay. The respondent then applied for reconsideration of his application, and the Commissioner granted it. Subsequently, under instructions from Government, the Commissioner sent the following communication to the respondent:—

"I am directed by Government to inform you that the permission to erect a cinema at the above site granted to you..... is hereby cancelled."

The respondent then applied to the High Court to direct the Commissioner of Police to withdraw the cancellation and to grant permission for the erection of the cinema, and the High Court directed the Commissioner to withdraw the order of cancellation passed by him. The Commissioner of Police then appealed to the Supreme Court. The Supreme Court held that there was no valid cancellation of the license because (*a*) the order of cancellation communicated to the respondent was one made by the Government, and not by the Commissioner on his own authority; the Commissioner acted in the matter only as a transmitting agent, and (*b*) under the rules framed under certain sections of the

(1) (1952) S. C. R. 135.

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.

City of Bombay Police Act, 1902, the Government of Bombay had no power to cancel a license once issued: the only person vested with authority to grant or refuse a license for the erection of a building to be used for the purposes of public amusement is the Commissioner of Police. The learned Advocate-General referred to the form of agreement which a lessee has to execute under section 9 of the Act. Rule 10 of the rules framed under the Act says:

> "The contract which the lessee will be required to execute under section 9 of the Act shall be in the form attached to these rules."

The form shows that the parties to this agreement are the State and the lessee. The learned Advocate-General, therefore, argued that, since the State is a party to the agreement which the lessee has to execute, it should be inferred that the State can give directions to the District Magistrate as its agent. I cannot accede to this argument in view of the fact that the Act and the rules framed thereunder give the sole control of the ferries to the District Magistrate, subject only to the direction of the Commissioner, and I do not think that the State Government can give directions to the District Magistrate. The learned Advocate-General also suggested that an extension of the lease is permissible under rule 7(*d*). I have already stated that rule 7(*d*) fixes the maximum period for which a lease may be granted as not exceeding three years at a time. I cannot read into this rule the power to extend a lease. It may be that the previous lessee may again be granted a lease for a period not exceeding three years at a public auction held under the provisions of the Act; but that does not amount to an extension of the lease: it will be a fresh lease. I do not think, therefore, that the withdrawal of the settlement of the tolls of the ferry from public auction by the District Magistrate under the orders of the State Government or the extension of the lease in favour of opposite party no. 5 can be held to be legal.

Sir Sultan Ahmad also contended that the present application was not maintainable, inasmuch as the

1953.

RAM-BHAROSA v. STATE OF BIHAR.

withdrawal of the settlement of the tolls of the ferry from public auction by the District Magistrate did not affect any interest of the petitioner, and that, therefore, the petitioner was not entitled to make an application under Article 226 of the Constitution. Mr. P. R. Das conceded to the argument that there must reside in the petitioner a legal right to the performance of a legal duty by the party against whom a *writ* of *mandamus* is sought to be issued under Article 226 of the Constitution. In the present case, I have found that the act of the District Magistrate in withdrawing the settlement of the tolls from public auction at the instance of the State Government was in breach of a statutory duty cast upon him under the Bengal Ferries Act, and that his further action to extend the lease in favour of opposite party no. 5 was also illegal. The petitioner was an intending bidder, and had come to Patna to bid at the proposed auction to be held on the 22nd December, 1952. As I have already stated, he had also filed an application before the District Magistrate offering Rs. 1,05,000 as the annual rental, if the tolls of the ferry were leased to him. In these circumstances, the petitioner has a right to vindicate a public matter, and he has sufficient interest to make this application. Sir Sultan Ahmad cited the case of *The Queen* v. *The Guardians of the Lewisham Union*(1) wherein it has been held that the petitioner must have a legal specific right in himself before he can make an application for the *writ* of *mandamus*. Several English decisions were cited at the Bar on behalf of both the parties. Whether a person has a legal right to make an application for the issue of a *writ* of *mandamus* must depend, in my view, upon the facts of each case, and I do not think it would be right to lay down a hard and fast rule enumerating the circumstances under which such a right can be said to exist. In my opinion, in the present case before us, the petitioner should be found to have a legal right in himself to ask for a *writ* of *mandamus*.

JAMUAR, J.

(1) (1897) 1 Q. B. D. 498.

1953.

RAM-BHAROSA v. STATE OF BIHAR.

JAMUAR, J.

Sir Sultan Ahmad also contended that no *writ* of *mandamus* can issue against opposite party no. 5 himself, and that, therefore, he ought not to have been made a party to this application. He is right to this extent that no order need be passed against opposite party no. 5 giving him any directions; but the order against the other members of the opposite party ought to be passed in the presence of opposite party no. 5 in whose favour an extension of the lease has been granted without holding a public auction. I think, therefore, that opposite party no. 5 is a proper party to this application.

For these reasons, I think that this application must be allowed, and that a writ should be issued cancelling the order of the District Magistrate of Patna, dated the 19th December, 1952, withdrawing the public auction and all further proceedings of the District Magistrate subsequent to the cancellation of the public auction including settlement of the tolls of the public ferry to the opposite party no. 5 by a private treaty. A *writ* in the nature of *mandamus* will also be issued to the District Magistrate commanding him to issue a fresh notification for holding a public auction and to lease out the tolls of the Patna-Ganges Ferry according to law. There will be no order for costs of the hearing of the application.

RAMASWAMI, J.—In the course of the argument there was much discussion as to the question whether the petitioner could maintain this application for a *writ* in the nature of *mandamus*. The contention of Dr. Sultan Ahmad was that the petitioner had no legal specific right which entitled him to enforce the performance of the duties imposed under the statute in question. The argument of learned counsel is based on the fact that at common law the advertisement of the sale by auction does not amount to a contract with any one who might act upon the advertisement; nor does it amount to a warantee that all the articles advertised would be put up for sale. Dr. Sultan Ahmad relied in this connection upon *Harris* v.

Nickerson(1). The proposition upon which Dr. Sultan Ahmad relies is undoubtedly correct. It is well-settled that an advertisement of a sale by public auction is a mere declaration for an intention and does not constitute a contract with the persons who intend to bid at the proposed auction sale. The question at issue in the present case is however of a different description. The question is not whether the petitioner has a legal right to enforce a contract. The case of the petitioner is not founded on any contractual right. The petitioner, on the contrary, bases his claim on the breach of statutory obligation imposed on the District Magistrate. I agree with my learned brother that upon a proper construction of the relevant provisions of the Bengal Ferries Act the conclusion must be drawn that the District Magistrate is bound to settle the tolls of Patna-Ganges Ferry by a public auction if the District Magistrate does not choose to hold the ferry 'khas'. If this interpretation is correct, the statute imposes a duty upon the District Magistrate in the matter of settlement of the public ferry. The contention of Dr. Sultan Ahmad is, however, that the petitioner was only an intending bidder at the public auction and that there was no sufficient legal right which entitled the petitioner to prosecute this case. In my opinion this argument is not correct. I think that upon the facts admitted in the present case the petitioner had a sufficient legal right which entitles him to ask the Court to issue a *writ* under Article 226 so that the District Magistrate who is clothed with certain statutory powers does not exceed those powers. It is not disputed that the petitioner was an intending bidder and that he had come to Patna to bid at the proposed auction to be held on the 22nd December, 1952. He had also filed an application to the District Magistrate offering Rs. 1,05,000 as annual rental if the tolls of the ferry were leased to him. In view of these facts I think that the petitioner in this case was within the range of those

(1) (1873) 8 Q. B. 286.

1953.

RAM-BHAROSA v. STATE OF BIHAR.

RAMASWAMI J.

persons to whom the District Magistrate owed statutory duty. There is, I think, sufficient legal interest vested in the petitioner which entitles him to maintain the present application. This opinion is consistent with the decisions reported in *The Queen* v. *Bowman*(1), *The King* v. *Manchester Corporation*(2) and *The King* v. *Speyer*(3).

I agree that the application of the petitioner ought to be allowed and that a *writ* ought to be issued against the District Magistrate of Patna in the terms proposed by my learned brother.

Application allowed.

K. D.

APPELLATE CIVIL.

1953.

May, 6, 7, 15.

Before Das and Sinha, JJ.

LACHHUMAN

v.

MAKAR.*

Arbitration Act, 1940 (*Act X of* 1940), *whether retrospective—section* 32, *whether applicable in the matter of an award made before* 1940.

The Arbitration Act, 1940, has no retrospective effect and does not apply to awards made long before the coming into force of that Act.

The bar of section 32 of the Act is not applicable where the award in question was of a period prior to the passing of the Act.

Sukhdeo Singh and another v. *Radhika Singh and others*(4), referred to.

Sia Kishori Kuer and others v. *Bhairvi Nandan Sinha and another*(5) and *Moolchand Jothajee v. Rashid Jamshed Sons & Co.*(6), discussed.

* Appeal from Original Decree no. 195 of 1947, from a decision of Mr. Saiyid Ali Jawad, Additional Subordinate Judge of Hazaribagh, dated the 30th April, 1947.

(1) (1898) 1 Q. B. 663.
(2) (1911) 1 K. B. 560.
(3) (1916) 1 K. B. 595.
(4) (1949) I. L. R. 28 Pat. 514, 518.
(5) (1952) I. L. R. 31 Pat. 886.
(6) (1946) A. I. R. (Mad.) 346.

1952.

LACHHUMAN v. MAKAR.

Pamudurthi Suryanarayana Reddy's, in re(1) and *Sayyaparaju Surayya* v. *Nekkanti Anandayya and others*(2), not followed.

B. Sher Bahadur Singh v. *Ram Narain Singh*(3), distinguished.

Appeal by defendant no. 1.

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

S. C. Mazumdar, Phani Bhusan Gupta and *A. C. Mitra*, for the appellant.

G. C. Mukherji, S. K. Sarkar and *A. N. Chakravartty*, for the respondents.

DAS, J.—Lachhuman Singh, defendant no. 1, is the appellant before us. The appeal arises out of a suit for partition. According to the plaintiffs-respondents, village Badgunda, which is the subject of partition, was given in *khorposh* to one Dayal Singh by Khem Narain Singh. Dayal Singh had six sons. Subsequently, Dayal Singh made a *mukarrari khposh* grant on the 14th November, 1895, in favour of one Mod Narain Singh in respect of 428 and odd acres of land of village Badgunda. Mod Narain had four sons, namely, Lachhuman Singh, Meghlal Singh, Guru Prasad Singh and Makar Singh. A tenure-holder's khewat, no. 5, was prepared in respect of 428 and odd acres of land in the names of Lachhuman Singh, Meghlal Singh and Guru Prasad Singh, Makar Singh, plaintiff no. 1, being a minor at the time. It was alleged that the parties had been messing separately for more than fifteen years before the suit and were also cultivating the bakasht lands separately according to convenience of cultivation, but there was no partition by metes and bounds. Makar Singh and the son of Guru Prasad Singh were the plaintiffs who brought the suit, each claiming 4 annas share.

(1) I. L. R. (1949) Mad. 111.
(2) (1951) A. I. R. (Mad.) 525.
(3) (1945) A. I. R. (Oudh) 1.

1953

LACHHU-MAN v. MAKAR.

DAS, J.

Lachuman Singh, the eldest son of Mod Narain, was the principal defendant who contested the suit. The heirs of Meghlal Singh, who were also ranged as defendants, supported the case of the plaintiffs. The substantial defence of Lachhuman Singh was that there was a previous partition of the property by metes and bounds as a result of an award made by certain arbitrators on the 3rd of June, 1925. It was alleged that Lachhuman Singh was entitled to 6 annas share on the strength of a custom in the family under which the eldest son got a larger share. It was alleged that as there had already been a partition of the property which was binding on the parties, the suit for a second partition was not maintainable.

The learned Subordinate Judge framed several issues, some of which are of no importance at this stage. On the question as to whether there was a previous partition, the learned Subordinate Judge found that the award on which the appellant relied was an invalid award which was never acted upon. He further found that there was no previous partition in fact, though the lands were being cultivated separately for convenience of cultivation. He also found that the appellant had failed to prove a family custom under which the eldest son was entitled to a larger share. On these findings he decreed the suit for partition, holding that plaintiffs 1 and 2 were entitled to 4 annas share each.

The award on which the appellant relied was not marked as an exhibit in the court below, because the appellant failed to pay the necessary stamp duty and penalty. Learned Counsel for the appellant has stated that the necessary stamp duty and penalty have now been paid and he has based one of his main arguments on the award, an English translation whereof has been placed before us. We have heard learned Counsel for the parties on the basis of the award and the appeal will be disposed of on that basis.

The first and foremost argument of learned Counsel for the appellant is that the award is binding

1953.

LACHHUMAN v. MAHAR.

DAS, J.

on the parties and sections 31 and 32 of the Arbitration Act, 1940, are a bar to the suit. Section 31(2), on which reliance has been placed by learned Counsel for the appellant, is in these terms:—

"31(2). Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court."

Section 32, which is more important, states:—

"32. *Bar to suit contesting arbitration agreement or award.*—Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

It seems to me that section 31(2) merely states which court shall decide questions regarding the validity, effect or existence of an award; in terms it does not bar a suit. Section 32, however, bars a suit on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award. The case of the plaintiffs-respondents is that they have brought the suit not for a decision upon the existence, effect or validity of the award; they have brought the suit for partition on their original title. The second part of section 32, however, is in very wide terms. It states,

"nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act".

The effect of decreeing the partition suit will be to set aside the award, and if section 32 applies to this case, it will be a bar to the suit, provided the appellant can plead the award by way of defence.

The question, therefore, has arisen whether section 32 applies to an award made long before the coming into force of the Arbitration Act, 1940. That Act came into force on the 1st day of July, 1940. Exhibit A was the arbitration agreement in the present case and was dated the 13th of July, 1921.

1953.

LACHHU-MAN v. MAKAR.

DAS, J.

The award was stated to have been made four years after, on the 3rd of June, 1925. Therefore, both the arbitration agreement and the award relate to a period long before the coming into force of the Arbitration Act, 1940. The question is—do the provisions of the Arbitration Act, 1940, apply? No direct decision bearing on the question has been brought to our notice, though in *Sukhdeo Singh* v. *Radhika Singh*(1) Manohar Lal, J., said:—"Moreover, it is doubtful if the provisions of the new Arbitration Act can be invoked in aid of or against the validity of an award which was pronounced before this Act came into force." The difference in the scheme of the Arbitration Act, 1940, and Schedule II of the Code of Civil Procedure has been the subject of many decisions of this Court, the latest of which is *Sia Kishore Kuer* v. *Bhairvi Nandan Sinha*(2). The difference was thus explained by Reuben, C. J., in the aforesaid decision:—

"The decisions to which I have referred illustrate the state of the law previous to the coming into force of the Arbitration Act, 1940. A valid award was an operative award by itself and there were two ways in which it could be enforced. It might be made a rule of the court by an application under the Civil Procedure Code or under the Arbitration Act, 1899, as the case might be, or the party might treat it as an independent source of title and enforce it by suit. In either case it was open to the opposite party to challenge the validity of the award. The remedy by suit was taken away by section 32 of the Arbitration Act, 1940 (his Lordships then quoted section 32)."

His Lordship then considered various decisions of different High Courts and approved of the view expressed by Leach, C.J., in *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*(3). Leach, C.J., said:—

"The scheme of the Act (the Arbitration Act, 1940) is to prevent the parties to an arbitration

(1) (1949) I. L. R. 28 Pat. 514, 518.
(2) (1952) I. L. R. 31 Pat. 886.
(3) (1946) A. I. R. (Mad.) 346.

agitating question relating to the arbitration in any manner other than that provided by the Act."

Reuben, C.J., then said that the Arbitration Act, 1940, by insisting that within the time limited by Article 178 of the first schedule to the Limitation Act, 1908, an application must be made in court for the filing of the award, makes for certainty and minimises the danger of an injustice occurring. If the scheme of the Arbitration Act, 1940, is to prevent the parties to an arbitration agitating a question relating to the arbitration in any manner other than that provided by the Act, then the appellant cannot be in a better position than the plaintiffs-respondents. If the plaintiffs-respondents could not bring a suit to set aside an award, the appellant could not also plead the existence of an award by way of defence in a suit, when he had taken no steps under the Arbitration Act to file the award. Mr. A. C. Mitra, appearing for the appellant, has relied on two Madras decisions. In *Pamudurthi Suryanarayana Reddy* v. *Pamudurthi Venkata Reddi*(1) it was held that section 32 of the Arbitration Act, 1940, did not preclude a defendant from putting forward an award which has been fully performed by him but which was not filed under section 14 and according to which a judgment was not pronounced or a decree given under section 17 of the Act, in answer to the plaintiff's claim which was the subject-matter of the reference and the award. It is to be noted that in the Madras case the award was made on the 9th March, 1943, that is, after the coming into force of the Arbitration Act, 1940; therefore, the question whether the Arbitration Act applied to awards made before the coming into force of that Act did not arise for decision before their Lordships. Their Lordships did, however, take somewhat narrower view of section 32 of the Arbitration Act, 1940—narrower than the view taken by Leach, C.J., in *Moolchand Jothajee's case*(2). Their Lordships took

(1) I. L. R. (1949) (Mad.) 111.
(2) (1946) A. I. R. (Mad.) 346.

1953.

LACHHU-MAN v. MAKAR.

DAS, J.

the view that the inhibition in section 32 was confined merely to a plaint by which a decision upon the existence, effect or validity of an award was sought. Speaking for myself, I find it somewhat difficult to confine the words of section 32 of the Arbitration Act, 1940, to a plaint only. The latter part of section 32, which I have already quoted, is comprehensive enough to preclude, to use the words of Leach, C.J., any of the parties to an arbitration from agitating a question relating to the arbitration in any manner other than that provided by the Act. The decision in *Pamudurthi Suryanarayana Reddy's case*(1) was followed by a Single Judge in the Madras High Court in *Sayyaparaju Surayya* v. *Nekkanti Anandayya*(2). That was also a case where the award was made after the coming into force of the Arbitration Act, 1940. Mr. A. C. Mitra also drew our attention to an Oudh decision, *B. Sher Bahadur Singh* v. *Ram Narain Singh*(3). That was a case in which section 48 of the Arbitration Act, which saved pending references, was considered and it was held that an appeal lay under the Act of 1940 in respect of an award made on the 21st March, 1939, but on which judgment was pronounced on the 12th August, 1940. I do not think that that decision is of any help in determining the question before us I need make only one more observation about section 48, Arbitration Act, 1940. That section shows that the Arbitration Act does not apply to references pending at the commencement of the Act. It is a little difficult to understand how then the Arbitration Act, 1940, will apply to arbitration agreements and awards made long before the coming into force of that Act. Mr. Mitra said that the Arbitration Act was a consolidating Act; its provisions would, therefore, apply to arbitrations made before the coming into

(1) I. L. R. (1949) Mad. 111.
(2) (1951) A. I. R. (Mad.) 525.
(3) (1945) A. I. R. (Oudh) 1.

force of the Act. I am unable to accept that argument. A consolidating Act does not necessarily apply to transactions past and closed, unless in express terms or by necessary intendment it has retrospective effect.

1953.

LACHHU-MAN MAKAR. v. MAKAR.

My own view is that the Arbitration Act, 1940, has no retrospective effect and does not apply to awards made long before the coming into force of that Act. If the Arbitration Act, 1940, applies, then the appellant will be precluded from putting forward an award which was never filed in court by way of defence to the suit for partition. Speaking with great respect, I doubt the correctness of the Madras decision which has put a narrower view on section 32 of the Arbitration Act, 1940. For these reasons, I do not think that section 32 is a bar to the present suit.

DAS, J.

Let us, however, examine this case on the footing that it was open to the appellant to plead the award as a bar to the suit. It is obvious that if the appellant can plead the award, it should be open to the court to consider whether the award is valid or invalid. It seems to me obvious that the court cannot allow a party to plead an award and at the same time preclude the other party from showing that the award was not valid. The learned Subordinate Judge has carefully considered the evidence bearing on the question. He has pointed out that out of the arbitrators mentioned in exhibit A, three had died before the award was made. It further appears that some eleven persons had joined in making the award, though they were not appointed arbitrators at all. An arbitration agreement sets up a private tribunal of the parties. That tribunal must consist of persons appointed as arbitrators. Outsiders who had never been appointed as arbitrators cannot give a decision which will be binding on the parties. This, in my opinion, is elementary. In the case before us it has been found, and the finding has not been challenged, that a number

1953.

LACHHU-MAN v. MAKAR.

of outsiders joined in making the award. Obviously, such an award was not valid and could not bind the parties. The learned Subordinate Judge correctly found that there was no valid award and the parties did not act upon it.

DAS, J.

Learned Counsel for the appellant took us through the evidence in the case and argued that the evidence establishes a previous partition, irrespective of the award. We have carefully examined the evidence and find that there was no previous partition. It is true that some of the witnesses of the plaintiffs-respondents said that there was separate cultivation: that, however, was the case of the plaintiffs-respondents who said that the separate cultivation was by way of convenience and not as a result of a partition by metes and bounds. My finding is that the appellant had failed to prove a previous partition.

On the question of a family custom of *jethans*, the learned Subordinate Judge has dealt with the evidence in great detail and has pointed out several instances where the custom does not appear to have been followed. Moreover, the evidence as to what the alleged custom was is highly discrepant. One witness said that the eldest son got the double share; another witness gave a different version. The entries in the record-of-rights also went against the existence of such a custom. Having regard to all the evidence in the record, I see no reasons to differ from the finding of the learned Subordinate Judge.

My conclusion, therefore, is that the findings of the learned Subordinate Judge are correct and there are no reasons for interference. The appeal fails and is dismissed with costs.

SINHA, J.—I agree.

Appeal dismissed.

K. D.

REVISIONAL CRIMINAL.

Before Imam and Misra, JJ.

1953.

GYANI

v.

DHARAM.*

May, 13, 14, June, 3.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145, 517 *and* 520—*lands attached—sale-proceeds of usufruct deposited—application by successful party for payment—other side moving higher court and praying for stay of payment—High Court ultimately ordering stay of payment—sections* 435, 439, 561A—*case-law, discussed.*

Where in a proceeding under section 145, Code of Criminal Procedure, 1898, the lands in dispute were attached and the yields from the lands were sold and deposited in court and on final orders having been passed in the proceedings, the successful party applied for the payment of the said sum to him, and the other party objected and moved the Sessions Judge against the order under section 145 and further prayed for stay of payment of the amount, and the Sessions Judge admitted the main application but held that he had no power to order stay;

Held, that the case was governed by the provisions of sections 517 and 520, Code of Criminal Procedure;

Held, further, that the High Court would exercise powers under section 520 of the Code and give relief to the aggrieved party;

Held, also, that section 145(4) of the Code referred only to immovable property and made no mention of any step to be taken beyond the pendency of the attachment. The money which was retained by the court as the income from the land was not under attachment; and sub-section (8) of the section gives a discretion to the Magistrate to dispose of the sale-proceeds in the manner he thought proper. There was no mandatory provision that the Magistrate was bound to hand over the crop or sale-proceeds to a particular party, and since the order under section 145 of the Code was a judicial one and was revisable, sub-section (8) was also likewise revisable. If, therefore, the court would pass a palpably wrong or perverse

*Criminal Revision no. 812 of 1953, against an order of Mr. R. N. Sinha, Magistrate of the first class, Motihari, dated the 11th March, 1953.

1953.

GYANI
v.
DHARAM.

order under sub-section (8), the superior court would have the authority to rectify it in a suitable manner.

Application in revision by the second party.

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

The case in the first instance came before Misra, J., and he referred it to a Division Bench.

On this reference.

Baldeva Sahay, *Gorakhnath Singh* and *Sheokumar Singh*, for the petitioners.

Thakur Prasad, for the opposite party.

MISRA, J.—This petition is directed against an order, dated the 11th of March, 1953, passed by Mr. R. N. Sinha, Magistrate with first class powers at Motihari, for the payment of a sum of Rs. 27,000 to the opposite party. The petitioners were second party in a proceeding under section 145 of the Code of Criminal Procedure which was heard and decided in favour of the opposite party, who constituted the first party in the case. The petitioners claimed possession over an area of 45 bighas out of a total area of 108 bighas of land. They are 38 persons in all, of whom petitioner no. 1 claims possession through the remaining 37 persons who appear as *bataidars* under him. The same relation is alleged as between opposite party no. 1 and the other members of that party, who claim as *bataidars* under him. Petitioner no. 1 and opposite party no. 1 claim the land in dispute and likewise the amount in deposit as *mahanths*. The final order in the 145 Criminal Procedure Code case was passed on the 20th of February, 1953, in favour of the opposite party.

Dharam Dass, opposite party no. 1, applied on the 25th of February, 1953, for withdrawal of the money in deposit as the successful party in the case

under section 145 of the Code of Criminal Procedure on the ground that the money, which represented the sale-proceeds of the yield from the land in dispute during the pendency of the attachment of the land under sub-section (4) of section 145 of the Code of Criminal Procedure, should be handed over to him as a necessary consequence of his success in the main case. The learned lawyer for the petitioners appeared on the 27th of February and objected to the payment on the ground that his clients had obtained a copy of the judgment in the 145 Criminal Procedure Code case and that they were ready to move the higher courts for setting aside the order, and that the learned Magistrate should, therefore, stay passing order for payment in favour of the opposite party. Time was accordingly granted till the 10th of March, 1953, for bringing stay order from the superior Court.

The petitioners accordingly moved the learned Sessions Judge of Motihari against the order in the case under section 145 of the Code of Criminal Procedure and prayed further that pending the hearing of the application by him, he should be pleased to issue an order for stay of payment of the amount in deposit to the opposite party. The learned Sessions Judge admitted the main application, but felt that he had no power to issue any order for stay of payment, and hence he refused to grant the prayer. The petitioners thereupon moved this Court. It is not necessary to set out in detail the other facts regarding the course of the case in this Court except that on the 11th of March, 1953, Mr. R. N. Sinha passed final order for payment of the amount in deposit to the opposite party against which the petitioners once again moved this Court and obtained the present rule. The matter was placed before me for final hearing, sitting as a Single Judge, when on 23rd April 1953 I felt that the question being one of considerable general importance, and there being no authoritative pronouncement of this Court on the

1952.

GYANI v. DHARAM.

MISRA, J.

point, it was desirable that the case should be heard and disposed of by a Division Bench. It is accordingly placed before us for decision.

Mr. Baldeva Sahay, who appears in support of the application, has urged that the learned Sessions Judge was in error in holding that he had no jurisdiction to issue the order for stay of payment of the amount in question to the opposite party as the Code of Criminal Procedure made no such provision. He has invited our attention in this connection to sections 517 and 520 of the Code of Criminal Procedure. It may be pertinent to quote clause 1 of section 517 of the Code of Criminal Procedure which is in following terms:—

> "517 (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal [by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise] of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

The argument is that the word 'inquiry' in this clause refers to an inquiry under section 145 of the Code of Criminal Procedure, and since the inquiry in this case has admittedly terminated, the Court is authorised to pass such order as it thinks fit in respect of the property in its custody. When, therefore, the land in dispute comes into the custody of the Court by virtue of the order of attachment under sub-section (4) of section 145 of the Code of Criminal Procedure, and in that capacity the Court is also seized of the produce of the land or the money which represents the sale-proceeds of the produce, it is money in the custody of the Court in respect of which the Court has to pass proper order for disposal. He has next invited our attention to section 520 of the Code of the Criminal Procedure which in terms confers the same power on the Court of appeal, revision or reference. The order

1953.

GYANI v. DHARAM. MISRA, J.

under section 517 of the Code of Criminal Procedure is thus made a judicial order and as such subject to alteration or control of the Superior Court in the same manner as any judicial order is subject to its supervision and control and correction. If, therefore, the justice of a case requires that the payment of a certain amount of money in the custody of a Court which is brought before it should be made in a particular manner, or that it should not be paid to any party at all for a certain period pending a more effectual adjudication, or in circumstances otherwise just, it should do so, and in case of a non-exercise or improper exercise of such power, the Court of reference or appeal or revision can correct it or alter it and pass the proper order The present case is a fit one for the purpose. The decision of the case under section 145 of the Code of Criminal Procedure is being challenged in due course, and in case the High Court sets aside the order on the point of possession, it will automatically affect the order under consideration. In this case, the justice of the case is further in favour of stay as the amount involved is fairly a big one and the opposite party no. 1, in whose favour the order for payment is passed, is a *mahanth* without any private property, and it will be a highly complicated business to recover the amount from him. It may even be that the amount may not be recovered at all.

Learned Counsel on behalf of the opposite party has raised the point that sections 517 and 520 of the Code of Criminal Procedure have no application to the case. These two sections have no application to an enquiry under Chapter XII of the Code of Criminal Procedure in which section 145 of the Code occurs and which contains detailed provisions with regard to the manner of the disposal of the property, the subject-matter of the enquiry therein. He lays stress on sub-section (4) of section 145 of the Code of Criminal Procedure which says that the Magistrate attaching the

1958.

GYANI v. DHARAM.

MISRA, J.

land can continue it only so long as the enquiry is on, and as soon as it is terminated, the attachment comes to an end as a matter of course, and the Magistrate has to make over possession to the party who is found entitled to possession, which means being in actual possession. Learned Counsel has drawn our attention in this connection to *Munia Servai* v. *Thangayya Onturiyar*(1) which is a Single Judge decision of the Madras High Court and which, however, rests upon another decision of the same High Court, being the decision of a Division Bench, [*Marudayya Thevar* v. *Shanmugasundara Thevar*(2)]. It has been laid down in these cases that as soon as proceedings under section 145 of the Code of Criminal Procedure have come to an end, the learned Magistrate who is seized of the matter has no jurisdiction to appoint a receiver or to stay the delivery of possession to the successful party. To the same effect are the other decisions to which reference has been made in course of the argument. The case reported in 49 Madras Law Journal, 593, represents an approach to the problem from the point of view of the inherent power of the Court to stay delivery of possession or stand in the way of the party entitled to be in possession after a declaration in his favour. Their Lordships of the Madras High Court deprecated such a course of action and held further that the inherent jurisdiction for which provision is made in section 561A of the Code is not meant to provide for such a situation. The question how far and in what circumstances, if any, or if at all, the trial court or Court of revision or reference can interpose by necessary order as consequential upon or incidental to the main order and whether it can apply to a case under section 145 of the Code of Criminal Procedure is a wider question to which it is not necessary to give a definite answer in the present case. A

(1) (1948) A. I. R. (Mad.) 133.
(2) (1925) 49 Mad. L. J. 593.

Single Judge of the Calcutta High Court in *Mukutdhari Shao* v. *Ayodhya Shao*(1) appears incline to the view that so far as stay is concerned, the power may be exercised, although with great respect to his Lordship, it must be said that there are observations in the judgment which are rather difficult to reconcile with each other upon the question of stay in a case under section 145 of the Code of Criminal Procedure. His Lordship, Sen, J., however, expressed himself as follows:—

"Next I would point out that the Court is given powers of stay and not powers of restoration. The finding of the Court of first instance is that the petitioner first party was in possession at the relevant time mentioned in section 145, Criminal Procedure Code, and that his possession should be maintained by his being put in possession. Once he has been actually put in possession I cannot see what authority the Sessions Judge has of directing his eviction and putting some one else in possession in proceedings such as these. The Sessions Judge has no power to decide the question of possession finally. All the power that he has is to report the matter to this Court stating that the order passed by the Magistrate is wrong. He has by ordering restoration usurped the power of this Court which is the only Court which can finally determine the matter."

The point before us is a narrow one. It does not relate to a question of possession of immovable property, but it relates to money which is movable property and which is brought before the Court. Learned Counsel for the opposite party has urged that this should also be treated as part of immovable property as it has come into the custody of the Court as part of the land in dispute and as such it must be treated on the same footing.

(1) (1949) A. I. R. (Cal.) 41.

1953.

GYANI v. DHARAM.

MISRA, J.

It appears on a proper balancing of the arguments for the parties that the correct view in the matter would be that the present case is governed by the provisions of section 517 of the Code of Criminal Procedure, and in consequence by section 520 of the Code of Criminal Procedure. Section 145 of the Code of Criminal Procedure, sub-section (4), refers only to immovable property and makes no mention of any step to be taken beyond the pendency of the attachment. The money which is retained by the court as the income from the land is not under attachment; and sub-section (8) of the section gives a discretion to the Magistrate to dispose of the sale-proceeds in the manner he thinks proper. There is no mandatory provision that the Magistrate is bound to hand over the crop or sale-proceeds to a particular party, and since the order under section 145 of the Code of Criminal Procedure is a judicial one and is revisable, sub-section (8) is also likewise revisable. If, therefore, the court would pass a palpably wrong or perverse order under sub-section (8) of the section, the Superior Court would have the authority to rectify it in a suitable manner. Learned Counsel finds it difficult to oppose this view except by saying that sub-section (8) is independent of sub-section (4) of the section, a contention which is difficult to accept on a plain reading of the words employed therein. Even if sub-section (8) be independent, it covers the case where the Magistrate has to order disposal of crop or sale proceeds thereof arising out of the land in dispute. This consideration merely lends additional support to the contention raised on the strength of sections 517 and 520 of the Code of Criminal Procedure.

The conclusion, therefore, that I arrive at is that the present case is a fit one, considering the amount involved and other circumstances, where we should stay the operation of the order for payment of the sum to the opposite party for a period of one month after

1953.

GYANI v. DHARAM.

MISRA, J.

the disposal of the application by the learned Sessions Judge for reference of the case under section 145 of the Code of Criminal Procedure to have the judgment and order in that case set aside, during which period it is likely that the petitioners would be in a position to move this Court against the order of the learned Sessions Judge refusing to make a reference when the petitioners would be free to renew their prayer for stay of payment of the amount in case their application against the main order is admitted by this Court. In the event of its rejection at the admission stage, however, the opposite party no. 1 will be entitled in due course to receive payment of the amount by virtue of the order passed in his favour against which the present petition has been filed.

IMAM, J.—I agree.

Order accordingly.

K. D.

REVISIONAL CRIMINAL.

Before Jamuar and Sahai, JJ.

LANGAR

v.

BACHA.*

1953.

July, 13.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 145, *possession of minor declared—minor no party to proceeding—proceeding, whether vitiated—section* 148(3)—*awarding of costs without holding any enquiry, whether permissible.*

Where in a proceeding under section 145, Code of Criminal Procedure, 1898, the magistrate found that a minor was in possession through her father-in-law who was impleaded as a party to the proceeding:

Held, that non-joinder of the minor to the proceeding was immaterial as the father-in-law was claiming to be in possession of the property in dispute on behalf of the minor.

*Criminal Revision no. 839 of 1952, against an order of Mr. Nasiruddin Khan, Sessions Judge, Champaran, dated the 19th August, 1952, rejecting an application in revision against a decision of Mr. M. P. Singh, Deputy Magistrate, First Class, Bettiah, dated the 21st July, 1952.

1953.

LANGAR v. BACHA.

Dhondhai Singh v. *Follet*(1), followed.

Bholanath Singh v. *Wood*(2) and *Jatan Singh* v. *Dukhia Singh*(3), referred to.

Behary Lall Triguait v. *Darby*(4) and *Jhabu Singh* v. *G. B. Rutherford*(5), not followed.

On the true interpretation of section 148(3), Code of Criminal Procedure, 1898, as amended in 1923, it would be wrong to hold that for awarding costs to the successful party an enquiry must always be held regarding the actual costs which have been incurred by him. The section now gives a very wide discretion in the magistrate for the assessment of the amount of costs and the only restriction which it places upon his discretion is that the costs must be reasonable.

Jhaman Mahton v. *Thakuri Mahton*(6) and *Mangla Sahu* v. *Ramdhani Tamboli*(7), over-ruled.

Brij Pal Singh v. *Ram Naresh Singh*(8), followed.

Application in revision by the second party.

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

The case in the first instance came before Sinha, J. sitting single and he referred it to a Division Bench.

On this reference

Kameshwar Dayal, for the petitioner.

Rai Indra Bihari Saran, for the opposite party.

JAMUAR, J.—This is an application by the second party to a proceeding under section 145 of the Code of Criminal Procedure against an order passed against them in that proceeding by a Magistrate of Bettiah. The argument advanced in support of this application

(1) (1903) I. L. R. 31 Cal. 48, F.B.
(2) (1904) I. L. R. 32 Cal. 287.
(3) (1917) A. I. R. (Pat.) 264.
(4) (1894) I. L. R. 21 Cal. 915.
(5) (1902) 7 Cal. W. N. 209.
(6) (1920) 1 Pat. L. T. 369.
(7) (1928) 9 Pat. L. T. 835.
(8) (1932) A. I. R. (All.) 825.

is that in the circumstances of this case the entire proceeding is without jurisdiction. As the point raised involved an important question of law, the application was referred to a Division Bench for decision.

The land involved in the proceeding was 8 bighas 8 kathas 13 dhurs in village Siswa Bahuarwa. The case of the first party is that these lands were recorded in the revisional survey in the names of two brothers, Lal Parikha Mahto and Bhoj Mahto, who had separated from their other three brothers, Bhicha Mahto, Sheogobind Mahto and Dasain Mahto. Lal Parikha having died without leaving a male issue and in jointness with Bhoj Mahto, Bhoj Mahto came in possession of the lands. Thereafter, Bhoj Mahto died leaving a son Goga Mahto, who inherited the lands in question and became the sole owner thereof. A few years later, Goga Mahto died leaving a daughter named Mosammat Sokrania as his only issue and his widow Mosammat Sundari. The case of the first party, thereafter, proceeds that Mosammat Sokrania became the owner of the property left by Goga Mahto and enjoyed possession over it. Mosammat Sokrania, who is still a minor, was married to Ramayan Mahto, son of Bacha Mahto, one of the members of the first party to the proceeding, and it is Bacha Mahto who has been looking after the property on behalf of his minor daughter-in-law Mosammat Sokrania. On these facts, Bacha Mahto claimed to be in khas possession of about 1 bigha of the lands in dispute on behalf of Mosammat Sokrania, and the rest of the lands through *bataidars* who are the other members of the first party.

The claim of the second party is that the lands in question have been coming in possession of one Jag Mahto and in the following circumstances. It is not denied that Lal Parikha and Bhoj had separated from their other brothers and were living jointly. It is

1953.

LANGAR v. BACHA.

JAMUAR, J.

also not denied that on the death of Lal Parikha, Bhoj came into possession of the property and, after him, his son Goga. It is, however, the case of the second party that, as Goga Mahto had no male issue, and since he and his wife Mosammat Sundari became crippled and invalid due to old age, Goga Mahto adopted Jag Mahto and, thereafter, Jag Mahto began to look after the affairs as the adopted son of Goga and came into possession of the property. It may be stated that Jag Mahto is a grandson of Bhicha Mahto, one of the brothers of Lal Parikha and Bhoj who had separated from him.

The learned Magistrate went into the question whether Jag Mahto had been adopted by Goga Mahto and he came to the conclusion that the story of adoption set up by the second party was false. The learned Magistrate concluded his order by finding that Mosammat Sokrania was in possession of the lands in dispute through her father-in-law, Bacha Mahto of the first party, in accordance with the case of the first party. The learned Magistrate, furthermore, under the provisions of sub-section (3) of section 148 of the Code of Criminal Procedure, ordered Jag Mahto to pay to the first party a sum of Rs. 250 towards the expenses incurred in respect of witnesses and pleader's fee to cover part of the cost incurred by the first party.

Mr. Kameshwar Dayal, who has appeared in support of this application, contended, in the first place, that Mosammat Sokrania ought to have been made a party to the proceeding and, by reason of her non-joinder, the entire proceeding has been vitiated and was without jurisdiction. His argument was that, since it was Mosammat Sokrania who, according to the first party, had come in possession of the lands after the death of her father Goga Mahto, she ought to have been made a party to the proceeding. I had

stated that Mosammat Sokrania is a minor and it was her father-in-law, Bacha Mahto, a member of the first party, who claimed to be in possession of the property in dispute on behalf of Mosammat Sokrania. In support of his contention, Mr. Kameshwar Dayal relied upon the case of *Jhabu Singh* v. *G. B. Rutherford*(1) in which it was held that an order passed under section 145 of the Code of Criminal Procedure in favour of a Manager, who was an employee of the proprietors of an indigo concern, was without jurisdiction. The argument was that, since the proprietors were not made parties to the proceeding, the order was without jurisdiction. Mr. Kameshwar Dayal also relied upon the case of *Behary Lall Trigunait* v. *Darby*(2). In this case, the proceedings were instituted against a person who happened to be the *karpardaz* of a lady and her children. The lady and her children had not been made parties to the proceeding. It was observed that the dispute was really not between the *karpardaz* and the other side but between the lady and her children on the one side and the second party on the other side and it was held that, in the circumstances, the proceedings were bad and were set aside. Mr. Rai Indra Bihari Saran, who has appeared for the opposite party, placed before us the case of *Dhondhai Singh* v. *Follet*(3) in which both the cases relied upon by Mr. Kameshwar Dayal were considered. The case in I. L. R. 31 Calcutta 48 is a Full Bench decision. With regard to the case of *Jhabu Singh*(1), their Lordships observed as follows:—

"No doubt, the case of *Jhabu Singh* v. *Rutherford*(1) is an authority to the contrary, but, speaking with every respect to the view there expressed, I think on a careful consideration of the language of the section, it is difficult to sustain that view."

(1) (1902) 7 Cal. W. N. 208.
(2) (1894) I. L. R. 21 Cal. 915.
(3) ((1903) I. L. R. 31 Cal. 48, F. B.

1953.

LANGAR v. BACHA.

JAMUAR, J.

In this Full Bench case, their Lordships were considering the question whether there was jurisdiction in the Court under section 145 of the Code of Criminal Procedure to make an order in favour of a person who claimed to be in possession of the disputed land, as agent to, or manager for, the proprietors, when the actual proprietors were not residents within the appellate jurisdiction of the High Court. Their Lordships rejected the contention that there was no jurisdiction in the Magistrate in the circumstances just stated and, with regard to the case of *Jhabu Singh*(1), they were clearly unable to accept the opinion expressed therein. The other case relied upon by Mr. Kameshwar Dayal, namely, the case of *Behary Lall Trigunait*(2), was also considered in the Full Bench case and it was distinguished by the observation that in that case it was not held that there was no jurisdiction in the Court to deal with a case such as the present one. I see no reason for holding the view that in the circumstances of the case before us, namely, Mosammat Sokrania being a minor and her property being looked after on her behalf by her father-in-law Bacha Mahto, a member of the first party, and Bacha Mahto claiming the lands in dispute not on his own behalf but on behalf of Mosammat Sokrania, the proceedings ought to be held to be without jurisdiction. It was, however, suggested that in some later litigation, complications may arise from the fact that Mosammat Sokrania was not made a party to the present proceedings, but I do not think that any such difficulty would be created in any subsequent proceeding, as the claim of Bacha Mahto is only stated to be as that of a guardian of his minor daughter-in-law, Mosammat Sokrania. In my opinion, although the possession of Bacha Mahto is merely as an agent or a guardian and is not the possession of a proprietor, yet his posssession is such

(1) (1902) 7 Cal. W. N. 208.
(2) (1894) I. L. R. 21 Cal. 915.

1953.

LANGAR
v.
BACHA.

JAMUAR, J.

possession as, in my opinion, is contemplated by section 145 of the Code of Criminal Procedure. In these circumstances, I do not think the order made under this section in favour of Bacha Mahto finding possession with him on behalf of Mosammat Sokrani can be said to be without jurisdiction.

Mr. Rai Indra Bihari Saran also referred to the case of *Bholanath Singh* v. *Wood*(1) wherein it has been held that the fact that the manager, and not his employer, namely, the zamindar, has been made a party to a proceeding under section 145 of the Code of Criminal Procedure is a mere irregularity, or at most an error of law, which does not affect the Magistrate's jurisdiction. In this case also, the argument was that the Magistrate had no jurisdiction to proceed where the manager was made a party and not his employer, the landlord, and the contention was answered by the observation that the course adopted by the Magistrate would be a mere irregularity, or at most an error of law which does not affect his jurisdiction. Another case relied upon by Mr. Rai Indra Bihari Saran is the case of *Jatan Singh* v. *Dukhia Singh*(2). It was held in this case that the failure of a Magistrate to add a particular person as a party to the proceedings under section 145 does not involve an absence of jurisdiction in the Magistrate to hear the parties and arrive at a determination as to which of the parties is entitled to possession of the land in dispute. Accordingly, on a review of the cases cited before us, I am of the opinion that the contention advanced on behalf of the petitioners that the proceedings in the present case were without jurisdiction ought not to be sustained.

Mr. Kameshwar Dayal then argued that the order passed by the learned Magistrate in respect of the

(1) (1904) I. L. R. 32 Cal. 287.
(2) (1917) A. I. R. (Pat.) 264.

1953.

LANGAR v. BACHA.

JAMUAR, J.

award of costs to the first party should be set aside on the ground that the learned Magistrate, while awarding the costs had not entered into the determination of the question as to what was the actual amount of costs incurred by the first party. In support of this contention, reliance was placed on the case of *Jhaman Mahton* v. *Thakuri Mahton*(1). This is a decision of a learned Single Judge and it was held that, while awarding costs under section 148 of the Code of Criminal Procedure to the successful party, the order should be based on proper materials, namely, the actual costs incurred as pleaders' fees and costs of witnesses. A similar view was taken in the case of *Manglu Sahu* v. *Ramdhani Tamboli*(2). The decision in the latter case was based upon the former case and it is also a decision of a learned Single Judge. Mr. Rai Indra Bihari Saran contended that on the true interpretation of sub-section (3) of section 148 of the Code of Criminal Procedure, it would be wrong to hold that an inquiry must always be held regarding the actual costs which have been incurred by the successful party. Sub-section (3) of section 148 gives, in my opinion, a very wide discretion in the Magistrate for the assessment of the amount of costs and the only restriction which this sub-section appears to place upon the Magistrate's discretion is that the costs must be reasonable. I do not think that, on the wording of sub-section (3) of section 148 of the present Code of Criminal Procedure, it can be said that an inquiry has to be made for the purposes of finding out as to what were the actual costs incurred by the successful party for assessing the amount of costs to be awarded to him.

The case of *Jhaman Mahton*(1) was decided prior to the amendment of sub-section (3) of section 148 of the Code of Criminal Procedure in 1923. Prior to

(1) (1920) 1 Pat. L. T. 369.
(2) (1928) 9 Pat. L. T. 855.

1953.

LANGAR
v.
BACHA.

JAMUAR, J.

this amendment, the Magistrate could award costs incurred by the party for witnesses and pleaders' fees only and had no power to award any other costs. In these circumstances, the Magistrate had to inquire as to what were the costs incurred in respect of witnesses or pleaders' fees, or both. Under the present Code the power to award costs is extended to other incidental costs as well and costs in respect of witnesses and pleaders' fees may be included. I do not think, therefore, that the case of *Jhaman Mahton*(1) can govern the present case. And the case of *Manglu Sahu*(2), though decided after the amendment of 1923, followed the earlier decision in *Jhaman Mahton's case*(1) and the amendment was not noticed.

In a case of the Allahabad High Court [*Brij Pal Singh* v. *Ram Naresh Singh*(3)], it was observed that it would be extremely difficult to prove the exact sum spent in costs in a semi-criminal case such as one under section 145 of the Code of Criminal Procedure, and it was further stated that in such cases the Court may very well use its discretion in awarding an amount which it considers reasonable. I do not, therefore, think that the learned Magistrate in the present case has wrongly exercised his judicial discretion in the matter of awarding costs. He was clearly aware that pleader's fees and witnesses' costs may be taken into consideration. In my opinion, the learned Magistrate has committed no error of law by not having held an inquiry regarding the actual amount of costs incurred in the case by the first party. He has, in my judgment, exercised his discretion within the terms of sub-section (3) of section 148 and the amount awarded by him is not unreasonable.

The only other point pressed by Mr. Kameshwar Dayal was that the learned Magistrate ought not to have

(1) (1920) 1 Pat. L. T. 365.
(2) (1928) 9 Pat. L. T. 835.
(3) (1932) A. I. R. (All.) 325.

1953.

LANGAR v. BACHA.

JAMUAR, J.

gone into the question regarding the adoption of Jag Mahto by Goga Mahto, as this involved a question of title to the property, and the learned Magistrate was really concerned with the actual possession of the property. I have stated that it was the case of the second party, the petitioners themselves, that the property in dispute is in possession of Jag Mahto by reason of his having been adopted by Goga Mahto as Goga Mahto had no male issue. In the circumstances of this case, I do not think that the learned Magistrate committed any error in examining the evidence adduced by the parties in respect of this question of adoption and I am of the opinion that no error of law has been committed in this regard.

For these reasons, I would dismiss this application and discharge the rule.

SAHAI, J.—I agree.

Rule discharged.

K. D.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sinha, JJ.

1953.

July, 13, 14, 15, 16.

NAZMA KHATOON

v.

CUSTODIAN, EVACUEE PROPERTIES, BIHAR.*

Administration of Evacuee Property Act, 1950 (Act XXXI of 1950), section 26(2), scope of—an order under the Act, whether can be reviewed—order passed behind the back of the person whom it affects, effect of—Constitution of India, Article 226, scope of—application for writ where other remedy open—applicant, whether entitled to a writ.

*Miscellaneous Judicial Case nos. 11 and 12 of 1953, in the matter of applications under Articles 226 and 227 of the Coustitution of India and in the matter of the Administration of Evacuee Property Act, 1950 (Act XXXI of 1950).

1953.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

The expression " review " used in section 26(2) of the Administration of Evacuee Property Act, 1950 must be construed not in a grammatical sense but it must be construed to have the same legal meaning as in Order 47, rule 1, of the Code of Civil Procedure, 1908.

Held, therefore, on an application under Article 226 of the Constitution that an order under section 26(2) of the Administration of Evacuee Property Act, 1950 reviewing an order passed under the Act on the same materials on which the order under review was based is without jurisdiction and the applicant is entitled to a *writ* of *certiorari* for quashing the order.

Chhaju Ram v. *Neki*(1), *Charles Bright & Co.* v. *Sellar*(2) and *L. P. E. Pugh* v. *Ashutosh Sen*(3), relied on.

Held, further, that it is a fundamental principle of justice that the party against whom a judgment or order is to operate should have an opportunity of being heard and a breach of this rule affects the jurisdiction of the Court or Tribunal which passes final order.

Capel v. *Child*(4), relied on.

Held, also, that as a general rule, an application for a *writ* of *certiorari* or prohibition will not lie when there is an alternative procedure by way of appeal or revision provided in the statute. But there is an exception in a case where the want of jurisdiction complained of is based upon violation of some fundamental principles of justice. In such an exceptional case, the existence of a remedy by way of appeal or revision is no answer to an application asking for a *writ* of *certiorari* or prohibition under Article 226 of the Constitution.

King v. *North*(5), relied on.

Applications under Articles 226 and 227 of the Constitution of India.

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

(1) (1922) L. R. 49 Ind. App. 144.
(2) (1904) 1 K. B. D. 6.
(3) (1928) L. R. 56 Ind. App. 93.
(4) (1832) 2 Cr. & J. 558, 579, 580.
(5) (1927) 1 K. B. D. 491.

1958.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

Baldeva Sahay and *S. S. Asghar Hussain*, for the petitioners.

The Advocate-General, for the opposite party.

RAMASWAMI AND SINHA, JJ.—In these two applications, which were heard together, a common question of law arises, namely, whether the Custodian, Mr. R. P. Singh acted in excess of his jurisdiction in setting aside the order of his predecessor, Mr. S. N. Ray, dated the 29th of September, 1950.

On the 12th of August, 1949, the petitioners purchased a house, namely, holding no. 98 of ward no. 3 of Gaya town from Mosammat Bibi Akbari Khatoon and her sister Mosammat Bibi Asghari Khatoon. The sale-deed was executed on behalf of Bibi Asghari Khatoon by Maulvi Abdul Rashid, her father-in-law, who had a general power of attorney on her behalf. The power of attorney was executed by Bibi Asghari Khatoon on the 7th of July, 1949. It is material to state that on the 21st of June, 1949, the Bihar Administration of Evacuee Property Ordinance, 1949, came into force. Section 25 of the Ordinance imposed certain restrictions on the right of transfer of evacuee properties made on behalf of evacuees after the 31st of March, 1947, and section 26 of the Ordinance granted power to the Provincial Government to prohibit transfer of immovable properties or any part thereof in certain specified areas. On the 24th of August, 1949, a notification was published by the Provincial Government, under section 26 of the Ordinance, prohibiting transfer of any immovable property belonging to a Muslim and situated in the Province but not in the rural areas of Chota Nagpur for a period of three months except with the previous approval in writing of the Collector of the district in which the property or the greater part thereof was situated. On the 21st of September, 1949, the petitioners applied, under section 25 of the Ordinance, to

1958.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

RAMASWAMI AND SINHA, JJ.

the Custodian for confirmation of the sale of the house so far as the share of Bibi Asghari Khatoon was concerned. The application was rejected by the Deputy Custodian, Mr. Aikat, who was under the wrong impression that the application was for permission to sell the interest of Bibi Asghari Khatoon. On the 29th of September, 1949, Mosammat Bibi Asghari Khatoon was declared to be an evacuee. A fresh application was made on the 7th of October, 1949, by the petitioners for confirmation of the sale. Mr. S. P. Singh who was the Deputy Custodian at the time refused confirmation of the sale on the ground that the sale-deed was executed after Bibi Asghari Khatoon had gone over to Pakistan. Mr. S. P. Singh also considered that, the earlier petition having been rejected by the Deputy Custodian, a second petition was not maintainable on the same point. An appeal was taken on behalf of the petitioners to the Custodian, who, by his order dated the 29th of September, 1950, set aside the order of Mr. S. P. Singh and confirmed the sale so far as the eight annas share of Bibi Asghari Khatoon was concerned. In course of his order, the Custodian, Mr. S. N. Ray, stated:

> "The principles for consideration in the matter of confirming a transaction are whether the transaction is *bona fide* and is for valuable consideration. In the present case Rs. 25,000 in cash which is certainly a valuable consideration was paid as the consideration money in presence of the Sub-Registrar before whom the sale-deed was executed and registered. The appellant has also produced Pass Books which support the fact of payment. Vendors and vendees are admittedly not related. Mr. B. B. Singh, Additional District Magistrate, Gaya, who was also acting as District Magistrate for some time made a personal enquiry into the matter and by his order dated the 24th October 1949 he held this transaction as *bona fide*. In view of the above facts I am of opinion that the transaction in question was *bona fide* and was for valuable consideration."

On the 10th of December, 1952, after lapse of more than two years, Mr. R. P. Singh, who had become Custodian, issued a notice to one of the petitioners to show cause why the order of his predecessor, Mr. S. N. Ray, should not be reviewed, and

1953.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

RAMASWAMI AND SINHA, JJ.

the order of confirmation of the sale should not be set aside. It is important to state that no notice was given to the petitioner Bibi Nazma Khatoon. The other petitioner appeared before the Custodian on the 18th of December, 1952, and, after hearing his lawyer, Mr. R. P. Singh set aside the order of his predecessor on the ground that the transaction of sale was *mala fide*.

In this state of facts, the question arises whether Mr. R. P. Singh acted in excess of his jurisdiction in setting aside the order of his predecessor dated the 29th of September, 1950. The argument of Mr. Baldeva Sahay, who appears on behalf of the petitioners, is that, upon a reconsideration of the same material, Mr. R. P. Singh had no jurisdiction to review and set aside the order of Mr. S. N. Ray. The objection taken by learned Counsel is that the power of review conferred by section 26(2) of the Administration of Evacuee Property Act cannot be exercised by the Custodian unless there is discovery of new and important matter or evidence, or there is some mistake or error apparent on the face of the record or for any other analogous reason. The contention on behalf of the petitioners is that Mr. R. P. Singh had not acted on any new and fresh matter or evidence, but considered the very same materials which were the basis of the order of his predecessor, Mr. S. N. Ray, dated the 29th of September, 1950. On a reconsideration of the same material, Mr. R. P. Singh had come to a different conclusion, namely, that the transaction of sale on behalf of Bibi Asghari Khatoon was a transaction vitiated by *mala fides*. It was pointed out by the learned Counsel that Mr. S. N. Ray based his order on the ground that there was full consideration paid for the transaction and that the consideration money was paid before the Sub-Registrar at the time of the registration of the sale-deed and

further that the petitioners had produced evidence to support the fact of payment. Mr. S. N. Ray referred to the circumstance that Mr. B. B. Singh, Additional District Magistrate of Gaya, had made personal enquiry into the matter and had concluded that the transaction was *bona fide*. There was also the admitted fact that the parties to the transaction were not related in any way. In view of these circumstances, Mr. S. N. Ray held that the transaction of sale was *bona fide*, and for valuable consideration and the transaction must, therefore, be confirmed. By his order dated the 18th of December, 1952, Mr. R. P. Singh has set aside the order of Mr. S. N. Ray but there was no fresh material before Mr. R. P. Singh upon which he could reach the finding that the transaction was *mala fide*. The argument of Mr. Baldeva Sahay is that, upon the same materials, Mr. R. P. Singh was not entitled to re-open the order of his predecessor and to come to a different conclusion of fact. The opposite view is maintained by the Advocate General who contended that the power of review was unrestricted and the Custodian was entitled to exercise the power of review even when there was no fresh material or even when there was no mistake or error apparent on the face of the record. In other words, the argument is that the expression "review" must be construed in the plain or grammatical sense. The question at issue depends upon the true interpretation of section 26(2) of the Administration of Evacuee Property Act which states:

> "The Custodian, Additional Custodian or Authorised Deputy Custodian (but not a Deputy or an Assistant Custodian) may, after giving notice to the parties concerned, review his own order."

Section 26(3) confers the power of review in case of a declaration made with respect to an intending evacuee. Section 26(3) states,

1953.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

RAMASWAMI AND SINHA, JJ.

"The Custodian, Additional Custodian or Authorised Deputy Custodian may from time to time, on application made to him in this behalf, review any declaration made by him in relation to any intending evacuee:".

The conditions in which the power of review should be exercised are not expressly mentioned in section 26(2) or section 26(3) of the Administration of Evacuee Property Act. But there are important considerations which support the view that the power of review is not unrestricted. Chapter V of the Administration of Evacuee Property Act is entitled "Appeals, Review and Revision". There are provisions in this chapter which relate to these three modes of proceeding. The statute, therefore, contemplates a procedure by way of review by the Court which has already given judgment to be different from a procedure by way of appeal or revision to a different Court. The same distinction appears in the Code of Civil Procedure wherein Order 47, rule 1, prescribes in what circumstances an application for review of judgment may be made. Order 47, rule 1, provides that an application for review may be made if there is discovery of new and important matter or evidence or if there is mistake or error apparent on the face of the record or for any other sufficient reason. It has been pointed out by the Judicial Committee in *Chhajju Ram* v. *Neki*(1) that the power of review given to the Indian Courts was different from the very restricted power of review given to the English Courts. There an application for review can, in certain circumstances, be entertained if there is error of law appearing in the body of the decree or when there is any fresh or new matter discovered after the passing of the decree. The scope of the power of review in

(1) (1922) L. R. 49 Ind. App. 144.

English Courts has been discussed in *Charles Bright and Co.* v. *Sellar*(1) where the history of procedure in England has been explained. It is manifest, therefore, that the expression " review " has a well known legal significane, and section 26(2) of the Administration of Evacuee Property Act must be construed in the context and background of the Code of Civil Procedure where the same expression has been used. It is a familiar rule of construction that when the legislature has deliberately used a term which has a known legal significance in law, it must be taken that the legislature has attached to that term that known legal significance [See *L. P. E. Pugh* v. *Ashutosh Sen*(2)]. In our opinion, the expression " review " used in section 26(2) of the Administration of Evacuee Property Act must be construed not in a grammatical sense but it must be construed to have the same legal meaning as in Order 47, rule 1, of the Code of Civil Procedure. If this view is right, it follows that Mr. R. P. Singh had no jurisdiction to review the order of his predecessor, Mr. S. N. Ray, in absence of any fresh material or in the absence of any mistake or error apparent on the face of the record. In this view of the matter, the petitioners would be entitled to a *writ* of *certiorari* for quashing the order of Mr. R. P. Singh dated the 18th of December, 1952, on the ground that he acted in excess of his jurisdiction.

There is another important ground on which the order of Mr. R. P. Singh has been impeached. It was alleged on behalf of the petitioners that no notice of the proceeding was given to Bibi Nazma Khatoon. In absence of such notice, the contention on behalf of the petitioners is that the entire proceeding initiated by Mr. R. P. Singh suffers from want of jurisdiction.

(1) (1904) 1 K. B. D. 6.
(2) (1928) L. R. 56 Ind. App. 93.

1953.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

RAMASWAMI AND SINHA, JJ.

It is conceded on behalf of the opposite party that no notice was given to Bibi Nazma Khatoon. It is a fundamental principle of justice that the party against whom a judgment or order is to operate should have an opportunity of being heard. The principle is embodied in the maxim *Audi Alteram Partem*. That is the general rule, and a breach of this rule affects the jurisdiction of the Court or Tribunal which passes final order. To illustrate the rule, reference may be made, for instance, to *Capel* v. *Child*(1) in which a complaint was made to the Bishop of London that the incumbent of a parish in his diocese had neglected his duties. The Bishop, without calling upon him to show cause, issued a requisition ordering him to nominate a curate at a certain stipend to assist in the duties of the parish. The incumbent ignored the order whereupon the Bishop appointed a curate, and, upon the incumbent neglecting to pay the stipend, directed sequestration. The incumbent brought an action against the sequestrators for fees detained, and as a special case stated for the opinion of the Court of Exchequer it was held that the requisition and the proceeding founded on it were void. In the present case, therefore, the order of review made by Mr. R. P. Singh must be held to be without jurisdiction on the ground that no notice was served upon Bibi Nazma Khatoon who had purchased a share of the house in question.

In the course of argument, the question was much discussed whether the power of the High Court under Article 226 of the Constitution can be invoked in a case where the petitioner has an alternative remedy by way of revision or appeal. It was pointed out on behalf of the opposite party that the petitioners had filed an application for revision before the Custodian-General against the order of review. As a general rule, the

(1) (1882) 2 Cr. and J. 558, 579, 580.

writ of *certiorari* or prohibition will not lie when there is an alternative procedure by way of appeal or revision provided in the statute. But there is an exception in a case where the want of jurisdiction complained of is based upon the violation of some fundamental principle of justice. In such an exceptional case, the existence of a remedy by way of appeal or revision is no answer to an application asking for a *writ* of *certiorari* or prohibition. In the *King* v. *North*(1) Scrutton, L.J. States:

"The other objection raised by the Divisional Court was that there was a right of appeal, and that where an appeal lay there could be no prohibition. But the case to which Atkin, L.J. has referred us. White *v.* Steele [12 C.B. (N.S.) 383] appears to be a distinct answer to that. The Judgment of Wiles, J. showed that in the opinion of a very strong Court the fact of there being a right of appeal was not necessarily fatal to the claim for prohibition. In Martin *v.* Mackonochie (4 Q.B.D. 697, 732). Thesiger, L.J., dealing with this question, said that error of the Judge in the conduct of the suit, in the pronouncement of the sentence, or in the means of its enforcement is matter in respect of which appeal and not prohibition would be the proper remedy 'unless his error involves the doing of something which, in the words of Littledale J. in Ex parte Smyth (3. Ad. & E. 719) is 'contrary to the general laws of the land', or, to use the language of Lush, J. in the Court below, is 'so vicious as to violate some fundamental principle of justice'. And as I have already said, to order a man to pay what is in the nature of a penalty for an offence without first giving him notice that an application for such an order is going to be made, is both contrary to the general law of the land, and is so vicious as to violate a fundamental principle of

(1) (1927) 1 K. B. D. 491.

1953.

NAZMA KHATOON v. CUSTODIAN, EVACUEE PROPERTIES, BIHAR.

RAMASWAMI AND SINHA, JJ.

justice. The case therefore falls within the exceptions to the general rule."

In view of these considerations, we make the rules absolute and grant a *writ* of *certiorari* quashing the order of the Custodian, Mr. R. P. Singh, dated the 18th of December, 1952. There will be no order as to costs of hearing of these applications.

Rule made absolute.

S. H.

REVISIONAL CRIMINAL.

Before Jamuar and Sahai, JJ.

K. N. CHOUDHARY

v.

STATE.*

1953.

July, 13, 14. 24.

Criminal Trial—bail bond by surety only—accused not appearing—surety's liability—Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 514—*Penal Code,* 1860 (*Act XLV of* 1860) *section* 174.

When a bail bond is only taken from the surety, the person for whom that bail bond is executed cannot be directed to pay the penalty or any portion thereof, as he cannot be said to have been guilty of any disobedience within the meaning of section 514 of the Code of Criminal Procedure, 1898. Failure by an accused, who is legally bound to attend in person or by an agent, so as to attend will render him liable to punishment under the provisions of section 174 of the Penal Code, 1860 and no question of forfeiture of any bond can arise.

*Criminal Revision no. 952 of 1952, against an order of Mr. D. P. Mallik, Subdivisional Magistrate, Sadr, Bhagalpur, dated the 16th July, 1952, an application against which order was dismissed by Mr. S. C. Roy, District Magistrate, Bhagalpur, on the 11th September, 1952.

1953.

K. N. CHOUDHARY v. STATE.

When an accused person has been released on bail merely on the undertaking of the surety and a bond is executed by the surety, without the accused having been required to execute a personal bond, it may be that the officer or the court has acted in an irregular manner and the accused should not have been released on bail but that fact cannot in any way affect the liability of the surety who had undertaken to produce the accused before the court on the date or dates mentioned in the bond;

Held, therefore, that the surety was liable to pay the penalty imposed on him under section 514 of the Code of Criminal Procedure.

Baidyanath Misra v. *Emperor*(1), over-ruled.

Nisar Ahmad v. *Emperor*(2) and *Abdul Aziz* v. *Emperor*(3), relied on.

Brahma Nand Misra v. *Emperor*(4), *Wadhawa Singh* v. *Emperor*(5), *Indar* v. *Emperor*(6), *Chamra Meher* v. *State of Orissa*(7) and *Govinda Chandra* v. *State*(8), not followed.

Application in revision by the accused and the surety.

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

The case in the first instance came before Sinha, J., and he referred it to a Division Bench.

On this reference—

Baldeo Singh, *M. M. Gajadhar* and *Umesh Chandra Sharma*, for the petitioners.

The Standing Counsel, for the State.

JAMUAR, J.—This application has been referred to a Division Bench as its decision involves questions of some importance.

(1) (1947) A. I. R. (Pat.) 58.
(2) (1945) A. I. R. (All.) 389.
(3) (1946) A. I. R. (All.) 116.
(4) (1939) A. I. R. (All.) 682.
(5) (1928) A. I. R. (Lah.) 318.
(6)(1940) A. I. R. (Lah.) 339.
(7) (1951) A. I. R. (Orissa) 179.
(8) (1951) A. I. R. (Orissa) 18.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

The facts are simple. On the 6th June, 1952, the Sub-Inspector of Gopalpur Police-Station reported for action under section 107 of the Code of Criminal Procedure against some persons of the first party as also against petitioners 1 to 13 as the second party. On the next day, the Subdivisional Magistrate of Bhagalpur drew up proceedings accordingly. We are concerned in this application with petitioners 1 to 13 who were members of the second party. Bailable warrants of arrest were issued for the appearance of these petitioners before him on the 26th June, 1952. These warrants are said to have been served upon these petitioners, and were returned on the 17th June, 1952. At this stage, it should be stated that petitioner no. 14, Janardan Prasad Choudhary, executed a bond standing as surety for the production of four out of petitioners 1 to 13 in the Court of the Magistrate on the 26th June, 1952, and he stated in this bond that—

" if I fail to produce them I shall pay to the Government rupees one thousand for each accused as fine. "

Upon this bond, those four petitioners also put their signatures, presumably, by way of attestation.

Petitioners 1 to 13, however, did not appear before the Magistrate on the 26th June, 1952, as required. The Subdivisional Magistrate, accordingly, took proceedings under section 514, Criminal Procedure Code, for the forfeiture of the bonds. All the fourteen petitioners showed cause before the Magistrate, which was not accepted as satisfactory. The bond executed by petitioner no. 14, Janardan Prasad Choudhary, the bailor for four of the other petitioners, was ordered to be forfeited, and he was ordered to pay a penalty of Rs. 200 in respect of each of the four persons for whom he had stood surety. The other thirteen petitioners, against whom bailable warrants of arrest had been issued, were also ordered to pay a penalty of Rs. 200 each for having failed to appear in Court on the date fixed.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

The points raised in support of this application were twofold: it was argued, in the first place, that the thirteen petitioners, against whom bailable warrants of arrest had been issued, had executed no bond at all which would be forfeited, nor had they given any undertaking to appear in the Court of the Magistrate on the 26th June, 1952, and that, therefore, in these circumstances, the order of the learned Magistrate to the effect that they should pay a penalty of Rs. 200 each for their non-appearance in Court on the date fixed is invalid and illegal, and, in the second place, that, as there was no valid bond or undertaking given by those thirteen petitioners, there could have been no valid bond taken from the surety of any of them for his production in Court. The second question is referable in the present case to petitioner no. 14, the bailor, only.

So far as the first question is concerned, it affects the order passed by the Magistrate against petitioners 1 to 13. Under sub-section (1) of section 514 of the Code of Criminal Procedure, it is provided that, whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or, when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid, and by sub-section (5) the Court has been given discretion to remit any portion of the penalty mentioned in the bond and enforce payment in part only. From the record of this case, it no where appears that any bond was executed by any of the first thirteen petitioners for their appearance in Court. What has happened is that the sureties executed bonds, and the persons for whom they stood surety put their signatures upon the bonds. In this state of affairs, all that can be said is that the sureties undertook to produce the persons for whom they stood

1958.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

sureties before the Magistrate on a particular date, but none of the persons for whom they stood surety had himself given any bond for his appearance on that date. Where a bail bond is only taken from the surety, the person for whom that bail bond is executed cannot be directed to pay the penalty or any portion thereof, as he cannot be said to have been guilty of any disobedience. It was sought to be argued for the State that the fact that such a person put his signature upon the bond would show that he was aware that he was to appear before a particular Magistrate at a certain place and on a certain date, and that, for his failure to do so, he can be penalised. If this argument were correct, the question arises—penalised to what extent? In the particular case before us, the surety had stated in his bond that he would pay a sum of Rs. 1,000, if he failed to produce a particular accused, as penalty. Can the argument be stretched to the extent that it would mean that the accused who signed that bond executed by the surety also undertook to pay a sum of Rs. 1,000 as penalty, if he did not appear as directed? I do not think that such an argument can be accepted. Failure by an accused, who is legally bound to attend in person or by an agent, so to attend will render him liable to punishment under the provisions of section 174, Penal Code. But no question of forfeiture of any bond can arise, as no bond has been executed by the accused. The fact that an accused has attested a bond executed by his surety will only amount to an information to the accused about the execution of such a bond. I am, therefore, of the opinion that, since no bond was taken from any of the first thirteen petitioners for their appearance in Court on the 26th June, 1952, the provisions of section 514, Criminal Procedure Code, cannot apply. The order passed against them requiring them to pay a penalty of Rs. 200 each must, accordingly, be set aside.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

The next question, as I have stated already, is confined to the case of petitioner no. 14 who stood surety for four of the other petitioners, and it was contended that, as those four petitioners had themselves not executed any bond for their appearance in Court, the bond executed by this surety cannot be effective or valid, as the two bonds, namely, the one executed by the person released on bail and the other executed by the surety, are interdependent, and cannot be dealt with separately. This argument was advanced upon the wording of sub-section (1) of section 499 of the Code of Criminal Procedure which is in the following terms:—

"Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be."

It seems that different views have been taken in this connection by some of the High Courts. The decision of a single Judge of this Court in the case of *Baidyanath Misra* v. *Emperor*(1) was placed before us in support of the view advanced on behalf of this petitioner. It is necessary to examine the view expressed in this Patna case first. The bond which is usually taken in such cases is in Form no. III of Schedule V of the Criminal Procedure Code. The first part of the bond is to be executed by the accused, and the second part by the surety. In the Patna case, the first part of the bond, which has to be given by the accused himself, was cancelled by scoring through, and the second part, which is meant for the surety, was signed by the surety. It was contended in that case on behalf of the surety that there was no such bond as is contemplated by the Code of Criminal Procedure, and, therefore, there was no power in the Code to forfeit such

(1) (1947) A. I. R. (Pat.) 58.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

a bond, and the contention was accepted. It was held that the provisions of section 499 as to the nature and contents of a bond are imperative, and it was incumbent under the section to get a bond executed by the person released on bail, and, in the absence of such a bond, there can be no valid bond by the surety alone, as a bond by the surety alone is not contemplated by the Code, and there was no power in the Code to forfeit such a bond. This view was based upon an earlier case of the Allahabad High Court, namely, *Brahma Nand Misra* v. *Emperor*(1). It was upon the basis of this decision of the Allahabad High Court that the Patna case was decided. On behalf of the State, it was argued in the present case that the decision of the learned single Judge of this Court in the case of *Baidyanath Misra* v. *Emperor*(2) is not correct, and should be overruled, the proper view to take being that the bond executed by the person released and the bond executed by the surety, though the two may be on the same form, are separable and not interdependent. The decision of the Allahabad High Court in *Brahma Nand Misra* v. *Emperor*(1) is also that of a single Judge. This decision does not, however, appear to have been followed by the same High Court in subsequent years. In the case of *Nisar Ahmad* v. *Emperor*(3) which is also a decision of a single Judge, the learned Judge expressed the opinion that he did not feel inclined to agree with the view expressed in the earlier Allahabad case, and he stated that if he were not in favour of the applicant on other points, he may have found it necessary to refer the case to a larger Bench, as " with great respect and with a certain amount of diffidence, I do not feel inclined to agree with the view expressed in that case [namely, the case of *Brahma Nand Misra* v. *Emperor*(1) ", and he

(1) (1939) A. I. R. (All.) 682.
(2) (1947) A. I. R. (Pat.) 58
(3) (1945) A. I. R. (All.) 389.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

observed: "The section clearly contemplates two bonds, one by the accused and another by the surety or sureties. The form prescribed by the Criminal Procedure Code in Schedule 5, Form no. 42, also clearly shows that there have to be two bonds, one executed by the accused and the other by the surety, but, to my mind, in a case of this nature the obligation undertaken by the surety is entirely independent ..... The Court may require the accused and the sureties to give bonds for different sums. When, therefore, an accused person has been released on bail merely on the undertaking of the surety and bond is executed by the surety, without the accused having been required to execute a personal bond, it may be that the officer or the Court has acted in an irregular manner and the accused should not have been released on bail, but I do not see how that fact can in any way affect the liability of the surety who had undertaken to produce the accused before the Court on the date or dates mentioned in the bond." In a still later case of the same High Court, namely, *Abdul Aziz* v. *Emperor*(1) the decision given in the case of *Brahma Nand Misra* v. *Emperor*(2) was not followed, and the decision given in the case of *Nisar Ahmad* v. *Emperor*(3) was accepted as being the correct view. The view taken in this later case was that the fact that the person released on bail himself did not sign the bond for his attendance when called upon does not make the bond executed by the surety an invalid one.

Two cases of the Lahore High Court were also brought to our notice: *Wadhawa Singh* v. *Emperor*(4) and *Indar* v. *Emperor*(5). In the former

(1) (1946) A. I. R. (All.) 116.
(2) (1939) A. I. R. (All.) 682.
(3) (1945) A. I. R. (All.) 389.
(4) (1928) A. I. R. (Lah.) 318.
(5) (1940) A. I. R. (Lah.) 339.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR. J.

case it was observed that the terms of a bail bond should be in accordance with Form 42 of the Schedule which indicates what the contents of a bond with sureties should be, and, in order to be enforceable, a bond must be in accordance with the form. Where, therefore, the bond is not in accordance with the form, the person executing the same incurs no legal liability by executing it. It was further observed in this case as follows: " Further it is obvious that there can be no surety without a principal. In the present case no undertaking having been given by Teja Singh to appear when called upon to do so, it is not possible for any person to declare himself surety for his appearance. " With great respect, I do not agree with this observation, for, under the Criminal Procedure Code, there is no question of a principal and a surety. Under this Code, there can be a surety without a principal, in the sense that the surety may undertake to produce a person released on bail, and yet the person so released may not have executed any bond for his own appearance. The view expressed in this case was not approved in the later Lahore case, namely, *Indar* v. *Emperor*(1), in which the learned Judge said: " I do not agree with the reasons by which the learned Judge supported his order. "

The only other case to which we were referred by learned Counsel on behalf of the petitioners was the case of *Chamra Meher* v. *State of Orissa*(2) in which it was also held that a bond executed only by the sureties and not by the accused also is not a bond as contemplated by section 499 (1), Criminal Procedure Code, and, therefore, the summary procedure for forfeiture of the bond provided in section 514 will not be applicable to such a case. This was a Division Bench case decided by Ray, C.J. and Narasimham, J.,

(1) (1940) A. I. R. Lah. 889.
(2) (1951) A. I. R. (Orissa) 179.

1953.

K. N. CHOUDHARY v. STATE.

and it confirmed the view expressed in an earlier case [*Govinda Chandra* v. *State*(1)], decided by Ray, C. J., sitting singly. In this latter Orissa case the bond executed by the surety was a peculiar one. The wording of the bond is really applicable to the accused and not to the surety, for it proceeded as follows: JAMUAR, J.

" We the accused have been called upon to furnish securities with one surety of Rs. 200 each. I, therefore, agree that from today till the disposal of this case I shall appear in Court on 30th December 1949 and on all other dates to which the case is adjourned ..... and in case I fail to appear I shall have to pay Rs. 1,200. If I fail to pay, the State shall realise it by attaching and selling my properties. I execute the *Muchalika* to this effect. "

But it was signed not by the accused but by the surety. It was not signed by any of the accused persons, though the document contained a list of the names of six accused persons. None of the accused persons had, therefore, bound himself to appear in Court on condition of forfeiting any sum of money. The learned Chief Justice observed as follows:

" I cannot conceive that, without an accused himself executing a bond, any surety could be thought of. The very conception behind the word 'surety' and the liability implied in that status as recognised by law is to reimburse the loss sustained by the principal on account of failure of performance on the part of the obligor. The principal (i.e., the State in this case) has double remedy—one against the principal obligor and the other against his surety. Not taking a bond from the accused person to appear on the dates fixed amounts to leaving him to act at his own option. If the accused is not bound to appear, there is no meaning requiring the surety to make him

(1) (1951) A. I. R. (Orissa) 18.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

appear. It is well established in law that if the principal by his laches or otherwise releases the debtor from the liability sought to be assumed by the surety, his remedy against the surety is frustrated."

With very great respect, I think this reasoning confuses the relationship between a principal and a surety in civil law with that between an accused person and his surety or bailor in criminal law. If a bond is not taken from an accused person himself for his appearance in Court, I see no reason why a bond taken from a surety for his production in Court should be held to be invalid. The learned Chief Justice also referred to section 499 of the Criminal Procedure Code, and observed rightly, if I may say so with respect, that the section contemplates two cases: one when the accused is to be released on his own bond and the other when the accused is released on bail. The execution of a bond by the accused is imperative, and, in the case of release of the accused on bail, a bond by sureties has to be executed in addition. But if a bond is not taken from the accused himself but only from a surety, and the accused is released on bail, this would, in my opinion, be an irregularity, but it would not make the bond executed by the surety invalid. The learned Chief Justice accepted the view taken in the case of *Wadhawa Singh* v. *Emperor*(1) but dissented from the view taken in the subsequent case of the same High Court, namely, the case of *Indar* v. *Emperor*(2) in which the opinion expressed in the former Lahore case was not accepted. The learned Chief Justice also dissented from the view expressed in the two Allahabad cases referred to above, namely, *Nisar Ahmad* v. *Emperor*(3) and *Abdul Aziz* v. *Emperor*(4). With regard to the two

(1) (1928) A. I. R. (Lah.) 318.
(2) (1940) A. I. R. (Lah.) 339.
(3) (1945) A. I. R. (All.) 389.
(4) (1946) A. I. R. (All.) 116.

1953.

K. N. CHOUDHARY v. STATE.

JANUAR, J.

Allahabad cases, his Lordship the Chief Justice stated as follows:

"In the Allahabad cases, their Lordships have failed to consider that the accused, remaining at large without executing a bond, cannot be said to have been released on bail. To hold otherwise would amount to setting the imperative provisions of section 499 at naught. If the accused has not been released on bail, and has not undertaken to appear on pain of forfeiture of a bond for a certain amount, the consideration for the surety bond fails and the surety's liability is enlarged or subjected to greater risk than he shall be considered to have undertaken under the provisions of section 499 without his consent. The surety's bond, therefore, becomes unenforceable."

I do not find myself able to accept this view of the law. I have already stated that in such a circumstance all that can be said is that the release of the accused on bail was irregular, and not warranted, but that the position of the surety as expressed in the bond executed by him remains unaltered. Then the learned Chief Justice expressed the view that on principle he was bound, sitting in the Orissa High Court, by the view prevailing in the Patna High Court, and he referred to the view expressed by the learned single Judge in the case of *Baidyanath Misra* v. *Emperor*(1) where it was held that a bond by the surety alone was not contemplated by the Code, and there was no power in the Code to forfeit such a bond. But, as I have already stated, this Patna case was based upon an earlier view of the Allahabad High Court expressed in the case of *Brahma Nand Misra* v. *Emperor*(2) which was dissented from in the later Allahabad cases already noticed.

(1) (1947) A. I. R. (Pat.) 58.
(2) (1939) A. I. R. (All.) 682.

1953.

K. N. CHOUDHARY v. STATE.

JAMUAR, J.

Furthermore, I have already shown that the terms of the bond are terms which are not applicable to a bond executed by a surety but applicable to one executed by the accused. The surety, in the bond executed by him, nowhere stated that he had undertaken to produce the accused in Court on any date. As pointed out by the learned Chief Justice, the bailor was entitled to demand his pound of flesh and to say that, in accordance with the terms of the document, he had appeared on all the dates in Court; the bailor not having failed to make his appearance, though the accused had, the bailor had fulfilled the terms and the conditions mentioned in the bond, and he could not be held liable. He nowhere agreed to be liable to pay any sum of money for the non-appearance of the accused. To forfeit such a bond of a surety for the non-appearance of an accused would, therefore, be scarcely justified.

On a review of the decisions, therefore, I do not feel disposed to follow the opinion expressed in the case of *Baidyanath Misra* v. *Emperor*(1) which was based upon a decision of the Allahabad High Court, which itself was not followed in later cases of the same High Court. I am of the opinion that although the four petitioners, for whom petitioner no. 14, Janardan Prasad Choudhary, stood surety, were improperly released, no bond having been taken from them personally for their appearance in Court, the bond executed by this petitioner for the production of those four men in the Court of the Subdivisional Magistrate of Bhagalpur on the 26th June, 1952, was valid, and that the learned Subdivisional Magistrate was entitled to forfeit it in the circumstances of the case. I, therefore, find no ground for interference with this part of the order of the learned Subdivisional Magistrate.

(1) (1947) A. I. R. (Pat.) 58.

1953.

K. N. CHOUDHARY v. STATE.

In the result, the application of petitioners 1 to 13 is allowed, and the application of petitioner no. 14 is dismissed. The penalty, if paid by petitioners 1 to 13, will be refunded.

SAHAI, J.—I agree.

Order accordingly.

S. H.

REVISIONAL CRIMINAL.

Before Jamuar and Sahai, JJ.

SHAUKAT ALI

1953.

July, 27, 28.

v.

STATE.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 141, 143—*five or more persons sitting together and talking of breaking head of those who would come and demand tax—such assemblage, whether unlawful—" unlawful assembly " explained—Constitution, Article* 226—*interference.*

Where five or more persons meet for deliberation only or to arrange some plans for future action which may be brought into effect individually and not necessarily jointly that would not constitute unlawful assembly.

To constitute an unlawful assembly, the common object of that assembly must be an immediate one to be carried into effect forthwith.

Where five or more persons were sitting and conversing together that they would break the head of those who would demand payment of taxes and that they would keep their party intact;

Held, that there would be no conviction under section 143, Penal Code.

*Criminal Revision no. 1246 of 1952, against an order of Mr. B. Sinha, Subdivisional Magistrate, Bettiah, dated the 22nd September, 1952, rejecting an application in revision against a decision of the Gram Panchayat of village Manwarparsi, P.-S. Shikarpur, dated the 31st January, 1952.

1953.

SHAUKAT ALI v. STATE.

King Emperor v. *Nga Tun Maung*(1), referred to.

Where an order has been passed by a tribunal which is without jurisdiction altogether as a result of grave dereliction of duty and flagrant abuse of any fundamental principle of law, the High Court would interfere under Article 226 of the Constitution.

Nivas Singh v. *Amar Sao*(2), relied on.

Application under Article 226, Constitution.

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

Gorakh Nath Singh and *Shiva Kumar Singh*, for the petitioners.

K. P. Varma, for the State.

JAMUAR, J.—This is an application under Article 226 of the Constitution by which the petitioners challenge their conviction by a bench of the *Gram Cutchery* of Manwarparsi, constituted under the Bihar Panchayat Raj Act, 1947, for an offence punishable under section 143 of the Penal Code and their sentence of one month's rigorous imprisonment each as being without jurisdiction.

The case against the petitioners, who are eight in number, was that in the early hours of the 31st January 1952, that is, at about 3 A.M., they were found in an orchard to the west of village Parsi sitting together and engaged in a conversation. The conversation which was taking place between them was deposed to by two witnesses to have been to the effect that, when the *Mukhia* or *Swayang Sevak* would demand payment of taxes, they would break his head and they were further saying that they should keep their party intact. It was in respect of this conversation only that the conviction of the petitioners under section 143 of the Penal Code has been recorded by the *Gram Cutchery*.

(1) (1925) A. I. R. (Rang.) 362.
(2) (1953) A. I. R. (Pat.) 188.

1953.

SHAUKAT ALI v. STATE.

JAMUAR, J.

A bench of the *Gram Cutchery* has been given concurrent jurisdiction with that of the Criminal Court for the trial of certain offences enumerated in section 62 of the Bihar Panchayat Raj Act, 1947, and amongst the offences so enumerated, there appears section 143 of the Penal Code. The argument in support of this application was that the *Gram Cutchery* can only assume jurisdiction if the facts alleged against the accused constitute one of the offences enumerated in section 62 of the Act and that, if the facts so alleged do not constitute any of those offences, the conviction would be without jurisdiction.

Section 143 of the Penal Code provides punishment for being a member of an unlawful assembly, and an unlawful assembly has been defined in section 141 of the Code as an assembly of five or more persons, if the common object of the persons composing that assembly is one of those mentioned in that section. In the present case before us, the common object is said to have been the third mentioned in the section, namely, " to commit any mischief or criminal trespass or other offences "; and, in the present case, to assault. It appears to have been the case of the prosecution that the petitioners had the common object of committing assault upon the *Mukhia* or *Swayang Sevak* in accordance with the conversation in which they were engaged. I do not think that the mere conversation would show that the petitioners constituted an unlawful assembly. All that they were saying was that, if and when the *Mukhia* or the *Swayang Sevak* would come to demand payment of taxes, his head would be broken. This was, therefore, in contemplation of some event which might or might not happen in future. It seems to me that to constitute an unlawful assembly, the common object of the assembly must be an immediate one to be carried into effect forthwith. If certain number of people meet merely to arrange a

1953.

SHAUKAT ALI v. STATE.

JAMUAR, J.

plan for some future action, on an uncertain event taking place, it cannot be said that they had assembled to carry out some plan forthwith. There should be some present and immediate purpose of carrying into effect the common object. If five or more persons meet for deliberations only or to arrange some plans for future action which may be brought into effect individually and not necessarily jointly that would not constitute an unlawful assembly. I am fortified in this view by the decision of *King-Emperor* v. *Nga Tun Maung*(1). Accordingly, even accepting the evidence adduced in the present case against the petitioners that they were heard saying that, if and when the *Mukhia* or the *Swayang Sevak* would demand payment of taxes, his head would be broken, this circumstance by itself would not constitute them into an unlawful assembly within the meaning of section 141 of the Penal Code.

The bench of the *Gram Cutchery* under the Panchayat Raj Act, as I have said, can only assume jurisdiction to try offences which they have been empowered to try under section 62 of the Act. If the facts found do not constitute any of those offences, they can not, in my opinion, assume jurisdiction to try such a case and, if such a case is tried and an order passed, that order would be, in my opinion, without jurisdiction.

It was contended on behalf of the State that, even if it be so, this Court should not interfere under Article 226 of the Constitution. I think, when an order has been passed by a tribunal, which is without jurisdiction altogether, and, as has been held in several cases, as a result of grave dereliction of duty and flagrant abuse of any fundamental principle of law, this Court would interfere and set aside

(1) (1925) A. I. R. (Rang.) 362.

1953.

SHAUKAT ALI v. STATE.

such an order. This, in my opinion, is the case in the present application before us. A Division Bench of this Court in the case of *Nivas Singh* v. *Amar Sao*(1) interfered and quashed the conviction on the ground that the trial of the petitioners held by the *Gram Cutchery* was without jurisdiction.

I would accordingly allow this application and, holding that the trial of the petitioners was without jurisdiction, quash their conviction and the sentence imposed on them.

SAHAI, J.—I agree.

Application allowed.

K. D.

REVISIONAL CRIMINAL.

Before Jamuar and Sahai, JJ.

S. LAL

v.

STATE.*

1953.

July, 29.

Bihar Cotton Cloth and Yarn (Control) Order, 1948, *clause* 9(1)—*salesman other than licensee, whether liable for contravention of the clause or condition of the license—salesman selling for higher price and refusing to give receipt.*

Only the licensee is liable for contravention of clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948 or for contravening a term of the license. In no case is the salesman, who is not a licensee, liable for contravening the above provisions. Such salesman selling for higher price and refusing to grant cash memo cannot be held liable under the Order.

*Criminal Revision no. 1135 of 1952, against an order of Mr. Sachchidanand, Second Additional Sessions Judge of Darbhanga, dated the 5th November, 1952, confirming an order of Mr. K. P. Chakravarty, Munsif Magistrate, First Class, Samastipur, dated the 18th July, 1952.

(1) (1953) A. I. R. (Pat.) 188.

1953.

S. LAL
v.
STATE.

Sheokaran Lall v. *Emperor*(1), *Emperor* v. *Harish Chandra Bagla*(2) and *Narsing Das Modi* v. *Emperor*(3), relied on.

Ravula Hariprasada Rao v. *The State*(4), referred to.

Application in revision by the accused persons.

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

The case in the first instance came before Misra, J., sitting singly, and he referred it to a Division Bench.

On this reference.

M. Fazal Ali, for the petitioners.

K. P. Varma, for the State.

JAMUAR, J.—This is an application by two petitioners against their convictions under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, for an alleged violation of clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, as also of condition no. 3 of the license issued under that Order. Each of them has been sentenced to rigorous imprisonment for one month and to pay a fine of Rs. 50, and, in default, to further rigorous imprisonment for seven days.

The petitioners are salesmen at a cloth shop owned by one Murlidhar at Hassanpur Bazar of Samastipur. The facts found by the two Courts below are that on the 10th June 1950 one Ajodhya Das went to that shop to buy a pair of dhoties which were priced at Rs. 14-12-0, but the petitioners as salesmen sold the dhoties at Rs. 22, that is, at a price in excess of the controlled price; and, further, when Ajodhya

(1) (1947) A. I. R. (Pat.) 191.
(2) I. L. R. (1945) All. 540.
(3) (1948) A. I. R. (Pat.) 110.
(4) (1951) A. I. R. (S. C.) 204.

asked for a cash memo the petitioners refused to issue it. Mr. Murtaza Fazl Ali who has appeared for the petitioners has contended that in view of the legal position, the petitioners cannot be convicted of any of the offences for which they were prosecuted.

Clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, is as follows:

"No licensee shall sell cloth or yarn at a price higher than that fixed by the Controller."

It was argued that the person in whose name the license had been issued was Murlidhar and that, neither of the two petitioners being a licensee, they could not be punished for any violation of clause 9(1) of the Order in question. With regard to the other charge, namely, the contravention of condition no. 3 of the license, the argument was similar. Condition no. 3 is to the following effect:

"All licensees (except such licensees as have been licensed as hawkers) shall issue to every customer a correct receipt—cash or credit memo, or invoice as the case may be—in which are set forth clearly the name, the licence no., police-station, subdivision and district of the licensee as well as the quantity of cloth ..... the rate charged, the total amount charged and the date of transaction ..... ."

Here again the argument was that the duty to grant a cash or credit memo is cast upon a licensee, and neither of the petitioners being a licensee, they cannot be held to have contravened any such condition.

In my opinion, the contention is sound and must be accepted. No duty which is cast upon a licensee can be cast upon a servant or a salesman of a shop. If anyone can be held responsible for the act of the servant, that person must be the licensee who in most cases is the employer. In other words, the maxim *Respondent Superior* must apply. In the case of

1953.

S. LAL
v.
STATE.

JAMUAR, J.

Sheokaran Lall v. *Emperor*(1), it was observed as follows:

"When a servant is employed by the owner of a shop and sells articles of the shop on behalf of the owner, it is the owner who is selling or offering for sale. So long as the servant is acting within the scope of his authority and there is nothing to show that he was acting beyond it, that is to say, selling articles of his master at a high rate and thereby making a personal profit, the act of sale or the offer to sell no doubt is an act of the servant, but it is the owner of the shop who must be regarded as the person who is selling or offering for sale. The mere absence of the owner from the shop at the time of the transaction would not, in my opinion, be a good defence to the charge."

The view that the servant or the salesman cannot be held liable is supported by a decision of the Allahabad High Court in *Emperor* v. *Harish Chandra Bagla*(2) in which it was held that where a salesman employed by a cloth merchant had sold cloth at a price in excess of the controlled price, the cloth merchant or dealer is criminally liable. The decision of the Allahabad High Court was followed in the above-mentioned Patna case as also in a later case of *Narsing Das Modi* v. *Emperor*(3).

The language of clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, as also of condition no. 3 of the license granted under that Order can admit of no other interpretation. There is a decision of the Supreme Court in *Ravula Hari-Prasada Rao* v. *The State*(4) where the distinction was clearly drawn. Their Lordships were considering two clauses of the Motor Spirit Rationing Order,

(1) (1947) A. I. R. (Pat.) 191.
(2) I. L. R. (1945) All. 540.
(3) (1948) A. I. R. (Pat.) 110.
(4) (1951) A. I. R. (S. C.) 204.

1941, namely, clauses 22 and 27A. Clause 22 provided that no person shall furnish ..... motor spirit otherwise than in accordance with the provisions contained in this Order. It was held that the language of this clause was a general one and would hit any individual person who contravened the provision. The language of the clause suggested that only the person who furnished motor spirit contrary to the provisions of the Order will be affected by the contravention. On the other hand, the language of clause 27A was different. It made it incumbent upon the supplier to endorse or cause to be endorsed, the registration or other identifying mark of the vehicle to which the motor spirit was furnished. It was pointed out that having regard to the language of this clause, it threw the responsibility for making the necessary endorsement upon the supplier and upon no one else. Accordingly, a person who came within the definition of the word " supplier " only could be held guilty of the contravention. In this connection their Lordships observed as follows:

1952.

S. LAL v. STATE.

JAMUAR, J.

" The object of this clause clearly is that the supplier of petrol should set up a complete machinery to ensure that the necessary endorsements are made on the coupons against which petrol is supplied. It is conceivable that in many cases the default will be committed by the servants of the supplier, who are in charge of the petrol pump, but that fact by itself will not exonerate the supplier from liability. "

In the present case before us since clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, quoted above provides that no licensee shall sell cloth or yarn at a price higher than that fixed by the Controller, the liability is thrown upon the licensee. Similarly, condition no. 3 of the license granted under that Order also casts the responsibility of granting the cash or credit memo upon the licensee. I do not

1953.

S. LAL v. STATE.

think, therefore, that the petitioners, neither of whom is a licensee, can be held guilty for the contravention of either clause 9(1) of the Bihar Cotton Cloth and Yarn (Control) Order, 1948, or for a breach of condition no. 3 of the license granted under that Order.

In the result, I would allow this application, set aside the conviction of the petitioners and the sentence imposed upon them. The fine if paid, will be refunded and the petitioners will be discharged from their bail bonds.

SAHAI, J.—I agree.

K. D.

Application allowed.

APPELLATE CIVIL.

Before Jamuar and Ahmad, JJ.,

1953.

April, 13.
July, 30.

KANAK KUMARI

v.

C. L. KHATTRY.*

Sale of Goods Act, 1930 (*Act III of* 1930), *section* 59, *scope of—warranty, when may exist—subject matter of sale neither in existence nor ascertained at the time of contract, whether a mere warranty—buyer's option to split up claim for damages—quantum of damages controlled by sections* 73, 74, *Contract Act*, 1872 (*Act IX of* 1872).

A warranty properly so called, can only exist where the subject matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract and is a collateral engagement that the specific thing so sold possesses certain qualities.

*Appeal from Original Decree no. 296 of 1947, from a decision of Mr. Mazhar Hussain, Additional Subordinate Judge of Arrah, dated the 24th April, 1947.

1953.

KANAK KUMARI v. C. L. KHATTRY.

Where, however, the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained possess certain qualities, is not a mere warranty, but a condition the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity; and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.

Under section 59 of the Sale of Goods Act, 1930, the buyer has an option either to split up his damages, one covering the general damages arising out of the depreciation of the value in the object of sale for the non-compliance of the warranty stipulated in the contract, and the other covering consequential damages by reason of the necessity of reparing the defect in the objects sold contrary to the terms of the contract or to combine the two damages into one. In that view of the matter, the buyer has apart from the remedy available to him by way of counter-claim two other remedies—(1) he may bring an action for the breach of warranty, (2) or in case he has not paid the price, he may plead the breach of warranty in reduction or extinction of the price in the seller's action, and may also maintain an action or set up a counter-claim for any further damage he may have suffered.

The words of section 59(1)(*a*) of the Act " has set up " do not cover only the case where the action for further damage is subsequent to an action in which the breach of warranty is set up by the buyer in defence. The sequence of action has to surrender itself to the principle of law whereby the circuity of action has to be avoided as far as possible, and, therefore, it is permissible that not having paid the price, the same being due, the purchaser may only recover his special damages, if this be the first action, and show the diminished value when called on to pay the price.

The Act does not include in itself any specific rule as to quantum of damages to be awarded in case of breach of warranty and for that purpose the provisions of section 59 of the Act are controlled in matters of quantum of damages by the provisions laid down in sections 73 and 74 of the Contract Act, 1872.

1953.

KANAK KUMARI v. C. L. KHATTRY.

It is the general intention of the law that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract has been performed.

Section 74 of the Contract Act is not limited to the case of liquidated damage or pre-estimated damage only. It covers the case of penalty as well. The distinction between liquidated damages and penalty is to be found in this, that the essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

Two machines were sold for one lac and out of it Rs. 75,000 was paid and for the balance it was agreed that in case the vendor failed to put the two machines in satisfactory working order the purchaser would not be liable to pay the balance and the vendor further agreed that in case he failed to instal the machines and put them in working order the vendor would indemnify and pay to the purchaser all losses and damages that the purchaser may be put to or suffer. The machines were installed as agreed but they were not put in working and running order. The purchaser brought a suit against the vendor for recovery of damages. The vendor in defence pleaded a counter-claim for the unpaid balance of the price together with interest and other costs and expenses. On a plea by the plaintiff that the defendant had forfeited the balance under the agreement:

Held, that the term in the contract that the vendor would forfeit the balance of the unpaid price if he failed to instal the machines and put them in satisfactory working order fit for production of articles intended to be produced thereby is a warranty and not a condition and therefore the plaintiff is entitled under section 59 of the Sale of Goods Act, 1930, to set up a claim for damages for the breach of the contract and cannot claim forfeiture of the balance of the unpaid price.

Mondel v. *Steel*(1), *Basten* v. *Butter*(2), *Davis* v.

(1) (1841) 8 M. & W. 858, 870-871.
(2) (1860) 7 East 479.

1953.

KANAK KUMARI v. C. L. KHATTRI.

Hedges(1), *Hadley* v. *Banendule*(2), *Jaya* v. *Leo Films*(3), *Khatiquz* v. *Parekh*(4), *Skipp* v. *Kelly*(5), *Halubasia* v. *Rup Kishore*(6), and *Kunbha* v. *Motichand* (7), relied on.

Barker v. *Cleveland*(8), not followed.

Appeal by the plaintiff.

Cross-objection by the respondent.

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

B. C. De and Kanhaiyaji, for the appellant.

AHMAD, J.—This appeal is by the plaintiff. Mr. Nandlal Untwalia, whose name appears for the respondents, has informed us that he has no instruction to oppose the appeal. We have heard Mr. B. C. De for the appellant.

The plaintiff is the wife of the Maharaja Bahadur of Dumraon. She, through her manager, Mr. H. Knight, entered into an agreement with the two defendants, who are father and son, for the purchase of net-weaving and hosiery machines which had been installed at Barrackpore, Calcutta. The price fixed for the net-weaving machinery was Rs. 60,000, and that for the hosiery machinery Rs. 40,000, the total being Rs. 1.00,000. The agreement for sale was drawn up between the parties on the 13th January, 1945. Under this agreement, a sum of Rs. 10,000 out of the price was to be paid on that very date, and it was so paid. Another sum of Rs. 25,000 was to be

(1) (1871) L. R. 6 Q. B.687.
(2) (1854) 23 L. J. Ex. 179.
(3) (1948) A. R. (Mad.) 442.
(4) (1926) 180 Ind. Cas. 879, P. C.
(5) (1926) 94 Ind. Cas. 331, P. C.
(6) (1921) 62 Ind. Cas. 72.
(7) (1917) 39 Ind. Cas. 121.
(8) 19 Michigan Reports 237-8.

1953

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

paid when the sale deed regarding the machinery was completed. This sum was paid on the 7th February, 1945, when the sale deed was drawn up. A further sum of Rs. 40,000 was to be paid when the machines would be despatched to Dumraon, and this took place on the 9th February, 1945. The balance of Rs. 25,000 was payable when the machines were installed at Dumraon and put in working and running order by the defendants. It was further stipulated that, in case the machines were not put in working order at Dumraon, the machines would be kept by the purchaser; but the balance of Rs. 25,000 would not be paid to the sellers and would be forfeited. There was a further stipulation that the purchaser would be further entitled to claim damages from the sellers.

The machines reached Dumraon in February, 1945. Both the defendants had gone to Dumraon. By the end of March, 1945, the machines were installed at their proper places. It was, however, found that the hosiery machines did not work at all while the net-weaving machines were not working satisfactorily, and could not produce marketable goods. Defendant no. 1 left Dumraon, promising to return with certain parts of the machines which were wanting, and he took with himself two chain machines and one sock machine for certain repairs. Defendant no. 1 had, however, left his son, defendant no. 2, at Dumraon. Thereafter, defendant no. 1 never returned to Dumraon, although letters and telegrams were sent to him by defendant no. 2 as also by the plaintiff's men. When, however, a registered notice was sent on behalf of the plaintiff in August, 1945, the defendants claimed to have put every thing in proper condition, and demanded the balance of Rs. 25,000 which was the unpaid portion of the purchase money. It is the case of the plaintiff

1953.

KANAK KUMARI v. C. L. KHATTRY.

that she had to carry out the necessary repairs and had to purchase the necessary parts in order to put the machines going.

The suit was filed on the 20th December, 1945, and, in the suit, the plaintiff claimed a sum of Rs. 24,975 as damages. In paragraph 13 of the plaint, it is stated:

AHMAD, J.

"That Rs. 25,000 (rupees twenty-five thousand), the unpaid portion of the consideration money of one lac of the sale deed, the plaintiff is absolved from the payment of the same and is not liable to the defendants for it on account of the breach of the agreement by the defendants as stated above and that the said Net-weaving Mills and Hosiery Mills stand forfeited to the plaintiff to be held and enjoyed by her as an absolute proprietor and for ever."

In defence, the defendants filed a written statement, and, in the last paragraph, they made the following claim:—

"It is, therefore, prayed that your honour may be pleased to dismiss the suit with costs and pass a decree in favour of the defendants in respect of the counter claim, namely, Rs. 25,000, besides interest at one per cent on account of balance of unpaid price for the machines and machineries supplied amounting Rs. 2,063-5-0 (rupees two thousand and sixty-three and five annas) and future interest till realisation and also Rs. 1,005 on account of costs incurred for the plaintiff in erection of the machinery and also on plaintiff's account in that connection, total value of defendants' claim being Rs. 28,068-5-0 (rupees twenty-eight thousand sixty-eight and five annas) on which court-fee is paid."

By way of reply to the aforesaid counter claim the plaintiff led evidence in support of the diminution

1953.

KANAK KUMARI v. C. L. KHATTRY.

of price on the ground that the mills were not put into working order as contemplated by the contract and thus were not fit for the purpose for which they were purchased.

AHMAD, J.

The two important issues framed by the learned Subordinate Judge and relevant to this appeal were issues nos. 2 and 5. They are in the following terms:—

> " 2. Whether the clause for the forfeiture of the last instalment of the consideration money, namely, Rs. 25,000 on account of the alleged non-performance of the obligation imposed upon the defendants is a penal clause as alleged by them and cannot be given effect to?
>
> 5. Are the defendants entitled to recover from the plaintiff the sum of Rs. 25,000 with interest and other costs as balance of the consideration money remaining still unpaid as claimed? "

The learned Subordinate Judge came to the finding that the machines had not been put in working order by the defendants, as agreed upon by the parties, and, substantially accepting the plaintiff's case, passed a decree for a sum of Rs. 20,730 as damages. So far as the question regarding the balance of the price, namely, Rs. 25,000 was concerned, and to which the defendants had laid claim, the learned Subordinate Judge accepted the case of the defendants on the ground that this clause in the sale deed amounted to a penal clause. The learned Subordinate Judge has said as follows:—

> " The term is unreasonable and in my opinion the parties cannot have contemplated that it should receive effect. It was only inserted so that by reason of its oppressive character it may operate *in terrorem* on the seller and drive him to fulfil the contract. The plaintiff under the last clause of the sale deed is entitled to recover all her losses and thus there was no reason why she should not get a further sum of Rs. 25,000. The fact that the price was settled at Rs. 1,00,000 also shows that clause about forfeiture of Rs. 25,000 was not within the original intention of the parties."

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

Ultimately, the learned Subordinate Judge found that the defendants should be given relief against this clause, as this condition in the contract was meant to be a " punishment and nothing else ".

The plaintiff has appealed against that judgment and decree of the learned Subordinate Judge. Her appeal was in respect of a sum of Rs. 4,245 which sum, out of the amount claimed by her as damages, was disallowed. The further appeal was against that part of the decree of the learned Subordinate Judge by which he allowed the claim of the defendants in respect of Rs. 25,000 as against the plaintiff as being the balance of the price due from the latter.

Mr. B. C. De, who has appeared for the appellant, has not pressed the appeal regarding the portion disallowed by the learned Subordinate Judge out of the claim made by the plaintiff for damages. Mr. De, however, has pressed the appeal only in respect of the sum of Rs. 25,000 which the learned Subordinate Judge has allowed the defendants to recover from the plaintiff.

The express warranty in the contract, which has given rise to the present litigation, was in the following terms:

" And it is hereby further expressly agreed and declared by and between the parties hereto that in case the vendors fail forthwith to put the said Net-weaving Mills and Hosiery Mills in satisfactory working and running order fit for production of the articles intended to be produced thereby the purchaser shall not be liable for and be absolved from payment of the said balance of the sum of rupees twenty-five thousand and the vendors will in that event accept (in lieu of the said sum of rupees one lac) the said sum of rupees seventy-five thousand paid or to be paid as aforesaid as being in full settlement and payment of the price of the said Net-weaving Mills and Hosiery Mills sold hereunder and to be delivered as mentioned herein and the said Net-weaving Mills and Hosiery Mills will stand forfeited to the purchaser to be held and enjoyed by the purchaser absolutely and for ever as herein mentioned. And this indenture also witnesseth and

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

the venders do and each of them doth hereby covenant with the purchaser that in case the vendors fail properly to instal the said Net-weaving Mills and Hosiery Mills at Dumraon as aforesaid and/or fail to put the said Net-weaving Mills and Hosiery Mills in satisfactory working order fit for production of the articles intended to be produced thereby, the vendors will indemnify and pay to the purchaser all losses and damages, costs and charges that the purchaser may be put to or suffer or incur in the premises aforesaid and also in properly installing these said Net-weaving and Hosiery Mills and/or in putting the said Net-weaving Mills and Hosiery Mills in satisfactory working order fit for production of the articles intended to be produced thereby."

In the circumstances of the present case there is little scope for any difference of opinion on the point as to whether the term stipulated in the contract in telling a liability on the vendors to instal net-weaving mills and hosiery mills and to put them in satisfactory working order fit for production of the articles intended to be produced thereby is a warranty and not a condition. The mills sold under the contract have already been, as stated above, transferred to the vendee. Section 13 of the Sale of Goods Act provides that even in the case of a breach of condition, if the buyer has accepted the goods or in the case of entire contracts, part of them, either voluntarily, or acting in such a way as to preclude himself from exercising his right to reject them, his remedy is to set up a claim for damages as if the breach of the condition was a breach of warranty. Further Benjamin in his book on sale at page 986 in its 8th edition says:

" The learned author of the Leading Cases thus expresses the rules deduced from the authorities (2 Sm. L. C. 11th Ed. 281: [A warranty properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract and is a collateral engagement that the specific thing so sold possesses certain qualities] but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract and

revest the property in the vendor without his consent ..... [But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity; and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.]"

Here the mills which were the subject-matter of sale were things ascertained and existing and were capable of being inspected at the time of the contract. In this view of the matter also, the stipulation as to the fitness and as to the liability of the vendor to put the mills in running condition is *prima facie* an independent contract collateral to the principal bargain. It, therefore, only gives rise to an action for damage for the breach of warranty in accordance with the procedure laid down in section 59 of the Sale of Goods Act, which reads as follow:

" 59. (1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty;

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage. "

1958.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

The buyer has under this section along with the remedy available to him by way of counter claim two remedies. (1) He may bring an action for the breach of warranty. (2) Or in case he has not paid the price, he may plead the breach of warranty in reduction or extinction of the price in the seller's action, and may also maintain an action or set up a counter claim for any further damage he may have suffered.

In the present case the procedure followed by the plaintiff is alleged to be in line with that stated in the second alternative and in order to substantiate it Mr. B. C. De contended that it was open to the plaintiff not only to split up the cause of action into two parts and to follow two independent remedies for each of them but also to follow those two remedies in any order convenient to her. The remedy of the buyer in the second alternative can be best explained by extracts from the lucid decision given by Parke, B. in *Mondel* v. *Steel*(1).

In that case the action was by the buyer for damages for breach of an express warranty of the quality of a ship built under written contract. The defendant pleaded in effect that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. This reduction was in respect of the difference at the time of delivery between the ship as she was and what she ought to have been according to the contract; but the damages claimed in the present action were special, and such as could not have been allowed in the former action, being in respect of subsequent necessary repairs, so that the plaintiff was deprived of the use of the vessel. A general demurrer

(1) (1840) 8 M. & W. 858, 870—871.

to the plea was sustained. The Court said: "Formerly it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty or of work which was to be performed according to contract to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract [As in *Broom* v. *Davis* (1794), 7 East 181(*n*)]..... In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant ..... has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price: and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Baster* v. *Butter* (1806) 7 East 479, a different practice ..... began to prevail, and ..... has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value .....The rule is, that it is competent for the defendant ..... simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract: and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more."

1952.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

In reference to the passage quoted above Benjamin in his book on sale at page 990 observed:

" Accordingly a reduction or extinction of the price under the rule in *Mondel* v. *Steel*(1) is not a set-off (which is based upon statute). But the rule applies only to cross-claims under the same contract. A buyer therefore cannot defend himself against the seller by a cross-claim arising under a different contract. "

I may point out here that in the case of *Mondel* v. *Steel*(1) the action was started by the seller for the price left unpaid followed by a defence in diminution or extinction of the price and also an independent action by the buyer for special damages. The principle laid down in those circumstances in that case was that the claim for special damages was not barred on account of the plea set up against the seller for the breach of warranty in diminution or extinction of the price.

The Queen's Bench in the case of *Davis* v. *Hedges*(2) followed *Mondel* v. *Steel*(1) and explained the language of Parke, B. " to the extent that he obtains, or is capable of obtaining, an abatement ..... ". That suit as it appears from the placitum of that case arose out of an action for damages for the non-performance and improper performance of certain work which the plaintiff had employed the defendant to do, the defence set up was that the defendant had sued the plaintiff for the price of the work alleged to have been improperly done, and the plaintiff had settled by paying the whole amount then sued for: and that, as the plaintiff might

(1) (1840) 8 M. & W. 858.

(2) (1871) L. R. 6 Q. B. 687.

have given the non-performance and the defective performance complained of in evidence in reduction of damages, the plaintiff was precluded from bringing a cross action for them. In those circumstances the court held:

" The particular point decided in *Mondel* v. *Steel*(1) was, that a person who has in fact obtained, in an action brought against him, an abatement of the price of work done, by reason of a breach of contract in its execution, is not precluded from suing for special damage resulting from the breach of contract; but it leaves undecided the question whether he was bound to obtain the abatement in the action in which he was a defendant, or might recover it as damages in a cross action. "

In answering that question it was observed therein:

" We have, though not without some doubt, come to the conclusion that the better rule is, that the defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as Parke, B. says, he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action. "

In giving reasons for the aforesaid conclusion it was said in that case:

" Another inconvenience which would result from holding that the inferiority of the thing done to that contracted for must, if an action be commenced, be used by way of defence, is that instead of

(1) (1840) 8 M. & W. 858.

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

furthering the object for which this defence was permitted, namely, the prevention of circuity of action, it would in many cases tend to complicate and increase litigation. The cases are, perhaps, rare in which the consequences of defective performance of work are limited to the depreciation of the value of the work done; they usually involve consequential damage by reason of the necessity of repairing the defective work; and for this the case of *Mondel* v. *Steel*(1) decides a separate action must be brought. Park, B. there says: 'All the plaintiff could by law be allowed in diminution of damages on the former trial was a deduction from the agreed price, according to the difference at the time of delivery between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that on account of the subsequent necessity for more extensive repairs could not have been allowed in the former action, and may now be recovered.' So that two litigations instead of one would be frequently necessary, with the additional inconveniences that it would be very difficult to discriminate in each action between that which ought to be allowed in diminution of price, and that which should be compensated for as special damage."

This case, therefore, also clearly laid down that the option is given to the buyer either to split up his damages one covering the general damages arising out of the depreciation of the value in the object of sale for the non-compliance of the warranty stipulated in the contract and the other covering consequential damage by reason of the necessity of repairing the defect in the objects sold contrary to the terms of the contract or to combine the two damages into one and to bring one separate action for both of them. In the

(1) (1840) 8 M. & W. 858.

case of *Davis* v. *Hedges*(1) too the litigation between the parties started by an action by the buyer, both for special and consequential damages. On the similar line is the decision given in the case of *Ridge* v. *Burbridge*(2). In that case in an action for the stipulated price of a specific chattel, defendant pleaded payment into court of a sum which the plaintiffs took out in satisfaction of the cost of action and then the defendant brought an action against the plaintiffs for damages arising out of the negligence in the construction of the chattel. In that action the seller raised the plea that "*Fisher* v. *Samuda*(3) appears to be an authority for the proposition, that where an action has been brought for the value of goods supplied on a stipulated price, and the buyer does not, either in bar of the action or in reduction of the damages, object to the quality of the goods but let the seller recover a verdict for the full price agreed upon, he cannot then maintain a cross-action on the ground of the goods being of not good quality, or unfit for the purpose for which they were ordered." In answer to that plea it was held therein "that the buyer in the action was not estopped thereby from suing the plaintiffs for negligence in the construction of the chattel."

These decisions, in my opinion, leave no doubt that the buyer has got an option to split up his claim for total damages into one for general damages which he can set up against the seller in diminution or extinction of the price and the other for special damages for which he can bring a separate action. The principle laid down in them are on all fours applicable to the cases arising under the Sale of Goods Act, as the remedy provided under section 59 of the Sale of Goods Act is substantially the same as that

(1) (1871) L. R. 6 Q. B. 687.
(2) (1846) 15 M. & W. 598.
(3) (1808) 1 Campb. 190.

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

laid down in section 53 of the Sale of Goods Act, 1893 of England.

It has next to be answered whether the words of section 59(1)(*a*) of the Indian Sale of Goods Act " has set up " cover only the case where the action for further damage is subsequent to an action in which the breach of warranty was set up by the buyer in defence. This question is important to be considered as in the present case the action for further damage is in fact precedent to the counter claim in which the breach of warranty was set up by the buyer in defence as an answer to the counter claim. In my opinion, the sequence of action is immaterial. Once it is held that the damages available to the buyer can be split up into two, one covering general damage and the other covering special damage, there is little importance left in the discussion as to what should be the consequence in which the remedies for the two damages should be exercised. That question has to surrender itself to the other principles of law whereby circuity of action has to be avoided as far as possible as laid down in the case of *Ridge* v. *Burbridge*(1). In the present case it was open to the seller not to press for the balance of the consideration left unpaid by the buyer in order to compensate him for the general inefficiency in the mills arising out of the fact that they were not put in working order and in that view of the matter it was necessary for the purchaser to sue the buyer for a sum of Rs. 25,000 on account of the general damages as stipulated in the contract and thereby to force the seller to advance his claim for the balance of his unpaid consideration. In a case at common law the Supreme Court of Canada also took the similar view that the sequence of action was immaterial. That was the case of *Church* v. *Abell*(2). The facts of that case as stated in the

(1) (1846) 15 M. & W. 598.
(2) (1877) 1 Canad. S. C. R. at 442.

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

placitum of the report was that "C wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, undertook to put in a 'Four-Foot Sampson Turbine Wheel', which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C sued A for breach of the warranty and recovered £ 438 damages. A subsequently sued C for the price, and C offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the learned Judge presiding at the trial declared the evidence inadmissible." In those circumstances the matter went up in appeal where it was held as stated above. The court of appeal was composed of five judges and the judgment in favour of the appellant was recorded by 4:1, Strong, J., dissenting. The leading judgment of the majority was by the Chief Justice with whom Ritchie, Taschereau and Fournier JJ. agreed. It must, however, be observed here that in that case the buyer had not accepted the wheel nor had paid for it and had undertaken to return it and did in fact return it to the seller. This, however, in my opinion, does not make any difference for in the present case it can be said that to the extent to which the value of the mills was diminished the buyer did not get the materials for that or that he returned the parts or that he condemned the parts bearing that much value. Ritchie, J. in that case observed:

"The question to be decided in this case is of very considerable practical importance, viz. whether

1958.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

we are constrained by general principles or the weight of authority to enunciate a technical rule fraught with consequences so inconvenient and unreasonable as those so clearly and forcibly pointed out in this Court by the Chief Justice, and by Mr. Justice Moss in the Appeal Court of Ontario; or whether we can recognize and promulgate as law, a rule, which, while doing full and ample justice to all parties, is calculated to prevent unnecessary litigation, and that circuity of action which it is always the policy of the law as far as possible to avoid. "

On similar line the learned Chief Justice in the leading judgment observed:

" To force this state of things by a technical rule seems to be inconsistent with the general views which now prevail in the administration of the law. The tendency of Modern decisions is to have the rights of parties settled, if possible, in one action rather than by a multiplicity of suits. The absurdity of regulating the rights of parties by the accidental circumstances as to which party may first commence his action, is referred to in the judgment of Mr. Justice Hannen in *Davis* v. *Hedges*(1)..... It seems to me that in harmony with the decisions of *Mondel* v. *Steel*(2) and *Davis* v. *Hedges*(1), it is a reasonable rule to lay down for the ascertainment of damages, where a purchaser with a warranty brings an action before he has paid the contract price, or at least, rendered himself absolutely liable to pay it, as by giving a bill of exchange or a promissory note, that he shall only recover the amount of his special damage, and that he shall be left to use the inferiority of value as a weapon of defence, if the vendor claims from him the full contract price..... The fitting deduction from the language used and principles laid down in the cases of *Mondel* v. *Steel*(2) and *Davis* v. *Hedges*(1),

(1) (1871) L. R. 6 Q. B. 687.
(2) (1840) 8 M. L. W. 858.

to quote again from the judgment of Mr. Justice Moss, is to hold that when the purchaser brings his action upon the warranty before making payment, and I should add to this when the payment is due, he shall be restricted to the recovery of any special damages he has sustained and shall not be permitted to recover for inferiority of value, for the simple reason that if he is afterwards sued for the price, the law affords him full protection by enabling him to assert this inferiority as a ground of defence ..... The only objection to extending the same rule when the action is first brought by the purchaser of the article instead of the seller, is the technical one that you must recover all your damages in that action and not separate them. The argument of convenience was allowed in *Mondel* v. *Steel*(1) to prevail to establish the rule that the damages having been separated by the diminished value being set up in the first action, the rest of the damages, viz., the special damages, could be recovered in the last. Our decision is merely the converse of that, and based on the same principles of convenience and justice, viz., that not having paid the price, the same being due, the purchaser should only recover his special damages if this be the first action, and shew the diminished value when called on to pay the price. ''

In my opinion, therefore, Mr. De was right in contending also that the sequence of action did not stand in the way of his pleading diminution of the price by a sum of Rs. 25,000 as an answer to the counter claim pleaded by the defendants in the action for damages brought by the plaintiff, though I must concede that the point is not free from difficulty. In the case of *Barker* v. *Cleveland*(2) the rule laid down is just to the contrary. I, however, think that looked at from the larger point of view the law laid

(1) (1840) 8 M. L. W. 858.
(2) (19 Michigan Reports 237-8,

1958.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

down in the case of *Church* v. *Abell*(1) is more consistent with the rule preventing circuity of action.

The last matter for consideration is the measure of damage to be allowed to the plaintiff covering both special and general damages for the breach of warranty alleged in the plaint. The rule regulating the measure of damage for the breach of warranty in our country is not exactly what is laid down in clauses (2) and (3) of section 53 of the Sale of Goods Act, 1893 of England. It is by now well settled that the Sale of Goods Act does not include in itself any specific rule as to the quantum of damage to be awarded in case of breach of warranty and for that purpose the provisions of section 59 of the Sale of Goods Act are controlled in matters of quantum of damages by the provisions laid down in sections 73 and 74. Those sections read as follows:—

> " 73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it 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. "
>
> " 74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. "

(1) (1877), Canada S. C. R. at 442.

The rules for measuring the damage as laid down in section 73 of the Contract Act are in fact themselves based on the rule laid down in the leading case of *Hadley* v. *Baxendale*(1). According to the principles laid down in that case, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they make the contract, as the probable result of the breach of it. In cases where the circumstances under which the contract is actually made are special and are communicated by the plaintiff to the defendants, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. If, however, the special circumstances are wholly unknown to the party breaking the contract, he, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstance, from such a breach of contract. It is the general intention of the law that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. That is, in fact, the ruling principle. In the present case the primary contract was the sale of the two mills by the defendants to the plaintiff in accordance with the contract

(1) (1854) 23 L. J. Ex. 179.

1958.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

entered into by the parties. These two mills have by now been in fact transferred to the plaintiff and the property in the mills is now admittedly in her. The contract collateral to the contract for sale of the two mills was the obligation accepted by the defendants that they would properly instal the said two mills at Dumraon and would put them in satisfactory working order fit for the production of articles intended to be produced thereby. As a security to fulfil the obligation arising out of this collateral contract the defendants agreed to leave the balance of the consideration unpaid, that is, Rs. 25,000 with the plaintiff on the condition that they would be entitled to get that amount only on fulfilling the obligation under the collateral contract and in case of failure to lose the claim for that amount. The allegation of the plaintiff is that the defendants did not discharge the obligation under the collateral contract and failed to set the two mills in satisfactory working order fit for production of the articles intended to be produced by them with the result that she had to purchase a number of extra parts of the machines in order to be fitted in the mills sold and had also incurred other minor expenses over the stuff in the course of repairs of the machines for bringing them in satisfactory working condition. The total loss thus sustained by the plaintiff is given in the schedule attached to the plaint, the total of which comes to Rs. 24,975. The trial court has found.

> " The evidence taken as a whole, in my opinion, proves sufficiently that the machines were not put in working order by the defendants as agreed upon by the parties ",

and decreed the claim of the plaintiff for damages to the tune of Rs. 20,730 out of her total claim of Rs. 24,975. The matter so far is simple. The difficulty that, however, arises is due to the stipulation in the contract that on the failure of the defendants to

put the mills in satisfactory working order, the defendants would also lose their claim for the balance of the consideration money of Rs. 25,000 kept unpaid by the plaintiff, over and above the incurring of the liability to indemnify and pay to the purchaser all losses and damages, costs and charges that the purchaser would be put to suffer or incur in the premises and also in properly installing the mills and in putting the said mills in satisfactory working order fit for the production of the articles intended to be produced thereby. This, therefore, leads to the consideration whether this sum of Rs. 25,000 stipulated in the contract was by way of penalty or as sum named therein to be paid in case of the breach of warranty? But before answering that question this much can be said at the very outset that in either case the provisions of section 74 of the Contract Act will come into play. For that reason there is no scope from the conclusion that the plaintiff cannot in any view of the matter get on account of her total damages, both general and special, a sum more than Rs. 25,000 which was stipulated in the contract either as the amount to be paid in case of breach of warranty or by way of penalty. Section 74 as is evident from its terms is not limited to the case of liquidated damage or pre-estimated damage only. It covers the case of penalty as well. In the case of liquidated damage or what is known as pre-estimated damage settled at the time of making the contract, damage to be decreed is generally the figure settled by the parties, though in the case of penalty the court is not to act on that figure but has to come to its own conclusion about the actual damage suffered by the plaintiff as a result of breach of warranty.

"Under a contract the parties may agree that a particular sum shall be payable for the breach of the contract. The sum so fixed may be either in the nature of liquidated damages, i.e., a sum payable as damages the amount of which, instead of being left to the determination of the court, is previously determined by the agreement of the parties;

1958.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

or in the nature of a penalty for breach of the agreement. The distinction between liquidated damages and penalty is to be found in this, that the essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. "

In the opinion of the trial court this sum of Rs. 25,000 was inserted in the contract to operate in *terrorem* on the seller and as such the amount named in the contract is to be considered as a penalty and not to be treated as liquidated damages. In my opinion, as well the amount stipulated in the contract was by way of penalty. Had that amount been in fact the pre-estimated of the entire losses likely to be incurred by the plaintiff in case of default on the part of the defendants to fulfil the obligation under the collateral contract, there could not be any occasion for including a further clause in the contract to the effect that in the case of failure on the part of the vendors—

" the vendors will indemnify and pay to the purchaser all losses and damages, costs and charges that the purchaser may be put to or suffer or incur in the premises aforesaid and also in properly installing these said Net weaving and Hosiery mills and or in putting the said Net weaving Mills and Hosiery Mills in satisfactory working order fit for production of the articles intended to be produced thereby. "

This shows that the basic idea under the contract was not the pre-estimation of damages arising out of the failure on the part of the defendants to put the machinery in satisfactory working order, rather to lay down a general liability to pay all the losses arising therefrom in the case of default on their part in putting the machinery in satisfactory working order. The amount of Rs. 25,000 which was part of the consideration money and was left in the deposit of the purchaser to be paid only on fulfilment of the obligation under the contract by the defendants was, in my opinion, left as a security to discharge the obligation resting on them under the contract. That being so, the term " was only inserted " as held by the trial court—

" so that by reason of its oppressive character it may operate in *terrorem* on the seller and drive him to fulfil the contract. "

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

In my opinion, therefore, the plaintiff cannot be entitled to receive from the defendants compensation exceeding the amount of Rs. 25,000 that is, more than the penalty stipulated for in the contract. The trial court has assessed the damage to the extent of Rs. 20,730. Mr. De appearing for the appellant has not contested this figure; neither he has placed any material before me to hold that the damage assessed by the trial court to the extent of the amount stated above was not correct. He, in fact, did not press his claim for the balance of the damage not allowed to the plaintiff by the trial court. On principle as well, as laid down in the case of *Jāya* v. *Leo Films*(1), the appellate court should as a rule be reluctant to interfere with the finding of the trial court on the amount of damages to be awarded in a

NOTICE TO BINDER.

Substitute the pages below for old pages 687-688.

clearly wrong with the figure he had fixed upon." To the same effect is the law in *Halubasia* v. *Rup Kishore*(3) and *Kunbha* v. *Motichand*(4). I have, therefore, no ground to differ with the amount of damage assessed by the trial court to be awarded to the plaintiff for the breach of warranty as stipulated in the contract.

As already held by me, Rs. 25,000 were nothing but a part of the consideration money for the two mills sold by the defendants to the plaintiff and that had been left in the custody of the plaintiff by the defendants as a security to discharge the obligation resting on them to put the machinery in satisfactory working order. The damage suffered by the plaintiff on account of the default on the part of the defendants, as found above, comes to the total amount of

(1) (1948) A. I. R. (Mad.) 442.
(2) (1926) 94 Ind. Cas. 331, P. C.
(3) (1921) 62 Ind. Cas. 72.
(4) (1917) 39 Ind. Cas. 121.

1953.

KANAK KUMARI v. C. L. KHATTRY.

AHMAD, J.

Rs. 20,730 only and that amount has been awarded to the plaintiff as damages. Therefore, the amount of Rs. 25,000 which was left unpaid with the plaintiff out of the total consideration money has to be paid back by her to the defendants. Thus on mutual adjustment of the liabilities between the parties, the defendants are entitled to get from the plaintiff only the sum of Rs. 4,270 with interest at six per cent. from September 1945 till the date of realisation, and in this respect the conclusion arrived at by the trial court is, I think, correct.

The appeal is accordingly dismissed but in the circumstances of the case there will be no order for costs.

The cross-objection filed by the respondents, as already stated above, was not pressed during the hearing of the appeal. In fact the appeal was heard *ex parte*. The cross-objection, therefore, is also dismissed without costs.

JAMUAR, J.—I agree.

Appeal dismissed.

Cross-objection dismissed.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sinha, JJ.

V. N. N. SINHA,

v.

BIHAR JOURNALS, LTD.*

1953.

July, 23, 24
28.
August. 4.

Industrial Disputes Act, 1947 (*Act XIV of* 1947), *object and scope of—Assistant Editor of newspaper, whether a*

*Miscellaneous Judicial Case no. 135 of 1953, in the matter of an application under Article 226 of the Constitution of India.

1953.

J. N. N. SINHA v. BIHAR JOURNALS, LTD.

workman within the meaning of the Act—section 33, whether applicable—such employee, whether has a civil right of action—entire scheme of the Act, discussed;

Held, that the petitioner, a senior Assistant Editor of a newspaper, was not a workman within the meaning of the Industrial Disputes Act, 1947, and therefore section 33 of the Act had no application.

National Association of Local Government Officers v. *Bolton Corporation*(1), and *D. N. Banerji* v. *P. R. Mukherjee*(2), distinguished.

Jam-e-Jamshed Press, Bombay v. *Workmen Employed Under It*(3), referred to.

The duty imposed on the employer under section 33 of the Act is a duty not owed to the particular employee prejudicially affected, but it is the duty owed to the public. Therefore, the employees affected have no civil right of action for a breach of the statutory obligation imposed by section 33. The remedy for breach of section 33 is the special penalty provided in section 31 of the Act, and the statutory obligation can be enforced only by that special penalty.

Doe v. *Bridges*(4), *Pasmore* v. *Oswaldtwistle Urban District Council*(5) and *Black* v. *Fife Coal Co., Ltd.*(6), relied on.

Application under Article 226 of the Constitution.

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

B. C. Ghosh, Birendra Pd. Sinha, Keshari Singh, Harikishore Thakur and *B. P. Samaiyar*, for the petitioners.

Baldeva Sahay, Shivanugrah Narain, Ramji Sharan, A. B. N. Sinha and *Government Pleader*, for the opposite party.

(1) (1943) A. C. 166.
(2) (1953) S. C. R. 302.
(3) (1950) Ind. C. R. 1112.
(4) (1831) 1 B. & Ad. 847, 859.
(5) (1898) A. C. 387, 394.
(6) (1912) A. C. 149, 165.

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI, J.

RAMASWAMI, J.—In this case the petitioners have obtained a rule calling upon the respondents to show cause why a writ of mandamus should not be issued for quashing the order of the respondent no. 2, dated the 7th of April 1953, transferring petitioner no. 1 Sri Vinaya Nath Narain Sinha to Calcutta to work as a correspondent of the *Searchlight*. Cause was shown by Mr. Baldeva Sahay on behalf of the respondents.

Petitioner no. 1, Sri Vinaya Nath Narain Sinha, is a senior Assistant Editor of the *Searchlight*, a newspaper printed and published at Patna. He alleges that on the 30th of March 1953, Sri Parasnath Sinha, Managing Director of the Bihar Journals, Ltd., ordered his transfer to Calcutta to work in the capacity of the correspondent of the newspaper. The order was that petitioner no. 1 should join at Calcutta on the 6th of April 1953, but subsequently the date of joining was extended up to the 13th of April 1953. Petitioner no. 1 alleges that he had been elected as the Vice-President of the Bihar Journalists' Union, and the respondents were opposed to his taking any part in the activities of that particular trade union. Petitioner no. 1 alleges that the order of his transfer to Calcutta was an act of victimisation on the part of the respondents. On the 1st of April 1953, petitioner no. 1 and petitioner no. 2, Sri Shri Krishna Datta Bhatt, who is the Secretary of the Bihar Journalists Union, applied to the Labour Commissioner of Patna seeking his intervention in the matter. On the 3rd of April 1953, Sri R. N. Sharma, Conciliation Officer and Assistant Commissioner of Labour, started conciliation proceedings. He wrote to the respondent asking them to stay the order transferring petitioner no. 1 to Calcutta and fixed the 8th of April 1953 for hearing the matter. In reply to the letter of the Conciliation Officer, the respondents asserted that the Conciliation Officer had no jurisdiction to start proceedings. The contention of the respondents was that

there was no industrial dispute, and petitioner no. 1, Sri Vinaya Nath Narain Sinha was not a ' workman ' within the meaning of the Industrial Disputes Act. On the 7th of April 1953, respondent no. 2 Sri Parasnath Singh made a peremptory order that the petitioner no. 1 should comply with his previous order, dated the 30th of March 1953 and join the post of the correspondent at Calcutta. The petitioners assert that in making this order the opposite party committed a breach of section 33 of the Industrial Disputes Act which states that—

" during the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings ":

The petitioners, therefore, pray that a *writ* in the nature of *mandamus* should be issued to the respondents for quashing the order of transfer made on the 30th of March 1953 and reiterated on the 3rd of April 1953.

In their counter-affidavit the respondents submit that the order of transfer was made for the sake of administrative convenience and there was no question of any victimisation of the petitioner. The respondents further object that neither the Labour Commissioner nor the Conciliation Officer had any jurisdiction to interfere in the dispute. It is stated in the counter-affidavit that the petitioner is neither a manual workman nor a member of the clerical staff. He is, on the contrary, the senior Assistant Editor of the newspaper and his case fell outside the purview of the Industrial Disputes Act. The respondents contend that section 33 of the Industrial Disputes Act has no application to the case.

The first question in this case is, therefore, whether section 33 of the Industrial Disputes Act applies to this case.

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI, J.

Section 33 states:

"During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall—(*a*) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or (*b*) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be".

In this context section 12 must also be read.

Section 12(1) enacts:

"Where any industrial dispute exists or is apprehended, the Conciliation Officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall, hold conciliation proceedings in the prescribed manner."

On behalf of the respondents, Mr. Baldeva Sahay submitted that there was no industrial dispute and the Conciliation Officer had no jurisdiction to start conciliation proceedings under section 12. Learned Counsel referred to the definition of the expression 'industrial dispute' given in section 2(*k*) of the Industrial Disputes Act.

Section 2(*k*) defines 'industrial dispute' to mean—

"any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person".

Mr. Baldeva Sahay contended that petitioner no. 1 Sri Vinaya Nath Narain Sinha was not a 'workman' within the meaning of the Act, and the Conciliation Officer had, therefore, no jurisdiction to start proceedings.

The argument of the learned counsel is based upon section 2(*s*) which defines 'workman' to mean

"any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward .....".

Mr. Baldeva Sahay maintained that petitioner no. 1 was not a clerical or manual workman and the

dispute between him and the management of the *Searchlight* would not fall within the ambit of the Industrial Disputes Act. The opposite view put forward by Mr. B. C. Ghosh on behalf of the petitioners was that petitioner no. 1 was employed in doing skilled clerical work and that he was a 'workman' within the meaning of the Industrial Disputes Act. Mr. B. C. Ghosh said that the pay of the petitioner no. 1 was about Rs. 450 per month, that he was employed as a senior Assistant Editor of the newspaper and that his job was to write editorial articles and notes and to read the proofs thereof. Mr. Ghosh stressed the argument that the editorial articles and notices written by petitioner no. 1 were subject to the approval of the Editor and might not be inserted in the newspaper if the Editor did not approve them. Learned counsel submitted that there was no written specification of duties maintained for the editorial staff of the *Searchlight* and there was also no written contract of service between petitioner no. 1 and the management of the newspaper. There is absence of documentary evidence on the point but upon the affidavits filed in the case it appears that the duty of petitioner no. 1 was generally to write editorial articles and notes and read proofs thereof and that the articles and notes were subject to the approval of the Editor. Mr. B. C. Ghosh argued that the work of petitioner no. 1 was of skilled clerical nature and that he was, therefore, a 'workman' within the meaning of the Industrial Disputes Act. I am unable to accept the argument of the learned counsel.

Section 2(*s*) defines 'workman' to mean—

> 'any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward .....'.

In the lexicographic sense a clerk generally denotes a person employed in a subordinate position in a public or private office to make fair copies of documents or to do mechanical work of correspondence. In my opinion the duties assigned to

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

petitioner no. 1 as senior Assistant Editor are not clerical. In doing his editorial work, petitioner no. 1 has to display qualities of initiative and independence and it is, I think, too far-fetched to argue that the duties of petitioner no. 1 are of mechanical or routine description. I hold that petitioner no. 1 is not a ' workman ' within the meaning of the Trade Disputes Act. Mr. B. C. Ghosh said that the expression ' workman ' should be interpreted in a wider and more comprehensive sense so as to meet the requirement of modern social and industrial conditions. But it will be straining the language of section 2(*s*) to interpret it in the sense for which the petitioners contend.

In this connection, it is important to notice that in the Trade Unions Act (Act XVI of 1926) the expression ' workman ' is defined in a wider sense. Section 2(*g*) of that Act states:

> " ' Trade dispute ' means any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and ' workmen ' means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises ".

I do not wish to express any final opinion, but petitioner no. 1 may be a ' workman ' within the meaning of the Trade Unions Act, but he is not, in my opinion, a ' workman ' within the meaning of the Trade Disputes Act. In support of his argument, Mr. B. C. Ghosh referred to a passage in the judgment of Lord Wright in *National Association of Local Government Officers* v. *Bolton Corporation*(1), which runs thus: " In my opinion, the respondents' contention would unduly narrow and limit the wide connotation which should here be given to 'trade' and to ' workman '. Section 11 of the Act of 1919 shows that ' trade ' is used as including ' industry ' because

(1) (1943) A. C. 166.

it refers to a trade dispute in the industry of agriculture. The same inference appears from the short title. It is described as an Act to provide for the establishment of an industrial court in connexion with trade disputes. Trade and industry are thus treated as interchangeable terms. Indeed 'trade' is not only in the etymological or dictionary sense, but in the legal usage, a term of the widest scope. It is connected originally with the word 'tread' and indicates a way of life or an occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. It may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman, but the word 'trade' is used in the widest application to the appellation 'trade unions'. Professions have their trade unions. It is also used in the Trade Boards Act to include industrial undertakings. I see no reason to exclude from the operation of the Industrial Courts Act the activities of local authorities, even without taking into account the fact that these authorities now carry on in most cases important industrial undertakings". But this passage must be read in the context of the English Industrial Courts Act, 1919. Section 8 of that Act defines 'trade dispute' and 'workman' in much wider terms than in the corresponding Indian Statutes.

Section 8 of the English Industrial Courts Acts, 1919, states:

> 'The expression 'trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person.'
>
> The expression 'workman' means any person who has entered into or works under a contract with an employer whether the contract be *by way of manual labour, clerical work, or otherwise*, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour".

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

Mr. B. C. Ghosh also relied upon the case of *D. N. Banerji* v. *P. R. Mukherjee*(1), but this authority is of no assistance to the petitioners, for, the Supreme Court expressly left open the question whether the Sanitary Inspector and the Head Clerk of the Municipality were officers and not 'workmen' within the meaning of the Industrial Disputes Act. Mr. B. C. Ghosh also strongly relied upon the Award of the Banking Companies Tribunal, dated the 26th of March 1953. At page 1267 the Tribunal state that an officer has responsibilities of a directional and controlling nature and that, on the contrary, a clerk does work of a routine or mechanical nature and has no responsibility to take final decision in most of the matters which come in his hands. The Tribunal further make a distinction between supervisory work and managerial or controlling work and reach the conclusion that accountants, head cashiers and supervisors of banks were not officers but are workmen of the bank. Mr. Ghosh pointed out that the Tribunal had accepted the view of Justice Bind Basni Prasad in the U. P. Conciliation Board case of the year 1948. But I do not think that Mr. Justice Bind Basni Prasad or the Tribunal intended to lay down a universal test for deciding whether an employee is a workman or an officer. The tests were laid down in cases which related to Banking Companies where conditions are highly peculiar. At page 1268, the Banking Companies Award reads: "The real point of controversy is with reference to the question whether normal supervisory work, sort of what is described as directional and controlling powers, is sufficient by itself to take an employee out of the category of workmen. We think it will not be right to lay down a general proposition of that sort. Most often, supervisory work is entrusted to senior clerks who have experience of that kind of work and who as sectional heads can supervise similar work of clerks under

(1) (1953) S. C. R. 302.

1958.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

them. It may be that in some instances, supervisory work is of such a type and character that it can only be a responsibility of an officer, strictly so called. That may very well happen where there is a supervising hierarchy, and particularly so in big banks and in Head Offices and branches in important cities where the volume of work is considerable and requires supervision at several stages. It must be remembered that in the banking industry there is supervision at several levels, as for instance, where a cheque goes round a number of hands to see whether it is in order and should be paid and in some cases where the amounts are large still higher officers may have to scrutinise the same. Supervision, therefore, in banking industry cannot be regarded as a clear dividing line between clerical and officers' work. In this respect the peculiarities of this industry must be kept in view. As already stated, a hard and fast rule cannot be laid down". The observations made by Justice Bind Basni Prasad and by the Tribunal must, therefore, be read in the special background of the conditions prevailing in the banking industry and cannot be applied to the present case.

On behalf of the respondents Mr. Baldeva Sahay referred to the award of the Industrial Court in *Jam-e-Jamshed Press, Bombay* v. *Workmen Employed Under It*(1). In which it was held by the Industrial Tribunal that members of the Editorial Department of the newspaper were not covered by the definition of the word 'workmen' under section 2(*s*) of the Industrial Disputes Act. It was contended before the Tribunal on behalf of the employers that the members of the Editorial Department were not occupied in doing work which was mainly skilled clerical work but do journalistic work which was superior to and distinct from skilled clerical work or the work done by the workmen in the press section. This argument was accepted by the Tribunal but there is

(1) (1950) Ind. C. R. 1112.

1956.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI, J.

no actual discussion of the point and the case proceeded mainly on the admission that the case did not fall within the ambit of the Industrial Disputes Act.

For the reasons already stated, I think petitioner no. 1 Sri Vinaya Nath Narain Sinha is not a workman within the meaning of the Industrial Disputes Act and section 33 of the Act has no application to the present case.

Assuming that my conclusion on this point is not right and that there has been a breach of section 33 of the Act on the part of the respondents, the question arises whether petitioner no. 1 has any civil right of action. This question is important, for the existence of a civil right is the foundation of an application for the grant of a *writ* under Article 226 of the Constitution. Unless, therefore, the petitioner no. 1 establishes that there has been a breach of civil right, the application for issue of a *writ* under Article 226 of the Constitution must fail. On behalf of the opposite parties Mr. Baldeva Sahay maintained that even if section 33 had been violated, petitioner no. 1 had no right of action.

Mr. Baldeva Sahay referred to section 31(1) of the Act which is as follows:

> "Any employer who contravenes the provisions of section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both".

The submission of the learned counsel was that special penalty has been attached to the breach of section 33 and that remedy is exclusive, and petitioner no. 1 has no civil remedy in addition to the remedy expressly provided by the statute. Mr. B. C. Ghosh on behalf of the petitioners put forward the opposite view that apart from the express penalty provided in section 31, petitioner no. 1 had a right of civil action for breach of section 33. In my opinion, the question raised depends upon the intention of the Trade Disputes Act. Was it intended to make the duty one

which was owed to the individuals aggrieved or was it intended to be a public duty only? The answer depends upon the construction of the whole Act and the circumstances in which it has been enacted.

In the approach to this question it is necessary to have regard to certain principles which afford guidance in ascertaining the intention of the Legislature. For example, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is dimnified by the breach. For, if it were not so, the statute would be wholly ineffectual. But "where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner" [Lord Tenterden, C. J. in *Doe* v. *Bridges*(1)]. This passage was cited with approval by the Earl of Halsbury, L. C. in *Pasmore* v. *Oswaldtwistle Urban District Council*(2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. That depends on the scope and language of the particular statute. For instance, in *Black* v. *Fife Coal Co., Ltd.*(3), Lord Kinnear observed: "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.*(4), and by Lord Herschell in *Cowley* v. *Newmarket Local Board* (5) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit

(1) (1831) 1 B. & Ad. 847, 859.
(2) (1898) A. C. 387, 394.
(3) 1912, A. C. 149, 165.
(4) (1877) 2 Ex. D. 411, 448.
(5) (1892) A. C. 345, 352.

1958.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention ".

An illustration of the general rule is the leading case of *Atkinson* v. *Newcastle & Gateshead Waterworks Co.*(1). In that case it was held by the Court of Appeal, reversing the decision of the Court of Exchequer, that the defendant company was not liable in damages for the destruction of the plaintiff's house by fire, although its destruction was directly due to the failure of the defendants to perform the duty laid upon them under the Waterworks Clauses Act, 1847, to maintain a certain pressure of water in their water-pipes for the purpose of extinguishing fire. The statute in question provided that any breach of this duty should be an offence punishable by a fine of ten pounds, and the Court came to the conclusion that on the true interpretation of the statute the intention of the Legislature was that this should be the sole remedy available. The principle is stated by Lord Cairns as follows: " Apart, then, from authority, I should say, without hesitation, that it was no part of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action; but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them to the persons injured, but, where not convenient so to do, there simply to impose public penalties, not by way of compensation, but as a security to the public for the due performance of the duty ".

(1) (1887) 2 Ex. D. 441, 448.

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI, J.

Adopting this principle, it is necessary to consider the scope and object of the Trade Disputes Act and to ascertain for whose benefit the protection of section 33 is intended. Section 33 undoubtedly imposes a duty on the employers but the important question is—to whom is the duty owed? Was it intended by the framers of the Act to make the duty one which was owed to the petitioner, or was it a duty owed to the public?

The *preamble* of the Act states:

"It is expedient to make provision for the investigation and settlement of industrial disputes and for certain other purposes".

There is nothing in the title or preamble of the Act which suggests that it is a charter for the employees or that it is enacted solely for the benefit of the employees like the Factories Act or the Trade Unions Act. On the contrary, the preamble suggests that the object of the Act was the proper adjustment of relations between capital and labour, preservation of law and order, and the increases of industrial production. Chapter II deals with the constitution of authorities like Conciliation Officers, Boards of Conciliation, Courts of Enquiry and Industrial Tribunals. Chapter III deals with references of disputes to Boards, Courts or Tribunals. Chapter IV of the Act relates to procedure, powers and duties of authorities constituted for investigation and settlement of industrial disputes. Chapter V is entitled "Strikes and lock-outs".

Section 22(1) of this Chapter states that:

"No person employed in a public utility service shall go on strike in breach of contract without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking.....".

Section 22(2) states that—

"No employer carrying on any public utility service shall lock-out any of his workmen without giving them notice of look-out as hereinafter provided, within six weeks before locking out....."

1953.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

Section 23 states:

"No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out—(*a*) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings; (*b*) during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceeding; or (*c*) during any period in which a settlement or award is in operation in respect of any of the matters covered by the settlement or award".

Section 24 provides that a strike or a lock-out shall be illegal if it is commenced or declared in contravention of section 22 or section 23. Chapter VI is important. Section 26(1) states that any workman who commences, continues or otherwise acts in furtherance of an illegal strike shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees. Section 26(2) similarly provides that any employer who commences, continues or otherwise acts in furtherance of an illegal lock-out shall be punishable with imprisonment for a term which may extend to one month, or with fine, or with both. Section 27 provides penalty for instigation of an illegal strike or lock-out. Section 28 states that any person who knowingly expends or applies any money in direct furtherance of any illegal strike or lock-out shall be punishable with imprisonment for a term of six months. Section 30 provides penalty for disclosing confidential information.

Section 31(1) states:

"Any employer who contravenes the provisions of section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both".

Upon this consideration of the various provisions of the Act it is manifest that the overriding purpose of the Act is the benefit of the community and not the benefit of the employees or of the employers. For instance, section 24 imposes a statutory duty on the employees not to commence or declare an illegal strike. If there is a breach of this statutory duty on

the part of the employees, can it be contended that the employer has a right of civil action against the employees in default in addition to the statutory penalty provided by section 26(1)? Clearly not. Similarly if the employer declares an illegal lock-out, there is a breach of the obligation created by section 24 but the employees have no right of civil action. The exclusive remedy open to them is criminal prosecution under section 26(2). The duty imposed by section 33 on the employer is certainly not more important than the duty owed by the employer under section 24. In my opinion the duty imposed by section 33 is a duty owed not to the employees concerned but a duty owed to the public which can be solely enforced by criminal prosecution under section 31. Mr. Ghosh referred to section 34 of the Act and complained that sanction of the Government was necessary before a criminal court could take cognizance of any offence under section 33. But this circumstance supports the conclusion I have already reached that the duty is owed under section 33 not to the employees but to the public. For the matter is left under section 34 to the discretion of the local Government to authorise or not to authorise the criminal prosecution for the breach of the statutory duty imposed on the employer under section 33. There is also another circumstance to be considered.

Section 31(1) states that any employer who contravenes the provisions of section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. If the Legislature intended that the duty owed under section 33 was a private right owed to the employees, it is unlikely that the Legislature would have imposed heavy criminal penalties of this description. This circumstance also indicates that section 33 deals with violation of public right and the remedy for such violation is the exclusive remedy provided by the statute. There is also another matter to be taken into consideration.

1956.

V. N. N. SINHA v. BIHAR JOURNALS, LTD.

RAMASWAMI J.

Section 33A makes a special provision for adjudication as to whether the conditions of service, etc., have been changed during the pendency of proceedings before a Tribunal.

Section 33A states:

"Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Tribunal and on receipt of such complaint that tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly".

The provisions of section 33A also indicate that the employee has no right of civil action for breach of section 33 if the proceedings are pending before a Tribunal. Upon reading the Act as a whole and after considering its scope and object, I am satisfied that the duty imposed on the employer under section 33 is a duty not owed to the particular employee prejudicially affected, but it is a duty owed to the public. To put it differently, the employees affected have no right of action for a breach of the statutory obligation imposed by section 33. The remedy for breach of section 33 is the special penalty provided in section 31 of the Act, and the statutory obligation can be enforced only by that special penalty. It is manifest that the petitioners in this case have no civil right even if it is assumed that there is breach of section 33 on the part of the respondents.

In view of these considerations I think that this application for issue of a *writ* under Article 226 of the Constitution must fail and should be dismissed with costs. Hearing fee five gold mohars.

SINHA, J.—I agree.

Application dismissed.

K. D.

REVISIONAL CRIMINAL.

1953.
July, 21.
30.
August, 11.

Before Jamuar and Sahai, JJ.

RAMJEE

v.

STATE.*

Bihar Prevention of Food Adulteration Act, 1947 (*Bihar Act V of* 1948), *section* 3(*c*)(*i*), 21—*complaint by Chairman of a municipality, whether legal.*

Chairman of a municipality is not 'local authority' within the meaning of the Bihar Prevention of Food Adulteration Act, 1947.

Hence, a magistrate has no jurisdiction to take cognizance of a case under the Act on the complaint of the Chairman.

Application in revision by the accused person.

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

The case in the first instance came before Narayan, J., who referred it to a Division Bench.

On this reference.

Prem Lall, for the petitioner.

K. P. Varma, for the State.

SAHAI, J.—This is an application against a judgment of the Sessions Judge of Monghyr whereby he dismissed an appeal against an order of a Magistrate with first class powers who convicted the petitioner under section 27 read with section 8(1) of the Bihar Prevention of Food Adulteration Act, 1947, and sentenced him to pay a fine of Rs. 300 or, in default, to undergo rigorous imprisonment for three months.

* Criminal Revision no. 963 of 1952, against an order of Mr. R. Sharan, Sessions Judge, Monghyr, dated the 26th August, 1952, affirming an order of Mr. P. Jha, Magistrate 1st class, Monghyr, dated the 28th January, 1952.

1953.

RAMJEE v. STATE.

SAHAI, J.

The facts of the case may be shortly stated. Bhupendra Narayan (P. W. 1) is a Sanitary Inspector attached to the Monghyr Municipality. He went to the petitioner's shop on the 14th February, 1950, and took sample of mustard oil which was exposed for sale. He tendered the price to the petitioner; but the latter refused to accept it. The sample was sent to the Chemical Analyst for examination. He reported that the mustard oil was adulterated with linseed oil. After receiving this report, the Sanitary Inspector filed a prosecution report before the Chairman of Monghyr Municipality. The Chairman's order was: "Prosecution sanctioned, submitted to the Magistrate".

The Subdivisional Magistrate took cognizance on the basis of the aforesaid prosecution report with the Chairman's order, and the petitioner was tried. He was convicted and sentenced as already mentioned.

Mr. Prem Lall, who has appeared on behalf of the petitioner, has argued that the Subdivisional Magistrate could not take cognizance in this case in view of section 21 of the Food Adulteration Act. Section 21 lays down as follows:—

> "No Court shall take cognizance of an offence against the provisions of this Act except on the complaint made by—
>
> (*a*) a purchaser of an article of food;
>
> (*b*) the local authority or a person expressly authorised in this behalf by the local authority;
>
> * * * *"

We are not concerned with the other parts of this section. Mr. K. P. Varma, who has appeared on behalf of the State, has conceded that the Chairman could not be held to be the local authority as referred to in section 21(*b*), because the expression "local authority", as defined in section 3(*e*)(*i*), means "in a municipality, the Municipal Commissioners". The prosecution report which is the complaint in this case

1953.

RAMJEE v. STATE.

SAHAI, J.

bears the signatures of only the Chairman and the Sanitary Inspector. There is no evidence that either of them was authorised by the municipal commissioners to file a complaint in connection with an offence under the Food Adulteration Act. In similar circumstances, Imam, J. held in *Gopal Das Kapoor* v. *The State*(1) (disposed of on the 13th January, 1953), that no opportunity could be given to the prosecution by the appellate Court to prove that the Vice-Chairman or the Health Inspector in that case was authorised to file a complaint when it had failed to prove this fact at the trial. We, however, gave plenty of time to Mr. K. P. Varma to find out whether there was any such authorisation; but he has conceded today that neither the Chairman nor the Sanitary Inspector has ever been authorised by the municipal commissioners to file a complaint in a case of this kind. Thus the complaint cannot be treated to be a complaint filed as contemplated by section 21(*b*).

Some argument was advanced on previous dates by Mr. K. P. Varma to the effect that the complaint was properly entertained by the Subdivisional Magistrate because it had been signed by the Sanitary Inspector (P. W. 1) also, and he was a purchaser within the meaning of section 14 of the Act. He was given time to find out whether there was any notified order as required by section 14, authorising the Sanitary Inspector to make a purchase. " Notified order " has been defined in section 3(*f*) to mean " an order notified in the Offical Gazette ". He has conceded today that there is no notification in the Official Gazette authorising the Sanitary Inspector to make a purchase in accordance with section 14. He has today argued that the Sanitary Inspector could file the complaint as he was a purchaser in accordance with section 13. Section 13, however, provides for a case of purchase by an ordinary purchaser. A transaction which can be described as purchase can only be

(1) (1953) Cr. Rev. no. 1090 of 1952 (unreported).

1953.

RAMJEE v. STATE.

SAHAI, J.

based upon passing of consideration. In this case, the Sanitary Inspector did not actually pay any price as the petitioner did not accept it; and there is no evidence that he promised to pay the price in future. That being so, the transaction cannot be held to be a purchase.

The result is that I am unable to hold that the Sanitary Inspector is a purchaser either within the meaning of section 13 or within the meaning of section 14 of the Act. He could not, therefore, file a complaint as a purchaser under section 21(*a*). That being so, it is clear that no Court could entertain the complaint which was filed in this case. It is, therefore, further clear that the Court had no jurisdiction to try this case at all.

In the circumstances mentioned above, I would allow this application, and set aside the conviction and sentence recorded against the petitioner.

JAMUAR, J.—I agree.

Rule made absolute.

K. D.

MISCELLANEOUS JUDICIAL.

1953.

August, 11, 12, 13, 14, 17.

Before Ramaswami and Sinha, JJ.

R. A. SINGH

v.

STATE.*

Master and Servant—case of compulsory retirement of a Sub-Inspector of Police under rule 75(d) of the Bihar and Orissa Service Code—provisions of Articles 311, 320, whether applicable—Article 226, prayer for the issue of a writ under, whether entertainable.

* Miscellaneous Judicial Case no. 448 of 1952, in the matter of an application under Article 226 of the Constitution of India.

1953.

R. A. SINGH v. STATE.

A case of compulsory retirement contemplated in rule 75(*d*) of the Bihar and Orissa Service Code is not a case of removal or dismissal from service within the meaning of Article 311 of the Constitution of India.

Ajit Kumar Banerji v. *Chief Operating Superintendent, East Indian Railway, Calcutta*(1) and *Satish Chandra Anand* v. *The Union of India*(2), referred to.

The interpretation of the rule is for the courts of law to decide and the interpretation placed upon it by the Executive Authorities is not binding upon the court.

Held, that the provisions of Article 320 of the Constitution of India were not attracted to the case of the petitioner,

Held, further, that no case for issue of *writ* under Article 226 of the Constitution of India had been made out.

Application under Article 226 of the Constitution of India.

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

Bhabanand Mukharji, *Amlakant Choudhury* and *Kameshwari Nandan Singh*, for the petitioner.

Government-Advocate, for the opposite party.

RAMASWAMI AND SINHA, JJ.—In this case, the petitioner Ram Adhar Singh has obtained a rule calling upon the opposite party, the State of Bihar and the Inspector-General of Police, to show cause why a *writ* in the nature of *certiorari* should not issue for quashing the order, dated the 27th of October, 1952, requiring the petitioner to retire compulsorily under the provisions of rule 75(*d*) of the Bihar and Orissa Service Code.

The petitioner was employed as a Sub-Inspector of Police, and was last stationed at Arrah, in the district of Shahabad. The petitioner was appointed

(1) (1953) A. I. R. (Pat.) 92.
(2) (1953) A. I. R. (S. C.) 250.

1953.

R. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

to the police service on the 2nd January, 1926. He completed twenty-five years of service on the 2nd January, 1951. It appears that on the 24th of October, 1950, there was an amendment of rule 75(*d*) of the Bihar and Orissa Service Code providing that the State Government may require any Government servant, who has completed twenty-five years of service from the date of his first appointment, to retire from Government service, if it considers that his efficiency and conduct are not such as to justify his retention in the service. Acting on the provisions of this amended rule, the Inspector-General of Police issued a notice to the petitioner on the 24th of September, 1951, asking him to show cause why he should not be compulsorily retired. The notice is as follows:—

"You were appointed on 2nd January 1926 and therefore completed 25 years of total service on 2nd January 1951.

You have completed 21 years of duty as defined in Service Code rule 18, vide calculation attached.

You have earned 98 rewards and nil major and 8 minor punishments vide the statement enclosed herewith.

Extracts from your c. c. roll containing adverse entries are also enclosed.

Judging from your records I consider that you are unfit for further retention in public service and therefore, I propose to retire you from service in accordance with the power conferred on me by rule 75(*d*) of the Service Code.

I direct you to show cause why you should not be made to retire forthwith.

Any representation that you wish to make must be submitted by 12th October 1951. This will be considered by the Committee that has been set up before I pass final orders."

There was, annexed to this notice, a statement of rewards and punishments and also an extract from the adverse entries in the character roll of the petitioner. In reply to the notice, the petitioner duly made representation. On the 27th of October, 1952, the Inspector-General of Police sent the following letter to the petitioner:—

"In accordance with powers vested in me under rule 75(*d*) of

Bihar and Orissa Service Code (as amended) and agreeing with the recommendation of the Board, I hereby order that the following officers should be retired compulsorily with effect from 1st November 1952:—

(1) Sulaiman Khan of Shahabad.

(2) Azim Khan of Shahabad.

(3) Ram Adhar Singh of Shahabad."

1953.

R. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

It is submitted on behalf of the petitioner that the order of the Inspector-General of Police dated the 27th October, 1952, is illegal and without jurisdiction as there was no compliance with the provisions of Article 311 of the Constitution of India. The petitioner, consequently, prays that a *writ* in the nature of *certiorari* should be granted by this Court for quashing the order passed by the Inspector-General of Police on the 27th of October, 1952.

Cause has been shown by the learned Government Advocate on behalf of the State of Bihar and on behalf of the Inspector-General of Police.

The first question to be examined is whether Article 311 of the Constitution of India applies to this case. The submission of Mr. Bhabanand Mukharji is that the order of compulsory retirement, under the provisions of rule 75(*d*) of the Bihar and Orissa Service Code, is tantamount to an order of dismissal or removal within the meaning of Article 311 of the Constitution. On the basis of this submission, learned Counsel contended that Article 311(2) requires that no person should be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against any action proposed to be taken in regard to him. In other words, the argument is that the opposite party ought to have served on the petitioner two notices, one notice asking him to show cause why he should not be compulsorily retired under rule 75(*d*), on the ground that his efficiency and conduct are not such as to justify his retention in service, and a second notice requiring the petitioner to show cause why the proposed action,

1958.

R. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

namely, order of compulsory retirement, should not be taken. The question whether two notices were requisite in this case really depends upon a proper interpretation of Article 311 of the Constitution. We do not propose to go into this question for we think that the petition must fail on the ground that Article 311 of the Constitution has no application to this case. The argument of Mr. Bhabanand Mukharji, on behalf of the petitioner, is that a case of compulsory retirement under rule 75(*d*) of the Bihar and Orissa Service Code is tantamount to an order of dismissal or removal within the meaning of Article 311(2) of the Constitution. We are unable to accept this argument. In our opinion, the terms ' dismissal ', ' removal ' and ' reduction in rank ' are all technical expressions employed in Article 311, and it is not right to interpret them in the popular or grammatical sense. The question is not to be approached from the grammatical point of view. The question of construction of Article 311 must, on the other hand, be decided upon a historical approach. In the interpretation of Article 311, you must have regard to the historical facts, you must have regard to the surrounding circumstances, you must have regard to the state of the law at the time the Constitution was enacted. Under section 241 of the Government of India Act, 1935, which corresponds to Article 309 of the Constitution of India, rules and regulations have been framed regulating the recruitment and conditions of service of persons appointed to public services in the Government of India and in the Government of the various States. Rule 49 of the Civil Services (Classification, Control and Appeal) Rules sets out various penalties to which the members of the service can be subjected. These penalties are, (*i*) censure, (*ii*) withholding of increments or promotion, including stoppage at an efficiency bar, (*iii*) reduction to a lower post or time-scale, or to a lower stage in a time-scale, (*iv*) recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders, (*v*) suspension, (*vi*) removal

1953.

R. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

from the civil service of the Crown, which does not disqualify from future employment, and (*vii*) dismissal from the civil service of the Crown which ordinarily disqualifies from future employment. This rule applies to the officers belonging to superior class of service. It should be noticed that a case of compulsory retirement is not dealt with in rule 49 but is separately dealt with in Article 465-A of the Civil Service Regulations. Note 1 to Article 465-A is to the following effect:—

"465A. For officers mentioned in Article 349-A. the rule for the grant of retiring pension is as follows:—

(1) An officer is entitled, on his resignation being accepted, to a retiring pension after completing qualifying service of not less than 25 years or in the case of officers of Imperial Services of the Forest, Geological Survey, Public Works, Railway and Telegraph Departments and any others covered by Article 635 who entered the service before the 6th day of December, 1932, not less than twenty years.

(2) A retiring pension is also granted to an officer who is required by Government to retire after completing twenty-five years' qualifying service or more.

NOTE 1.—Government retains an absolute right to retire any officer after he has completed twenty-five years' qualifying service without giving any reasons, and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of an officer."

As regards police officers of the subordinate services, to which category the petitioner belongs, the relevant provision is rule 824 of the Bihar and Orissa Police Manual which describes in detail the punishments which may be inflicted on a police-officer below the rank of Deputy Superintendent. These punishments include a case of dismissal or removal, but rule 824 does not refer to a case of compulsory retirement. It is important to take note of the fact that a case of compulsory retirement is not referred to either in rule 49 of the Civil Services (Classification, Control and Appeal) Rules or in rule 824 of the Bihar and Orissa Police Manual. In case of police services of subordinate class the rule of compulsory retirement is

1953.

R. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

contained in rule 75(*d*) of the Bihar and Orissa Service Code, which, after the amendment of the 24th of October, 1950, is to the following effect:—

"(*d*) The State Government may require any Government servant who has completed twenty-one years of duty and twenty-five years of total service calculated from the date of his first appointment to retire from Government service, if it considers that his efficiency and conduct are not such as to justify his retention in service. Where any Government servant is so required to retire, no claim to any special compensation shall be entertained.

NOTE 1.—Compulsory retirement effected in pursuance of this rule amounts to removal from service within the meaning of clause (2) of Article 311 of the Constitution of India and Government servant so compulsorily retired shall be given a reasonable opportunity to show cause against the action proposed to be taken against him. It shall, however, not be necessary in such cases to follow the procedure laid down for the institution of departmental proceedings against a Government servant before removing him from Government service.

NOTE 2.—The grant under rule 296 of leave extending beyond the date on which a Government servant must compulsorily retire, or beyond the date up to which a Government servant has been permitted to remain in service, shall be treated as a sanction to an extension of service up to the date on which the leave expires."

It is manifest, therefore, that the statutory rules made under section 241 of the Government of India Act, 1935, made a clear distinction between a case of removal or dismissal of a Government servant and a case of compulsory retirement. If we construe Article 311 of the Constitution in the background of the statutory rules and regulations, it is clear enough that the expressions 'removal' and 'dismissal' in that Article cannot be interpreted so as to include a case of compulsory retirement. The expressions 'removal' and 'dismissal' in this Article must be given the same meaning which is given in the statutory rules and regulations which were existent at the time the Constitution was enacted If this view is correct, it must follow that the order of compulsory retirement passed against the petitioner does not fall within the purview of Article 311 of the Constitution of India.

The view that we have taken as regards the interpretation of Article 311 of the Constitution is supported by a decision of this Court in *Ajit Kuma*

Mukherji v. *Chief Operating Superintendent, East Indian Railway, Calcutta*(1), in which it was held that the expressions 'dismissal' and 'removal' used in Article 311 must be construed in a technical sense and not in the popular sense and that a case of compulsory termination of service under rule 3 of the Railway Services (Safeguarding of National Security) Rules does not fall within the ambit of that Article. This view is also supported by a decision of the Supreme Court in *Satish Chandra Anand* v. *The Union of India*(2) in which it was decided that the termination of service of a civil servant in accordance with the terms of a contract was not tantamount to dismissal or removal or reduction in rank within the meaning of Article 311 which had no application to the case. At page 251 of the report, Bose, J. has observed as follows:—

"Taking Article 14 first, it must be shown that the petitioner has been discriminated against in the exercise or enjoyment of some legal right which is open to others who are similarly situated. The rights which he says have been infringed are those conferred by Article 311. He says he has either been dismissed or removed from service without the safeguards which that Article confers. In our opinion, Article 311 has no application because this is neither a dismissal nor a removal from service, nor is it a reduction in rank. It is an ordinary case of a contract being terminated by notice under one of its clauses.

The services in India have long been afforded certain statutory guarantees and safeguards against arbitrary dismissal or reduction in rank. Under section 240, Government of India Act, 1935, the safeguards were limited to those two cases. Under the present Constitution, a third was added, namely, removal from service. In order to understand the difference between 'dismissal and 'removal' from

(1) (1953) A. I. R. (Pat.) 92.
(2) (1953) A. I. R. (S. C.) 250.

1952

R. A. SINGH v. STATE.

service, it will be necessary to turn to the Rules which governed, and with modifications still govern, the 'services' in India because of Article 313 of the Constitution.

RAMASWAMI AND SINHA, JJ.

Part 12 of the Civil Services (Classification Control and Appeal) Rules relating to Conduct and Discipline includes Rule 49 which sets out the various penalties to which a member of the services can be subjected for indiscipline and misconduct. They are seven in number and include censure, suspension, reduction in rank, removal from service and dismissal from service. The Act of 1935 selected only two of these possible penalties as serious enough to merit statutory safeguards, namely, reduction in rank and dismissal from service. The Constitution has added a third to the list. The distinction which is drawn between the two is explained in Rule 49. There is first removal from service 'which does not disqualify from future employment and there is next dismissal from service 'which ordinarily disqualifies from future employment '.

Then follows an Explanation:

'The discharge—

(*c*) of a person engaged under contract, in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule '.

These terms are used in the same sense in Article 311. It follows that the Article has no application here and so no question of discrimination arises, for the 'law' whose protection the petitioner seeks has no application to him.''

In the course of his argument, Mr. Bhabanand Mukharji referred to the note appended to rule 75(*d*) of the Bihar and Orissa Service Code which states:

"Compulsory retirement effected in pursuance of this rule amounts to removal from service within the meaning of clause (2) of Article 311 of the Constitution of India and Government servant so compulsorily retired shall be given a reasonable opportunity to show cause against the action proposed to be taken against him. It shall, however, not be necessary in such cases to follow the procedure laid down for the institution of departmental proceedings against a Government servant before removing him from Government service."

The argument of Mr. Bhabanand Mukharji is that this note is a part of the amendment made by the Governor of Bihar and must be read as a part of rule 75(*d*). The contention of the learned Counsel is that it is the intention of the rule-making authorities that compulsory retirement will be treated as removal from service for the purposes of Article 311(2) of the Constitution of India and that a Government servant so compulsorily retired should be given a reasonable opportunity to show cause against the action proposed to be taken against him. We regret, we are unable to accept the argument put forward by the learned Counsel. The note,—whether it is treated as part of rule 75(*d*) or is not to be so treated—is merely the view of the Executive Government as to the interpretation of rule 75(*d*). The question whether a case of compulsory retirement in rule 75(*d*) is tantamount to removal from service under Article 311 of the Constitution of India is a judicial question to be decided in a proper Court, and the view of the Executive Government as to the legal effect of rule 75(*d*) cannot be conclusive on the point. For the reasons we have already expressed in the earlier part of the judgment, we are of the opinion that a case of compulsory retirement contemplated in rule 75(*d*) is not a case of removal or dismissal from service within the meaning of Article 311 of the Constitution of India; and that the petitioner cannot be heard to complain that the safeguards provided in Article 311 have been violated in his case. As we have already said, the interpretation of rule 75(*d*) is for the Courts of law to decide and the interpretation placed upon it by the Executive Authorities is not binding upon the Court.

1955.

B. A. SINGH v. STATE.

RAMASWAMI AND SINHA, JJ.

Reference may be made in this connection to the following passage at page 393 of Crawford's Statutory Construction:—

"As a general rule executive and administrative officers will be called upon to interpret certain statutes long before the courts may have an occasion to construe them. Inasmuch as the interpretation of statutes is a judicial function, naturally the construction placed upon a statute by an executive or administrative official will not be binding upon the court. Yet where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has ben observed and acted upon for a long period of time, and generally or uniformly acquiesced in, it will not be disregarded by the courts, except for the most satisfactory, cogent or impelling reasons. In other words, the administrative construction generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight."

Two other points were taken by learned Counsel for the petitioner. In the first place, it was complained that the notice given to the petitioner by the Inspector-General of Police was vague and did not give sufficient particulars as regards the alleged inefficiency. The second point was that Article 320 of the Constitution of India was violated in the case of the petitioner and the order of compulsory retirement was, therefore, *ultra vires* and without jurisdiction. It is necessary to remark that neither of these two points were put forth by the petitioner in his application. On the point of vagueness, it was pointed out by the learned Government Advocate that the petitioner did not complain at the time of showing cause

before the Inspector-General of Police that the notice given to him was vague; on the contrary, the petitioner duly made his representation to the Inspector-General of Police against the action proposed against him. On the merits also, the argument has no substance, for we think (for the reasons already stated) that a case of compulsory retirement from service is not a case of disciplinary action falling within the purview of Article 311 and even if there was vagueness in the notice the petitioner cannot complain that any right under Article 311 has been violated. As regards the reference to Article 320 also, the argument on behalf of the petitioner is without substance. It was argued on behalf of the petitioner that this Article required that State Public Service Commission should have been consulted before the services of the petitioner were terminated. We are not aware in this case whether the State Public Service Commission was consulted or not. Indeed the Government Advocate took the objection that this point was not taken in the application under Article 226 and he had no opportunity to find out whether the State Public Service Commission had been consulted in this case or not. But even if it is assumed that the State Public Service Commission was not consulted in this case, we are of the opinion that the order of compulsory retirement is not unconstitutional. Article 320(3)(*c*) indicates that the Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters. It is manifest that Article 320(3)(*c*) refers to a case of only disciplinary action. In view of the considerations we have set out while dealing with the applicability of Article 311, we are of the opinion that the case of the petitioner is not a case of disciplinary action to which the provisions of Article 320 are attracted. The argument of Mr. Bhabanand Mukharji on this point cannot be accepted as correct.

1953.

R. A. SINGH v. STATE.

In view of these considerations, we think that no case has been made out by the petitioner for issue of a *writ* under Article 226 of the Constitution of India. We, accordingly, dismiss the application.

Application dismissed.

RAMASWAMI AND SINHA, JJ.

K. D.

APPELLATE CIVIL.

1953.

August, 18.

Before Reuben, C.J. and Choudhary, J.

M. C. DUTTA

v.

RAI M. N. BOSE.*

18.

Landlord and Tenant—co-sharer landlord purchasing occupancy holding and settling same with another—such settlee becomes tenant of all the co-sharers but he is liable for the settled rent only to the settler landlord—other co-sharer landlords entitled to their share of the original rent from the co-sharer landlord who purchased and made the settlement—Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 22(2)—*case-law, reviewed.*

When a co-sharer landlord purchases an occupancy holding and settles that with another person, that person becomes a *raiyat* of all the landlords, but he is liable to pay rent at which the settlement is made with him, only to the purchasing co-sharer landlord who had inducted him on the land, and, so far as the other co-sharer landlords are concerned there is no relationship of landlord and tenant between them and the sub-lessee from the co-sharer purchaser landlord for the purpose of realising rent, and that those other co-sharer landlords are entitled to receive their proportionate share of the original rent from the purchasing co-sharer who holds an intermediate interest in the land and is bound to pay rent to the other co-sharers.

* Appeal from Appellate Decree no. 1533 of 1950, with Civil Revision no. 663 of 1950, from a decision of Mr. S. S. Sinha, 4th Additional Subordinate Judge, Gaya, dated the 15th June, 1950, affirming that of Mr. S. N. Ganguli, 3rd Additional Munsif, Aurangabad, dated the 30th March, 1949.

1953.

M. C. DUTTA v. RAI M. N. BOSE.

Jadupravа Mitra v. *Rai Batabehari*(1), *Raja Surajpal* v. *Ramgati*(2), *Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*(3) and *U. P. N. Sahi* v. *Dulhin I. Kuer*(4), reviewed.

Appeal and application in revision by plaintiff no. 2.

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

The cases in the first instance came before Rai, J. who referred them to a Division Bench.

On this reference.

U. N. Sinha, for the appellant-petitioner.

Nakuleshwar Prasad, for the opposite party.

S. Mustafi and *Radhika Raman Pd.*, for the respondents.

CHOUDHARY, J.—This appeal and the application in revision by plaintiff no. 2 are directed against the judgment and decree of the fourth Additional Subordinate Judge, Gaya, passed in Money Appeal no. 3 of 1950, affirming the judgment and decree of the third Additional Munsif, Aurangabad.

The plaintiffs brought a suit for recovery of money value of produce rent for the years 1353 and 1354 Fasli in respect of a holding appertaining to *khata* no. 35 of village Dhiwar, *tauzi* no. 2892, in the district of Gaya. Originally this holding was a *bhaoli* holding. The plaintiffs are co-sharer landlords to the extent of 6 annas 9 pies, the principal defendants, namely, defendants 1 to 5 are co-sharer landlords to the extent of 8 annas and the remaining 1 anna 3 pies share belongs to the *pro forma* defendants. In the year 1925 the principal defendants purchased the holding in execution of a decree for rent obtained by them against the original tenant and in

(1) (1947) I. L. R. 26 Pat. 659.
(2) (1947) I. L. R. 26 Pat. 353.
(3) (1937) I. L. R. 16 Pat. 500.
(4) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

M. C. DUTTA v. BAI M. N. BOSE.

CHOUDHARY, J.

due course obtained possesion thereof. In 1935 they settled the land with one Ramnandan Missir on a cash rent of Rs. 26-15-3, besides cess, per year. The plaintiffs sought to get their proportionate share of price of *bhaoli* produce as against the principal defendants on the ground that they were liable to pay the same to the plaintiffs under section 22(2) of the Bihar Tenancy Act. These defendants contested the suit on the ground that they were not liable to pay any rent as they had already settled the land with Ramnandan Missir. This Ramnandan Missir, however, filed a petition for being made an intervenor defendant, which was allowed and he contested the suit on the ground that the plaintiffs were entitled to a decree against him not on the basis of produce rent, but on the basis of the annual rental of Rs. 26-15-3, according to the settlement made with him. Both the courts below accepted the defence of the defendants and decreed the suit against the intervenor defendant only on the basis of cash rental. Plaintiff no. 2 has, therefore, come up in appeal to this Court, and by way of precaution he has filed an application in revision also.

The question to be considered is whether the co-sharer landlord who has purchased the occupancy holding will have to pay to his co-proprietor his share of the rent which was originally payable by the tenant to all the landlords or the non-purchasing co-sharer will have to realise his share of the rent from the sub-lessee inducted on the land by the purchasing co-sharer on the basis of the rent payable by such sub-lessee: in other words, whether the plaintiff is to receive his share of rent from the principal defendants 1 to 5 according to the rent of the original tenancy, namely, the share in *bhaoli* produce, or, he has to receive his proportionate share of rent from the intervenor defendant on the basis of the cash rental at which it was settled with him by the principal defendants. Mr. H. N. Sinha appearing for the appellant has argued

1953.

M. C. DUTTA v. RAI M. N. BOSE.

CHOUDHARY, J.

that sub-section (2) of section 22 of the Bihar Tenancy Act entitles the plaintiff to receive from the principal defendants his proportionate share of the original rent which was payable by the original tenants to the 16 annas landlords. This sub-section runs as follows:

"If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a *raiyat*, as the case may be, in respect of the land."

There is an illustration to this sub-section which runs as follows:

"A, a co-sharer landlord, purchases the occupancy-holding of a *raiyat* X. *A* is entitled himself to hold the land on payment to his co-sharers of the shares of the rent payable to them in respect of the holding. A sub-lets the land to Y, who takes it for the purpose of establishing tenants on it; Y becomes a tenure-holder in respect of the land. Or *A* sub-lets it to Z, who takes it for the purpose of cultivating it himself; Z becomes a *raiyat* in respect of the land."

In *Jaduprava Mitra* v. *Rai Batobehari*(1) it was held that a person who takes settlement from the purchasing co-sharer becomes *raiyat* under the whole body of landlords provided the settlement is made *bona fide*. Relying on this decision the court below came to the conclusion that the intervenor defendant was a *raiyat* under the whole body of landlords including the plaintiffs who were, therefore, held to be entitled to recover rent from him alone on the basis of the cash rental. It refused to consider the case of *Raja Surajpal* v. *Ramgati*(2) as it was considered in the case of *Jaduprava Mitra* v. *Rai Batobehari*(1). The court below was in error in not considering the case of I. L. R. 26, Patna 353. This case was no doubt referred to in the judgment of Ramaswami, J. in the latter case, but the questions decided in the two cases were different and the decisions were not inconsistent with each other.

(1) (1947) I. L. R. 26 Pat. 659.
(2) (1947) I. L. R. 26 Pat. 353.

1953.

M. C. DUTTA v. RAI M. N. BOSE.

CHOUDHARY, J.

In *Raja Surajpal* v. *Ramgati*(1), it was held as follows:

"Section 22(2), Bihar Tenancy Act, 1885, clearly recognises that where an occupancy right in land is transferred to a person jointly interested in the land as proprietor, he shall be entitled to hold the land subject to the payment to his co-proprietors their share of rent which may be from time to time payable to them. The fact that he sub-lets the land to some one else cannot deprive his co-sharer of the right to realise from him their share of the rent which may be from time to time payable and, therefore, that the person to whom the land was sub-let was not a necessary party to a suit for recovery of rent."

In the course of the judgment Imam, J. observed:

"No matter what the purchasing co-sharer does by way of sub-letting the land to a third person *vis-a-vis* himself and his co-sharers his liability to pay the shares of rent to his co-sharers remains unaffected."

The observation of Das, J. also may preferably be quoted:

"I do not see how the purchasing co-sharer can say in this case that his co-proprietors must sue Nathuni Mahto (sub-lessee under the purchasing co-sharer) on a reduced rental and thereby force them to give up the right to realise their share of the original rent from the purchasing co-sharer."

Reliance was placed on the case of *Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*(2) according to which the co-sharer purchaser was liable to pay rent of the original holding and not the rent payable in respect of the tenancies that might have

(1) (1947) I. L. R. 26 Pat. 353.
(2) (1937) I. L. R. 16 Pat. 500.

1953.

M. C. DUTTA v. RAI M. N. BOSE. CHOUDHARY, J.

been created by him. Fazl Ali, J. (as he then was) held as follows:

" In my opinion, if sub-section (2) is read along with the illustration which follows it, it will be tolerably clear that the word ' rent ' used in this sub-section means the rent which was payable in respect of the holding when it was transferred. The words ' in respect of the holding ' do not occur in the sub-section (2) but they do occur immediately after the words ' payable to them ' in the illustration and this seems to me to indicate clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer."

His Lordship further observed:

" If the purchasing co-sharer sub-lets the land to a third person and realises from him a higher rent than that paid by the original tenant, the other co-sharers are not entitled under this section to realise from the purchasing co-sharers their share of such rent."

The point was further considered in the Full Bench decision of *U. P. N. Sahi* v. *Dulhin I. Kuer*(1). After reviewing the various cases on the point Meredith, J. observed as follows:

" We get two things from these cases: (1) that, when the purchasing co-sharer sub-lets, his sub-lessee gets the full rights and status of a *raiyat*, and, with respect, I think, that is the only possible view. Anything else would destroy the whole effect intended by the Legislature, and reduce the sub-lessee to a mere trespasser *vis-a-vis* the remaining co-sharers; and (2) that, though a sub-lessee has the rights of a *raiyat*, he is liable to pay rent only to the purchasing co-sharer. The remaining co-sharers cannot sue him for rent, nor can they sue the purchasing co-sharer for their proportionate share of the sub-lessee's rent, but only for

(1) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

M. C. DUTTA v. RAI M. N. BOSE.

CHOUDHARY, J.

their share of the original rent of the holding. That also seems to be the correct view."

His Lordship further observed:

"To me it seems that these two positions are only consistent with the existence of some intermediate interest in the hands of the purchasing co-sharer, otherwise the sub-lessee being a *raiyat vis-a-vis* all the landlords, all the landlords will be entitled to sue him for rent, and each will be entitled to the proportionate share of the new rent. I consider, therefore, that these four rulings afford authority for the view that there is an intermediate tenancy of some sort."

Narayan, J. also after considering the authorities on the subject observed:

"The intention was to create a tenancy in favour of the purchasing co-sharer there being such a thing as an anomalous tenancy which the law can recognise."

His Lordship further observed:

"A co-sharer landlord as such has no right to induct a person upon a land belonging to the entire body of the co-sharers without the consent or authority express or implied of the other co-sharers. If, therefore, the legislature has authorised the co-sharer purchaser of the occupancy right to sub-let the land to a third person and has further laid down that such third person shall be deemed to be a tenure-holder or *raiyat* as the case may be in respect of the land, the conclusion is irresistible that the law contemplates that because of the purchase of the occupancy right of the land by the co-sharer purchaser an intermediate interest is created in his favour."

On consideration of the authorities discussed above, the position is very clear that when a co-sharer landlord purchases an occupancy-holding and settles that with another person, that person becomes a

1953.

M. C. DUTTA v. RAI M. N. BOSE.

CHOUDHARY, J.

raiyat of all the landlords, but he is liable to pay rent at which the settlement is made with him only to the purchasing co-sharer landlord who had inducted him on the land, and, so far as the other co-sharer landlords are concerned there is no relationship of landlord and tenant between them and the sub-lessee from the co-sharer purchaser landlord for the purpose of realising rent, and that those other co-sharer landlords are entitled to receive their proportionate share of the original rent from the purchasing co-sharer who holds an intermediate interest in the land and is bound to pay rent to the other co-sharers. In that view of the matter, the plaintiff was, in this case entitled to have a decree against the principal defendants 1 to 5 for his share of the produce rent. As, however, the courts below have not considered as to what should be the amount of produce rent to which the plaintiff would be entitled, the case has to go back to the trial court to find out the value of the produce for the share of the plaintiff to which he might be entitled.

In the result the appeal and the application are allowed, the judgments and decrees of the courts below are set aside and the case is remanded to the trial court for investigating the claim of the plaintiff on the basis of the produce rent and decide the case in accordance with law. Costs will abide the result. There will be only one set of hearing fee and no separate set of hearing fee in civil revision.

REUBEN, C.J.—I agree.

Appeal allowed.

Rule made absolute.

K. D.

1958.

August, 10.
11, 25.

APPELLATE CRIMINAL.

Before Reuben, C.J.

(On difference of opinion between Das and Sinha, JJ.)

BUDHAN

v.

STATE.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 30 *and* 34, *whether offend against Article* 14 *of the Constitution and are invalid.*

Per Reuben, C.J. and Das, J. (*Sinha, J. contra*):— Sections 30 and 34, Code of Criminal Procedure, 1898, do not offend against Article 14 of the Constitution and are not invalid.

Amir Khan v. *King Emperor*(1), *Prithivinath*, In re(2), *Missouri* v. *Lewis*(3), *Kameshwar Singh* v. *State of Bihar*(4), *Brown* v. *State of New Jersey*(5) and *Snowden* v. *Hughes*(6), referred to.

Lachmandas Kewalram v. *State of Bombay*(7), *State of West Bengal* v. *Anwar Ali Sarkar*(8), *Syed Qasim Razvi* v. *State of Hyderabad*(9), *Yick Wo* v. *Peter Hopkins*(10) and *Narain Hazam* v. *Ramdhari Singh*(11) (unreported), discussed and distinguished.

Appeal by the accused persons.

*Criminal Appeal no. 410 of 1951, from a decision of Mr. S. F. Azam, Special Magistrate with powers under section 30, Code of Criminal Procedure, Hazaribagh (Camp Giridih), dated the 29th August 1951.

(1) (1903) 7 Cal. W. N. 457.
(2) (1938) A. I. R. (Nag.) 56.
(3) (1880) 101 U. S. 22.
(4) (1951) A. I. R. (Pat.) 91.
(5) (1899) 175 U. S. 172.
(6) (1944) 321, U. S. 1.
(7) (1952) A. I. R. (S. C.) 235.
(8) (1952) A. I. R. (S. C.) 75.
(9) (1953) A. I. R. (S. C.) 156.
(10) (1886) 118 U. S. 356.
(11) Criminal Revision no. 641 of 1952, decided on 16th March 1953.

1953.

BUDHAN
v.
STATE.

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

The case in the first instance came before Das and Sinha, JJ. and they delivered the following judgments.

SINHA, J.—The 13 appellants in this case have been convicted under sections 366 and 143 of the Penal Code, and each one of them has been sentenced to rigorous imprisonment for five years under section 366; no separate sentence has, however, been passed under section 143.

The case was tried by a Magistrate of the First Class having powers under section 30 of the Code of Criminal Procedure. This appeal had first been placed before a single Judge, but, as it was mentioned that a point was to be raised regarding the constitutionality of section 30 of the Code of Criminal Procedure, it was referred to a Division Bench.

The prosecution case is that there are two brothers Sukar Mahto and Barhan Mahto. The younger brother Barhan had a daughter named Bhatni, aged about 10 years. Applicant Budhan Choudhry had negotiated for Bhatni's marriage with his brother, Ganpat Choudhry, another appellant in this case, and Barhan had taken Rs. 600 as the consideration for giving his daughter in marriage to Ganpat, who is also known as Ganpatia. Before the marriage could take place, Bhatni died in the month of Aghan before the date of occurrence which was in Baisakh. After the death of Bhatni, Budhan wanted back the money which he had paid to Barhan. There was a *panchait*, and the *panches* decided that a sum of Rs. 315 only, out of the money advanced, should be paid back to Budhan by Barhan. Barhan had, accordingly, gone out for making arrangement for the money on the 12th of May, 1951, corresponding to the 21st of Baisakh, which was a Saturday. Barhan's brother, Sukar, had left his house at about 6 A.M. with his cattle, when he heard an alarm raised by his wife, Nanhki (P. W. 5). Upon the alarm so raised, he came back home, and saw Budhan carrying away his daughter, Bilwa, aged about 4 or 5 years. He asked Budhan to hand him over his daughter, but Budhan held out threats of assault, and falsely alleged that Sukar had taken money for the marriage of his daughter. The other appellants had come with Budhan, and they were variously armed. Lilo Mahto had a *pharsa*, Thambi Singh had a *barchha* and the other appellants had *lathis*. The appellants took away the girl Bilwa to their village Nawadih from village Kuturgarha, the village of Sukar and Barhan. Upon the prosecution case, Barhan (P. W. 2) returned to his village 3 or 4 days after, and information was sent to the police-station, which is about 18 miles away from the place of occurrence, on the 16th of May, 1951. Another reason for the delay given in the first information report was that the accused were moving about to prevent Sukar from going to the police-station.

The defence was that Sukar (P. W. 1) had taken money for the marriage of his daughter, Belwa, and she was given in *karhui* form of

1953.

BUDHAN
v.
STATE.

SINHA, J.

marriage by him. In *karhui* form of marriage, which is prevalent among some poorer classes of the people, the bride is taken to the village of the bride-groom, and she is accompanied by the father or other male member of the family who could give the girl in marriage, and the marriage is performed at the house of the bride-groom. Upon the defence case, the girl's father's brother and others gave her in marriage and participated in the caste feast on the succeeding day. The defence, however, did not examine any witness in support of its version.

The prosecution has examined P. W. 1 Sukar, the first informant and father of the girl, P. W. 3 Bhikhari Mahto, a relation of Sukar, P. W. 4 Dukhi Turi, P. W. 5. Naubki, the mother of the girl and P. W. 7 Tulu Suri, a ploughman of Sukar, as eye-witnesses to the occurrence.

It is admitted that the marriage of the girl was performed, whether by force or fraud or both, on the very day she was taken by the appellants to their village. P. W. 8 Basudeo Missir, the priest, and P. W. 9 Somar Hajam were examined to support the fact that the marriage was performed on that very day, but these witnesses were declared hostile. The girl is admittedly now at her father's place.

Mr. Bajrang Sahay, learned Counsel on behalf of the appellants, has submitted that the prosecution case is false, and, in support of his submission, he has argued that there was a delay of four days in lodging the first information. There is no doubt that there has been an unusual delay in reporting the matter to the thana, but, in the circumstances of this case, there appears to be an explanation for this delay. The statement in the first information report that Barhan was not in his house does not appear to be quite accurate. Upon the evidence of the prosecution witnesses, including Barhan himself, Barhan had come back to his house on Sunday following, namely, the next day after the occurrence; the occurrence had taken place on Saturday. In that view of the matter, the delay cannot be due to the fact that Barhan was not present in the village for several days. It is, however, clear from the evidence of the chaukidar Gopi Turi (P. W. 14) that immediately after the occurrence the matter had been reported to him, and the names of all the appellants had been given out to him. Bhikhari, a cousin of Sukar, had asked him to confront Budhan and Bharat. The witness says that he went to Bharat's house and questioned him about Bilwa, Bharat said that he had given Rs. 61/- on Barhan's daughter, and that he would return Bilwa on getting back the money, and further that if he did not get his money back by 2 o'clock that very day, he would perform the marriage of Bilwa with Ganpat. Sukar was asked by this chaukidar to go to the thana, but he said that he would wait until the return of Barhan. From the evidence of this witness it does not appear that he was either interested in the prosecution or his evidence is otherwise unworthy of credit. He is aged about 50, and has been the chaukidar of the village since a long time, and there is no reason to doubt his evidence. It is quite clear from his evidence, therefore that immediately after the occurrence, the matter was reported to him. In a case like this, the father of the girl, naturally, would not like to rush to the thana; he would prefer to have the matter settled out of Court. Barhan (P. W. 2), according to the evidence, came back the following Sunday, the

13th of May. We do not know the exact time when he came back. If he came back in the evening, he could have gone to the thana on the 14th, and, the distance being 18 miles from the place of occurrence, it may not have been possible to lodge the first information on that very date. So, at the most, there appears to be a delay of two days. In my opinion, however, no adverse inference, in the circumstances of this case, should be drawn against the prosecution because of the delay in lodging the first information report.

1953.

BUDHAN v. STATE.

SINHA, J.

It is next argued that there is a discrepancy as to the person who carried the girl, and it is said that that discrepancy makes the prosecution case unbelievable. According to the first information report, the first informant saw Barhan Mahton (appellant no. 9) taking away Bilwa in his lap. The first informant, however, in his evidence in court says that he saw Budhan Mahton (appellant no. 1) carrying his daughter. It is likely that there may have been some mistake in recording the first information report as, otherwise, there can be no reason for the discrepancy between the statement of Sukar in the first information and his statement at the trial. In his cross-examination, however, it was pointed out, this man had said that Ghanshyam had picked up Bilwa when she was asleep. It is further said that he obstructed Ghanshyam, but, in spite of that, he took away the girl. The discrepancy is obvious. P. W. 3 says that he saw appellant Borhan carrying away Bilwa; P. W. 4 says that he saw Budhan's brother keeping Bilwa on his shoulder and carrying her away; and P. W. 5, the mother of the girl, says that she saw Budhan keeping Bilwa on his lap and shoulder and holding her. She has further said that, while the girl was being carried, sometimes she was carried by one and sometimes by other accused persons. P. W. 7 saw Bilwa in Borhan's lap and then in Ghanshyam's lap. There is, therefore, no doubt that, on the point of taking the girl, there is discrepancy, but in my opinion, this discrepancy should not be allowed to affect the prosecution case. The discrepancy appears to be due to lapse of time and faulty memory.

Comment has also been made that there is no independent witness in this case except the chaukidar. In a case like this, one may not expect independent witnesses especially because it was in the early hours that the occurrence had taken place. The chaukidar is admittedly an independent witness, and, as I have said, there is no reason to disbelieve his evidence. If his evidence is believed, the name of all the appellants had been mentioned to him soon after the occurrence. In the first information report, it is said that, amongst the eye-witnesses, there was a Forest Guard also, but that Forest Guard has not been examined. No witness was asked by the defence as to why the Forest Guard was not examined, and there may be a number of reasons for his non-examination. In my opinion, the non-examination of the Forest Guard or the non-examination of the *panches*, who are supposed to have decided that a sum of Rs. 315 only, out of Rs. 600 advanced by Budhan to Borhan, should be returned, does not affect the main story of the prosecution. No comment has been made or could be made upon the evidence of the witnesses, who are alleged to have seen the occurrence themselves, on merits.

1958.

BUDHAN
v.
STATE.

SINHA, J.

Mr. Bajrang Sahay laid stress on the custom of *karhui* marriage, and he submitted that it should be found in this case that the girl had been married in *karhui* form with the consent of the girl's father and her other relations. P. W. 8, the priest, had come to depose to the fact of solemnization of the marriage. In his examination in chief, he only said that when he went to the house of Budhan Mahto at the request of Phulchand and Borhan (the appellant), he found music going on in the house of Budhan, and that he solemnized the marriage of the girl Bilwa with Ganpat at the house of Borhan. In cross-examination, however, he said that he did not remember the name of the person who gave Bilwa in marriage. Then he said that there were 2 to 4 men on behalf of the girl, but he did not have acquaintance with them. In further cross-examination by the prosecution, he said that the man who gave Bilwa in marriage did not disclose his name. I have no doubt that this man, who is the priest of Budhan's family, was trying, falsely, to support the defence case of marriage by consent. If there was any person on behalf of the girl to give her in marriage, his name was bound to be disclosed to the priest during the performance of the marriage, and I cannot believe this witness when he says that man did not disclose his name. The Hajam (P. W. 9), in his examination-in-chief, has said that he had taken part in the marriage between Ganpat and Bilwa. In his cross-examination, he first said that there were two men whom he did not recognise during the marriage; and then he added that they were Sukar and Bhikhari. This statement he made after hesitation and his demeanour was not satisfactory, as remarked by the learned Magistrate. In further cross-examination by the prosecution, he said that he did not know who had given Bilwa in *kanyadan*. He said that there were 5 to 10 persons on behalf of the girl, but he did not know their names. He further said that he recognised Sukar and Barhan. Although he had said before that he had seen Sukar and Bhikhari, in answer to Court question, he said that he did not recognise anybody, Sukar or Bhikhari. It is difficult to believe this witness. I would, accordingly, hold that the prosecution case has been proved beyond reasonable doubt, and that the defence version of the marriage having been performed in *karhui* form with the consent of the girl's parents is unworthy of credence in the circumstances disclosed in this case.

The other question relates to the invalidity of the trial as being in violation of Article 14 of the Constitution because the trial was held by a Magistrate empowered under section 30 of the Code of Criminal Procedure.

The points taken in relation to section 30 of the Code of Criminal Procedure can be properly appreciated after some of the sections of the Code have been mentioned.

Under section 28, subject to the other provisions of the Code, any offence under the Indian Penal Code may be tried—

(*a*) by the High Court, or

(*b*) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable. 1953.

BUDHAN v. STATE.

SINHA, J.

Section 30 runs as follows:—

"In Assam, Madhya Pradesh, Punjab, Oudh, Madhya Bharat, Hydorabad, Mysore, Patiala and East Punjab States Union and Rajasthan, in all Part C States and in those parts of the other States in which there are Deputy Commissioners or Assistant Commissioners the State Government may, notwithstanding anything contained in section 28 or section 29, invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death."

According to section 34,

"The Court of a Magistrate specially empowered under section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years."

The appellants in this case were tried of offences under section 366 and section 143 of the Penal Code. An offence under section 366, as mentioned in column 8 of the second schedule, is triable exclusively by a Court of Session, and an offence under section 143 is triable by any Magistrate. In effect, had there been no magistrate empowered under section 30 of the Code, the appellants should have been tried only by a Court of Session. In the district of Hazaribagh, from where this case comes, the District Officer is known as Deputy Commissioner. In the present case, when the charge-sheet was submitted by the police before the learned Subdivisional Magistrate, he passed the following order in the order-sheet:—

'Let the record be sent to the Deputy Commissioner of Hazaribagh for transferring it to the file of the Special Magistrate for trial."

Thereupon, the learned Deputy Commissioner made the following order:—

"Perused Subdivisional Officer's ordersheet. Withdrawn and transferred to the file of Mr. S. F. Azam, Magistrate with powers under section 30, Criminal Procedure Code for favour of disposal."

and the case was tried by the said Magistrate.

The question raised by Mr. Bajrang Sahay, learned Counsel on behalf of the appellants, is that the trial of the appellants by a Magistrate empowered under section 30, Code of Criminal Procedure, is void, invalid and illegal in view of Article 14 of the Constitution of India inasmuch as the procedure for trial in their case was varied to the disadvantage of the appellants from the ordinary mode of trial by a Court of Sessions as laid down by the Code of Criminal Procedure. Article 14 reads as follows:—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

1958

BUDHAN
v.
STATE.

It is said that an offence under section 366, Penal Code, is triable exclusively by a Court of Session; the present appellants have, however, been tried for that offence by a Magistrate, although any other person similarly situated and having committed the same offence could be tried by a Court of Session.

SINHA, J.

The second contention of Mr. Sahay is that the district of Hazaribagh, after the coming in force of the Constitution, stands on the same footing as other districts of the State, and, therefore, simply because the District Officer is styled there as Deputy Commissioner there was no justification for investing a Magistrate with powers under section 30 of the Code, and, to that extent, there has been a discrimination and that is hit by the equality clause of the Constitution mentioned above.

No provision is made in section 30 for the trial of a particular case. It is by virtue of the fact that a particular case involving an offence not punishable with death is transferred to a Magistrate with powers under section 30 that section 30 comes into operation. The power of transfer is given in section 528 of the Code. Sub-clause (2) of section 528 empowers a District Magistrate or a Subdivisional Magistrate to withdraw any case from, or recall any case which he has made over to any Magistrate subordinate to him, and to inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. If, however, a Subdivisional Magistrate is himself empowered under section 30, then he can try the case himself without the aid of the provisions of section 528. In the present case, as we have seen, the learned Subdivisional Magistrate directed the record of this case to be sent to the Deputy Commissioner with a request to transfer the same to the file of Special Magistrate (empowered under section 30 of the Code), and this must have been done under sub-clause (2) of section 528.

The Code of Criminal Procedure prescribes four modes of trials.

(*i*) trial of summons cases by Magistrate;

(*ii*) trial of warrant cases by Magistrate:

(*iii*) summary trials; and

(*iv*) trial before High Court and Courts of Sessions;

and the procedure in each of these trials is different. A Court of Session or a High Court takes cognizance of an offence after a committal proceeding (*see* section 193, Code of Criminal Procedure). Chapter XVIII of the Code of Criminal Procedure lays down the procedure for inquiry into cases triable by the Court of Session or the High Court. Committal proceeding is imperative for trial by the Court of Session or the High Court. In a committal proceeding before a Magistrate, when the accused appears and is brought before the Magistrate, the latter proceeds to hear the complainant and takes all evidence which are produced in support of the prosecution or on behalf of the accused, and the accused is at liberty to cross-examine the witnesses for the prosecution. If, after taking the evidence and after

1953.

BUDHAN
v.
STATE,
SINHA, J.

examining the accused the Magistrate finds that there are not sufficient grounds for committing the accused for trial, for reasons to be recorded by him, the accused can be discharged, and if the accused is not discharged, he is to be committed for trial to the Court of Session or to the High Court, as the case may be, after framing a charge. Chapter XXIII lays down the procedure for trial before the High Court and the Courts of Session, and section 268 lays down that all trials before a Court of Session shall be either by jury or with the aid of assessors. It is conceded in this case that in the district of Hazaribagh the system of jury trial does not prevail, and the trials are held with the aid of assessors. In that district, there is a Court of Session presided over by the Sessions Judge, and there is also an Assistant Sessions Judge who can pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years. These two features of session trial, namely, a committal proceeding before trial and the trial with the aid of jury or assessors, distinguish a session trial from trials of warrant cases. It is argued that, after the coming in force of the Constitution, there could be no difference in the procedure for the trial of persons accused of the same offence and similarly situated. It is said that any accused having committed the same offence under section 366, whose case has not been sent for trial before a Magistrate empowered under section 30 of the Code, is triable by a Court of Session and he can enjoy the privilege of a session trial while the appellants have been denied the privilege of a sessions trial and in that respect there has been a denial of the equal protection of the laws and equality before the law. In that view of the matter, it was contended, the whole trial of the appellants was bad and unconstitutional.

The direct question involved in this case has not been the subject-matter of a decision by any court so far, and at least none has been brought to our notice. There have, however, been several cases recently where the provisions of Article 14 of the Constitution have been considered by the Supreme Court. In those cases, however, the facts were different, but the observations made therein are of help in deciding the question at issue in the present case.

The following observation was made by Mukherjea, J. in *State of West Bengal* v. *Anwar Ali Sarkar*(1):—

"……the principle underlying the guarantee in Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances……"

It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed……

It is said that the entire problem under the equal protection clause is one of classification or of drawing lines……

It (the legislature) can make and set apart the classes according to the needs and exigencies of the society and as suggested by

(1) (1952) A. I. R. (S. C.) 75.

1953.

BUDHAN v. STATE.

SINHA, J.

experience.....but the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made, and classification made without any reasonable basis should be regarded as invalid.....

A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.....

It cannot be denied that there is a difference between the two proceedings. In a warrant case, the entire proceeding is before the same Magistrate and the same officer who frames the charge hears the case finally. In a sessions case, on the other hand, the trial is actually before another Judge, who was not connected with the earlier proceeding.

Be that as it may, this is not the only matter upon which the normal procedure has been departed from in the Special Courts Act. One of the most important departures is that the trial by the Special Court is without the aid of any jury or assessors.....

It appears to be an accepted doctrine of American Courts that the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constituted agents."

The next in point of time is the case of *Kathi Raning Rawat* v. *State of Saurashtra*(1). The Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949) was the subject matter of consideration before the Supreme Court. The impugned provisions of this Ordinance (section 11) and section 5 of the West Bengal Special Courts Act (X of 1950) are in almost similar terms; the difference is in the terms of the notifications in the two. The majority view was of the opinion that this Saurashtra Ordinance was not unconstitutional and that section 11 of that Ordinance, so far as it authorised the State Government to direct offences or classes of offences or classes of cases to be tried by the Special Courts Act, did not offend against the equal protection clause of the Constitution of India and that the notification issued by the Saurashtra Government, under the Ordinance, could not be held to be invalid or *ultra vires*. In this case, although the majority of the learned Judges of the Supreme Court were of the view that the Ordinance or the notification under that Ordinance was not *ultra vires* as they did not offend against the equal protection clause of the Constitution, they, however, gave different reasons for coming to that conclusion. Referring to the differences in procedure in warrant cases and in sessions trials, Patanjali Sastri, C. J. made the following observation :—

"The impugned Ordinance having thus been passed to combat the increasing tempo of certain types of regional crime, the twofold

(1) (1952) A. I. R. (S. C.) 123.

classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is, in my view, reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded."

Mukherjea, J., made the following observation :—

"It may be stated at the outset that the Criminal Procedure Code of India as such has no application to the State of Saurashtra."

After quoting certain provisions of the Ordinance, his Lordship proceeds as follows :—

"the ordinance *prima facie* makes discrimination and the question has got to be answered whether such discriminations bring it in conflict with Article 14 of the Constitution..... It is well settled that a legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objection which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the regulation, that necessity of judicial interference arises. ..... If special Courts were considered necessary to cope with an abnormal situation, it cannot be said that the vesting of authority in the State Government to select offences for trial by such courts is in any way unreasonable."

DAS, J., who also held that the Ordinance and the notification issued under it were not unconstitutional, said :—

"It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation, in order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

1953.

BUDHAN v. STATE.

SINHA, J.

His Lordship having found that there was reasonable classification observed:—

"Such a classification will not be repugnant to the equal protection clause of our Constitution, for there will be no discrimination, for whoever may commit the specified offence in the specified area in the specified circumstances will be treated alike and sent up before a special court for trial under the special procedure. Persons thus sent up for trial by a Special Court according to the special procedure cannot point their fingers to the other persons who may be charged before an ordinary Court with similar offence alleged to have been committed by them in a different place and in different circumstances and complain of unequal treatment, for those other persons are of a different category and are not their equals."

The other three learned Judges, Chandrasekhara Aiyar, Mahajan and Bose, JJ. disagreed with the majority view and held that the Ordinance was invalid and it infringed the equal protection clause of the Constitution.

The third case to consider is that of *Lachmandas Kewalram* v. *State of Bombay*(1). In this case, the Bombay Public Security Measures Act (VI of 1947) was under consideration, and the question was whether section 12 of the Act was unconstitutional as having contravened Article 14 of the Constitution. Section 12 of the Act was expressed in the same terms in which section 5 of the West Bengal Special Courts Act and section 11 of the Saurashtra State Public Safety Measures Ordinance were expressed. Section 13(1) said that a Special Judge may take cognizance of offences without the case being committed to his court for trial, and, in regard to other matters also, the procedures prescribed under the Act were different from the procedure prescribed under the Criminal Procedure Code. The trial of this case was held partly before the 26th January, 1950, and partly after that date, when the Constitution came into force. The appeal was heard by a Bench of five Judges of the Supreme Court, and four of them held that the Constitution, being not retrospective, could not invalidate that part of the proceedings that had already been gone through, but the Constitution did not permit the special procedure to stand in the way of the exercise or enjoyment of post constitutional rights and must, therefore, strike down the discriminatory procedure if it was sought to be adopted after the Constitution came into operation, and, for that reason, the conviction of the appellants, on trial held by the Special Judge after the date of the Constitution, according to the special procedure prescribed by the impugned Act, and the sentences passed on them could not be supported and the conviction and the sentences were bound to be set aside. They, accordingly, ordered a retrial. Das, J. who delivered the majority judgment, observed:—

"Thus, besides providing for enhanced punishment and whipping the Act eliminates the committal proceedings [section 13(1)], permits the special Judge to record only a memorandum of the evidence, confers on him a larger power to refuse to summon a defence witness, than what is conferred on a Court by section 257(1) of the Code of

(1) (1952) A. I. R. (S. C.) 235.

Criminal Procedure and also deprives the accused of his right to apply for a transfer or for revision. That these departures from the ordinary law cause prejudice to persons subjected to the procedure prescribed by the Act cannot for a moment be denied."

Relying upon the two previous cases, *State of West Bengal* v. *Anwar Ali*(1) and *Raning Rawat* v. *State of Saurashtra*(2), it was held that Article 14 of the Constitution condemned discrimination not only by a substantive law but also by a law of procedure and his Lordship held that: SINHA, J.

"the procedure prescribed by the corresponding provisions in the West Bengal Special Courts Act and the Saurashtra Ordinance which introduced similar departures from the ordinary law of procedure constituted a discrimination against persons tried by the Special Judge according to procedure prescribed by those pieces of legislation and finally that, in any event, section 5(1) of the West Bengal Act and section 11 of the Saurashtra Ordinance, both of which corresponded to section 12 of the Bombay Public Safety Measures Act, in so far as they authorised the Government to direct specific and particular 'cases' to be tried by the Special Judge, was unconstitutional and void."

It was held that, at any rate, section 12 of the Act, in so far as it authorised the Government to direct particular 'cases' to be tried by a Special Judge, was also unconstitutional. His Lordship reiterated the view about reasonable classification which he had expressed in the Saurashtra case, and proceeded:

"In the present case, although the first part of section 12 of the Bombay Act like section 5(1) of the West Bengal Act or section 11 of the Saurashtra Ordinance, may indicate and imply a process of classification, the section, in so far as it authorises the Government to direct particular 'cases' to be tried by the Special court, does not purport to proceed upon the basis of any classification at all..... If the consideration of the security of the State or the maintenance of public order requires the application of the special procedure there is no obvious reason why it should be applied to 'cases' already referred and not to cases not yet referred at the date of the Constitution. The same consideration applied equally to both categories of cases. It is, therefore, clear that there is no nexus which connects the basis on which the supposed classification is founded with the objects of the Act, for the object of the Act is wide enough to cover both categories of 'cases'—Therefore, it is not a permissible classification. Indeed, it is an instance of fanciful classification which has no rational basis at all."

Patanjali Sastri, C. J., however, held to the view expressed by him in the West Bengal case and disagreed with the majority view, but, in doing so, his Lordship also made the following observation:—

"In the first place as already pointed out, equal protection of the laws postulates persons in the same situation and in the same circumstances claiming that the same law should be applied to them."

(1) (1952) A. I. R. (S. C.) 284.
(2) (1952) A. I. R. (S. C.) 435.

1953.

BUDHAN v. STATE.

SINHA, J.

The only other case to be considered is that of *Syed Qasim Razvi* v. *State of Hyderabad*(1). The majority judgment in this case was delivered by Mukherjea, J., Patanjali Sastri, C. J., and Chandra Sekhara Aiyar, J., concurring. The tribunal in this case, had been constituted in accordance with the provisions of the Special Tribunal Regulation (V of 1358 Fs.). Under section 3 of the Regulation, it was competent to the Military Governor, by general and special order, to direct that any offence or class of offences should be tried by a Special Tribunal, and the procedure to be followed by such tribunal was laid down in section 4 of the Regulation. The procedure followed in this case was the procedure prescribed for warrant cases. Cross-examination of 18 witnesses had been finished before the 26th of January, 1950, and the rest of the witnesses were cross-examined after that date and the accused was convicted. The High Court of Hyderabad on appeal allowed the appeal in respect of the conviction under only one of the sections; otherwise, the appeal was dismissed. There was appeal to the Supreme Court. When the appeal was pending, the appellant presented an application under Article 32 of the Constitution praying for a writ in the nature of certiorari for quashing the orders of the High Court as well as of the Special Tribunal and for releasing him on the ground that the proceedings before the Special Tribunal became void after 26th of January, 1950 as they conflicted with the provisions of Article 14 and Article 21 of the Constitution. Mukherjee, J., who delivered the majority judgment, dismissed the application making the following preliminary observation:—

"The first question that requires consideration is as to whether the procedure for trial of criminal offence laid down in the special Tribunal Regulation is discriminatory in its character and offends against the provision of Article 14 of the Constitution? If it si found that some of the provisions at least are discriminatory, the question would then arise as to what exactly is the legal position in a case like this where admittedly a considerable portion of the trial was gone through prior to the coming into force of the Constitution and that portion is immune from challenge on the ground of discrimination, as the rights guaranteed under the Constitution are not retrospective in their operation. If the procedure subsequently followed was also discriminatory, it is not disputed that the conviction of the accused could not stand. But if it is found that there was no occasion after the 26th of January 1950 to apply any of the provisions of the Regulation which are discriminatory in their character and if as a matter of fact the procedure that was actually followed was substantially the same as obtains under the ordinary law, could it be said that the whole trial is vitiated and the resulting conviction and sentence must necessarily be set aside?"

The Regulation gives the Special Tribunal all the powers which are conferred on a Court of session by the Hyderabad Criminal Procedure Code, but section 4(1) provides that it can take cognizance of offences without the accused being committed to it for trial; and under sub-section (7) of this section, the Tribunal is enjoined to follow the

(1) (1953) A. I. R. (S. C.) 156.

1953.

BUDHAN
v.
STATE.

SINHA, J.

procedure prescribed for summary trials by Magistrates though it may, when it considers proper, follow the warrant procedure. It is open to the Special Tribunal to direct that the proceedings before it should be conducted in the English language. The tribunal is given option either to take down only a memorandum of the substance of the evidence or, if it considers proper, the entire evidence could be taken down. The powers of revision and transfer are wholly taken away. These were, in brief, the special features of the procedure laid down for trial before the Special Tribunal. There is no system of jury trial in the Hyderabad State, but there is provision for trial with the aid of assessors in the city of Hyderabad only. Under the ordinary procedure also, the present case could not have been tried with the aid of assessors. In this case, however, the evidence was recorded in full, and the procedure followed was that of warrant cases and not summary procedure. His Lordship made the following observation:—

"The provision relating to summary trial irrespective of the nature of the offences and also that relating to recording of evidence in a summary manner may be considered prejudicial to the accused and may normally deprive him of benefits which are enjoyed by other persons similarly situated who are tried under the ordinary law."

The contention that the trial was bad as it was held as a warrant case and not according to the procedure prescribed for sessions trial was, however, negatived, and it was observed.—

"If we leave out the committal proceeding, which is not compulsory under the Hyderabad law, the accused could not be in really worse position by reason of the warrant procedure being followed instead of the sessions procedure."

The West Bengal case was distinguished on the ground that section 5(1) of the West Bengal Special Courts Act authorised the State Government to direct 'any case' to be tried by a Special Court, and it did not mention in what cases or offences the directions for trial by a Special Court could be given, nor did it purport to lay down the criterion or the basis on which that classification was to be made. After a consideration of the previous cases, the following propositions were laid down in this case:—

(1) "A mere threat or possibility of unequal treatment is not sufficient. If actually the accused has been discriminated against, then and then only he can complain, not otherwise."

(2) "If the normal procedure is trial by jury or with the aid of assessors, and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage. Similarly having once adopted the summary procedure, it is not possible to pass on to a different procedure on a later date. In such cases the whole trial would have to be condemned as bad."

(3) "If the tribunal had adopted that procedure (the procedure for summary trial), we would have no other alternative but to declare the whole trial as invalid for although the summary procedure could not have been challenged as illegal prior to the coming in of the Constitution, it could not possibly have been changed to a different procedure

1958.

BUDHAN v. STATE.

SINHA, J.

after 26th January 1950. The entire procedure could then have to be held as invalid as conflicting with the equal protection clause. ", and

(4) " The committal proceeding not being compulsory under the Hyderabad Code, the difference between a warrant procedure and a sessions procedure is not material."

Upon the several cases of the Supreme Court, considered above, and other authorities, the following propositions appear to be firmly established :—

(1) that no person has a vested right to a particular remedy, and that the State has full control over the procedure in its Courts subject only to the qualification that such procedure must not work a denial of fundamental rights;

(2) that the Acts of the Legislature and other bodies exercising legislative powers are presumed to be constitutional, although this presumption is not conclusive. It merely means that every reasonable presumption will be made in favour of constitutionality and an Act fair on its face may be void and unenforceable on account of its actual operation (Weaver on Constitutional Law, 1946, Edition, pages 82-83.)

(3) that a rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law (A. I. R. 1952 Supreme Court 75 and A. I. R. 1952 Supreme Court 235 mentioned above).

(4) that it is not necessary that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.

The entire problem under equal protection clause is one of classification and drawing of lines. The classification should not be arbitrary, artificial or evasive (A. I. R. 1952 Supreme Court 75). Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purpose of legislation (A. I. R. 1952 Supreme Court 123).

(5) That the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constitued agents.

If the law prescribes a general procedure for the trial of an offence or offences and also lays down special procedure, without making any classification as to the circumstances in which the special procedure is to apply, and if the Court applies a special procedure, which is not the procedure ordinarily applicable to a similar offence or offences alleged to have been committed in similar circumstances, the discrimination so made will not be beyond the reach of the equal protection clause (Article 14) of the Constitution (A. I. R. 1953 Supreme Court 156).

(6) that " A mere threat or possibility of unequal treatment is not sufficient. If actually the accused has been discriminated against, then and then only he can complain, not otherwise." (A. I. R. 1953, Supreme Court 156 *ibid.*)

1953.

BUDHAN v. STATE.

In the present case, section 366 of the Penal Code, one of the offences with which the appellants were charged, was triable by a Court of session, and the appellants, have been actually tried under a procedure prescribed for trial of warrant cases by a Magistrate empowered under section 30 of the Code of Criminal Procedure: they were thus denied the advantage of trial with the aid of assessors (jury trial not prevailing in the district of Hazaribagh) and of the committal proceedings, and to that extent these appellants have been discriminated against. The question is whether this discrimination was permissible under the Constitution. As indicated above, no person can have any right to a particular procedure or mode of trial, but certainly he is entitled to demand that the same procedure should be followed which is the ordinary procedure applicable to persons similarly situated and having committed the same offence. Under the ordinary procedure, the appellants were entitled to sessions trial. The question that arises is whether the discrimination made against these appellants was permissible because of any reasonable classification. In my opinion, the answer must be in the negative. There is absolutely no classification and much less a reasonable classification which distinguishes the appellants from others. The only reason for the trial of the appellants under a procedure different from the ordinary one was because of the provisions of section 30 read with section 528 of the Code of Criminal Procedure. I have already quoted the relevant provisions of the Code, and offences not punishable with death can be tried, under section 30, by a Magistrate under a procedure prescribed for a warrant case; but another person similarly situated having committed the same offence is triable under the ordinary procedure, that is, procedure followed in sessions trial. In my opinion, this distinction is not based upon any classification.

SINHA, J.

Some answers have been attempted by the learned Counsel appearing on behalf of the State to resolve this apparent discrimination. It is suggested that the provisions of section 28 read with the second schedule of the Code are subject to the other provisions of the Code, namely, section 30; and if section 30 authorises the State Government to empower a Magistrate with powers under that section, the trial of a person by the Magistrate so empowered under the procedure prescribed for a warrant case will be the ordinary procedure. If a Magistrate empowered under section 30 were to try all offences triable by a Court of session and within the competence of section 30 Magistrate in a particular locality, then I would agree that for the particular locality the trial by a Magistrate under section 30 would be the ordinary mode of trial. In the district of Hazaribagh, there is a Court of session, and persons alleged to have committed offences under section 366, with which the appellants were charged, are still triable by the Court of session; and it is only in cases where the Subdivisional Magistrate or the Deputy Commissioner, as the case may be, makes a special order transferring a particular case that the case is tried by the Magistrate

1953.

BUDHAN
v.
STATE.

SINHA, J.

empowered under section 30 and not otherwise. This is an apparent discrimination without any classification whatsoever.

It is next contended that even a Magistrate empowered under section 30 can commit an accused for trial before a Court of session, and section 347 of the Code of Criminal Procedure has been referred to in this connection. It may be conceded at once that a Magistrate empowered under section 30 or any other Magistrate can commit a particular case at any stage of the proceeding to be tried by a Court of session or the High Court, but, in my opinion, that is no answer to the claim of the accused that they have, in fact, been discriminated in the procedure followed in their case from others similarly situated as they have been tried not under the ordinary procedure but under a special procedure. If the accused is committed to take his trial by the Court of session or the High Court by a Magistrate empowered under section 30, then, in that case, he cannot complain of any discrimination because it is not merely a threat or possibility of unequal treatment which is sufficient. If, in fact, the accused has been discriminated from other persons similarly circumstanced and similarly situated, it cannot be said that merely because there was power in the Magistrate who tried him to commit his case to the Court of session, he has not been discriminated. The present appellants have been tried by the Magistrate under the procedure prescribed for warrant cases, and it is no consolation to them to be told that the Magistrate who tried them had the choice of committing them to the Court of session. They can legitimately claim that, as they have been tried under a procedure not ordinarily followed in a case like theirs, they were subjected to discrimination in spite of the equal protection clause of the Constitution.

Another submission made on behalf of the State is that even in trials under Chapter XXII of the Code relating to summary trials, similar difference in the mode of trial of the same offence between one person and another is possible, and, on that basis, it is argued that difference in the mode of trial between one person and another similarly situated as a result of judicial discrimination is beyond the reach of Article 14 of the Constitution. In the first place, the fact that there exist in the body of the Code of Criminal Procedure some other provisions which are liable to attack as unconstitutional can be no answer to the present challenge. In the next place, these contentions should be rejected in view of the pronouncement of the Supreme Court in the case of *Syed Qasim Razvi* v. *The State of Hyderabad*(1). In that case, the Special Tribunal Regulation (V of 1358 Fs.) was under consideration. The Regulation itself gave a choice to the Special Tribunal appointed under that Regulation either to follow the procedure laid down for summary trials or to follow the procedure prescribed for warrant cases as given in the Hyderabad Criminal Procedure Code. The Special Tribunal followed not the procedure prescribed for summary trials, but the one prescribed for the trial of warrant cases. The Special Tribunal also recorded the evidence in full although it had the option to take down only a memorandum of the substance of the

(1) (1953) A. I. R. (S. C.) 156.

1953.

BUDHAN v. STATE.

SINHA, J.

evidence. Under the ordinary procedure the case of Syed Qasim Razvi could not have been tried with the aid of assessors, and the system of trial by jury was not prevelant in the Hyderabad State; and, according to the procedural law of the State, committal proceedings before the trial by the Court of session were not compulsory. It was contended that the petitioner had been discriminated against inasmuch as he was not tried by a Court of session according to the procedure laid down for trial of sessions cases. Their Lordships negatived the contention on the ground that committal proceedings not being compulsory, the accused were not in a worse position by reason of the warrant procedure having been followed instead of the procedure for sessions trial, but they pointed out that "if the Tribunal had adopted that procedure (the procedure for summary trial), we would have no other alternative but to declare the whole trial as invalid for although the summary procedure could not have been challenged as illegal prior to the coming in of the Constitution, it could not possibly have been changed to a different procedure after 26th January 1950. The entire procedure would then have to be held as invalid as conflicting with the equal protection clause."

In my judgment, upon the authority of this case, it is clear that if the Special Tribunal, as a result of judicial discretion, had adopted the summary procedure for trial of the petitioner, such judicial discretion could have afforded no protection to the procedure followed against attack under Article 14 of the Constitution. In that view of the matter, these contentions must be negatived.

It is also contended that the transfer of a case by the Subdivisional Magistrate or by the District Magistrate, under section 528 of the Code of Criminal Procedure, is a judicial order, and, therefore, it is revisable by this Court. Therefore, if a case is transferred for trial by a Magistrate empowered under section 30 of the Code, the party aggrieved is entitled to get that order set aside by the Court of revision, and, if that right is open to the accused, it cannot be said that there was any discrimination made in regard to the mode of his trial. It is problematic if the High Court will interfere in a matter like this, but the fact remains that the appellants in the present case were tried not according to the ordinary procedure prescribed in the Code. In my judgment, although the appellants were subjected to discrimination as a result of the direction given by the Deputy Commissioner, the discrimination nonetheless offended the provisions of Article 14 of the Constitution, and even though the order of transference was a judicial order that alone will not allow the appellants to be subjected to discrimination. This view is supported by several American authorities. "A State may act through different agencies, either by its legislative, its executive or its judicial authorities, and prohibitions of the Amendment (the Fourteenth Amendment) extent to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." [*Ex-Parte in the matter of the Commonwealth of Virginia*(1)]. And again, "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of

(1) (1879) 100 U. S. 313, 339.

1953.

BUDHAN v. STATE.

SINHA, J.

the law. Whoever, by virtue of public position under a State Government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." [*Ex-parte in the matter of the Commonwealth of Virginia*(1).] The principle has also been re-iterated in *Yick Wo* v. *Peter Hopkins*(2) where it has been observed: "Though a law be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discrimination between persons in similar circumstances, material to their rights, the denial or equal justice is still within the prohibition of the Constitution". I concede that if as a result of judicial discretion there is incidental inequality resulting from the operation of the law, the prohibition contained in Article 14 of the Constitution will have no application; but, on the other hand, if that discrimination is intentional and purposeful, the discretion, though judicial, is not beyond the reach of the constitutional prohibition. In the present case, when the Deputy Commissioner, upon the request made by the Subdivisional Magistrate, transferred this case for trial to the Magistrate empowered under section 30 of the Code, he did so with a definite purpose that the appellants should not have the benefit of trial by a Court of session and thus be deprived of the advantages of a committal proceeding and of trial with the aid of assessors. If he had not had that intention, there was no meaning in the transfer. I have already said that if all persons similarly situated and in similar circumstances were to be tried by a Magistrate empowered under section 30, then there could be no ground to hold that the appellants were subjected to discrimination and were deprived of the equal protection of the laws. In *Joseph E. Snowden* v. *Hughes*(3), the following observation was made:—

"The unlawful administration by State Officers of a State statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person..... or it may only be shown by extrinsic evidence showing a discriminatory design to favour one individual or class over another....."

In my opinion, as in this case the transfer was with a purpose, namely, that the appellants be tried by a Magistrate empowered under section 30 of the Code and not by a Court of Session, the prohibition in the Constitution is attracted.

It was lastly suggested, though faintly, that even in regard to offences sent for trial to a Magistrate empowered under section 30 of the Code of Criminal Procedure some sort of classification may be discovered. It is said that a Magistrate empowered under section 30 can

(1) (1879) 100 U. S. 313, 339.
(2) (1886) 118, U. S. 356.
(3) (1944) 321 U. S. 1.

1953.

BUDHAN
v.
STATE.

SINHA, J.

pass any sentence authorised by law excepting a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years, that is to say, only the cases, in which the Subdivisional Magistrate or the Deputy Commissioner thinks that the accused should not be punished for more than seven years, can be sent to the Magistrate empowered under section 30, and therefore, in a way, a line is drawn between cases requiring sentence of seven years or below and cases requiring sentence of more than seven years. Even if it be conceded that that could be a basis of classification, the mode of trial need not have been changed because the powers of a Magistrate empowered under section 30, Code of Criminal Procedure, are exactly the same as of an Assistant Sessions Judge and there was an Assistant Sessions Judge also posted at Hazaribagh. Therefore, it is apparent that that could not be the basis of classification. In the present case, we have seen that, at the request of the Subdivisional Officer, the case was transferred to the section 30 Magistrate without any pretence to show that this case required a sentence not exceeding seven years. It is on the sweet will of the Subdivisional Officer or the Deputy Commissioner to transfer any case triable by a Court of session to the section 30 Magistrate and thus change the mode of trial to the disadvantage of the accused. This cannot be permissible after the Constitution came into force.

On a consideration of the matters raised, I am of the opinion that the trial of these appellants was hit by Article 14 of the Constitution, and as such the trial is void and invalid.

So far as the second contention of Mr. Sahay is concerned, I do not think there is any merit in that contention; but, in view of my judgment on the first point, it is not necessary to decide this point.

In the result, I would set aside the judgment of the Court below and also the conviction and sentence of the appellants, and order their re-trial according to law.

If I were to uphold the conviction of the appellants in the peculiar circumstances of this case, I should have reduced the sentence of imprisonment to only two years' rigorous imprisonment.

I had sent a draft of my judgment for favour of consideration to my learned brother, Das, J., but he has given a separate judgment disagreeing with my view on the constitutional point raised. I took time, and gave my very best consideration to the view of my learned brother and it had caused me great misgivings to find myself in disagreement with him. I feel, however, bound to act on my own view.

DAS, J.—I agree entirely with my learned brother, with regard to the conclusion at which he has arrived on the facts of the case. I would also hold that the prosecution case has been proved beyond reasonable doubt and that the defence version of the marriage having been performed in *karhui* form with the consent of the girl's parents, is unworthy of acceptance in the circumstances of the case.

On the question of law, I respectfully differ from my learned brother. Mr. Bajrang Sahai, appearing on behalf of the appellants, has contended that by reason of the trial of the appellants by a

1953.

BUDHAN v. STATE.

DAS, J.

Magistrate empowered under section 30 of the Code of Criminal Procedure, they have been denied the equal protection of the laws guaranteed to them under Article 14 of the Constitution. In support of his contention he has urged various points. Firstly, he has argued that section 30 of the Code of Criminal Procedure makes a territorial discrimination against certain local areas in the State of Bihar, particularly the district of Hazaribagh where the appellants were tried. Such discrimination, according to learned counsel for the appellants, brings section 30 of the Code of Criminal Procedure within the mischief of Article 13(1) of the Constitution of India and on that ground section 30, Code of Criminal Procedure, is void. Secondly, he has argued that section 30, read with certain other sections of the Code of Criminal Procedure, has, in effect, resulted in a discrimination against the appellants, in so far as the appellants were tried by a Magistrate empowered under section 30 instead of by the Court of Session. Such discrimination, according to him, amounts to a denial of equality before the law or of appeal protection of the laws guaranteed to every person under Article 14 of the Constitution of India.

I shall deal with the points urged by learned counsel for the appellants under the two broad headings referred to above, in which learned counsel has classified his argument. But before I do so, it is necessary to say a few words about the object and scope of section 30, Code of Criminal Procedure. Section 30 occurs in Chapter III of the Code of Criminal Procedure and has to be read along with some other sections of the Code. Chapter III deals with " powers of Courts ". The first section in the chapter is section 28 which reads:—

" 28. Subject to the other provisions of this Code any offence under the Indian Penal Code may be tried "—

(*a*) by the High Court, or

(*b*) by the Court of Sessions, or

(*c*) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable."

It is important to observe that section 28 begins with the clause. " Subject to the other provisions of this Code ", which means that it is controlled by other provisions of the Code, including the provisions in section 30. This is also clear from the words of section 30. Section 30, as it stands now, is in these terms:—

" In Assam, Madhya Pradesh, Punjab, Oudh, Madhya Bharat, Hyderabad, Mysore, Patiala and East Punjab States Union and Rajasthan, in all Part C States, and in these parts of the other States in which there are Deputy Commissioners or Assistant Commissioners, the State Government may, notwithstanding anything contained in section 28 or section 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death."

In this case we are concerned particularly with that part of the section which reads " and in those parts of the other States in which there are Deputy Commissioners or Assistant Commissioners ",

Hazaribagh being a district where there is a Deputy Commissioner. The history of the areas where there are Deputy Commissioners or Assistant Commissioners was traced by Ilbert in his Government of India (second edition). He said:—

1953

BUDHAN v. STATE.

DAS, J.

"Doubts had for some time existed as to the proper mode of legislating for newly acquired territories of the Company. When Benares and the territories afterwards known as the North-Western Provinces were annexed, the course adopted was to extend to them, with some variations, the laws and regulations in force in the older provinces of Bengal, Bihar and Orissa. But when the Saugor and Narbudda territories were acquired from the Marathas by Lord Hastings, and when Assam, Arakan, and Tenasserim were conquered in 1824, and Pegu in 1852, these regions were specially exempted from the Bengal Regulations, instructions, however, being given to the officers administering them to conduct their procedure in accordance with the spirit of the regulations, so far as they were suitable to the circumstances of the country. And when the Punjab was annexed the view taken was that the Governor-General-in-Council had power to make laws for the new territory, not in accordance with the forms prescribed by the Charter Act for legislation, but by executive orders, corresponding to the Orders in Council made by the Crown for what are called Crown Colonies. Provinces in which this power was exercised were called 'non-regulation provinces' to distinguish them from the 'regulation provinces', which were governed by regulations formally made under the Charter Acts.....

A very important modification in the machinery for Indian legislature was made by the Government of India Act, 1870. It has been seen that for a long time the Governor-General believed himself to have the power of legislating by executive order for the non-regulation provinces. The Indian Councils Act of 1861, whilst validating rules made under this power in the past, took away the power for the future. The Act of 1870 practically restored this power by enabling the Governor-General to legislate in a summary manner for the less advanced parts of India. The machinery provided is as follows. The Secretary of State in Council, by resolution, declares the provisions of section 1 of the Act of 1870 applicable to some particular part of a British Indian Province. Thereupon the Governor in Council, Lieutenant-Governor, or Chief Commissioner of the province, may at any time proposed to the Governor-General-in-Council drafts of regulations for the peace and good Government of that part, and these drafts, when approved and assented to by the Governor-General-in-Council, and duly gazetted, have the same force of law as if they had been formally passed at sittings of the Legislative Council. This machinery has been extensively applied to the less advanced districts of the different Indian provinces, and numerous regulations have been, and are constantly being, made under it.....(page 105).

Besides the formal power of making laws, through the Legislative Council, the Governor-General has also, under an Act of 1870, power to legislate in a more summary manner, by means of regulations, for the Government of certain districts of India of a more backward character, which are defined by orders of the Secretary of State, and

1953.

BUDHAN v. STATE.

DAS, J.

which are 'scheduled districts' within the meaning of certain Acts of the Indian Legislature.....(page 118).

The old distinction between regulation and non-regulation provinces has become obsolete, but traces of it remain in the nomenclature of the staff, and in the qualifications for administrative posts. The corresponding distinction in modern practice is between the regions which are under ordinary law, and the more backward regions, known as scheduled districts, which are under regulations made in exercise of the summary powers conferred by the Government of India Act, 1870 (33 Vict. c. 3).....(page 135).

At the head of the district is the District Magistrate, who in the old regulation provinces is styled the Collector and elsewhere the Deputy Commissioner.....(page 135).

He thus summarised the history of scheduled districts:—

"The Indian Statute Book has from the earliest times contained 'deregulationizing' enactments, i.e., enactments barring, completely or partially, the application in the more backward and less civilised parts of the country of the ordinary law, which was at first contained in the old regulations'. These enactments took varied and sometimes very complicated forms, so that, in course of time, doubts arose, and it became occasionally a matter of considerable difficulty to ascertain what laws were and what were not in force in the different 'deregulationized' tracts. The main object of the Scheduled Districts Act, 1874 (XIV of 1874), was to provide a method of removing these doubts by means of notifications to be issued by the Executive Government. The preamble refers to the fact that 'various parts of British India had never been brought within, or had from time to time been removed from, the operation of the general Acts and regulations, and the jurisdiction of the ordinary Courts of Judicature': that 'doubts had arisen in some cases as to which Acts or regulations were in force in such parts, and in other cases as to what were the boundaries of such parts'; and that 'it was expedient to provide readier means for ascertaining the enactments in force in such territories and the boundaries thereof, and for administering the law therein'. The Act then proceeds to specify and constitute a number of deregulationized tracts as 'scheduled districts,' to give the power of declaring by notification what enactments are, or are not, actually in force in any scheduled district, and to provide for extending by notification to any 'scheduled district,' with or without modifications or restrictions, any enactment in force in any part of British India at the date of the extension. The Act also gives powers to appoint officers for the administration of a scheduled district and to regulate their procedure and the exercise of their powers therein, and also to settle questions as to the boundaries of any such tract.....

The Scheduled Districts Act, 1874, is immediately followed in the Indian Statute Book by the Laws Local Extent Act, 1874 (XV of 1874), the object of which is to remove doubts as to the application of certain enactments to the whole or particular parts of British India. This Act also uses the expression 'scheduled districts', but in a sense which has in the course of time become different from that in which the term is

used in the Scheduled Districts Act. The lists of scheduled districts appended to the two Acts were originally identical, but since 1874 Acts have been passed which have amended or partially repealed the list in Act XIV, but have not in all cases made corresponding alterations in the list annexed to Act XV. Moreover, certain regions not included in the original schedule have, by reason of the application to them of 33 Vic. c. 3, s. 1, become *ipso facto* scheduled districts." (Pages 211-12.)

The position underwent a change under the Government of India Act, 1935, under which these so-called backward areas were called 'excluded areas' or 'partially excluded areas'. The division of Chota Nagpur, within which the district of Hazaribagh is situate, and the Santal Parganas were 'partially excluded areas' in the Province of Bihar under the Government of India Act, 1935. The Constitution of India made a further change in the position. Under Article 244(1), read with the Fifth Schedule, the administration and control of the Scheduled Areas and Scheduled Tribes in any State specified in Part A or Part B of the First Schedule shall be in accordance with the provisions of the Fifth Schedule. Paragraph 6 in part C of the Fifth Schedule States that the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas, and sub-paragraph (2) of paragraph 6 gives the President power, *inter alia*, to alter the boundaries of Schedules Areas. Mr. Bajrang Sahai has drawn our attention to the order made by the President under sub-paragraph (1), known as the Scheduled Areas (Part A States) Order, 1950. In that Order the only districts in Bihar which are Scheduled areas are Ranchi, Singhbhum (excluding Dhalbhum Subdivision), Santal Parganas (excluding Godda and Deoghar Subdivisions) and Latehar Subdivision of Palamau district. His contention is that Hazaribagh is not now a Scheduled Area and, therefore, there is no reason why Hazaribagh should be discriminated against from the rest of Bihar in the matter of trial of offences, such as the offence under section 366 (for which the appellants were tried), which are triable by the Court of Sessions according to the eighth column of Schedule II of the Code of Criminal Procedure.

In my opinion, this argument is based on a misconception as to the object and scope of section 30, Code of Criminal Procedure. Section 30, Code of Criminal Procedure, no doubt, qualifies or controls the provisions of section 28, which again makes a reference to column 8 of the Second Schedule. But section 30 by itself does not make any discrimination. It merely confers jurisdiction and enables the State Government, notwithstanding anything contained in sections 28 and 29 of the Code, to invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death: this power the State Government can exercise only in those parts of the State in which there are Deputy Commissioners or Assistant Commissioners. Whether Hazaribagh is a Scheduled Area or not, it is a district where there is a Deputy Commissioner. The reason why there is a Deputy Commissioner at Hazaribagh is to be found in the history of scheduled districts, later called excluded or partially excluded areas. Originally, Hazaribagh was such an area. It has now ceased to be a Scheduled Area; but that does

1953.

BUDHAN v. STATE.

DAS, J.

not take it out of the purview of the provisions of section 30 of the Code of Criminal Procedure. Presumably, one of the objects of conferring powers on District Magistrates or first class Magistrates in certain areas where communication was not probably very easy, was to accelerate proceedings at the trial by avoiding the delay consequent on the commitment to the Sessions Court, which sits only at considerable intervals; perhaps, it was also intended to afford relief to those who were to attend as witnesses in the court; see the observations in *Amir Khan* v. *King Emperor*(1) and *In re Prithivinath*(2).

What are the needs of the district of Hazaribagh, even though it has ceased to be a Scheduled Area, is really a matter for the State Government or State Legislature to consider. A court of law has no means of judging the necessities of a particular local area. The argument of learned counsel for the appellants on the point of territorial discrimination proceeds on the assumption that equality before the law or the equal protection of the laws guaranteed under Article 14 of the Constitution means that the law should be the same in every part of India or in every part of the State of Bihar. That, however, is not the meaning of the guarantee. The American Constitution has a similar guarantee in the Fourteenth Amendment: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws". In *Missouri* v. *Lewis*(3) an argument similar to the argument of Mr. Bajrang Sahai was advanced with regard to the Constitution and law of Missouri; by the Constitution and laws of Missouri an appeal lay to the Supreme Court of that State from any final judgment or decree of any Circuit Court except those in the Countries of St. Charles, Lincoln, Warren and St. Louis, and the City of St. Louis; for which countries and city was established a separate court of appeal. But no appeal was given to the Supreme Court in certain cases arising in those countries or city. The contention was that that feature of the judicial system of Missouri which denied to suitors in the Courts of St. Louis and the countries named, a right of appeal to the Supreme Court was in effect a denial of the equal protection of the laws and was, therefore, in conflict with the Fourteenth Amendment. Bradley, J. said:—

"The Amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "No State shall deny to any person within its jurisdiction the equal protection of the laws". It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount, and the finality and effect of their decisions: provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States: and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal

(1) (1903) 7 Cal. W. N. 457.
(2) (1938) A. I. R. (Nag.) 56.
(3) (1880) 101 U. S. 22.

protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local Government. As regards the administration of justice it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right.....

1953.

BUDHAN v. STATE.

DAS, J.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by Jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of own modes of judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions; trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts, and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State Government if it could not, in its discretion, provide for these various exigencies."

My view is that the principles laid down in the aforesaid decision should be applicable in the present case irrespective of the fact that Hazaribagh has ceased to be a Scheduled Area. The first point, that of territorial discrimination, urged by learned counsel for the appellants, must, therefore, be overruled.

I now proceed to consider the other branch of his argument, which is to the effect that the appellants have been personally discriminated against because instead of being tried by the Court of Session they were tried by a Magistrate empowered under section 30 of the Code of Criminal Procedure. It appears that the case against the appellants was investigated into by the local police and a charge-sheet was received by the Subdivisional Magistrate on or about the 4th of June 1951. The Subdivisional Magistrate then recorded an order for placing the record before the Deputy Commissioner, Hazaribagh, for transferring it to the file of the Magistrate vested with powers under section 30. On the 11th of June, 1951, the Deputy Commissioner perused the report of the Subdivisional Magistrate. He then withdrew the case to his file and transferred it in the file of Mr. S. F. Azam, Magistrate under section 30,

1953.

BUDHAN
v.
STATE.

DAS, J.

Code of Criminal Procedure, Mr. S. F. Azam then recorded the evidence, tried the appellants as a Magistrate vested with powers under section 30, Code of Criminal Procedure.

Now, the question is whether in the circumstances in which the appellants have been tried by a Magistrate with powers under section 30, they have been denied the equal protection of the laws guaranteed under Article 14 of the Constitution. In my opinion, the answer is in the negative and my reasons are the following. I have already stated that section 30 by itself does not make any discrimination between one person and another, or one case and another, or even between one offence and another offence. It imports a twofold classification the first classification is with regard to area, with which I have already dealt; the second classification is with regard to "all offences not punishable with death". Under section 30 the District Magistrate or any Magistrate of the first class may be given power to try as a Magistrate all offences not punishable with death. Along with that section should be read section 34 which states what sentence the Court of a Magistrate specially empowered under section 30 may pass; it states that such a court may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years. There is thus a twofold limitation. The first limitation is that a Magistrate empowered under section 30 can try "all offences not punishable with death"; the second limitation is with regard to the sentence. He can pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years. It would appear from a careful scrutiny of the provisions of these two sections that no question of any individual discrimination arises under them. All persons within the territorial area where section 30 applies who are alleged to have committed offences not punishable with death, are placed in exactly the same position: namely, they are liable to be tried by a Magistrate empowered under section 30. It is well settled that the guarantee of the equal protection of the laws does not mean that the same law or the same remedy must be available to everybody. It is open to the legislature to say that in a particular area persons who have committed offences not punishable with death will be liable to be tried by a Magistrate empowered under section 30. I am advisedly using the word "liable", and I shall explain later how it may so happen that a person committing an offence not punishable with death is tried by the Court of Session whereas another person committing the same offence is tried by a Magistrate empowered under section 30. To that aspect of the case I shall come later. The point which I am trying to emphasise now is that section 30 by itself is not a piece of discriminatory or class legislation; it does not discriminate against anybody; on the contrary, it places all persons coming under its purview in the same position. It merely classifies certain offences in a particular area, and confers jurisdiction on the State Government to empower certain Magistrate to try those offences. It is now beyond dispute, and has been explained on more than one occasion, that a reasonable classification does not offend the guarantee of equality before the law or the equal protection of the laws. Thus, where there are rational

grounds for so doing, persons may be grouped into classes, to each of which specific legal rights or liabilities may be attached (*see* Willoughby on the Constitution of the United States, Volume II, 2nd edition, page 1037), section 30, Code of Criminal Procedure, does nothing more than make a rational classification of certain offences, and confer jurisdiction to empower certain Magistrate to try those offences with regard to the needs of the particular area where the section applies. By no stretch of argument can it be held that it violates Article 14 of the Constitution of India.

Now, I turn to the other aspect of this question. Learned counsel for the appellants has drawn our attention to section 528 of the Code of Criminal Procedure under which a District Magistrate may withdraw any case from any Magistrate subordinate to him and may try the case himself or refer it for enquiry or trial to any other Magistrate competent to enquire into or try the same. In the case before us, the Deputy Commissioner of Hazaribagh in exercise of his power under section 528, Code of Criminal Procedure, withdrew the case from the file of the Subdivisional Magistrate and transferred it to Mr. S. F. Azam for disposal. The contention of Mr. Bajrang Sahai is that the effect of such transfer was to deprive the appellants of the benefit of a trial by the Court of Session. He has taken us through all the provisions which regulate the procedure of a sessions trial. I think, it may be conceded at once that there are differences in procedure between a sessions trial and a trial by a Magistrate. One fundamental difference is that there is a commitment proceeding before a sessions trial. Another difference is that the sessions trial is held with the aid of a jury or assessors; in Hazaribagh it is a trial with assessors. Notwithstanding these differences I do not think that there has been any denial of the equal protection of the laws so far as the appellants are concerned.

It is necessary to explain at this stage how it happens that one person may be tried by the Court of Session and another may be tried by a Magistrate for the same offence. The relevant sections of the Code of Criminal Procedure bearing on this question are sections 207, 254, and 347. Section 207 states, *inter alia*, that a particular procedure shall be adopted in enquiries before Magistrates' where the case is triable exclusively by the Court of Sessions or where, in the opinion of the Magistrate, it ought to be tried by such Court; in other words, the Magistrate has a discretion in respect of offences which are triable by him, and he can commit to the Court of Sessions a case which he can legally try but which, in his opinion, ought to be tried by the Court of Sessions. Section 254 states the circumstances in which a Magistrate trying a warrant case should frame a charge; it states that the Magistrate should frame a charge "when there is ground for presuming that the accused has committed an offence triable under Chapter XXI, which such Magistrate is competent to try and which, in his opinion, can be adequately punished by him." Thus, the section leaves it open to the Magistrate to commit a case to the Court of Session, though he can legally try it but which, in his opinion, cannot be adequately punished by him. Section 347 states, *inter alia that* if in any trial before a Magistrate, before signing the judgment, it appears to him that the case is one which ought to be tried by the Court of

1953.

BUDHAN
v.
STATE.

DAS J.

Session, he shall commit the accused if he is empowered to commit for trial; otherwise he shall proceed under section 346, Code of Criminal Procedure.

My purpose in quoting and explaining the sections mentioned above is to show that a judicial discretion is given to the Magistrate whether a case which he is legally competent to try should be tried by him or committed to the Court of Session; therefore, it often happens that a person committing an offence is tried by the Court of Session, whereas another person committing the same offence is tried by the Magistrate. In this, however, there is no arbitrary discrimination, because the Magistrate exercises a judicial discretion according to well established judicial considerations, exactly same is the position with regard to a Magistrate empowered under section 30 of the Code of Criminal Procedure. When a case is transferred to a Magistrate empowered under section 30, he can try the case himself or he can commit the case to the Court of Sessions. Whether he shall commit the case to the Court of Session or not depends on the exercise of his judicial discretion according to well known judicial consideration; for example, section 32 itself indicates one of the considerations which the Magistrate must have in mind. That section lays down a limitation on the sentence, which such a Magistrate can pass. If the Magistrate thinks that the offender in the case before him cannot be adequately punished by him, he ought to commit the case to the Court of Session. There are other considerations also. If a case is complicated, he can commit it to the Court of Session. If the offender is alleged to have committed several offences, some of which cannot be tried by the Magistrate, he can commit the accused person to the Court of Session for a trial for all the offences. These are some of the considerations which will undoubtedly weigh with the Magistrate before he makes up his mind whether he should try the accused persons or commit them for trial by the Court of Session. In a matter which is left to the judicial discretion of a Magistrate, it can hardly be said that there is arbitrary discrimination by law. If in actual fact the Magistrate has exercised his discretion arbitrarily, there is a remedy available by a resort to a higher Court. Whether that remedy is easy of reach or not is, in my opinion, irrelevant for the purpose of determining the question at issue. The question at issue is whether there is arbitrary discrimination by law. I am fully satisfied that in a matter of judicial discretion, there is no arbitrary discrimination by law; if there is arbitrary discrimination in fact, the remedy is by way of a resort to a higher Court for correcting the error of the Magistrate. I do not think that there is any scope for the application of the equality guarantee or the equal protection guarantee in such a case.

So far as I have understood the argument of Mr. Bajrang Sahai, the appellants in this case made no grievance that they were specially victimised by the Deputy Commissioner who transferred the case to Mr. Azam, or by Mr. Azam himself who tried the case against the appellants. There was no allegation that the law was administered " with an evil eye and an unequal hand " [*Yick* v.*Peter Hopkins*(1)].

(1) (1886) 118 U. S. 356,

1953.

BUDHAM
v.
STATE.

DAS, J.

No objection was raised when the Subdivisional Magistrate, who had taken cognizance of the case, directed that the record be placed before the Deputy Commissioner; no objection was raised when the Deputy Commissioner withdrew the case to his file and transferred it to Mr. Azam; and no objection was taken when Mr. Azam tried the case of the appellants. Even in the grounds of appeal preferred to this Court no objection was taken to the effect that any of the Magistrates " acted with an evil eye or an unequal hand ". Even when Mr. Bajrang Sahai intimated to the Advocate-General that he would raise a constitutional point in this case, the point which he raised was the constitutionality of section 30 of the Code of Criminal Procedure (please see his notice to the Advocate-General). In my opinion, there was no allegation, far less any materials, on the record from which it can be said that any of the Magistrates dealing with the case of the appellants discriminated arbitrarily against the appellants. Mr. Bajrang Sahai's argument, as I have understood it, has been this: his contention is that whenever the Deputy Commissioner in Hazaribagh transfer any case in which the accused person is alleged to have committed an offence triable by the Court of Session, to a Magistrate under section 30, Code of Criminal Procedure, there is discrimination. By the logic of his argument he is forced to take the position that section 30 is unconstitutional, because the section read with section 528, Criminal Procedure Code allows a Deputy Commissioner to transfer a case triable by the Court of Session to a Magistrate empowered under section 30, Code of Criminal Procedure. Let me examine this position a little more carefully. The Deputy Commissioner transfer the case under section 528, Code of Criminal Procedure; he can transfer any case to the file of any competent Magistrate. If section 30, Code of Criminal Procedure, is constitutionally valid, no limitation can be placed on the power of transfer given to the Deputy Commissioner under section 528, Code of Criminal Procedure. It is not contended that section 528, Code of Criminal Procedure, is by itself a piece of discriminative legislation. Mr. Bajrang Sahai is, therefore, forced to fall back on an attack on section 30, Code of Criminal Procedure, and he contends that though section 528, Code of Criminal Procedure, by itself is not discriminative, it becomes discriminative because of the existence of section 30, Code of Criminal Procedure. In other words, his attack is that section 30, Code of Criminal Procedure, as a matter of law, permits discrimination to be made in respect of offences triable by the Court of Session. I have tried to show that section 30 has no such effect. If Mr. Bajrang Sahai's argument is accepted as correct, then even in cases where section 30, Code of Criminal Procedure, does not apply, there will be discrimination when a Magistrate commits an accused person to the Court of Session when he can himself try him; in one case he tries the accused person himself, in another case he commits. I have been at some pains in trying to show that this difference arises out of the exercise of judicial discretion and not out of any discrimination. If section 30, Code of Criminal Procedure, is not by itself open to any constitutional objection, I do not understand how any discrimination can be said to arise out of section 528, Code of Criminal Procedure. Reduced to its basic content, the argument of Mr. Bajrang Sahai is not that there has been any special victimisation, or discrimination in fact, against the appellants; but the transfer of any case triable by

1953.

BUDHAN
v.
STATE.

DAS, J.

the Court of Session to a Magistrate under section 30, Code of Criminal Procedure, in Hazaribagh is, in his opinin, discrimination. Put in that form, without any circumlocution, the argument is realy an argument of discrimination in law (because of the existence of section 30, Code of Criminal Procedure) and is demonstrably fallible. I have already said that all persons who commit the offence under section 366, Indian Penal Code, in Hazaribagh, are liable to be tried by a Magistrate empowered under section 30, Code of Criminal Procedure, and whether such person will be so tried by a Magistrate or by the Court of Session will depend on the exercise of a discretion by the Magistrate concerned. I do not see how it can be said that section 30 or any of the other sections of the Code of Criminal Procedure violate Article 14 of the Constitution of India.

I would further add that if the argument of Mr. Bajrang Sahai is accepted, then section 30, Code of Criminal Procedure, will have to be scrapped in every area where there is a Court of Session; because any transfer of any case triable by the Court of Session to a Magistrate under section 30, Code of Criminal Procedure, will be, according to him, discriminatory. The argument, if accepted, will also affect all decisions given by section 30 Magistrates in the different areas in the State of Bihar. I do not suggest that we should judge the constitutional validity of section 30, Code of Criminal Procedure, from the standpoint of what further effects a declaration of its invalidity may have. I am referring to the far reaching effects, only to show the importance of the question raised and the necessity of a very careful consideration of the question.

A nuumber of decisions of the Supreme Court dealing with Article 14 of the Constitution of India have been placed before us; *State of West Bengal* v. *Anwar Ali Sarkar*(1), *Kathi Raning Rawat* v. *State of Saurashtra*(2), *Lachmandas Kewalram* v. *State of Bombay*(3), and *Syed Qasim Razvi* v. *State of Hyderabad*(4). None of those decisions dealt with a matter of judicial discretion; the legislation there impugned related to State action which was held to be arbitrary. In the first case, the *State of West Bengal* v. *Anwar Ali Sarkar*(1), section 5 of the West Bengal Special Courts Act, 1950, was impugned. That section gave the State Government power to direct, by general or special order in writing, that such offences, or classes of offences, cases, or classes of cases, shall be tried by a Special Court. It was held that the classification sought to be made on the expediency of a speedier trial was not a well defined classification; it was too indefinite and vague. Similar was the case in *Kathi Raning Rawat* v. *State of Saurashtra*(2) where the impugned provision was upheld by the majority of judges on the footing that the classification was a reasonable classification and the objection of the classification was definite, tangible and rational. I can do no better than quote some of the observations made by his Lordship Mukherjea, J., in that case. His Lordship said :—

(1) (1952) A. I. R. (S. C.) 75.
(2) (1952) A. I. R. (S. C.) 123.
(3) (1952) A. I. R. (S. C. 235).
(4) (1953) A. I. R. (S. C.) 156.

1953.

BUDHAN v. STATE. DAS, J.

"It is well settled that a legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives, of the regulation, that necessity of judicial interference arises."

In the third case, *Lachmandas Kewalram* v. *State of Bombay*(1), Das, J., who gave the leading judgment, said that section 12 of the Bombay PublicSecurity Measures Act, in so far as it authorised the Government to direct specific and particular "case" to be tried by the Special Judge, was unconstitutional and void. Patanjali Sastri, C. J., who dissented, made an observation which, if I may say so with great respect, is very apposite:—

"I have emphasised elsewhere, and I do so again, that in applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided."

In the last case, *Syed Qasim Razvi* v. *State of Hydrabad*(2) the majority of the Judges held that the elimination of the committal proceeding was not by itself a substantial departure from the normal procedure, and there was no deprivation of equal protection by reason of the fact that the accused persons were tried by a special tribunal. It was pointed out that in that particular case the substitution of warrant procedure for sessions procedure did not constitute a substantial difference. I do not think that it is necessary to examine these decisions in any great detail; because, as I have already stated none of these decisions relate to a matter which the legislature in their wisdom left to the judicial discretion of a Magistrate. So far as I know, it has never been held that legislation which leaves a matter to judicial discretion is bad on the ground of being in conflict with the guarantee of equality contained in Article 14 of the Constitution.

It may not be out of place to indicate, by some examples, the very startling results which will follow if legislation permitting the exercise of judicial discretion is held to be discriminatory in nature. Take, for example, some of the penal provisions of the Indian Penal Code. Those provisions mention the sentence to which an offender is liable. In the exercise of his discretion, a Magistrate sentences one offender to a particular sentence and another offender to a much higher sentence for the same offence. Can it be said that this is

(1) (1952) A. I. R. (S. C.) 235.
(2) (1953) A. I. R. (S. C.) 156.

1953.

BUDHAN
v.
STATE.

DAS, J.

discrimination? The answer obviously is that is the exercise of his discretion, the Magistrate passes a sentence within the maximum permissible under the law, in relation to the facts of each case; this is the exercise of judicial discretion and not discrimination. Take section 23 of the Provincial Small Cause Courts Act. A Small Cause Court may in certain circumstances try an action as a small cause when it is cognizable by the Court of Small Causes; but he may in certain other circumstances direct that the action be tried by the ordinary courts. There is a well recognised difference in procedure in the trial of small causes and ordinary suits. The judge exercises a judicial discretion in the matter whether the particular action before him should be tried as a small cause or as an ordinary suit. I do not think it can be suggested that this is discrimination. The Code of Criminal Procedure has other provisions which permit an exercise of discretion. Section 260, for example, allows certain Magistrates, if they think fit, to try in a summary way all or any of certain offences mentioned therein, sub-section (2) of the section states that when in the course of a summary trial, it appears to the Magistrate that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate shall proceed to re-hear the case in the manner provided by the Code. This is another example of the exercise of a discretion. The Indian Statute Book is, I think, replete with examples of such legislation; and if one is to hold such legislation bad on the ground of discrimination, a considerable part of the Statute Book will have to be scrapped a step which I for one will not take unless I am forced to do so by the plain meaning and undisputed effect of Article 14 of the Constitution. In my opinion, the plain meaning and undoubted effect of Article 14 of the Constitution does not force me to do so. Some times the operation of a law depends on a fortuitous circumstance. Take section 153 of the Bihar Tenancy Act, which says that no appeal shall lie from a decree or order pased whether in the first instance or on appeal in any suit instituted by a landlord for the recovery of rent where (*a*) the decree or order is passed by a District Judge, Additional Judge or a Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, or (*b*) the decree or order is passed by any other judicial officer specially empowered by the State Government to exercise final jurisdiction under this section and the amount claimed in the suit does not exceed Rs. 50. It may so happen that in a particular area there is a judicial officer specially empowered, whereas in another area there is no such officer. Here the operation of the section depends on a fortuitous circumstance; but the law itself is not discriminative. Willoughby has said :—

"The provision of the Fourteenth Amendment guarantees to individuals and to corporations that they shall not by State law be excluded from the enjoyment of privileges which other persons and corporation similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from. But no one is guaranteed that in fact, through the fortuitous operation of a law, which in itself is not discriminative, a special burden may not be imposed, or the enjoyment of a privilege taken away."

(Willoughby on the Constitution of the United States, 2nd edition, page 1931).

1953.

BUDHAN
v.
STATE.

REUBEN, C. J.

My conclusion, therefore, is that Mr. Bajrang Sahai's contention that the appellants have been deprived of the equal protection of the laws is wholly without substance and must be overruled.

I would accordingly dismiss the appeal. My learned brother has, however, taken a different view on the constitutional point. The record must, therefore, be placed before my Lord the Chief Justice for being placed before a third Judge under the provisions of section 429, Code of Criminal Procedure.

On this reference—

Bajrang Sahay, for the appellant.

Advocate-General, G. P. Sahi and *B. D Singh*, for the State.

REUBEN, C. J.—This appeal comes to me on a difference between my learned brothers Das, J. and Sinha, J.

The appellants have been convicted under section 366 and 143 of the Penal Code and have been sentenced each to rigorous imprisonment for five years under section 366. No separate sentence has been imposed under section 143. The main point of difference is one arising under the Constitution of India. The case relates to the district of Hazaribagh, to which district section 30 of the Criminal Procedure Code applies. There is at this time an Assistant Sessions Judge exercising powers in the district of Hazaribagh. When the charge-sheet was received in the present case the Subdivisional Magistrate submitted the record to the Deputy Commissioner of Hazaribagh with the following order:

"Let the record be sent to the Deputy Commissioner of Hazaribagh for transferring it to the file of the Special Magistrate for trial."

It may be noted that the term "Special Magistrate" although there is no legal provision for it. is by practice used to denote the Magistrate exercising powers under section 30 of the Code. On receiving the record the Deputy Commissioner passed the order of transfer in the following terms:

"Perused Subdivisional Officer's ordersheet. Withdrawn and transferred to the file of Mr. S. F. Azam, Magistrate with powers under section 30, Criminal Procedure Code, for favour of disposal."

1953.

BUDHAN v. STATE.

REUBEN, C. J.

In the course of the argument before me it has been urged that the Deputy Commissioner as such has no powers under the Criminal Procedure Code. Admittedly the Deputy Commissioner is also the District Magistrate and the use of the wrong terminology in the Subdivisional Magistrate's order will not affect the validity of the order of withdrawal and transfer passed by him. The case was thereafter tried by Mr. Azam and ended in the conviction and sentence mentioned above. It was contended before their Lordships in appeal that the appellants had been subjected to unequal treatment inasmuch as they had been tried by the Magistrate empowered under section 30 instead of being tried in the ordinary way by the Court of Session. This contention has been accepted by Sinha, J. but not by Das, J.

There is another point of difference which makes it necessary for me to examine the facts of the case. The main judgment in the case was delivered by Sinha, J. who dealt with the case on the merits. He held that the appellants had been rightly convicted and expressed the opinion that, if he had not found the trial to be hit by Article 14 of the Constitution of India, he would have upheld the conviction of the appellants but reduced the sentence of imprisonment to two years in the case of each of the appellants. Das, J. accepted entirely the conclusions of Sinha, J. on the facts of the case. In expressing his opinion after repelling the contention about discrimination he stated that he would dismiss the appeal. It is not clear from his judgement whether at the time of expressing this view he had in mind Sinha, J's proposal that the sentences should be reduced.

The fact as found are that there are two brothers, Sukar Mahto and Barhan Mahto. The younger brother, Barhan, had a daughter named Bhatni, aged about 10 years. By due negotiations between the parties it had been arranged that Bhatni should marry appellant Ganpat Choudhary, brother of the

1953.

BUDHAN v. STATE.

REUBEN, C. J.

appellant Budhan Choudhary, and Rs. 600 was paid to Barhan for getting his consent. Before the marriage took place, however, Bhatni died. This was in the month of Aghan. Thereupon Budhan demanded repayment of the money. There was a *panchaiti*, and the *panches* decided that only Rs. 315 should be repaid. Barhan left home in order to make arrangement for the money. Apparently the appellants were not satisfied with the decision of the *panches* and during Barhan's absence and when Sukar had gone out of the house for some purpose the appellants came to the house and carried away Bilua, Sukar's daughter aged about 4 or 5 years. Sukar came back on hearing the alarm raised by his wife and protested. Nevertheless the appellants took the girl to their village Nawadih and on that very day performed her marriage with Ganpat appellant. It is not suggested that beyond going through the form of marriage between Ganpat appellant and the girl anything more was done and the girl is now in the house of her parents. Some of the appellants are persons of tender years; for instance, Ganpat Choudhary is aged 18 years and Budhan Mahto is 20 years old. The Magistrate who tried the case and who saw these persons in the dock was apparently unable to distinguish between them in the matter of the sentence. In these circumstances it is perhaps better to accept lighter sentence which seems to my brother Sinha, J. to be appropriate for the offence.'

I come now to the point arising under the Constitution of India. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, and under Article 13 of the Constitution all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III of the Constitution, which Part includes Article 14, shall, to the extent

1953.

BUDHAN v. STATE.

REUBEN, C. J.

of such inconsistency, be void. The meaning and effect of the guarantee under Article 14 has been explained by their Lordships of the Supreme Court in several decisions, among which I may mention *Charanjit Lal Chowdhary* v. *Union of India*(1) *State of West Bengal* v. *Anwar Ali Sarkar*(2) *Lachmandas Kewalram* v. *State of Bombay*(3) and *Syed Qasim Razvi* v. *State of Hyderabad*(4) and it would be a work of supererogation on my part to discuss this afresh. In the work of the Professor Willis, the guarantee forbids class legislation but not classification resting on reasonable grounds. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.

The substance of the objection in the present case is that the appellants have been tried under a procedure applying to the trial of warrant cases by a Magistrate, although other persons charged under the same sections would be entitled under the provisions of the Criminal Procedure Code to trial in the Court of Session following a procedure which is more advantageous to the accused persons than the procedure prescribed for the trial of warrant cases by a Magistrate. The circumstances in which this anomalous state of things has come about have been examined by Das, J. and it is evident from his examination that the prescription of two alternative modes of procedure in the areas affected for the trial of offences not punishable with death is founded on the backwardness of those areas as compared with other parts of India. Das, J. has suggested that one

(1) (1951) A. I. R. (S. C.) 41.
(2) (1952) A. I. R. (S. C.) 75.
(3) (1952) A. I. R. (S. C.) 235.
(4) (1953) A. I. R. (S. C.) 156.

1953.

BUDHAN v. STATE. REUBEN, C. J.

of the objects of providing this alternative mode of trial for such offences was to accelerate proceedings by avoiding the delay consequent on the commitment of the accused to the Court of Session, and has referred in this connection to the observations in *Amir Khan* v. *King Emperor* (1) and *In re Prithivinath* (2). The desirability of a quick disposal of cases exists in all areas whether advanced or backward. Perhaps the necessity for ensuring it is greater in a backward area where the local inhabitants would be less likely to understand the formalities of a procedure which puts off for an indefinite period the bringing to justice of offenders. To the primitive mind it seems natural that a person who has offended should be dealt with at once and given what he deserves, and such a mind will tend to be impatient with a procedure which requires that a person wrongly accused of a crime must be detained in custody for a long time till the arrival of some high judicial officer on circuit or be harassed by a trial in some far away district town before he can secure his liberty. These appear to be some of the considerations which perhaps induced the legislature to prescribe the sessions procedure exclusively for offences punishable with death. I would suggest another consideration which may also have been operative, namely, the difficulty in the backward areas of finding suitable persons to act as jurors or assessors. One more possibility comes to my mind. The areas in which section 30 operates are generally areas where members of the aboriginal tribes abound. These people are very different in their ideas and more violent in their reactions than the people we find in the regulation areas. They were more childlike in their outlook and district administration in these areas generally took the form of a paternal Government with the Deputy Commissioner as the *ma-bap* of the district. The Deputy Commissioner and his local assistants would be more likely to know and under-

(1) (1903) 7 Cal. W. N. 457.
(2) (1938) A. I. R. (Nag.) 56.

1953.

BUDHAN v. STATE.

REUBEN, C. J..

stand the ways of these people than a Sessions Judge or the Judicial Commissioner whose work confines them to the headquarters of the district and limits their experience of these folk to contacts in court. There would also be difficulties in language which would affect both the judge and the jurors or assessors, as the case might be, and would necessitate proceedings being taken in a language which the accused persons did not understand. By increasing the powers of the Magistrates in the manner it did, therefore, the legislature gave these persons a court which was likely to be more sympathetic and understanding than a Court of Session would be.

The differentiation between one portion of a State and another portion of it in the matter of the procedure prescribed for criminal trials in these portions does not offend against the equality clause. Bradley, J. in *Missouri* v. *Lewis* (1) observed:—

> "The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local Government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right."

Under the Criminal Procedure Code there are four different modes of procedure prescribed: (1) for the trial of summons cases, (2) for the trial of warrant cases, (3) for summary trials under Chapter XXII and (4) for trials before High Courts and Courts of Session. The Code further defines carefully the power of different courts to try offences. Any offence under the Penal Code may be tried by the High Court or by the Court of Session. In respect of other courts the powers of the courts are defined by column 8 of

(1) (1880) 101 U. S. 22.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

Schedule II appended to the Code. We find by reading this column that there are offences which are triable by the Presidency Magistrate or a Magistrate of the first class; for instance, one under section 148; others that are triable by a Presidency Magistrate or a Magistrate of the first or second class; for example, an offence under section 154 of the Penal Code; and still others which are triable by any Magistrate; for instance, an offence under section 160 of the Penal Code. A similar provision is made in this Schedule for the trial of offences under other laws. Where a special court is mentioned in the law, the offence shall be tried by that court; where no court is mentioned, it may be tried by the High Court, or, in this circumstances set out in column 2 of Schedule II, by (1) the Court of Session, or (2) the Court of Session Presidency Magistrate or Magistrate of the first Class, or (3) Court of Session, Presidency Magistrate or Magistrate of the first or second class, or (4) any Magistrate. As between the different courts empowered to try a particular offence, the choice between the courts must necessarily depend on judicial discretion. In the first instance the discretion is to be exercised by the Subdivisional Magistrate or the District Magistrate whose powers of transferring cases or for withdrawing cases from one Magistrate and making them over for trial by another Magistrate are defined in the Code. The Magistrates to whom the case is made over for trial have also been entrusted with certain amount of judicial discretion as to whether they will dispose of the case themselves or not. For instance, under section 347, if in any enquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Sessions or High Court, and if he is empowered to commit for trial, he shall so commit the accused, and if he is not so empowered he shall proceed in the manner prescribed under section 346, that is to say, he shall stay the proceedings and submit the case with

1958.

BUDHAN v. STATE.

REUBEN, C. J.

a brief report to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction as the District Magistrate directs, and the Magistrate to whom the case is submitted may, if so empowered, try the case himself, or he may refer it to any Magistrate subordinate to him having jurisdiction, or he may commit the accused for trial. In the district of Hazaribagh and in the other areas to which section 30 of the Code applies, it has been enacted that in addition to the powers of trial as defined elsewhere in India, Magistrates empowered under section 30 of the Code shall have power to try as Magistrates all offences not punishable with death. In respect of these offences, therefore, they retain the power which they are given under section 347 to commit to the Court of Session any case which appears to them to be one which ought to be tried by that court. Under section 34 a Magistrate specially empowered under section 30 may pass any sentence authorised by law except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years, that is to say, he has the same powers in this respect as an Assistant Sessions Judge under sub-section (3) of section 31 of the Code.

Under the provisions set out, in the areas to which section 30 applies, there is no difference between one person and another charged with offences under the same section as regards their liability to be tried by a Magistrate under section 30. It is in this sense that Das, J. has observed that section 30 is not in itself discriminatory.

I have stated above some of the reasons which to me appear to be behind this special provision for the backward areas. The provision that has been made is of very long-standing. Section 36 of the Code of Criminal Procedure, 1872 (Act X of 1872) ran as follows:—

"In the territories subject to the Lieutenant-Governor of the Punjab and in the territories administered by the Chief Commissioners

of Oudh, the Central Provinces and British Burma, in Coorg, and in these parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may invest the Deputy Commissioner, or other chief officer charged with the executive administration of the district in criminal matters, with power to try as a Magistrate all offences not punishable with death, and to pass sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorised by law, or of fine, or of whipping, or any combination of these punishments authorised by law; but any sentence of upwards of three years' imprisonment passed by any such officer shall be subject to the confirmation of the Sessions Judge to whom such Deputy Commissioner is subordinate. Such Sessions Judge may either confirm, modify or annul any sentence referred for confirmation."

The provision continued into the Code of Criminal Procedure, 1882 (Act X of 1882) in which section 30 provided:—

"In the territories respectively administered by the Lieutenant-Governor of the Punjab and the Chief Commissioners of Oudh, the Central Provinces, British Burma, Coorg and Assam, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may, notwithstanding anything contained in section 29, invest the District Magistrate with power to try as a Magistrate all offences not punishable with death."

and the provisions as to the powers of the Magistrate so empowered were contained in section 34:—

"The Court of a District Magistrate specially empowered under section 30 may pass any sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorised by law, or of fine, or of whipping, or of any combination of those punishments authorised by law.

But any sentence of imprisonment for a term exceeding three years passed by any such court shall be subject to the confirmation of the Sessions Judge."

Sections 30 and 34 of the present Code substantially reproduce the previous provisions. It is no longer necessary that sentences of imprisonment exceeding a term of three years imposed by such a Magistrate should be confirmed by the Sessions Judge. The modification is of no importance since the order of conviction is itself open to appeal and it is extremely unlikely that a person convicted and sentenced to such a term of imprisonment will not avail himself of his right of appeal. Also under the present Code the

1953.

BUDHAN v. STATE.

REUBEN, C. J.

larger powers may be conferred on any Magistrate of the first class, and not merely on the District Magistrate, or other chief officer charged with the executive administration of the district in criminal matters. This is a reflection of the general advance that has taken place since those days. The number of matters to which the District Magistrate and the Subdivisional Magistrate, who are also the administrative heads of their respective charges, have to attend to has increased and it is very seldom that the District Magistrate himself tries any criminal case, and the Subdivisional Magistrate generally has one or more Magistrates of the first class under him and he himself tries a comparatively small number of cases. What the course of legislation shows is that throughout the long period from 1872 the legislature has considered it necessary that it should be possible in these backward areas to empower Magistrates of experience to try all cases of offences not punishable with death. In doing this the legislature was acting well within its powers of prescribing for the particular area under consideration the different courts to exercise jurisdiction therein and of determining the extent of their jurisdiction and powers. With regard to the cases that would come before the Magistrate under these provisions, the legislature provided that he should try them as a Magistrate. This makes applicable to the trial of these offences the procedure applying for the trial of warrant cases. This is a procedure that has been prescribed by the Code for the trial of the more serious cases which ordinarily come before Magistrates, and although it is not so elaborate as the procedure prescribed for trials in the Sessions Court it contains all the safeguards necessary to ensure a fair trial.

It would appear from what I have said that the provisions contained in section 30 are, on the face of them, fair and reasonable. There is no reason to regard them as hostile and discriminatory. On the

contrary they appear to be designed with the needs of the areas affected in view. It is complained, however, that Hazaribagh is no longer a backward area and that it is not included in the areas notified by the President of India as Scheduled Areas under clause C of the fifth schedule to the Constitution of India. The fifth schedule contains provisions relating to the administration and control of areas declared as Scheduled Areas under this Schedule. Certain limitations are put upon the executive power of the State in regard to such areas. The Governor or the Rajpramukh of a State is required to make reports to the President regarding the administration of such areas and the executive power of the Union extends to the giving of directions to the State as to the administration of such areas. A Tribes Advisory Council shall be established in respect of such areas for advising the Governor or the Rajpramukh in matters appertaining to the welfare and advancement of the Scheduled Tribes in the State.The Governor or the Rajpramukh, as the case may be, is empowered to exclude Acts of Parliament or of the Legislature of the State from applying to the Scheduled Area, or to apply them to the Scheduled Area subject to exceptions and modifications specified by him. He has also power to legislate for the Scheduled Areas by means of regulations after consultation with the Tribes Advisory Council and with the assent of the President. The exclusion of Hazaribagh from the list of Scheduled Areas means at the most that it is not considered necessary for Hazaribagh to receive the special treatment and protection provided in the fifth schedule. It does not follow that Hazaribagh must be taken to be on the same level in all respects with the other parts of the State not included in the Scheduled Areas. It is for the executive and legislative authorities to decide whether the conditions which led to the enactment of the provisions contained in sections 30 and 34 of the Code still exist in Hazaribagh or not.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

It is next objected that the impugned provisions do not provide any criterion for the guidance of the Magistrates in deciding whether or not the case should be tried by the Magistrate or the Court of Session. There was no difficulty, it is conceded, so long as Hazaribagh was included within the Judicial Commissionership of Chota Nagpur and there was no Assistant Sessions Judge but only the Judicial Commissioner, exercising the powers of a Sessions Judge. At that time the gravity of the offence, a distinction recognised by the Code, furnished a sufficient guide. The difficulty arose, it is said, when Hazaribagh was made a separate judgeship and given a Sessions Judge of its own. It has now got an Assistant Sessions Judge, whose powers of imposing sentences are exactly the same as those of the Magistrates exercising powers under section 30. The decision as to which of the courts should hold the trial is in such circumstances left to the judicial discretion to be exercised on the facts of the particular case. This is not necessarily unconstitutional. It is not possible for the legislature to anticipate and to legislate for all contingencies that may arise and in the ultimate analysis the decision as to the proper course to be taken in the particular circumstances of the case must be left to the decision of the officer or judge dealing with the case. The well known case of *Yick Wo* v. *Peter Hopkins*(1) has been cited as an authority that an unregulated discretion entrusted to a State authority offends against the equality clause. In my judgment in *Kameshwar Singh* v. *State of Bihar*(2) I have endeavoured to show that this is not correct. I am supported in my conclusion by the observation made by Patanjali Sastri, C.J. in the case of *Anwar Ali Sarkar*(3):—

"Thus explained, the *Yick Wo case*(1) is no authority for the view that the vesting in a public

(1) (1886) 118 U. S. 356.
(2) (1951) A. I. R. (Pat.) 91.
(3) (1952) A. I. R. (S. C.) 75.

authority of a discretion which is liable to abuse by arbitrary exercise contrary to its intendment is a sufficient ground for condemning a statute as discriminatory and unconstitutional."

In the case of *Yick Wo*,(1) Matthews, J. in delivering the opinion of the court distinguished the statute under consideration from other statutes by which a discretion was entrusted in a public authority:—

" The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

His Lordship was evidently prepared to consider as constitutional the vesting of discretionary power in public officers or bodies to decide on the facts of each case whether the applicant is fit for the licence applied for. *Brown* v. *State of New Jersey*(2) is a case in which the discretion was vested in a court to choose between two alternative modes of procedure. The statute under examination introduced into the state of New Jersey what is known as a "struck jury". When a rule for a struck jury was granted, the court on the motion of the prosecutor, or of the defendant, or of its own motion, was empowered to select from the persons qualified to serve as jurors in or for the county, whether the names of such persons appeared on the sheriff's book of persons qualified to serve as jurors or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant were permitted each to strike twenty-four names in the usual way. The remaining forty-eight names

(1) (1886) 118 U. S. 356.
(2) (1899) 175 U. S. 172.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

were then to be placed by the sheriff in the box, in the presence of the court, and from the names so placed in the box the jury was to be drawn in the usual way. Under sections 80 and 81 of the statute, where there was no " struck jury " and the party was on trial for murder, he was entitled to twenty peremptory challenges and the State to twelve, but in the case of a " struck jury " each party was allowed only five peremptory challenges. Brewer, J. in delivering the opinion of the court observed:—

" It is true that here there is no territorial distribution, but in all cases in which a struck jury is ordered the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, State or defendant, may apply for a struck jury, and the matter is one which is determined by the court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws. That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more."

Referring to this decision Mukhrejea, J. observed in the case of *Anwar Ali Sarkar*(1): " That a judicial discretion has to be exercised on the basis of the facts of each case in the matter of granting the application for a struck jury does not really involve discrimination."

That a discretion given without any express guidance as to the principles on which it is to be exercised does not necessarily offend against the Constitution is also the view expressed by Patanjali

(1) (1952) A. I. R. (S. C.) 75.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

Sastri, C.J. in *Anwar Ali Sarkar's case*(1) (vide paragraphs 13 and 14 of the report). His Lordship there was speaking about local administrative bodies. If such discretion can legally be vested in administrative bodies, so much the more can it be legally vested in a court

Sinha, J. has conceded that " if as a result of judicial discretion there is incidental inequality resulting from the operation of law, the provision contained in Article 14 of the Constitution will have no application." He has, however, relied on an observation of the Supreme Court in the case of *Qasim Razvi*(2) that if the Special Tribunal in that case had exercised the judicial discretion entrusted to it to adopt the procedure for a summary trial instead of that for the trial of a warrant case, they would have had no other alternative but to declare the whole trial invalid. With respect I would submit that in considering this case as well as the cases of *Anwar Ali Sarkar*(1) and *Lachmandas Kewalram*(3) it is necessary to keep in mind the nature of the legislation which was impugned. The Special Tribunal Regulation which was under examination in *Qasim Razvi's case*(2) established a special tribunal different from the ordinary courts of law known to the State. Neither the object of the enactment nor the legislative policy behind it was specified and an unfettered discretion was vested in the Military Governor to send " any offence or class of offences " to be tried by the Special Tribunal and no objective was stated to guide the exercise of that discretion. The ordinary procedure prescribed by the Hyderabad Criminal Procedure Code was modified apparently to shorten the trials before the Special Tribunal and to put the Special Tribunal in entire charge of the cases referred to it

(1) (1952) A. I. R. (S. C.) 75.
(2) (1953) A. I. R. (S. C.) 156.
(3) (1952) A. I. R. (S. C.) 235.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

The Tribunal was to exercise the powers of a Sessions Judge. Under section 4(1) it could take cognizance of offences without the accused being committed for trial. Under sub-section (7) of section 4 it was enjoined to follow the procedure prescribed for summary trials by Magistrates, though it was given discretion, when it considered it proper, to follow the warrant procedure. The Tribunal was not bound to take evidence at length and need only cause a memorandum of the substance of the deposition of each witness to be taken down. Here again, a discretion was given to it to direct that the entire evidence should be taken down. The Regulation further provided that the Tribunal would not be bound to adjourn the trial for any purpose, that there would be no *de novo* trial if there was a change in the personnel of the Tribunal and that the accused person might in certain circumstances be tried in his absence. Appeal lay in the usual way against the orders of the Tribunal to the High Court as it lay against the orders of Sessions Court but powers of revision and transfer were wholly taken away. The Regulation, therefore, was entirely different from the statute which we are now considering. It constituted a new Tribunal and prescribed a new procedure which was substantially prejudicial to the accused in many respects and gave the Military Governor unfettered discretion to apply the Regulation to any offence or class of offences. It was of the nature of legislation which has been described as in itself " hostile and discriminatory ". Here, on the contrary, we are concerned with a statute which has not been enacted to deal with an emergency and whose sole object seems to be to make suitable provision for backward areas. In some respects it provides for a procedure which is different from that in the other parts of the State. But the differences are based on reasonable grounds, and of the two alternative procedures provided for offences not punishable with death and not ordinarily triable by a Magistrate, both are

1953.

BUDHAN v. STATE.

REUBEN, C. J.

the ordinary procedures in use in the State and they contain the usual safeguards for the protection of the interests of the accused and for ensuring a fair trial. In these circumstances I do not think that an exercise of judicial discretion which results in a person charged with an offence under section 366 being tried by a Magistrate whereas other persons similarly charged are tried by the Court of Session can be said to be hit by the equality clause.

Fazl Ali, J. observed in *Anwar Ali Sarkar's case*(1):—

" In my opinion, the true position is as follows: As a general rule, if the Act is fair and good, the public authority who has to administer it will be protected. To this general rule, however, there is an exception, which comes into play when there is evidence of *mala fides* in the application of the Act."

Said Stone, C.J. in *Snowden* v. *Hughes*(2):—

" The unlawful administration by state officers of a State statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Frankfurter, J. concurring observed:—

" The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a State."

Here also we are concerned with a statute fair on its face and there is no suggestion that there has been any intentional or purposeful discrimination as against the appellants.

(1) (1952) A. I. R. (S. C.) 75.
(2) (1944) 321 U. S. 1.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

I have pointed out above that there are several modes of procedure prescribed in the Code for the trial of cases and that more courts than one are vested with jurisdiction to try offences under the same section; for instance, an offence under section 326 may be tried by the Court of Session or by a Magistrate of the first class. In answer to a question as to whether an accused person charged under this section can complain of discrimination because he is tried by a Magistrate whereas another person charged under the same section is committed to the Court of Session, counsel for the appellants replied that provided the accused person gets the usual mode of trial, he cannot make it a grievance that some one else was luckier. Relying on *Narain Hazam* v. *Ramdhari Singh*(1) he urged, however, that cases which come to a Magistrate for trial under section 30 of the Code are not cases " triable by a Magistrate " and, therefore, the accused can complain of discrimination. Their Lordships in Criminal Revision no. 641 of 1952 were concerned with the meaning of the term " offence triable by a Magistrate " as used in section 250 of the Code, and the case is not in point here. The legislature in this particular area has prescribed that such cases may be tried by Magistrates empowered under section 30 and this provision has been in existence since 1872. There is no reason to suppose that these sections have been in abeyance throughout this long period and, since an Assistant Sessions Judge has been appointed for this area only in comparatively recent times, we can hardly say that a trial by a Magistrate empowered under section 30 deprives the accused of the usual mode of trial.

Much stress has been laid before me on the case of *Anwar Ali Sarkar*(2), to which I have referred several times above. As I have observed, their Lordships

(1) (1953) Cr. Rev. no. 641 of 1952 (unreported), decided on 16th March 1953.
(2) (1952) A. I. R. (S. C.) 75.

were there concerned with a statute which is entirely different from the statute which is under examination here. The Act was stated in the preamble to be for providing for a speedier trial of certain offences. It established special courts for trial, for which courts it prescribed a procedure which departed in several important particulars from the established mode of trial in cases under the Criminal Procedure Code. The Tribunal was to exercise the powers of a Sessions Court. The trial was to be without jury or assessors and the committal procedure in sessions cases was eliminated. The Tribunal was given special powers to deal with refractory accused and a *de novo* trial on the transfer of a case from one court to another was dispensed with. The liability to undergo the disadvantages attaching to a trial by the Tribunal was made to depend entirely on the unregulated will of the State Government. This was, on the face, of it, hostile and discriminatory. It was characterised as such by Mahajan, J. (paragraph 39 of the report) and Mukherjea, J. pointed out that discrimination arose on the very terms of the Act (paragraph 50 of the report). It was for this reason that their Lordships refused to draw the usual presumption in favour of the constitutionality of the impugned statute. Mukherjea, J. concluded his examination of the point in these words:—

"The question in each case would be: whether the characteristics of the class are such as to provide a rational justification for the differences introduced? Judged by this test, the answer in the present case should be in the negative; for the difference in the treatment rests here solely on arbitrary selection by the State Government. It is true that the presumption should always be that the legislature understands and correctly appreciates the needs of its own people and that its discriminations are based on adequate grounds: *Middleton* v. *Taxes Power and Light Co.*(1),

(1) (1919) 249 U. S. 152.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

but as was said by Brewer, J. in *Gulf Colorado, etc., Company* v. *Ellis*(1).

" to carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clauses of the Fourteenth Amendment a mere rope of sand '. "

In other words, the statute was on the face of it discriminatory and the question of a presumption in its favour did not arise.

In the course of their decision in this case several of their Lordships observed that the necessity for a speedy trial cannot be a reasonable basis for a classification. It was sought to use these observations as a weapon against the constitutionality of section 30. Again, the two statutes are not on a par. It was sought in that case to use the necessity for a speedy trial as a basis of classification between one offence and another or betwen one class of offences and another, and it was pointed out by Mahajan, J. that this is too vague and uncertain a criterion (paragraph 37 of the report). In the case before us the distinction attempted to be made is not between offences or classes of offences, but between one area where it is urgently desirable that there should be a speedy trial and another area where it is not. I have tried to indicate above that for this purpose speed of trial may form a reasonable basis of classification and have also given reasons for thinking that this is not the only basis for the classification.

The statute which came under examination in the case of *Lachmandas Kewalram*(2) introduced similar departures from the ordinary law of procedure as were introduced by the West Bengal Special Courts Act

(1) (1897) 165 U. S. 150.
(2) (1952) A. I. R. (S. C.) 235.

1953.

BUDHAN v. STATE.

REUBEN, C. J.

the case of *Anwar Ali Sarkar*(1); and as in that Act, here also the Special Judge was authorised to try "such offences or class of offences, or such cases or class of cases as the Provincial Government may, by general or special order in writing, direct". The only difference between this case and that of *Anwar Ali Sarkar*(1) is that in this case cognizance of the offence was taken before the Constitution of India came into effect, and to the extent that the trial had proceeded before that date the trial was valid. After that date, further proceedings were hit by Article 14, and the continuation of the application of the discriminatory procedure to the trial constituted a breach of a fundamental right. Indeed, as observed by Das, J., in a sense the Special Judge's jurisdiction came to an end after that date, for he was enjoined to proceed only according to the special procedure and that procedure having become void under Article 13, clause (1), he could not proceed at all with the case. It is in this last respect that the case differs from the case of *Qasim Razvi*(2). There a similar but not so drastic an enactment came under consideration and the Special Tribunal having been given a discretion to choose between alternative procedures chose a procedure which was not open to the objection of discrimination. These cases, as I have said already, are concerned with legislation which was on the face of it discriminatory and have no application here.

For the reasons I have given, I agree with Das, J., that sections 30 and 34 do not offend against Article 14 and are not invalid.

In the result the conviction of the appellants will be upheld but the sentence imposed on them will be reduced to a term of imprisonment of two years in the case of each appellant.

Order accordingly.

K. D.

(1) (1952) A. I. R. (S. C.) 75.
(2) (1953) A. I. R. (S. C.) 156.

REVISIONAL CIVIL.

1953.

August, 18, 25.

Before Reuben, C.J. and Choudhary, J.

MANORMA DASI

v.

MADANCHAND.*

Provincial Small Cause Courts Act, 1887 (*Act IX of* 1887), *Schedule I, Article* 8—*scope of—suit for a co-sharer's share of rent, whether excepted from the jurisdiction of Small Cause Court—Bihar Tenancy Act*, 1885 (*Act VIII of* 1885), *sections* 22(2), *rent, meaning of.*

The word " rent " used in section 22(2), Bihar Tenancy Act, 1885, means nothing other than " compensation for use and occupation " payable by a purchasing co-sharer to the non-purchasing co-sharer and the amount of that compensation has to be ascertained by calculating the proportionate share of rent that was originally payable by the tenant to the entire body of landlords.

Therefore, a suit for recovery of his share of the produce rent instituted by a co-sharer landlord is not a suit for rent so as to be excepted from the cognizance of a Small Cause Court.

Rajkishore Pd. Narain Singh v. *Mojibul Rahman*(1), affirmed.

Sunder Mall's case, In re(2), followed.

M. C. Dutta v. *Rai M. N. Bose*(3), explained and referred to.

Jaduprava Mitra v. *Rai Batobehari*(4), referred to.

U. P. N. Sahi v. *Dulhin I. Kler*(5), commented upon.

* Civil Revision nos. 859 and 860 of 1950, against an order of Mr. K. N. Singh, Small Cause Court Judge, Aurangabad, dated the 7th September 1950.

(1) (1942) A. I. R. (Pat.) 391.
(2) (1940) I. L. R. 19 Pat. 893, F. B.
(3) (1953) I. L. R. 32 Pat. 720.
(4) (1947) I. L. R. 26 Pat. 659.
(5) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

MANORMA DASI v. MADAN-CHAND.

Applications in revision by the defendants 1st party.

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

The cases in the first instance came before Rai, J. who referred them to a Division Bench.

On this reference.

P. K. Bose, for the petitioner.
U. N. Sinha, for the opposite party.

CHOUDHARY, J.

CHOUDHARY, J.—The defendants 1st party in the two revision applications seek to set aside the decree passed against them by the Munsif exercising small cause courts power at Aurangabad in Small Cause Court Suits nos. 366/183 and 367/184 of 1949, which were tried together and disposed of by one judgment. C. R. 859 of 1950 arises out of Suit no. 367/184 of 1949 which relates to the holding appertaining to khata no. 34 and C. R. 860 of 1950 arises out of Suit no. 366/183 of 1949 which relates to the holding appertaining to khata no. 27.

The plaintiffs in both the suits sued for recovery of their proportionate share of produce rent from the defendants 1st party who are also co-sharer landlords to the extent of eight annas share. There are three sets of plaintiffs, namely, the original plaintiff, having 4 annas share, and the plaintiffs 1st party and the plaintiffs 2nd party, each having two annas share. The defendants 1st party purchased the two holdings in execution of their decrees for rent and obtained delivery of possession over them. The plaintiffs, therefore, sued the defendants 1st party for recovery of their proportionate share of produce rent to which they were entitled under section 22(2) of the Bihar Tenancy Act. The defence of the defendants 1st party was that after their purchase they settled the land of both the khatas with one Dewan Singh who

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

transferred the land of khata no. 34 to Harihar Singh and that of khata no. 27 to Jugeswar Singh, both of whom are intervenor defendants in the respective suits. These intervenor defendants contested the suits mainly on the ground that the rent of the holdings had been commuted to cash rent under section 40 of the Bihar Tenancy Act. The court below held that the order commuting the rent was invalid and was not binding on the plaintiffs. In suit no. 367/184 of 1949, therefore, the court below passed a decree in favour of the three sets of the plaintiffs against the defendants 1st party for their proportionate share of produce rent. In suit no. 366/183 of 1949, however, the court below found that the original plaintiff had accepted the rent from the intervenor defendant on the basis of commuted rent and, therefore, it dismissed the suit so far as his claim was concerned, but decreed it in favour of other two sets of plaintiffs for their proportionate share of produce rent against the defendants 1st party. Against the decrees passed in the two suits the defendants 1st party have filed the two revision applications in this Court.

The proposition that a co-sharer landlord having purchased the occupancy-right in land is liable to pay to the non-purchasing co-sharer landlords their proportionate share of the original rent of the holding is not in dispute and it is well settled by now that the non-purchasing co-sharer landlords are entitled to receive their proportionate share of the original rent from the purchasing co-sharer who holds an intermediate interest in the land, vide, *Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*(1); *Raja Surajpal* v. *Ramgati*(2); and *U. P. N. Sahi* v. *Dulhin I. Kuer*(3).

The contention raised by Mr. P. K. Bose for the petitioners is that the suits having been brought for

(1) (1937) I. L. R. 16 Pat. 500.
(2) (1947) I. L. R. 26 Pat. 353.
(3) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

recovery of rent were not cognizable by a small cause court. Under Article (8), Schedule I of the Provincial Small Cause Courts Act, 1887 (Act IX of 1887), a suit for recovery of rent, other than house-rent, unless the Judge of the court of the small causes has been expressly invested by the State Government with authority to exercise jurisdiction with respect thereto is excepted from the cognizance of the court of small causes. Therefore, if the present suits are suits for recovery of rent, the small cause court Judge had no jurisdiction to try them. But, if these suits are not suits for recovery of rent, then in that case the small cause court Judge had jurisdiction to decide them. The decision of the question whether these suits were triable by a small cause court Judge or not, therefore, depends upon the determination of the question whether the amount which a non-purchasing co-sharer landlord is entitled to recover from the purchasing co-sharer landlords under section 22(2) of the Bihar Tenancy Act is rent, or, something other than rent. Rent has been defined in section 3(5) of the Bihar Tenancy Act to mean whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of use and occupation of the land held by the tenant. The words "tenant" and "landlord" used in this definition mean the entire body of tenants and the entire body of landlords where there are more than one tenant or one landlord. If that be so, we can take the definition of rent to mean whatever is lawfully payable or deliverable in money or kind by the entire body of tenants to the entire body of landlords on account of use and occupation of the land held by the entire body of tenants. It will not, therefore, include what has to be paid by one who holds the land to some of the landlords only. Thus whatever is payable by the purchasing co-sharer to a non-purchasing co-sharer under section 22(2) of the Bihar Tenancy Act does not amount to that which the entire body of the tenants has to pay to the entire body of the landlords and cannot, therefore, be called

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

rent. Complication has, however, arisen due to the mention of the word " rent " in that section itself. It provides that if the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them. It is, therefore, contended that whatever the purchasing co-sharer has to pay to the non-purchasing co-sharer, amounts to rent.

The status of a purchasing co-sharer has been examined in various cases. In *Jawadul Huq* v. *Ram Das Sahu*(1) a Special Bench of the Calcutta High Court held that the status of the purchaser was that of a tenant under the other co-proprietors of the land. That case was considered in the Full Bench decision of this Court in *Sunder Mall* v. *Lachmi Tewari*(2). Agarwala, J. (as he then was) who delivered the judgment (the Chief Justice and Manohar Lall, J. having agreed with him) referring to that case observed as follows:

" That again is a view which, in my opinion, it is difficult to sustain. If A, B and C are co-proprietors of an estate, I do not understand how one of them who is in possession of a part of the estate can be viewed as a tenant under the other two, for the land belongs to all the three co-proprietors, and not merely to the other two. Nor in my opinion can he be viewed as occupying the status of a tenant under himself and his co-proprietors for that involves the purchaser being a tenant under himself and the other co-proprietors as landlords. The law does not recognise a person as a tenant of himself. The amendments of 1907 have made it quite clear that the Legislature never intended that after ' the right of occupancy '

(1) (1896) I. L. R. 24 Cal. 143, S. B.
(2) (1940) I. L. R. 19 Pat. 893, F. B.

had been purchased by a proprietor and extinguished by sub-section (1) of section 22, the purchaser should be regarded as a tenant by substituting for the words 'the occupancy right shall cease to exist' in sub-section (1) the words 'such persons shall have no right to hold the land as a tenant'. Precisely the same language was used in the original sub-section (2) and should not be construed differently. It is true that the amended sub-section (2) does not, as in the case of sub-section (1), provide that the purchaser 'shall have no right to hold the land as a tenant' but, in my view, the amendment of that sub-section should not be construed so as to defeat the object of the Legislature which was to prevent landlords from encroaching upon the *raiyati* land of the province."

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

In *U. P. N. Sahi* v. *Dulhin I. Kuer*(1), another Full Bench decision of this Court, Meredith, J. seemed to take a view that a purchasing co-sharer was a tenant of some sort under his co-sharer. His Lordship observed:

"It must be interpreted, in my view, as providing for the transfer by the purchase of a tenancy right, apart from an occupancy right, to the purchasing co-sharer. Its effect upon the general law is to take away the right of the co-sharers to participate in the purchase, so that in effect there will be a tenancy immediately upon the purchase, and not only when the co-sharers refuse to participate by contribution, or recognize the tenancy, as was the case prior to 1907."

But, later on, while considering the right of the purchasing co-sharer to transfer or sub-let the land to a third person he seems to have taken a different view which appears from the following observations made by him:

"The purchaser can do a thing which only the entire body of landlords can ordinarily do. His

(1) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

position is, therefore, not merely that of a co-sharer in exclusive possession, but rather that of one having the entire landlord's powers in himself in this regard. This must, I consider, mean that he holds some sort of intermediate landlord's interest. It is undoubtedly an anomalous status."

His Lordship thereafter reconciles the two views by holding that the purchasing co-sharer holds some intermediate interest in the land. Narayan, J., also took the view that an intermediate interest is created in favour of the purchasing co-sharer. His Lordship observed:

"If, therefore, the Legislature has authorised the co-sharer purchaser of the occupancy-right to sublet the land to a third person and has further laid down that such third person shall be deemed to be a tenure-holder or *raiyat* as the case may be in respect of the land, the conclusion is irresistible that the law contemplates that because of the purchase of the occupancy-right of the land by the co-sharer purchaser an intermediate interest is created in his favour."

Relying on these decisions it was held in another Division Bench case of this Court in *Madan Chand Dutta* v. *Rai Manmatha Nath Bose*(1) to which I was a party, that the purchasing co-sharer holds an intermediate interest in the land. On the authority of the Full Bench case in *Sunder Mall* v. *Lachhmi Tewari*(2) the purchasing co-sharer is not a tenant. The other cases refered to above also do not suggest that he is a tenant. His status appears to be of a person holding an intermediate interest, and as pointed out by Meredith, J. in *U. P. N. Sahi's case*(3) that may probably be an intermediate landlord's interest. The

(1) (1953) I. L. R. 32 Pat. 720.
(2) (1940) I. L. R. 19 Pat. 893, F. B.
(3) (1948) I. L. R. 27 Pat. 610, F. B.

1953.

MANORMA DASI v. MADAN-CHAND.

purchasing co-sharer thus not being a tenant, whatever is payable by him to the non-purchasing co-sharer cannot amount to be that which is payable by a tenant to his landlord so as to come within the definition of rent as provided in section 3(5) of the Bihar Tenancy Act.

CHOUDHARY, J.

In the aforesaid Full Bench decision in I. L. R. 27 Patna 610 Meredith and Narayan, JJ. were much influenced by the use of the word " rent " in section 22(2) of the Bihar Tenancy Act as opposed to the words " a fair and equitable sum for use and occupation " occurring in the amended section 22(2) prevailing in East Bengal. Their Lordships have come to the conclusion that whatever is payable by the purchasing co-sharer to the non-purchasing co-sharer amounts to rent. How far this view is correct requires consideration. But the point is can we question the correctness of the decision given by their Lordships sitting in Full Bench? The questions that were referred to the Full Bench were:

" (1) Do the provisions of section 22(2) of the Bihar Tenancy Act as amended in 1907 entitle a co-sharer landlord, who has purchased a non-transferable or a transferable occupancy-holding between the years 1907 and 1923, to retain it in his possession as purchased land on a partition taking place between him and his co-sharers?

(2) Were the cases of *Jhapsi Sao*(1) and *Babu Ram Prasad*(2) and *Basdeo Narain*(3) correctly decided, assuming that the acquisitions of the occupancy-holding were made after 1907 in those cases."

The answer of the Full Bench on these points was in the affirmative. We are bound by the decision of the Full Bench on those two points, but, in my opinion, the process of reasonings adopted by their Lordships in arriving at the conclusion for answering the two questions is not binding on us and we can, therefore,

(1) (1925) I. L. R. 5 Pat. 281.
(2) (1920) 2 Pat. L. T. 163.
(3) (1921) 3 Pat. L. T. 22.

1953.

MANORMA DASI v. MAHAN-CHAND.

CHOUDHARY, J.

examining the correctness of the proposition that the amount payable by the purchasing co-sharer to the non purchasing co-sharer under section 22(2) of the Bihar Tenancy Act amounts to rent. In order to decide whether the amount payable by the purchasing co-sharer to the non-purchasing co-sharer would come under the meaning of the word " rent " their Lordships compared the provisions made in section 22(2) of the Bihar Tenancy Act as applicable in Bengal with the amendment introduced in that section in East Bengal at that time. The amended section 22(2) as it prevails in East Bengal is as follows:

" If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person shall have no right to hold the land as a *raiyat*, but shall hold it as a proprietor or permanent tenure-holder as the case may be, and shall pay to his co-sharers a fair and equitable sum for the use and occupation of the same."

Whereas that section as applicable in Bengal at that time and now applicable in Bihar provides that such purchasing co-sharer shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them. Since in East Bengal the words were specifically used to provide for a payment by the purchasing co-sharer a fair and equitable sum for use and occupation of the same to the non-purchasing co-sharer and those words were not used in that section for Bengal, their Lordships took the view that the Legislature deliberately omitted to use those words for Bengal and therefore the word " rent " means rent and not compensation for use and occupation. Narayan, J. while discussing that question referred to the observation of the Select Committee in the Report which runs thus:

" The amendments made by them in the section will give effect to the intention of the framers of the

Act, by providing that, where a sole landlord acquires an occupancy holding of his *raiyat*, the interests of such landlord and tenant merge into a landlord's interest; and that where one of several co-sharer landlords or joint tenure-holders acquires an occupancy right of a tenant of all the co-sharers or joint tenure-holders, such landlord cannot thereby acquire an occupancy-right, or by sub-letting, bar the acquisition of *raiyati* rights by the sub-lessees. At the same time, under the section as modified by us, the landlord will not be prevented from cultivating the land himself, though the holding will not become proprietor's private land, we have inserted an illustration to make the meaning of the section quite clear."

It appears from the above observation of the Select Committee that they were not introducing any new law, but were giving effect to what was already the law on the subject, or, in other words, the amendment of section 22(2) in East Bengal providing for the payment by a purchasing co-sharer a fair and equitable sum for use and occupation to the non-purchasing co-sharer, did not introduce a new law, but only gave effect to and made the position clear what was already the law on the subject. Thus, prior to the amendment in East Bengal it was understood that what was payable by the purchasing co-sharer to the non-purchasing co-sharer was not rent, but only a compensation for use and occupation. In *Watson and Company* v. *Ramchand Dutt*(1) their Lordships of the Judicial Committee decided that where one of the co-sharer proprietors is in cultivating possession of a portion of the estate belonging to himself and the other co-sharers, such possession does not amount to ouster of the latter and, therefore, they are not entitled to a decree for joint possession with the former but to a decree for a sum of money as compensation in respect of exclusive use and benefit by the defendant of the lands which he cultivates, the

(1) (1890) I. L. R. 18 Cal. 10, P. C.

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

amount of compensation being in proportion to the share of the plaintiffs in the lands. Relying on this decision Agarwala, J. (as he then was) observed in *Sunder Mall's case*(1) as follows:

"It will be noticed that their Lordships did not award the plaintiffs rent which would have been the appropriate remedy if the defendant was a tenant, but compensation for exclusive use and occupation. The object of the amendment of sub-section (2) would appear to give effect to this decision in the case of a purchase of an occupancy-right by a co-proprietor, and at the same time to prescribe the amount of the compensation payable, namely, that proportion of the rent which would have been received by the other co-owners from the tenant if there had been no transfer of the occupancy-right. The reference to 'rent' in the present sub-section (2), should, in my view, be read in this sense and not as descriptive of the nature of the payment to be made by the purchasing co-owner to his co-sharers. It is pertinent to observe that in amending section 22(2) in its application to Bengal and East Bengal the Legislature has now made its intention clear by providing expressly that the purchasing co-proprietor or tenure-holder shall hold the land as proprietor or tenure-holder and shall pay a fair and equitable sum for use and occupation."

Referring to the case of *Midnapore Zamindary Company* v. *Naresh Narayan Roy*(2) his Lordship further observed:

"Their Lordships again pointed out that where a co-sharer or a co-proprietor cultivates any part of the lands which is not being cultivated by another of his co-sharers, he is liable to pay compensation to them in respect of the exclusive use of the land and if they are not satisfied, their proper remedy is to obtain a partition of the lands. They pointed out that no co-sharer can as against his co-sharer, obtain any

(1) (1940) I. L. R. 19 Pat. 893, F. B.
(2) (1924) I. L. R. 51 Cal. 631, P. C.

rights of permanent occupancy in the lands held in common. It will be noticed that their Lordships again negatived the idea of any tenancy existing between the parties by the use of the word 'compensation' instead of 'rent' and they denied the possibility of one co-sharer obtaining a right of permanent occupancy as against another co-sharer."

The observations of Manohar Lall, J. in *Jadu-prava Mitra* v. *Rai Batobhari*(1) may also be profitably quoted here:

"*Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*(2) proceeds upon the view that so long as there is no partition amongst the co-sharers, the co-sharer purchaser is liable to pay compensation to his co-sharers calculated at the rate of rent payable by the tenant of the occupancy holding at the time of the purchase and not the rent payable in respect of the tenancy which has been created by the co-sharer purchaser. A number of cases have been considered in this judgment and it has been approved by the Full Bench in *Sunder Mall's case*(3)."

In *M. C. Dutta* v. *Rai M. N. Bose*(4) I said that those other co-sharer landlords are entitled to receive their proportionate share of the original rent from the purchasing co-sharer who holds an intermediate interest in the land and is bound to pay rent to the other co-sharers. Reliance has been placed on behalf of the petitioners on the use of the words "is bound to pay rent to the other co-sharers". That portion of the sentence has to be read along with its previous portion and reading the sentence as a whole what I meant was that non-purchasing co-sharer landlords were entitled to receive their proportionate share of the original rent from the purchasing co-sharer who held an intermediate interest in the land and was bound to pay their proportionate share of rent to the

(1) (1947) I. L. R. 26 Pat. 659.
(2) (1937) I. L. R. 16 Pat. 500.
(3) (1940) I. L. R. 19 Pat. 893, F. B.
(4) (1953) I. L. R. 32 Pat. 720.

1953.

MANORMA DASI v. MADAN-CHAND.

CHOUDHARY, J.

other co-sharers. The words " rent " and " proportionate rent " have been used not as descriptive of the nature of payment to be made by the purchasing co-sharer to the non-purchasing co-sharer, but as a measure for finding out the amount of compensation that may have to be paid by such purchasing co-sharer to the non-purchasing co-sharers. This view is in consonance with the Full Bench decision in I. L. R. 19 Pat. 893 as already indicated.

The exact point arose in *Rajkishore Pd. Narain Singh* v. *Mojibul Rahman*(1) a single Judge case of this Court, in which it was held that a co-sharer in possession under section 22(2) of the Bihar Tenancy Act is not a tenant under the other co-sharers and what is payable to them is not rent, and a suit to recover that amount was cognizable by the court of small causes.

I am, therefore, of the opinion that on the authority of the Full Bench case of I. L. R. 19 Pat. 893 and the other authorities discussed above the word " rent " used in section 22(2) of the Bihar Tenancy Act means nothing other than compensation for use and occupation payable by a purchasing co-sharer to the non-purchasing co-sharer and the amount of that compensation has to be ascertained by calculating the proportionate share of rent that was originally payable by the tenant to the entire body of landlords. In that view of the matter, the two suits of the plaintiffs were suits for recovery of compensation for use and occupation as contemplated by section 22(2) of the Bihar Tenancy Act and were, therefore, cognizable by the court of small causes.

In the result the applications fail and are dismissed with costs, but there will be only one set of hearing fee which is assessed at Rs. 16.

REUBEN, C.J.—I agree.

Rules discharged.

K. D.

(1) (1942) A. I. R. (Pat.) 391.

APPELLATE CIVIL.

1953.
February, 10.
March, 31.

Before Narayan and Ahmad, JJ.

KALI

v.

TULSHI.*

Appeal, competency of—one respondent not served—appeal against that respondent dismissed—whole appeal incompetent.

Execution of a partition decree was levied. Execution was resisted on the ground that it was time-barred. The plea of limitation was overruled and the aggrieved party preferred an appeal. One of the respondents in the appeal was not served and the appeal stood dismissed against him;

Held, that the whole appeal was incompetent as the respondent against whom the appeal had been dismissed had got the right to execute, and if the appeal were to be allowed there would be two inconsistent orders.

Case of *Ramphal Sahu* v. *Babu Satdeo Jha*(1), requires re-consideration.

Appeal by the objectors to the execution.

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

K. P. Sinha, for the appellants.

T. K. Prasad, for the respondents.

NARAYAN, J.—This is a miscellaneous appeal directed against an order of the Subordinate Judge of Hazaribagh rejecting an application under section 47, Civil Procedure Code filed by the present appellants in Execution Case no. 32 of 1950, pending before the said Subordinate Judge. The decree which is sought to be executed in the said Execution Case is a decree

* M. A. no. 155 of 1951, appeal from a decision of Mr. Kedar Nath, Subordinate Judge, Hazaribagh, dated the 25th January, 1951.

(1) (1940) I. L. R. 19 Pat. 870, F. B.

1953.

KALI v. TULSHI.

NARAYAN, J.

for partition and for recovery of certain sums as costs, etc. The present appellants filed an application before the learned Subordinate Judge stating that the decree had become time barred and that the application for execution was, therefore, not maintainable. This application was rejected by the learned Subordinate Judge, and hence the judgment-debtors-objectors have preferred this appeal.

On account of want of service on respondent no. 15 the appeal stood dismissed against him on 2nd January 1953, and the question has, therefore, arisen as to whether the whole appeal has become incompetent. Because of Standing Order No. 1 of 1953, it has to be determined by the Bench immediately after the order of dismissal has been signed as to whether the appeal has become incompetent as a whole or not.

On behalf of the appellants it has been contended that they only being the objectors before the court below and the respondent no. 15 being not one of the decree-holders-respondents, the dismissal of the appeal against respondent no. 15 will not make the whole appeal incompetent. Counsel for the appellants placed reliance on certain decisions of this Court as well as on a decision of the Judicial Committee reported in *Mahomedally Tyebally v. Saftabai*(1). The Privy Council decision is, in my opinion, not at all a decision in point. The case before their Lordships was a case concerning the administration of an estate, and their Lordships observed that it not uncommonly happens in a suit for administration that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and inquiries so as to be bound

(1) (1940) A. I. R. (P. C.) 215.

1953.

KALI v. TULSHI.

NARAYAN, J.

by the result. It was concerning such a suit that their Lordships pointed out that it was open to the judge in his discretion under Order 1, rule 10, to add a party against whom the suit had abated for the purpose of giving effect to the rights of the parties. These facts can have no resemblance to the facts of the present case, and the principle laid down by their Lordships cannot be regarded as a principle of universal application. The decision of this Court on which reliance has been placed by the learned counsel is the one reported in *Radhamohan* v. *Shreekrishna*(1), and our attention has been particularly drawn to the following passage in the judgment:

" There is nothing whatever in the terms of Rule 4 to suggest that the persons, who did not appeal, must be impleaded as respondents, and were it necessary, one would expect words to that effect in the rule. In rule 33 there is, as I have already indicated, a direct indication to the contrary effect. Neither rule offends the principle that an order cannot be passed to the prejudice of a person in his absence, because the terms of each rule carefully and expressly limit its application to orders in favour of the absent person so that no question of any objection by him being shut out can arise."

On the basis of this observation it was argued that either under rule 4 of Order XLI or under rule 33 of that Order the appeal should be allowed to proceed against the remaining respondents, inasmuch as the decision made in this appeal cannot be to the prejudice of respondent no. 15 against whom the appeal has been dismissed. In other words, the learned counsel has urged that because the respondent no. 15 was also a defendant and a judgment-debtor in the original suit, and because he did not prefer any objection in the execution proceeding it is not at all

(1) (1948) I. L. R. 27 Pat. 242.

1953.

KALI v. TULSHI.

NARAYAN, J.

material if he is not made a party to this appeal. But it seems to have been overlooked that the decree which is sought to be executed is a decree in a partition suit and that the respondent no. 15 was in the position of a plaintiff in the suit. He like any plaintiff of the partition suit can seek to enforce the decree passed in the suit. It need hardly be pointed out that every defendant in a suit for partition is in the position of a plaintiff, and he can ask for a separate patti with regard to his share and thus can seek the execution of the partition decree. The respondent no. 15 is, therefore, in a position to seek an execution of the decree passed in the partition suit, and in every action for partition, all persons interested in the joint properties must be made parties, so that allotments may be made in presence and according to the conveniences of all of them. Though this respondent was not one of the judgment-debtors he can seek an execution of the partition decree, and because this present appeal stands dismissed against him, he would be able to seek an execution of the partition decree even if this appeal ultimately succeeds and it is found that the decree is not executable as it is time-barred. Therefore, it is manifest that if this appeal succeeds, two inconsistent situations will arise. The respondent no. 15 will be able to execute the decree, and the other respondents will not be allowed to execute the decree, because as against them the decision will be that the decree is time-barred. The question whether the interest of the respondent against whom the appeal stands dismissed still survives must depend on the nature of the litigation, the decree passed, the subject matter of the appeal and the effect of the decision in appeal in their absence. It is indisputable that because this respondent is in the position of a plaintiff his interest well remain unaffected whatever be the decision in this appeal. In this view of the matter, I am of opinion that the whole appeal has become incompetent. In the decision of this Court referred to above certain

observations had been made against the Full Bench decision of this Court in *Ramphal Sahu* v. *Satdeo Jha*(1). The *ratio decidendi* of the Full Bench decision is that where all the plaintiffs or defendants appeal from a decree and the decree appealed from proceeds on a ground common to all the plaintiffs or defendants and one of them dies and no substitution is effected within time, and an application for setting aside the abatement, so far as the deceased appellant is concerned has been refused, the appellate Court has no power under Order XLI, rule 4 of the Code of Civil Procedure to reverse or vary the decree in favour of all the defendants. It has further been held in this case that rule 4 of Order XLI cannot override or create an exception to Order XXII, rules 3 and 11, and in the case of one or more appellants dying even where a decree proceeds on a ground common to all the matter must be governed solely by the provisions of those latter rules. It was pointed out in this case that to hold otherwise will be to hold that Order XLI, rule 4 gives the Court the power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. On analogy, the decree which has been passed by the learned Subordinate Judge in this case has become final so far as the respondent no. 15 is concerned, and the learned counsel for the appellant was, therefore, wrong in asking us to apply Order XLI, rule 4 in this case. Meredith, J. who delivered the judgment in *Radhamohan's case*(2) while referring to this Full Bench decision observed as follows:

"Before I conclude I would like to express my personal opinion that *Ramphal Sahu* v. *Satdeo Jha*(1) may upon a proper occasion need reconsideration by a larger Bench. Previous to this decision the current of authority was fairly evenly divided. It is further

(1) (1948) I. L. R. 27 Pat. 242.
(2) (1940) I. L. R. 19 Pat. 870, F. B.

1958,

KALU v. TULSHI.

NARAYAN, J.

noteworthy that when the answer of the Full Bench to the question propounded came back to the Division Bench hearing the First Appeal in question, that Bench was so struck by the manifest injustice which that answer involved that it resorted to the inherent power of the Court to override the provisions of the statute as interpreted by the Full Bench, and to give relief to the appellants. I do not myself believe in any such inherent power of the Court to override statutory provisions. But in my opinion there is no question of overriding them ".

On the facts of the particular case before their Lordships they might not have felt pressed with the Full Bench decision, but so long as this Full Bench decision stands and is not reconsidered by a larger Bench, we are bound to follow it. And it is not at all open to us to override the principles laid down in this case. It is true that Harries, C. J. and Manohar Lall, J. who were parties to this Full Bench decision resorted to the inherent powers of the Court while deciding the case in which reference had been made to the Full Bench for the decision of the points formulated. The judgment of the Division Bench shows that their Lordships exercised their inherent powers so that a proper decree might be passed in favour of the plaintiffs. But, if on the peculiar facts of that case the Court thought fit to exercise its inherent powers that does not mean that in this case also we should exercise our inherent powers. Certainly, the facts of that case bear no resemblance to the facts of this present case. In that case the plaintiff no. 1 had sued for a decree for a sum of Rs. 33,070-4-2½ against four defendants and during the pendency of the appeal in this Court one of the four defendants died and no steps were taken to bring his heirs or personal representatives on the record. The defendants being the appellants before this Court the plaintiffs-respondents took a preliminary objection that the appeal was incompetent and that by

1953.

KALI v. TULSHI. NARAYAN, J.

reason of the failure to bring the names of the heirs or personal representatives of Ram Narayan Sahu on the record, the whole appeal had abated. That Division Bench decision, therefore, cannot be cited as an authority in this case in support of the view that the whole appeal should not be regarded as incompetent. Recently, I and Das, J. have followed that Full Bench decision in Appeal from Original Decree no. 501 of 1946. In this connection, I should like to cite a decision of the Judicial Committee in *V. P. R. v. Chokalingam Chetty* v. *Seethai Acha*(1). Referring to the provisions of Order XLI, rule 20, their Lordships remarked as follows:—

"The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in Order XLI, rule 20 on which the plaintiff relied both in the Appellate Court and before their Lordships. That rule empowers the Court to make such party a respondent when it appears to the Court that he is interested in the result of the appeal. Giving these words their natural meaning and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants."

And referring to the provisions of Order XLI, rule 33, their Lordships observed as follows:—

"The Appellate Court was then asked to take action under Order XLI, rule 33. That rule empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further that this

(1) (1927) L. R. 55 Ind. App. 7.

1953

KALI v. TULSHI.

NARAYAN, J.

power may be exercised notwithstanding that the appeal is as to part only of the decree, and 'may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection'. Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them.".

It cannot be disputed that a very valuable right has now been acquired by respondent no. 15, and he can execute the decree for partition because of the order passed by the learned Subordinate Judge irrespective of the decision that might be made in this appeal. And because there cannot be two inconsistent decisions in one and the same litigation, this appeal cannot be allowed to proceed in absence of the respondent no. 15. A Bench decision of this Court reported in *Badri Narayan* v. *East Indian Railway Company*(1) appears to be relevant for our present purpose, and it will in consonance with the view taken in that case to hold that the right created in favour of this respondent no. 15 is a valuable right, because as he is no party to this appeal he cannot be bound by any decision made in this appeal and will be free to execute the decree for partition.

My conclusion, therefore, is that this appeal becomes entirely incompetent and must be dismissed as such. There will be no order for costs.

(1) (1926) I. L. R. 5 Pat. 755.

1953

KALI v. TULSHI.

AHMAD, J.

AHMAD, J.—I agree with the order proposed. All the same, I wish to express my view that the decision given in the Full Bench case of this Court in *Ramphal Sahu* v. *Satdeo Jha*(1) deserves reconsideration by a larger Bench. The law laid down therein has not been followed uniformly in the decisions given by this Court subsequent to the judgment of the Full Bench case. On some ground or other that case has been side-tracked or by-past. In the case of *Radhamohan*(2) Meredith, J. has shown his disagreement with it and has given very strong reason for the reconsideration of that case. The present matter is, however, a short one and it can be disposed of with the same result on other grounds as well. Therefore, I at present reserve my opinion about the matter.

Appeal dismissed.

K. D.

APPELLATE CIVIL.

Before Narayan and Ahmad, JJ.

D. S. DEBYA

v.

RAKHAHARI.*

1953.

April, 23, 24, 27, 28. *August*, 5.

Evidence Act, 1872 (*Act I of* 1872), *sections* 65, 66, *not complied—secondary evidence, whether admissible—Hindu Law*—avyavaharika *debt tests, principles laid down—case-law, reviewed.*

Held, that the provisions of sections 65 and 66, Evidence Act, 1872, not having been complied, the certified copy of the bond was not admissible in evidence.

* Appeal from Original Decree no. 44 of 1947, from a decision of Mr. D. Mukherji, Additional Subordinate Judge, Purulia, dated the 17th July, 1946.

(1) (1940) I. L. R. 19 Pat. 870, F. B.
(2) (1948) I. L. R. 27 Pat. 242.

1953.

D. S. DEBYA v. RAKHAHARI.

Nityananda Roy v. *Rashbehari Roy*(1), relied on.

Obiter.—Where a judgment-debt for costs is challenged as *avyavaharika* the question that arises for determination is as to when the decree for costs was passed. Before the judgment there could be no judgment-debt for costs. It may be that the previous acts of the father in instituting the suit on a false claim was substantially responsible for setting the stage for the passing of the decree for costs. But those acts by themselves, however, immoral or illegal, could not constitute a debt against him in the absence of the pronouncement of the court and much less an *avyavaharika* debt.

Therefore, the immediate act which creates the debt or from which the debt originates, is the judgment. The examination of the nature and character of the debt should be made with reference to that point of time. If it be found that at that point of time there was immediate and direct act or omission or volition on the part of the father which contributed to the passing of the decree against him, and which act, omission or volition was tainted with a motive for the doing of an illegal or immoral act, the judgment-debt for costs may be termed *avyavaharika*. In the absence of any such evidence the debt is not *avyavaharika*.

Kirit Singh v. *Mt. Chandra Kali*(2) and *Hemraj* v. *Khemchand*(3), relied on.

Darbeshwari v. *Raghunath*(4), not followed.

Appeal by the plaintiff.

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

B. C. De, A. N. Chatterji and *S. K. Sarkar*, for the appellant.

S. C. Majumdar, S. K. Majumdar, H. K. Banerji and *Ramjatan Singh*, for the respondents.

AHMAD, J.—This appeal by the plaintiff arises out of a mortgage action for the recovery of a sum of

(1) (1953) A. I. R. (Cal.) 456.
(2) (1951) I. L. R. 30 Pat. 826.
(3) (1943) L. R. 70 Ind. App. 171.
(4) (1940) I. L. R. 28 Pat. 165.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

Rs. 5,999 due on a mortgage bond for a principal sum of Rs. 2,799 executed on 26th August, 1931, by one Nandlal Ojha, the father and husband of defendants nos. 1 and 2 respectively, in favour of the plaintiff. The necessity stated in the bond is to the effect—

"That being in urgent need of money for payment of the costs awarded to Sm. Amodabala Debya under the decree in appeal nos. 141 and 142 of 1928 and for payment of dues due to other creditors, I this day borrow from you Rs. 2,799 (Rupees two thousand seven hundred and ninety-nine)."

The decree for costs which was then under execution was for a sum of Rs. 2,349 only and hence the balance of the amount advanced under the bond was as stated therein for the payment of other debts. The money stated to have been advanced under the bond was to be paid back on 14th May, 1932, and the principal amount was to carry interest at the rate of twelve percentum. According to the plaintiff, not a pie was paid till the date of the suit towards the satisfaction of the debt under the bond, either towards interest or principal, and hence the suit for the entire amount, though the interest charged in the claim has been calculated at the rate of nine percentum only.

Nandlal Ojha, who along with his only son (defendant no. 1) constituted till his lifetime a joint Hindu family under the Mitakshara Law, died sometime in 1937 leaving defendant no. 1 as his surviving coparcener and defendant no. 2 as his surviving widow. On the death of Nandlal Ojha the present action was instituted on 13th May 1944, originally against his surviving coparcener and his first wife Subhadra Kumari, who was then dead, and then the name of Dasumoni Debi (defendant no. 2) was substituted for Subhadra Kumari. The bond under the suit is purported to have been executed by Nandlal Ojha as the Karta of the joint Mitakshara family and the property mortgaged under the bond covers the interest of all the coparceners.

1953

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

The plaintiff Sm. Durga Sundari Debya is the daughter of late Panchanan Pani, who was a Mukhtear practising at Purulia. He died, as it appears from the evidence of the plaintiff, sometime four years before the date of deposition of the plaintiff in this case, that is, near about 1942. One Radhanath Sarangi was the husband of the plaintiff. He was too a lawyer practising as a pleader at Purulia. Radhanath Sarangi died all of a sudden on 3rd Kartik 1339 B.S., that is, on 20th October, 1932, at Purulia. He hailed from village Bhegary but he resided mostly at Purulia. His family house in village Bhegary was in the occupation of his only brother Beni. Radhanath Sarangi was all along joint with his brother Beni. In the lifetime of Radhanath Sarangi all the documents and important papers of the family including those of his wife used to be kept by Radhanath Sarangi in his custody in an iron safe. His death took place at Purulia but his Sradh was performed at his family house in village Bhegary some ten or twelve days after his death.

The allegation of the plaintiff is that a few days after the death of her husband when she was to go to village Bhegary in order to attend the Sradh ceremony of her husband, she was requested by her husband's brother Beni to give him the key of the iron safe on the representation that some of the papers kept in the iron safe were needed to be filed in some suits. On that representation she did give the key to him. It appears that taking advantage of this situation all the documents and papers kept in the iron safe were removed by Beni. The key was returned back to her at Bhegary on his arrival there after a few days. The plaintiff came to know of the removal of the documents on her return from Bhegary to Purulia when one Abinash, who was her husband's registered clerk and on the death of her husband the Mokhtar-am of the plaintiff, found all the documents missing

from the safe. On this an information was given to the police about the theft of the documents by Beni and a criminal case was also filed against him in the court of the Subdivisional Officer, but with no result. The criminal case filed on 10th June 1933, was dismissed on 13th July 1933, on the ground that the dispute was of a civil nature. The matter, however, did not stop there. The relationship between the plaintiff and Beni deteriorated thereafter so much so that according to the allegation of the plaintiff she was on one occasion put into confinement along with her son by Beni in her house and it was only at the intervention of some relations that she could get release from the wrongful restraint put on her. On that occasion also a criminal case was instituted by her against Beni. It resulted in an order of conviction and Beni was awarded a sentence of imprisonment. Against that order Beni preferred an appeal. During the pendency of this criminal appeal the plaintiff instituted a partition suit bearing no. 28 of 1933. This suit was soon after its institution compromised between the parties. Under the terms of that compromise all the papers of the joint family which had been taken away by Beni were divided between the members of the family but regarding the bond in suit it was agreed upon between the parties that it was the personal property of the plaintiff. The document in question, however, could not be at that time handed back to the plaintiff by Beni as it was then not present with him at Purulia. For that reason it was specifically entered in the compromise petition that the bond in dispute along with one other document could not be returned to her at the time of compromise as they were not then with Beni at Purulia but with a clear undertaking by Beni that he would deliver back those documents to the plaintiff on finding them out from his village house at Bhegary. On the basis of this compromise, the criminal case

1958.

D. S. DEBYA v. RAKHABARI.

AHMAD, J.

then pending in appeal was also compromised with permisssion of the court. In spite of the compromise, however, the plaintiff has alleged that Beni did not return the documents to her. On the contrary, according to her allegation, Beni handed over the document in question to Nandlal Ojha and in consideration thereof a new document was brought about in its place. She, therefore, being unable to get the original document from Beni took a certified copy of it and instituted the suit giving rise to the present appeal for the realisation of the mortgage money on the basis of the certified copy of the bond.

From the evidence of the plaintiff in the case it appears that on the removal of the documents from the iron safe she had given a notice as well on 16th February 1933 to Nandlal Ojha by registered post intimating to him not to pay the money under the bond to any one excepting the plaintiff and also informing him that the documents had been taken away by Beni without her knowledge and permission. This notice is said to have been returned to the plaintiff with a note thereon that it was refused to be taken and no reply was received in answer to it by the plaintiff.

The defendants filed a common written statement. They raised a number of defence including the few following points, which call for consideration in the present appeal. Firstly, they alleged that the document had been executed without any consideration meaning thereby that the plaintiff had not advanced any money to the mortgagor under the bond in dispute. What exactly happened, according to the defence, was that one Purnima and Amodabala had got a decree against Nandlal Ojha for costs in a suit between them amounting to a sum of Rs. 2,349. This decree of Purnima and Amodabala was then under execution. It was in satisfaction of this decree for costs that the

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

bond in suit had been executed by Nandlal Ojha in the name of the plaintiff on the advice of Radhanath Sarangi, who was both a retained lawyer and a creditor of Purnima and Amodabala and enjoyed their full confidence. It was, therefore, alleged that in so far as the plaintiff was concerned, the document in her favour was without consideration. In this connection it was also alleged that excepting the satisfaction of the decree against the mortgagor for a sum of Rs. 2,349 not a farthing out of the total consideration of Rs. 2,799 had been paid to him. Secondly, it was alleged that a sum of Rs. 1,800 had already been paid in several instalments towards the part satisfaction of the due under the bond and that in proof thereof endorsements had been made to that effect on the back of the document. The third allegation of the defendants was that the original bond had been intentionally suppressed by the plaintiff in collusion with Beni in order to get rid of the payments endorsed on the back of the document in partial satisfaction of the amount due under the bond. Fourthly, it was pleaded that the debt incurred under the bond was an *aryaraharika* debt and, therefore, the coparcenary property of the joint family was not liable to pay the due under the bond, and Nandlal Ojha could not alienate the entire family property as such for that debt even if the same was advanced to him.

On the pleadings of the parties the court below framed the following issues:

"1. Is the suit bad for defect of parties?

2. Is the suit maintainable by the plaintiff?

3. Did any consideration money pass in respect of the mortgage deed? Is the deed duly attested?

4. Had the late Nandlal Ojha any right to mortgage the property of the Mitakshara family and are the defendants bound by the conduct of late Nandlal?

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

5. Was there any legal necessity for the loan on the mortgage deed?

6. Can the suit proceed on the certified copy of the alleged mortgage deed?

7. Is the plaintiff entitled to get the decree prayed for?

8. Are the payments alleged by the defendants correct?"

All the issues excepting issues nos. 6, 7 and 8 were decided in favour of the plaintiff by the trial court. The findings on issues nos. 6 and 8, which have been discussed jointly in the judgment of the trial court, are in the following terms:

"On a consideration, therefore, of the evidence adduced by the parties and also of the circumstances already discussed I find that the original bond has been intentionally suppressed by the plaintiff and that the defendants' case about payments is correct..... .....He is a man subject to the processes of this Court. Even then the plaintiff has not taken any steps to call for the original bond from him. In the circumstances secondary evidence of the original bond is not admissible in evidence under sections 65 and 66 of the Indian Evidence Act. In support of this contention I may refer to the decisions reported in I L. R. 6 Cal. 721 and I. L. R. 7 Cal. 98. I, therefore, find that the certified copy of the original bond, filed by the plaintiff, is not admissible in evidence."

In view of its findings stated above, the court came to the conclusion—

"In the circumstances I find that the suit cannot proceed on the strength of the certified copy of the original bond ".

The points raised and discussed in appeal are the following: Firstly that the bond in suit was for consideration. In this connection it was urged that in a mortgage suit the onus of proving execution and attestation is no doubt originally on the plaintiff but once they are proved it is for the defendants, if they so plead, to prove that the consideration under the bond did not in fact pass. That being so, in the present case the execution and attestation of the document, according to the plaintiff, having been admitted by the defendants, it should be held that the bond was for consideration. Secondly, it was urged that in the circumstances of the present case it is proved beyond reasonable doubt by the evidence on

the record that the original bond was lost and, therefore, the certified copy of the document should have been accepted in the case as a secondary evidence of the original under section 65 of the Evidence Act. Thirdly, Mr. De appearing for the appellant contended that the finding of the court on the repayment alleged to have been made by the mortgagor towards the part satisfaction of the due under the bond is not justified on the evidence on the record. Fourthly, Mr. Majumdar appearing for the respondents pressed that the decree for costs was an *avyavaharika* debt and that this debt was an antecedent debt both in point of fact and time. At the very inception of the hearing of the appeal Mr. Majumdar had also intimated that he would raise the point of limitation though it was not raised in the trial court on the ground that Sm. Dasumoni Debi (defendant no. 2), widow of late Nandlal Ojha, had been impleaded in the suit, as it appears from the ordersheet, sometime after the institution of the suit on 13th May 1944, when the claim under the bond was already time-barred.

In my opinion, there is no substance in the point that the bond in suit was without consideration. In paragraph 2 of the written statement it is stated—

" As Nandlal was unable to pay in cash the amount which was payable by him as costs of the suit with Amodabala and Purnima, he executed a mortgage bond for Rs. 2,349 ".

Then in paragraph 4 of the written statement it is stated:

" The defendants have come to know that at the time of execution of the bond in suit, Radhanath Babu filed a petition in court stating that he has received out of court, the entire amount of costs, but on that day Amodabala did not come to Purulia and Purnima also did not receive any money and neither the plaintiff nor her husband pay any money (to them)."

These two statements in the written statement clearly establish that the major part of the consideration had in fact passed under the bond in suit though the bond itself had been executed not in favour of the decree-holders but in the name of the plaintiff on the advice

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

of Radhanath, who was the lawyer for the decree-holders. Further, there is oral evidence which goes a long way to support the case of the plaintiff on this point. P. W. 1 is Abinash Chandra Biswas. In the lifetime of Radhanath Sarangi this Abinash Chandra Biswas, as already stated, was his clerk and on his death though he got himself registered with some other pleader he retained his old association with the family of Radhanath Sarangi and has been since then acting as a Mokhtar-am of his widow, the plaintiff. In his examination-in-chief he stated:

> " I was not present when the bond in suit was written and executed. I was present when the consideration money was paid. The money was paid after registration of the document. Nando Lall Ojha brought the registration receipt from Radhanath Babu and endorsed the receipt in his name. He made over the receipt to him and then Nando Lall was paid Rs. 2,799 in cash. With that money Nandolal paid the decretal dues of Purnima Datt and others and the balance he took with him for paying some miscellaneous debts he had in the market. Purnima Datt the Decree-Holder was then present. A petition of satisfaction was filed on that very day in that execution case.
>
> It is not a fact that this document was taken on behalf of Amodabala and Purnima in the Benami of the plaintiff and that they had received no payment."

It is true that this witness is very much identified with the family of the plaintiff but on that ground alone it is difficult to say that his evidence on oath in the witness box was not truthful. According to Mr. Majumdar this man has been the source of all troubles and been creating all the confusion in the case. It is said by him that is in fact the architect of the entire false claim against his clients. I have gone through his evidence carefully but I do not find anything which goes to suggest that he was not speaking the truth. This witness, therefore, proves the case of the plaintiff. The passing of consideration is further supported by the implied admission arising out of the plea of partial payment said to have been made towards the satisfaction of the consideration under the bond. According to the defence certain payments

had been made towards the partial satisfaction of the due under the bond and in proof thereof endorsements had also been made on the back of the document. In those circumstances it is not open to the plaintiff to say that the bond was executed without consideration. The evidence given by the defendants in support of their case about the non-passing of the consideration money is confined to the oral evidence of Jyotindra Nath Ojha. He is the brother of defendant no. 2. In his examination-in-chief he stated:

"Purnima had filed a suit against Nandolal and Nandolal had filed a suit against Purnima. Nandolal filed a false suit against Purnima.

Purnima won both the litigations in the High Court. Purnima and Amodabala got decree for costs. Nandolal could not pay the costs. Nandolal proposed to pay costs to Purnima by instalments and to execute a bond in his favour. Purnima then suggested that Radhanath Babu her pleader should have (?) consulted in the matter. Myself and Nandolal Ojha then went to the house of Radhanath Ojha, son-in-law of Nandolal, who was a pleader at Purulia. After that myself, Nandolal Babu came to court and waited near the Registration office. A little later Purnima came there on a rickshaw. Purnima then said that as she was a woman Radhanath Babu had told her that she would not be able to realise the amount and had suggested her to have the bond in his name, that he would realise the money and make the payment to Nandolal. Nandolal accordingly executed a bond. Radhanath Babu had come and he gave a draft of the bonds to be executed. Radhanath Babu or his wife paid no money on that bond."

This statement, in my opinion, on the face of it appears to be the testimony of a got-up witness. In his statement he has gone to the length of blackmailing Nandolal and asserting that the case instituted by him against Purnima was false. This was perhaps with a motive to develop a case that the money due under the decree for cost was for an immoral purpose. I am convinced that the statement of this witness was not of one who was making statement from his personal knowledge. The probabilities arising from his evidence are more in favour of the conclusion that whatever he stated was put into his mouth to

1958

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

support the case pleaded in the defence. His statement on this point is not the least worthy of reliance. I, therefore, hold that the defendants on their side have failed to prove that the consideration did not pass under the bond as stipulated in the document. On the other hand, there is clear evidence on the record to prove that the bond was for consideration. Then a point was raised in this connection as to whether a presumption can be drawn in favour of the passing of the consideration from the recital in the document. In view of the findings arrived at by me, this question is now not of a very material character in the case. The parties gave evidence for and against on the point of consideration and on that evidence it is to my mind clear that the consideration did pass and, therefore, the question of presumption in the light of that evidence is of little value. According to Mr. Majumdar appearing for the respondents the recital in the document about the passing of the consideration can be, if at all, of evidentiary value only against the executant of the bond or their privies but not against those who challenge that fact on their own right and not as a representative or heir or successor of the executant of the document. Sarkar in his book on evidence has observed at page 926:

" Lord Mansfield said : ' No man shall be allowed to dispute his own solemn deed ' (*Goodtitle* v. *Bailey*, 2 Cowp. 579). ' If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound, to deny the recital.' (*per* Parke, B. in *Carpenter* v. *Buller*, 8 M and W 212). There are however several exceptions to the rule of estoppel by deed:—

It binds only the parties and privies and is applicable only in actions on the deed. It does not apply

to actions on collateral matters even between the same parties (*Exp. Morgan, Re Simpson*, 2 Ch. D. 72); nor does it apply in general to proceedings between strangers, or a party and a stranger (*Cracknall* v. *Johnson*, 11 Ch. D. 1, C. A.; Phip 8th Ed., p. 660; Tay s. 99)."

In the present case so far as the interest of defendant no. 1 is concerned, he is not being sued as the heir or representative of the original mortgagor but as the surviving coparcener of the joint family. Mulla in his book on Hindu Law at page 255 in its 11th edition says:

" It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father, and, therefore, a transfer by a father of his own interest in the ancestral property, where such transfer is allowed by law (s. 257), cannot affect the interest of the son in the property."

To the same effect is the view expressed by Trevelyan in his book on Hindu Law at page 225 in its second edition, which is to the following effect:

" Under the Mitakshara Law a male Hindu acquires by birth or adoption a vested interest in all coparcenary property (whether ancestral or not, and whether acquired before or after his birth or adoption, as the case may be), held by his father, or father's father, or father's father's father, at the time of his birth or adoption, as the case may be, as members of a joint family even during their lifetime .....The interest that a son acquires is equal to that of his father; but separately and independently of his father. He has no independent dominion over the property."

In such a circumstance, therefore, the statement made by the original mortgagor in the bond in suit

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

is not binding on the son (defendant no. 1); neither it has any evidentiary value against the son, who was minor at the time as held by the trial court and not a party to it when the document had been executed by his father. In this view of the matter, in the present case the plaintiff in order to establish the consideration of the document cannot only rely exclusively on the statement made therein by the mortgagor.

The onus initially in such a case is on the creditor mortgagee to prove the passing of the consideration. Ramakrishna in his book on Hindu Law, Volume I, at page 338 says:

"A creditor or an alienee who claims under a charge or alienation from a Hindu father, must prove that the debt existed, or that, after due enquiries, he believed that it existed (8 M. 75; 5M 337; 13M. 51; 6M. 400; 26B. 326 at p. 336; 5 N. W. P. H. C. 89; 28A. 508 at p. 541)."

The debt in the present case, as stated in the document, was incurred for payment of antecedent debts. Looked at from that point of view as well, the onus is on the alienee to prove that the antecedent debts existed as observed by Mulla in his book on Hindu Law in its 11th edition at page 383.

A number of authorities were cited at the bar in the course of discussion on this point. The case of *Ali Khan Bahadur* v. *Indar Prashad*(1) and the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh*(2) do not throw much light on the point exactly under discussion in the present case as to whether the admission made by the father on the point of *factum* of debt is of binding value on the son in establishing the liability against him. Similarly the case decided in *Civil Appeal no.* 39 *of* 1940 by the Supreme Court does not throw much light on this aspect of the

(1) (1896) I. L. R. 23 Cal. 915, P. C.
(2) (1906) I. L. R. 29 All. 184, P. C.

1953.

D. S. DERVA v. RAKHAHARI AHMAD, J.

question. In the case of *Thakur Bhagwan Singh* v. *Bishambar Nath*(1) decided by their Lordships of the Privy Council it is stated:

" But in the opinion of their Lordships the onus of proof on the question whether there was consideration, or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendants and it is not for the plaintiffs to prove this matter affirmatively; on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was is on the plaintiffs."

Having laid down the aforesaid proposition their Lordships considered the evidence and came to the conclusion that the evidence given by the mortgagors was not sufficient for proving their case that the consideration stated in the mortgage was not paid and on that basis came to the conclusion:

" Ganesh Prasad's evidence having been rejected as untrustworthy there was nothing left in the case, and it was really unnecessary for the plaintiffs to have called any evidence on the issue as to consideration, for, as has already been pointed out, the burden of proof was entirely on the defendants. Not only did they wholly fail to discharge this onus, but the evidence which was called by the plaintiffs was indeed overwhelming. Had the defendants led any evidence sufficient to shift the onus of proof, that produced by the plaintiffs would, in their Lordships' opinion. have afforded a complete answer."

This case was subsequently attempted to be distinguished by the Madras High Court in the case of *Muthachi alias Nambiappan Muthirian* v. *Kandaswami Muthirian*(2) and in the case of *Vellai Goundan alias Munisami Goundan* v. *Maniam Rajagopal Mudaliar*(3). The opening paragraph in

(1) (1940) A. I. R. (P. C.) 114.
(2) (1945) A. I. R. (Mad.) 135.
(3) (1947) A. I. R. (Mad.) 310.

1953.

D. S. DEDYA v. RAKHAHARI.

AHMAD, J.

the judgment given by Somayya, J. in the case reported in A. I. R. 1945 Madras, 135 is to the following effect:

"The only question in this second appeal is whether when the father of an undivided son of a joint Hindu family executes a mortgage and the mortgagee brings a suit on it, the onus of proving consideration for the mortgage is on the mortgagee or whether it is for the son to prove want of consideration."

In the course of discussion it was further observed therein:

"Where the transaction is sought to be enforced against the executant or against his legal representatives strictly so-called the admission of receipt of consideration contained in the document might well be used both against the executant and against his legal representatives. But as against persons who do not claim through the executant but who claim independently, the admission of receipt of consideration is not enough."

Having laid down the aforesaid proposition the learned Judge tried to distinguish the case reported in A. I. R. 1940 Privy Council, 114. In distinguishing that he was influenced by a number of considerations. Firstly that in the case before their Lordships of the Privy Council there was a finding of fact given to the effect that the creditor had succeeded in proving affirmatively that consideration did pass; and secondly there was an admission that the money had been received by the mortgagor in the presence of the Sub-Registrar but it was said that having received it was subsequently returned to the mortgagee. In view of those two considerations the learned Judge held:

"I do not think that the decision of the Judicial Committee can, under these circumstances, be taken to lay down that in all cases where a creditor sues

upon a mortgage executed by the father, the onus of proving consideration is not upon the mortgagee and that the sons have to prove want of consideration for it."

1953.

D. S. DEBYA v. RAKHAHARI.

In my opinion, there is great force in the reasoning given by the learned Judge who decided the case reported in A. I. R., 1945 Madras, 135 and, if I may say so with all respect to their Lordships of the Privy Council, I think that the rule laid down by them in the case reported in A. I. R., 1940, Privy Council, 114, is very wide and was, in my opinion, based on the facts of that case. To the same effect is another single Judge decision of the Madras High Court [*Vellai Goundan* v. *Rajagopal*(1)] decided by Kuppuswami Aiyar, J. In that case he observed:

AHMAD, J.

"The head-note in 52 M. L. W. 310 (1940 P. C. 114) is rather too wide. In that case the consideration for the mortgage bond on which the suit was filed was made up of three items: payment in cash before the Sub-Registrar, the return of two documents and also payment of money in two banks. But it was pleaded that the money paid was taken back. That was the plea of the defendants. Consequently the burden was upon the defendants to prove, on account of the particular facts of that case, that the entire consideration did not pass. That case had to be considered by two Judges of this Court, Abdur Rahman, J. and Somayya, J. by the latter in 1945—1 M. L. J., 207 and by the former in 1942—2 M. L. J. 452. The facts of the Privy Council case are fully stated by Somayya, J. and as he has written an exhaustive judgment pointing out all the circumstances which led the Privy Council in that particular case to come to the decision at which it arrived, I entirely agree with him. It is unnecessary to repeat the observations of Somayya, J."

(1) (1947) A. I. R. (Mad.) 310.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

Further the doctrine of pious obligation for fixing the liability on the son for the debt incurred by the father is not the least based on the principle of representation and that being so it cannot be for a moment said that the son is anyway bound by any act or representation made by his father in incurring the debt. Reliance was also placed by Mr. Majumdar in support of his contention on the case of *Seth Kishori Lal* v. *Bhawani Shankar*(1). In that case the father had admitted the liability of the son and the document executed by him and the argument raised was that the son was bound by the statement made by the father to the effect of the liability of the son. In that connection their Lordships observed:

" It was said that the recital already quoted from the mortgage deed throws the burden upon the defendants of disputing that all the executants were liable for all these debts. As against the minor members of the family into whose mouth this recital was put by the draftsman of the mortgage deed, their Lordships can attach no such high value to it. The burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu Law permits the interest of the minor members to be taken from them. In the present case the recital read as a whole is proved to have been untrue—untrue to the prejudice of the minors—in important particulars regarding the antecedent debts."

This, therefore, undoubtedly lends support to the view that the statement made by the father in the deed is not binding on the son who challenges it not as the *privy* of his father but on his own independent right. The other case relied upon by Mr. Majumdar is the case of *Firm Pirthiraj* v. *Kishun Lal*(2). It relates to the effect of a decree passed against the father for the

(1) (1940) A. I. R. (P. C.) 145.
(2) (1946) A. I. R. (Pat.) 338.

debt incurred by him on the property of the son. The leading judgment of this case is by Sinha, J. with whom Manohar Lall, J. agreed with a short note of his own. What is important in this case is that the approach to the problem then under consideration was made from the larger point of view, that is, from the view that the son being not representative of the father in the matter of paying debt on the ground of pious obligation is not bound by any act or omission or representation made by the father in the matter of admitting the debt or even getting the debt adjudicated by the court in favour of the mortgagor. The learned judge has in his judgment dealt with all the authorities touching on the point and observed:

"The decisions, relied upon by Mr. Das, all appear to have proceeded on the assumption that there was a debt owing from the father and only the nature of the debt had to be investigated. The father could be held to have been sued in his representative capacity only where it could be shown that the transaction was entered into by him as the leading member of the family, that is to say, where it could be shown that the transaction was for the benefit of the family or for the legal necessity of the family as a whole. Simply because he was the father of the family, and he was sued by a creditor cannot necessarily lead to the inference that the father had been sued in his representative capacity. In other words, the father's representative capacity would be ascribed only to such transactions as could be justified with reference to the benefits and the needs of the family. Hence, on first principle, it cannot be held that in every case where the father is sued in respect of an alleged debt, and he suffers a judgment to be given against him, he has acted in his representative capacity."

This observation, in my opinion, lays down in unequivocal term that in cases where the liability of

1953,

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

the son is based on the doctrine of pious obligation, that is, on the ground that the debt incurred is by the father, it cannot be said that any act done by the father in admitting or in acknowledging the debt is an act by him in his representative capacity on behalf of the son and other coparceners of the family. In that view, therefore, any statement made by the father in the document cannot be said to be an admission by the son. This also lends full support to the view that any statement made or act done by the father in acknowledging or in admitting the debt is not in law an admission or an acknowledgment by the son. I, however, think that though it may not amount to an admission by the son, it cannot be said to be completely inadmissible in evidence against him. It may go in as a statement of the deceased mortgagor and may be considered along with other evidence to be given by the mortgagee to prove the *factum* of debt in establishing the liability of the son for its payment. I have already observed that in order that a son may be liable for any debt it has to be established that there was a debt due by the father. For the reasons stated above, I think, Mr. De was not right in stating that even where the suit is against the son, who is not a party to the document and not the mortgagor executant himself in a Hindu family, the admission by the father in the document is sufficient to establish the *factum* of debt in a suit instituted against the son after the death of his father or, in other words, the onus of proving the absence of consideration is on the son and it is not necessary for the mortgagee to prove the passing of the consideration.

Next comes the point of liability against the defendants in the suit. It is by now well-settled that the father of a joint family may sell or mortgage joint family property including the son's interest therein to discharge the debt contracted by him for his

own personal benefit, and such alienation binds the son provided (*a*) the debt is antecedent to the alienation, and (*b*) it has not been incurred for an immoral purpose. " The leading case on the subject " as observed by Mulla in his book on Hindu Law in its 11th Edition at page 386 " *is Brij Narain's case*(1). In that case the Judicial Committee after observing that *Sahu Ram's case*(2) must not be taken to decide more than what was necessary for the judgment, namely, that a debt created by the mortgage itself is not an antecedent debt, expressed their dissent from several dicta in that case, and laid down the following propositions: (1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity. (2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. (4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of, and not part of, the transaction impeached. (5) There is no rule that this result is affected by the question whether the father who contracted the debt or burdened the estate, is alive or dead."

In the present case the necessity mentioned in the bond in suit was for paying the debts which existed from before. Out of the debts mentioned therein the major debt was the decree passed against the mortgagor for costs in a litigation between the parties. That was to the extent of Rs. 2,349. It is admitted by the defendants that a satisfaction petition had

(1) (1924) L. R. 51 Ind. App. 129.
(2) (1917) L. R. 44 Ind. App. 126.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

been filed in the execution proceeding then pending for the realisation of the decree and, therefore, it is established that Rs. 2,349 out of the total principal of Rs. 2,799 went towards the satisfaction of that decree. There is, however, no clear evidence on the record as to how the balance of the money was utilised or that it was utilised at all for the payment of the antecedent debt which then existed against the mortgagor. The trial court relying on the authority laid down in A. I. R. 1938, Patna, 263, held that as it has been proved by evidence that the bulk of the mortgage money was in fact applied towards the satisfaction of the antecedent debt, that was to be accepted and the recital in the document as to the payment of the balance of the money also towards other antecedent debts was true. This finding given by the trial court has not been challenged here in appeal.

The only point raised in this connection was whether the debt against the mortgagor arising out of the decree for costs passed against him in a litigation between the parties was or was not an *avyvaharika* debt. The trial court found that it was not an *avyavaharika* debt and that the debt was antecedent both in point of fact and time to the debt and that was subsequently created by Nandlal Ojha by the execution of the mortgage bond in suit.

The decree for costs in execution at the inception of the bond in suit was passed in some title suits which gave rise to First Appeal nos. 141 and 142 of 1928 disposed of on 21st May 1931, by this Court by Wort and Fazl Ali, JJ. The High Court in appeal agreeing with the finding of the trial court had come to the conclusion—" In my opinion, however, the case of fraud has been established and her suit has been rightly decreed ". On the basis of this

it was alleged by Mr. Majumdar for the respondents that the decree for costs passed in the suit having been based on fraud could not be said to give rise to debt which was not an *avyavaharika* debt.

Dealing with the general principles relating to the law of debts Ramakrishna in his book on Hindu Law, Volume I, at page 320, has observed:

"According to the texts of Hindu Law, a debt is regarded as a sin, the consequence of which is a penalty imposed upon the debtor in the next world for the non-payment of his debts. A Hindu son, therefore, is under a moral and religious obligation to rescue his father from the sin of his debts, unless they are immoral or illegal. The texts on this point run thus:—'He, who having received a sum lent or the like does not repay it to the owner, will be born hereafter in his creditor's house, a slave, a servant, a woman or a quadruped' (Vrihaspati, 1 Colebrooke's Digest, 334)."

So the duty of the son for the discharge of the debt of the father is a religious one in order to save him from the sins of his debts. This, however, is limited to those debts which are moral and legal. In this connection at another place the same author in his book at page 323 has said:

"The general principle of Hindu Law is that a son is bound to pay out of the ancestral property in his hands the debts contracted by his father, unless he can show that they were contracted for an illegal or immoral purpose (11 C. 396; 6B, 520; 1B, 262; 24 W. R. 231)."

In dealing with what are the illegal or immoral debts of a Hindu father, the same author again has observed at page 328:

"According to Vrihaspati, the definition of an illegal or immoral debt is as follows:—'The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises

1933.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

made without any consideration, or under the influence of lust or of wrath; or sums for which he is a surety, or a fine, or a toll, or the balance of either' (Vrihaspati, Chap. XI, 51; Colebrooke's 'Digest', 1 p. 305). The description of an illegal or immoral debt is also found in the text of Ushane, which runs as follows:—'A fine, or the balance of a fine, likewise a bribe or a toll or the balance of it, are not to be paid by the son; neither shall he discharge improper debts.' (Mitakshra II. 48—*See* Bhattacharyya's 'Hindu Law', p. 247, Edn. 2). The Sanskrit equivalent for the word 'improper', observes Knight, J., in 32B. 348, is '*avyavahara*' which may perhaps be better rendered as 'unusual', or 'not sanctioned by law or custom'. It is this word that has crept into our text-books under the guise, or disguise of 'illegal or immoral'. The learned Judge then says that, according to the texts, the son is not to be held liable for debts, which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father, but not for those attributable to his failings, follies or caprices (Knight. J. in 32B, 348, 351—Durbar *Khachar Shri Odha Ala* v. *Khachar Harsur Oghad*) But debts incurred in transactions, the character of which is no more than imprudent, or unconscientiously imprudent, or unreasonable, are debts to which a pious duty attaches under the Mitakshara Law (20 C. 328, 337)."

In the same connection dealing with the costs awarded against a Hindu father under section 440 of the Code of Civil Procedure of 1882 for a false suit the same author at page 329 has observed:

"(In 20 M. L. J. 89-6 M. L. T. 308-*Ramiengar* v *Secretary of State*), a Hindu father brought a suit in *forma pauperis* as next friend of one of his sons, to establish his adoption, and the suit was dismissed on the ground that the adoption set up was false.

1953.

D. S. DEBTA v. RAHMAHAL AHMAD, J.

The father was ordered accordingly to pay the costs due to Government under section 440 C. P. C. of 1882. The question arose as to whether such costs were liable to be paid by the sons. Their Lordships, Munro and Abdur Rahim, JJ. held, that the liability to pay the costs was imposed as a penalty for the father's misconduct in bringing a suit which he must have known to be false, that such liability might be regarded as in the nature of a fine, and that, the debt incurred by the father, being thus tainted with immorality, his sons were not bound to pay it. But this decision ought not to be construed in the sense that generally the costs awarded against a father in litigation is illegal. In a recent case (reported in 6 Ind. Cas. 258-11 C. L. J. 599-14 C. W. N. 659), the text of Ushanas referred to in 32 B. 348 was considered. The question arose in that case, as to whether the cost awarded by a Court against a defeated litigant, was 'danda' within the meaning of Yajnavalkya's text, quoted in Mitakshara, Ch. VI, S. 3, verse 47. The Court held that such costs were not 'danda' and that they did not come under the description 'not *vyavaharika*' in the text of Ushanas, referred to in 32 B. 348. Accordingly, where costs were awarded against a father, who was living with his son and grandson as members of a joint Mitakshara family, and the father died, it was held that the decree-holder could proceed against his son and grandson to satisfy his decree (6 Ind. Cas. 258)."

In this Court in the near past this point came under discussion in two cases one in the case of *Darbeshwari Singh* v. *Raghunath Pd. Singh*(1) and the other in the case of *Kirit Singh* v. *Mt. Chandra Kali*(2). The case reported in I. L. R. 28 Patna, 165, arose out of a suit by the son for the declaration that the sale of the entire coparcenary property including

(1) (1949) I. L. R. 28 Pat. 165.
(2) (1951) I. L. R. 30 Pat. 826.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

the interest of the son held in execution of a decree for costs passed against his father was illegal and for the possession of his share. The decree for costs against the father was passed in the suit instituted by him on the basis of a title which was ultimately found by the court to be false. Hence it was alleged that the costs incurred by the father in such a suit was an *avyavaharika* debt. This contention was accepted by the learned Judges who decided that case. It is an elaborate judgment given by Ramaswami, J., with which Imam, J. agreed. Ramaswami, J. in his judgment has quoted the original text and having discussed them in detail has observed:

" On the precise meaning of the term '*avyavaharika*' there has been much difference of opinion in the commentaries:

Aparaka explains the phrase '*na vyavaharikam*' to mean 'what is not just'. Smriti Chandrika and Viramitrodaya explain it as 'not due to wine'. Balambhatta as 'what was not used for the family' Vivada Chintamoni as 'What is not admissible in law or under normal conditions'. Reference may be made to Mandlik who translates it to mean 'not proper' and to Colebrooke who translates it as 'debt for a cause repugnant to good morals'. "

Then the learned Judge in the course of his discussion refers to the different judicial decisions given in the cases of *Durbar Khachar* v. *Khachar Harsur*(1); *Ramakrishna* v. *Narain*(2); *Hanumat Kashinath* v. *Ganesh Annaji*(3); *Chhakauri Mahton* v. *Ganga Prasad*(4); *Venugopala Naidu* v. *Ramanadhar Chetty*(5); and also the decisions in the

(1) (1908) I. L. R. 32 Bom. 348.
(2) (1915) I. L. R. 40 Bom. 612.
(3) (1918) I. L. R. 43 Bom. 612.
(4) (1911) I. L. R. 39 Cal. 862.
(5) (1912) I. L. R. 37 Mad. 458.

cases *of Toshanpal Singh* v. *District Judge Agra*(1) and *Hemraj* v. *Khem Chand*(2), in all of which the word '*avyavaharika*' has been interpreted with varying shades of meaning. In the case reported in 61 I. A. 350 (A. I. R. 1934 Privy Council, 238) the points decided were that the sons of a deceased father are not liable in respect of a claim against him for criminal breach of trust and also the principle that the burden is upon the sons to show that in respect of liability of their father's debt they are not under pious duty to discharge it. This case, therefore, does not throw much light on the exact meaning of the word '*Avyavaharika*'; neither it deals with the general principle on the subject. The case of *Hemraj* v. *Khem Chand*(2) is undoubtedly direct on the point under discussion. The facts of that case, as it appears from the *placitum*, were that in the course of a partition between H and D, a promissory note had been allotted to H by the decree passed in the partition suit. D kept back the promissory note without handing it over to H in time. H, therefore, sought to realise the due covered by the promissory note from the ancestral property of D's sons. The finding against D was that he had allowed the promissory note to become time-barred by acting fraudulently towards H. In those circumstances the question arose whether the debt was an *avyavaharika* debt or that the sons were at all liable for the payment of it or that the joint family property in the hands of the sons could be attached and sold in satisfaction of a claim which was created by the misconduct and stupidity of D. In answer to that their Lordships observed:

"There has been much difference of opinion as regards the precise significance of the term *avyavaharika*. Colebrooke translates it as meaning 'debts

(1) (1934) L. R. 61 Ind. App. 350.

(2) (1943) L. R. 70 Ind. App. 171.

1908.

D. S. DERYA v. RAKHAHARI.

AHMAD, J.

for a cause repugnant to good morals' Mandlik renders it as 'not proper', and Sir Dinshaw Mulla in his 'Hindu Law' accepts Colebrooke's translation. The term has also been interpreted in various judgments by Courts in India, but the decisions are not all uniform."

Having discussed some of the judgments by Courts in India it was then observed in that case:

"Their Lordships do not think that any useful purpose will be served by reviewing these and other decisions brought to their notice, as, in their opinion, the principles with reference to which the term *avyavaharika* should be interpreted and by which this case should be decided are sufficiently clear and do not conflict with those decisions. They will now refer to those principles. If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-discharge of his debts; but this position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed; this appears from the following pronouncement made by Knight Bruce L. J. in *Hanuman Persaud's case* (*see* 6 M. I. A. 393 at page 421):—

'Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate would still be an act of pious duty on the son. By the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate .....'

1953.

D. S. DEBYA v. RAKHAHARI. AHMAD, J.

In 1 I. A. 321 (*Girdharee Lall* v. *Kantoo Lal*) Sir Barnes Peacock quotes the above rule and then proceeds as follows:

'It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it.' "

Then their Lordships said:

"It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If, on such examination, it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son. This principle, stated as R. 1 by Venkatasubba Rao and Madhavan Nair, JJ. in A. I. R. 1925 Mad. 841 at pp. 845 and 852 respectively, in language almost identical, is amply borne out by the numerous authorities which they have examined."

Thereafter their Lordships further observed:

"The decisions which their Lordships have examined proceed on the ground common to them all, that debts in the nature of *avyavaharika* are debts which would be comprised in the expression 'illegal or immoral debts'. Having regard to the principles underlying the rule of 'pious obligation', which forms the foundation for the son's liability, their Lordships think that the translation of the term *Avyavaharika* as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smrithi text, and may well be taken to represent its correct meaning."

1953.

D. S. DEBIA v. RAKHAHARI.

AHMAD, J.

Lastly, their Lordships expressed their concurrence with the following view expressed in the case of *Natassayyan* v. *Ponnusami*(1):

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

In the light of these observations the important question that arises for our consideration is as to when the debt arising out of the decree for costs in the present case came into existence. The debt arising out of the decree for costs undoubtedly came into existence as a result of the pronouncement made in the judgment on the basis of which the decree then under execution was passed. Before the passing of the judgment there was not and there could not be in the legal sense of the term a debt enforceable against the judgment-debtor for the costs of the suit. It may be that the previous acts of the father in instituting the suit on the basis of a false claim were substantially responsible for making the stage set for the passing of the decree for costs. But those acts by themselves, however, immoral or illegal, could not by themselves constitute a debt against him under the decree for costs in the absence of the pronouncement to that effect in the judgment by the court. In this view of the matter the immediate act which created the debt was the

(1) (1892) I. L. R. 16 Mad, 99.

1953.

D. S. DERYA v. RAKHAHARI.

AHMAD, J.

judgment itself, and, therefore, the debt originated at the time when the judgment was passed. That being so, it has, therefore, to be found out as to what was the nature or character of the debt which originated out of the judgment at the time when it was passed. Can it be said that at that time the debt arising out of the judgment was an immoral or illegal debt. The answer in my opinion, to this question should be in the negative, unless it is found that there was an immediate and direct act or omission or even a volition then on the part of the judgment-debtor which contributed to the passing of the decree against him for the costs of that suit, and which act, omission or volition was tainted with a motive to attain the doing of an act of a character illegal or immoral. I do not hereby any means suggest that there cannot be a case in which a decree arising out of the judgment may not be the result of some direct and immediate act or omission or volition contributed by the judgment-debtor himself in getting the decree passed against him for an illegal or immoral purpose. There is, however, no evidence in the present case in support of such a contention. The onus to prove such an illegality or immorality in the nature of character of the debt was on the defendants, which they have, in my opinion, failed to discharge. Speaking on the record, there is no evidence whatsoever in the present case to indicate that the debt at that point of time was at all tainted with immorality or illegality. The decree passed for costs in the present case, therefore, cannot be said to be an *avyavaharika* debt. Whatever might have been the history of the conduct on the part of the judgment-debtor which led to the passing of the decree and even assuming that the past conduct of the judgment-debtor was tainted with immorality or illegality, there is not an iota of evidence to suggest that he contributed in the least in the immediate and direct act of getting the decree

1953.

D. S. DEBYA v. BARNABAS AHMAD, J.

passed against him for an illegal or immoral purpose. The case of *Kirit Singh* v. *Mt. Chandra Kali*(1), was, in my opinion, if I may say so with the greatest respect to the learned Chief Justice, approached exactly on the line laid down by their Lordships of the Privy Council in the case reported in 70 Indian Appeals 171. The facts of that case were that in execution of a decree for costs passed against the father the co-parcenary property including the interest of the son had been sold. The sons had for that reason instituted the suit challenging the sale on the ground that they were under no pious obligation to pay the decree for costs awarded against their father. The reason given by them was that their father had defended the suit on the basis of a forged Hukumnama, and, therefore, he was guilty of a fraudulent act in relying on that forged document. The decree for costs as such passed in that suit according to sons was of the nature of an *avyavaharika* debt and hence they claimed immunity and sought recovery of possession of their share in the land which had been sold in execution of the decree. The leading judgment in the case was given by the learned Chief Justice Lakshmi Kanta Jha with which Chatterji, J. agreed. In answer to the question raised in that case the learned Chief Justice reviewed elaborately all the relevant Hindu Law texts and the judicial pronouncements. The texts quoted therein suggest to my mind that the general rule is that the son should try his best to absolve his father from debt though there are, as laid down in the Smritis, certain kind of debts incurred by the father, which the son is not bound to pay. These debts as summarised by the learned Chief Justice in his judgment are: " (1) debts due for spirituous liquor; (2) debts due for lust; (3) debts due for gambling; (4) unpaid fines; (5) unpaid tolls; (6) futile gifts, or gifts without any consideration or

(1) (1951) I. L. R. 30 Pat. 826.

promised in lust or anger; (7) suretyship debts; and (8) debts that are not *avyavaharika.*" The character imputed to the debts in those cases is in my opinion certainly in relation to the direct act for which the debts at their inception are found to have been incurred and not in any case in relation to the reasons and causes which may have come into play in the chain of events before the inception of the debt, even if the direct act giving rise to the incurring of the debts may itself be found to have been ultimately the outcome of those reasons and causes. The learned Chief Justice has in his judgment given an elaborate discussion on the meaning and implication of the word '*avyavaharika*'. And the principle finally laid down in that case is as follows:

"The obligation of the son to discharge his father's debt depends upon the nature or character of the debt when it originated—an examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt. If there is something illegal or immoral in the act of the father when the liability is incurred, the son is not bound to discharge it. If, however, the father incurs a debt (voluntary or involuntary) to make good a loss caused by his wrongful act, such a debt cannot be said to be illegal or immoral, and the son cannot claim exemption merely because the act in consequence of which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral."

In support of the principle laid down above reliance has been placed in the case on the view expressed by Plowden, J. in *Kartar Singh's* case(1), which is to the following effect:

"Granting that the son may go behind the decree, it is impossible to hold that the debt created by the

(1) (1879) P. R. 128.

1953.

D. S. DEBTA v. RAKHAHARI.

AHMAD, J.

decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral .....The most analogous case would be that of a father who had voluntarily contracted to compensate the person whom he had by a criminal offence deprived of property. A debt created by such a contract could not without an utter perversion of language be styled a debt contracted for an illegal or immoral purpose; on the contrary, it would be a debt contracted for a highly moral as well as lawful purpose, and the case of a debtor enforcing an obligation to pay an ascertained sum by way of such compensation stands upon at least as sound a basis, though the obligation be unwillingly contracted under lawful compulsion."

Similarly, reliance was placed by the learned Chief Justice on the rule laid down in the case of *Natasayyan* v. *Ponnusami*(1) and also on the following observation made by Mookerjee, J. in *Chhakauri Mahton's case*(2):

"The cases of *Mohabir Prasad* v. *Basdeo Singh* (I. L. R. 6 All. 234); *Pareman Dass* v. *Bhattu Mahton* (I. L. R. 24 Cal. 672) and *McDowell* v. *Ragava Chetty* (I. L. R. 27 Madras 71) seem to negative the liability of the son under such circumstances, while the cases of *Natasayyan* v. *Ponnusami* (I. L. R. 16 Madras 99), *Kanemar* v. *Krighna* (I. L. R. 31 Madras 161) and *Krasala Chetty* v. *Addepally Chetty* (I. L. R. 31 Madras, 472) apparently support the liability of the son. These cases, however, may possibly be reconciled if we recognise the distinction between a criminal offence and a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was

(1) (1892) I. L. R. 16 Mad. 99.
(2) (1911) I. L. R. 39 Cal. 862.

accountable; while in the second set of three cases, the father merely failed to account for the money received by him, and his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, and was recognised in *Medai Tirunmalayappa Moodeliar* v. *Veeraburda* (19 Madras Law Journal 759) where it was ruled that if a debt was incurred by an agent, his son was liable to pay the debt and the liability of the son was not affected by the circumstance that the father subsequently misappropriated the sum or made himself criminally liable. The case last mentioned consequently support the view that, where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence."

In conclusion the learned Chief Justice held:

"In my opinion, after the decision of the Judicial Committee in *Hemraj's case* (70 I. A. 171), a decree for costs cannot be said to be *avyavaharika*, for the liability is created by an order of the Court in the exercise of its discretion. The origin of the debt, therefore, cannot be said to be tainted with illegality or immorality."

I have already held that there is no evidence brought on the record by the defendants to prove that there was any immorality or illegality brought about by the father of defendant no. 1 in the immediate and direct act which resulted in the passing of the decree for costs. It also deserves consideration that the judgment passed by the court is, as a rule, always an act sacrosanct prompted by the highest legal and moral consideration with a purpose in view to do justice between persons involved in the case before

1958.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

it, though it cannot be denied, as already stated by me, that there may be cases wherein the passing of the judgment by the court may be brought about as a result of an act or omission played on it by the judgment-debtor or some other person for a purpose illegal and immoral. If there were such an evidence then it might have been a matter for consideration whether the debt created by a decree could at all be said not tainted with immorality or illegality. There is no such evidence in the present case. The debt arising out of the decree for costs is a debt generally incurred involuntarily and not voluntarily, and in the act of the court in passing the decree, the volition of the debtor as a rule does not come into play. It is, therefore, difficult to say that in such a circumstance, in the absense of any volition on the part of the judgment-debtor in the direct act giving rise to the judgment; the judgment-debtor can be said to have incurred the debt and much less to have incurred the debt for a purpose immoral or illegal. One of the definitions of debt as given in Webster's dictionary is " the condition of being under an obligation to pay money to and perform services for another ". In this definition there is no limitation as to how the condition of being under an obligation is brought about. It, therefore. in its wider sense covers both the cases, i.e., when the condition of being under an obligation is brought about voluntarily or involuntarily. In cases where the condition is brought about voluntarily, what has to be enquired is as to whether the volition of the debtor giving rise to that condition was given effect to for a purpose illegal or immoral. In cases where that condition is brought about involuntarily, what should be enquired, in my opinion, is as to whether the volition which brought about that condition though by an agency outside the debtor himself was given effect to by that agency for a purpose immoral or illegal. In a case of debt arising out of a decree for

1953.

D. S. DEBYA v. RAKHAHARI.

costs the condition of the debtor being under an obligation is in fact brought about by the volition of the court and there is no evidence, as already held by me, that that volition of the court was any way given effect to directly or indirectly for a purpose immoral or illegal. For the reasons stated above, in my opinion, the decree passed against the father of defendant no. 1 was not an *avyavaharika* debt. In the case reported in I. L. R. 28 Patna 165 decided by Imam and Ramaswami, JJ. what was looked at was not the immediate and direct act which gave rise to the debt but the acts subsequent thereto which were fraudulent and immoral. That line of approach, I think, with the greatest respect to the learned Judges, who decided that case, is contrary to the *dicta* of the Privy Council in *Hemraj's case*(1) and as pointed out by the learned Chief Justice in the case reported in I. L. R. 30 Patna 826, the principle of law laid down in that case was based on the peculiar facts of that particular case. AHMAD, J.

The third point raised was whether the suit could proceed on a certified copy of the mortgage deed. The reason given in the plaint for not filing the original document is that the original document passed into the hand of Beni and that in spite of the terms of the compromise arrived at in the partition suit the original document was in fact never returned by Beni. Subsequently the plaintiff heard rumour that Nandlal somehow got possession of that document from Beni, the plaintiff's husband's younger brother. In support of this contention reliance has been placed on a chain of incidents beginning from the fact that soon after the death of Radhanath Sarangi a list had been prepared of the documents in the iron safe by one Babu Dwarkanath Tripathi, a pleader of Purulia. Thereafter the documents were removed from the iron safe by Beni. Then some criminal cases were

(1) (1943) L. R. 70 Ind. App. 171.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

filed though with no result against Beni and then ultimately a partition suit was filed wherein a compromise was arrived at. In that compromise the mortgage bond in dispute was admitted to be the property of the plaintiff and a specific undertaking was given by Beni therein to return the same to her though that promise was never kept. It has also been alleged that a notice had then been served on the judgment-debtor of the bond intimating to him that the bond had been surreptitiously taken away by Beni and requesting him not to pay the due under it to Beni. I agree with the learned Subordinate Judge that the evidence on the chain of incidents stated above relied upon by the plaintiff in support of her contention is neither complete nor consistent to lead to the inference which was attempted by the plaintiff to be arrived at. Further I think that all what have been said in connection with the incidents stated above by the plaintiff in her pleading and evidence are not unmixed truth. In spite of that, however, there is no doubt left in my mind that at some stage or other Beni did succeed by some means fair or foul in removing the document to his own custody, though there is no evidence on the record to suggest or to substantiate the further allegation of the plaintiff that thereafter Nandlal somehow got possession of the original document. Therefore, there are only two alternatives to be considered. Firstly, that the document remained with Beni and was never returned to the plaintiff and secondly that after the compromise in the partition suit the document did come back in possession of the plaintiff and that for some reason or other it has not been filed in the case by her. In either of these circumstances it has to be decided as to whether the secondary evidence of the original bond could be admissible in evidence in this case under sections 65 and 66 of the Evidence Act in the manner in which it was proposed by the plaintiff to be tendered

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

at the trial. Mr. B. C. De appearing for the appellant has contended that the trial court was wrong in law in not taking it into evidence and has in support of his contention relied on the provisions laid down in clauses (*a*) and (*c*) of section 65 of the Evidence Act. Those clauses read:

"Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In the present case clause (*a*) of section 65 will, if at all, in my opinion, come into play only in case it is held that the document is not in the possession of the plaintiff but in the possession of Beni. Even, in that case however, the certified copy of the mortgage bond in dispute could be tendered in evidence only on compliance with the provisions of section 66 of the Evidence Act. Under those provisions a notice should have been given to Beni to produce it as prescribed by law or as directed by the court. It is the admitted case of the plaintiff that no such notice was given to Beni. There is also no evidence on the record to suggest that for some reason or other the court dispensed with the issue of such a notice. Lastly, it has to be seen whether the present case is covered by the exceptions given in section 66 wherein the certified copy of the document can be tendered even in the absence of a notice to the party in whose possession and power the document is. In this list of exceptions reliance was placed by the appellant on item no. (3). That reads:

"When it appears or is proved that the adverse party has obtained possession of the original by fraud or force."

1953.

D. S.
DEBYA
v.
RAKHAHARI.

AHMAD, J.

The adverse party in the present case are the heirs and successors of Nandlal. I have already held that there is no evidence on the record to indicate that the document ever came in the possession of Nandlal or his heirs. Therefore, item no. 3 of the list of exceptions given in section 66 of the Evidence Act also does not come into play. For the aforesaid reasons even it were held that the document is in the possession of Beni, the certified copy of it cannot go into evidence in the circumstances of the present case. It is further proved that Beni was then not out of reach nor not subject to the process of the court. On the other hand, it is fully established from the evidence on the record, as held by the trial court, that Beni was at the time of the institution of the suit in good relation with the plaintiff and was then present within the jurisdiction of the court. In spite of it there does not appear any indication on the record that any attempt was made by the plaintiff to make an enquiry from him as to the presence of the original with him or to get processes issued against him for the production of the same in the court—Mr. De tried to establish that Beni had been in collusion with Nandlal and in support thereof he has relied on the circumstances arising out of the payment alleged to have been made towards the satisfaction of the due under the mortgage bond. In his opinion, the second instalment of the repayment even if accepted to have been made must have been paid to Beni and that must have been necessarily paid after the notice alleged to have been sent by the plaintiff to Nandlal intimating to him that the bond had been surreptitiously taken from her custody by Beni and requesting him not to pay the due under the bond to Beni. This argument in my opinion is without substance. There is no evidence on the record as held by the trial court that a notice alleged to have been sent by the mortgagee was in

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

fact served on Nandlal. Therefore, it cannot be held with a certainty that there was any collusion or conspiracy in fact existing between Nandlal and Beni. Now if the second alternative is accepted and it is held that the document was returned to the custody of the plaintiff by Beni, even then I think in the circumstances of this case the position does not improve. In that case the certified copy could be tendered in evidence only if it were also held that the original had been destroyed or lost, or that the party offering evidence of its contents could not, for any other reason not arising from his own default or neglect, produce it in reasonable time. Nowhere in the present case, a case either of destruction or loss has been pleaded or proved. All that has been alleged and tried to be proved is that the document was taken away by Beni and it thereafter remained with Beni. That case even if accepted cannot lead to the conclusion that the document was destroyed or lost. In the case of destruction the document becomes non-existent while in the case of loss the destination of it is not known and it cannot be discovered by the owner of the document. Therefore, the proper course which should have been adopted by the plaintiff in such a circumstance was to give a notice to Beni as contemplated by section 66 of the Evidence Act. In this view of the matter the conclusion arrived at by the trial court in this respect on the basis of the decisions given in the cases of *Bhuraneswari Devi* v. *Harisaran Surma Moitra*(1) and *Womesh Chander Ghosh* v. *Shama Sundari Bai*(2) is in my opinion correct. In the case reported in 6 Calcutta, 720, the original document was in the possession of either of the two persons, namely, Konuk Tara, who was one of the defendants in the case, or her agent one Mullik, who was not a

(1) (1880) I. L. R. 6 Cal. 720, P. C.
(2) (1881) I. L. R. 7 Cal. 98, P. C.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

party to the suit. Another defendant in the suit, namely, Bhubneswari Debi, widow of Sibnath, wanted to tender the document in the case in support of her defence. In those circumstances the question arose whether she could tender secondary evidence of that document. In connection therewith their Lordships observed:

> "It appears that Ramottum Mullik, who was the Muktear of this lady, obtained a copy of this deed; and further that he got back from the Court the original and signed a receipt for it on the 7th December 1857. There may possibly be a question whether Mullik was or was not authorised to act on behalf of this lady, but it appears to their Lordships that whether he was or not, the custody of the deed is tolerably well shown. If Mullik acted on behalf of the lady, the presumption would be, that he returned the deed to her. If he did not act on her behalf, it is shown to be in his custody, and has not been shown to have come out of it. Under these circumstances it appears to their Lordships that the very first duty of the defendants was to endeavour to obtain the deed from the custody either of Ramottum Mullik or of Konuk Tara, one of the defendants. But no attempt whatever appears to have been made to obtain it from either of them, or even to inquire whether or not it was in their custody, or in whose custody it was. In short, no search for it, or inquiry respecting it, of any kind, has been shown. Under these circumstances, by the law of this country, which has been in a great measure, with respect to deeds, made the law of India, it appears to their Lordships that the first condition of the defendants' ability to give secondary evidence—namely, the accounting for the non-production of the original—has not been complied with; and on that ground they are of opinion that the

1953.

D. S. DEBYA v. RAKHAHARI.

AHMED, J.

judgment of the High Court was right, and that secondary evidence was not admissible."

In the case reported in 7 Calcutta, 98, defendant no. 1 had executed a registered bond in favour of defendant no. 2 Ramjoy Sircar. In execution of a decree against Ramjoy Sircar, his interest in the alleged bond was got sold and purchased by the plaintiff and thereafter the plaintiff on the basis of his purchase instituted the suit against the obligee making therein Ramjoy Sircar also a defendant. In the course of the proceeding of that suit a notice had also been served on Ramjoy Sircar to produce the bond. Ramjoy Sircar, however, did not produce the document. He was neither examined, nor there was evidence about the loss or destruction of the document. In these circumstances their Lordships held:

"The plaintiff can stand in no higher or better position than Ramjoy Sircar would himself have occupied. Before Ramjoy Sircar could have used secondary evidence, it would have been necessary for him to prove the destruction or loss of the alleged instrument. But Ramjoy Sircar has not been examined, and as the evidence stands, there is no proof of destruction or loss. For all that appears, the bond, if really executed, might, at the date of the institution of this suit, have been cancelled, or in the hands of a third party, or purchased for value. To admit secondary evidence under these circumstances would, in my opinion, be most dangerous, and inasmuch as the plaintiff purchased without requiring delivery or proof of the continued existence of the bond, he is not, in my opinion, entitled to claim any benefit under the last part of clause (*c*) of section 65 of the Evidence Act, otherwise he, as appears, would be placed in a better position than the obligee. I am, therefore, of opinion, that the decree of the Lower

1933.

D. S. DEDYA v. RAKHAHARI.

AHMAD, J.

Appellate Court is right, and that this appeal should be dismissed with costs."

To the same effect is the decision of their Lordships of the Privy Council in the case of *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*(1) laying down therein:

> "Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under clause (*c*), section 65 of the Indian Evidence Act."

In the case of *Harripria Devi* v. *Rukmini Debi*(2) the subject-matter of the suit was the challenge to an adoption made by the defendant. In defence the defendant had relied on an *anumati patra* or power executed by the Raja to adopt a son. The original *anumati patra* could not be produced. The defendant sought to prove that it had been lost, and tendered what she alleged to be a copy. A question arose whether in those circumstances the secondary evidence could go in. The trial court came to the conclusion that there was no sufficient proof of search for the loss of the original document given to lay the grounds for the admission of secondary evidence. In appeal their Lordships of the Privy Council observed:

> "Their Lordships will make only one remark on it. The point is one which is proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled except in a very clear case of miscarriage. But the evidence here is very far indeed from raising a case for overruling the Subordinate Judge, even if his judgment had not been supported as it has been by the Appellate Court."

(1) (1887) I. L. R. 14 Cal. 486, P. C.
(2) (1892) I. L. R. 19 Cal. 438.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

This principle was reiterated by their Lordships of the Privy Council in the case of *Anand Behari Lal* v. *Dinshaw and Co.*(1). On this point reliance was also placed by the respondents and I think rightly on the case of *Jaspat Rai* v. *Devi Dayal*(2), wherein it has been observed:

"Sufficient care is in many cases not taken to produce original documents, and, in our opinion, the Courts should be very strict before admitting secondary evidence in insisting on strict proof of the loss of a document like a mortgage or a special power-of-attorney authorising the creation of a mortgage. The desirability of insisting as far as possible on production of the originals of such documents is obvious."

These authorities, in my opinion, fully support the finding arrived at by me. In the present case the trial court has come to the conclusion that the plaintiff failed to account for the original document, not being produced at the trial, and, therefore, he refused to accept secondary evidence in evidence. He has given elaborate reasons for holding the view with which it is difficult for me to disagree.

Mr. De appearing for the appellant tried vehemently, though in my opinion unsuccessfully, to overcome this obstacle. He relied on the decision of a single Judge in the case of *Mulla* v. *Deo Karan*(3). In that case the suit was based on a hypothecation bond. The allegation of the plaintiff was that the original had been lost and hence a copy of it was produced. The answer by the defendant was that the original was not lost but suppressed as there was an endorsement on the bond showing certain payment by him to the plaintiff. In these circumstances their Lordships held:

"It is true that, in the present case the defendant-respondent has not in his written statement said

(1) (1946) A. I. R. (P. C.) 24.
(2) (1915) 32 Ind. Cas. 399.
(3) (1913) 11 All. L. J. 784.

1953

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

in so many words that he had executed the bond in suit. But his plea of payment of Rs. 200 and the endorsement of that payment on the back of the bond amount to an admission that he had executed the bond. In view of that admission the only question between the parties is one of part-payment. The plaintiff, I think, can maintain the suit on a copy of the original bond without having to prove the alleged loss."

As for this case, it is, I think, enough, as pointed out by the learned Counsel for the respondents, to point out that Mr. De perhaps in his desperation failed to take notice of the fact that that case was subsequently overruled by a Division Bench of that very Court. Referring to the case of *Mulla* v. *Deo Karan*(1) their Lordships of the Division Bench observed in their judgment in the case of *Muhammad Zafar* v. *Zahur Hussain*(2):

"With all respect to the learned Judge who decided that case, and who was a most experienced Judge in matters which may be described as questions of business, it appears to us that he was misled. In the first place, it is not true to say that an inconsistent plea turns a preliminary plea in the same written statement into an admission when it is not in fact an actual admission. This matter will be found fully discussed in a chapter by Dr. Weir in a recent book published on the principles of pleadings. Alternative pleas have always been admitted from the earliest days for excellent reasons."

In the case of *Sudhakar Misra* v. *Nilkantha Das*(3), the defendants relied on amongst others on a confirmatory Sanad, a copy of which only had been filed by them. The original Sanad was proved to be then in the possession of the plaintiffs who had not

(1) (1913) 11 All. L. J. 734.
(2) (1926) I. L. R. 49 All. 78.
(3) (1936) A. I. R. (Pat.) 129.

produced it. In those circumstances it was contended on behalf of the plaintiffs that the copy of the Sanad was not admissible in evidence. In answer to that their Lordships observed:

"One of the contentions on behalf of the appellants was that in order to entitle the Judge to admit the document as secondary evidence, notice would have to be given to the other side to produce the original. I have already stated that although the record-of-rights was founded upon the original sanad, and although it is quite clear that the document was in the possession or under the control of the plaintiffs, they failed to produce it. I should have very little hesitation in coming to the conclusion that, had the question been raised in the form in which it is now raised, the learned Judge in the Court below would have come to the conclusion that sub-clause (2) of the proviso to section 66, Evidence Act, applied; that is to say, by the nature of the case the adverse party (who were the plaintiffs in this case) knew that they would be required to produce it. That in itself is sufficient, in my opinion, to answer the point."

In the present case there is no evidence to suggest that the original of the mortgage document was at all at any time in the possession of the mortgagor or his heirs and successors. This authority, therefore, is of no avail to Mr. De.

The case of *Dol Govinda Das* v. *Makbul Sekh's infant*(1) is a decision by a single Judge. There the question raised was whether any hearsay evidence of the loss of a document could be given in order to justify the tendering of secondary evidence in place of the original lost. In that connection it was observed therein:

"With regard to the observation made by the Courts below that the loss has not been proved as the

(1) (1936) A. I. R. (Cal.) 164.

1958.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

evidence of loss is merely hearsay, the following passage in Taylor on Evidence, Edn. 11, Vol. 1. p. 323, para. 430, is relevant. The learned author summarises the case law in England in these terms:

'Indeed, it has been held that, in order to show that search has been made for a document so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received.'

On the above principle also I think that the lower Courts were not right in rejecting Ex. 1 from consideration."

This case is, therefore, not on the point raised here. Here the case pleaded is not one of loss but one of transfer of the custody of the document from the plaintiff to that of the brother of the plaintiff's husband.

In the case of *Basant Singh* v. *Brij Raj Saran*(1) the subject-matter of the suit was based on a will. Its original was alleged to be lost and hence a copy of it was tendered at the trial as secondary evidence of the same. A question arose whether in the circumstances brought on the record in that case it could be said that the document had been in fact lost. On this point their Lordships observed:

" With regard to the loss of the original will, it must be observed that the dispute is more as to the genuineness of the will than as to its contents, as also that there can be no doubt that a document existed which purported to be a will and from which the copy was taken, and the inquiry is as to the loss of this document. In the opinion of their Lordships there is sufficient evidence to establish its loss. The learned Subordinate Judge would appear to have

(1) (1935) A. I. R. (P. C.) 132.

allowed his grave suspicions as to the genuineness of the will to have affected his mind on this question of admission of evidence, and thus to credit defendant 1 with a desire to suppress the false document. But their Lordships are of opinion that it is sufficiently established by the evidence that the original document was not in the repositories of the Rani at her death, and had not been found since by defendant 1; his information from the Rani, supported by the evidence of Jeoni, a former maid of the Rani, is that it was given by the Rani to Girraj Singh prior to 1903, and that he had not returned it. Girraj Singh was summoned on behalf of the respondents to give evidence and to produce the original will of 1879; on 2nd September, 1924, he presented an application to the Subordinate Judge submitting that, if his evidence should be thought necessary, he should be informed of the date of his examination, but stating, 'neither the original will requisitioned from me was ever with me nor is it now'. Loss can never be proved absolutely, and although Girraj Singh was not called as a witness, their Lordships regard this evidence of loss of a document which has not been seen for so many years as sufficient to satisfy the provisions of Section 65, Evidence Act. Accordingly, they hold that the copy is admissible as secondary evidence of the original, and it may therefore, as already stated, be taken as a correct copy of the original document."

In the present case it is not the case that the document had been lost absolutely, rather it has been alleged that it is with Beni. In these circumstances, I think, it was incumbent upon the part of the plaintiff to make an attempt to get the original produced by Beni in court. Unfortunately no such attempt was made by the plaintiff in this case. Therefore, the rule laid down in A. I. R. 1935, Privy Council, 132, is not applicable to the facts of the present case.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

The case of *Surendra Krishna Roy* v. *Mirza Mahammad Syed Ali Mutwali*(1), is equally of no avail to the appellant. There a certified copy (exhibit 7) of the document filed by the plaintiff had been accepted as its secondary evidence. The original of it at some earlier time, as it appeared from the deposition of defendant no. 1 of that case in some previous suit, was with him. In the main case, however, defendant no. 1 denied to have ever had it and gave no reliable account as to what happened to it. This much, however, was clear that the terms of that document (exhibit 7) were inconsistent with the terms of two other documents, namely, exhibit B (of the year 1830) and exhibit C (of the year 1856) filed by defendant no. 1 on which he relied for his title. In those circumstances the trial court accepted the certified copy as secondary evidence. This decision of the trial court was challenged in appeal by defendant no. 1. In answer to it their Lordships of the Privy Council held:

"As defendant 1 had not filed the original, denied having ever had it, and gave no reliable account of what happened to it, the appellants can hardly claim now that the certified copy should have been rejected when tendered by the plaintiff. But in truth the appellants' criticisms are misconceived. In the face of the evidence given by Maurice, as recorded in exhibit 11, the defendants were in no position to ask the Court to presume the genuineness of the document of 1830 and 1856 unless the contents of the hebabilewas were laid before the Court. Rather than find against them on their own failure to produce the document it was eminently reasonable in the circumstances of this case to permit the plaintiff to produce the certified copy."

It is, therefore, evident that in that case the original was with defendant no. 1 and he relied on

(1) (1936) A. I. R. (P. C.) 15.

documents which were in contradiction to the terms of that document. It was in those circumstances incumbent on the defendant himself to produce the original before he could have laid reliance on his own documents not consistent with that of the original. The position of the present case is not like that. I, therefore, think that the authorities cited by Mr. De are of no avail to him.

The matter, however, does not rest there. The trial court has taken pains to find out as to which of the alternatives stated above was to be accepted as correct in the circumstances of the present case, and on an exhaustive discussion of the matter it has come to the conclusion that the original document did not remain with Beni, rather it had been intentionally suppressed by the plaintiff. In my opinion as well, as already stated, the evidence on the point of alleged incidents connected with the document is neither complete nor convincing. Those incidents have been elaborately dealt with by the trial court. I have carefully gone through the entire evidence and I think the trial court rightly came to the conclusion that the probabilities are more in favour of the finding that the document has been intentionally suppressed by the plaintiff for reasons perhaps to avoid the payments endorsed therein.

Lastly it was argued that the execution of the original bond by Nandlal has been admitted by the defendants in the written statement. It was, therefore, said that it is a case covered by clause (*b*) of section 65 and accordingly the certified copy of the original bond should have been taken into evidence by the trial court. Clause (*b*) of section 65 reads:

"Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest."

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

The action being one for mortgage, the contents and conditions of the mortgage bond have to be proved in the case to fix the liability arising therefrom and not only its existence. The admission said to have been made in the written statement is only regarding the execution of the mortgage bond and not about the contents or conditions of it. In the absence of the admission about the contents and conditions of the bond, the mortgage action on the basis of that document, in my opinion, cannot proceed.

The fourth point raised was that of limitation. The bond in suit is alleged to have been executed by Nandlal Ojha on 26th August 1931. Nandlal Ojha had two wives Subhadra Kumari and Sm. Dasumoni Debya. By his first wife Subhadra Kumari Nandlal had one son, namely, Rakhahari Ojha (defendant no. 1) but had no son by his second wife. Under the terms of the bond it is said that the debt was due to be paid on 14th May 1932. The mortgage action was brought on 13th May 1944, originally against his son Rakhahari Ojha (defendant no. 1) and his first wife Subhadra Kumari who had already died before the institution of the suit. Subsequently, perhaps the plaintiff realised the mistake in making Subhadra Kumari, the deceased wife, a party in the suit. And on 12th July 1944 an amendment was made in the plaint with the permission of the court whereby the name of Sm. Dasumoni Debya (defendant no. 2) was substituted for the name of Subhadra Kumari under Order 1, Rule 10(1) of the Code of Civil Procedure. Admittedly on 12th July 1944, the claim under the bond, dated the 26th August 1931, executed by Nandlal Ojha was already time-barred. It is, therefore, contended by Mr. Majumdar appearing for the defendants that Sm. Dasumoni Debya, a necessary party to the mortgage action not having been made a party in the suit within the period of limitation, the

suit as a whole should be held to have been barred by limitation.

This point was not pleaded earlier nor raised at the trial. It is still more unfortunate that the objection on the ground of limitation has not been set forth in the memorandum of appeal as required by the provisions laid down in rule 2, Order 41, C. P. C. It has been raised for the first time in appeal at the time of its hearing. In the present case, however, the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, and, therefore, I think, it is desirable in the ends of justice as contemplated by section 3 of the Limitation Act to give a decision on the point. The point raised involves a consideration of the two provisions of law; one laid down under section 22 of the Limitation Act and the other laid down in rule 10(1), Order 1, of the Code of Civil Procedure. Section 22 of the Limitation Act relevant for the purpose of this case reads:

"Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

Similarly, clause (1) of rule 10 of Order 1 C. P. C. reads:

"Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just."

There is no doubt that Sm. Dasumoni Debya was made a party in the suit after the period of limitation prescribed for the suit. The only question that deserves consideration so far she is concerned is as to whether it was a sheer mistake in describing her as Subhadra Kumari, and that at the very outset the

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

intention of the plaintiff was to make Sm. Dasumoni Debya a party defendant. I must say here and now that it is difficult to hold that it is a case of *bona fide* mistake in describing Sm. Dasumoni Debya as Subhadra Kumari. The two names Subhadra Kumari and Sm. Dasumoni Debya are connected with two different definite and known individuals. If one was named in the plaint for the other it is difficult to hold that the name given was not referred to that individual who bore that name. The mistake, if any, in my opinion, in the present case was not in the description of the individual but in knowing the fact as to which of the two wives of Nandlal was at the time of the institution of the suit dead. At the time of the institution the enquiry though defective disclosed that it was Subhadra Kumari who was alive and not Sm. Dasumoni Debya though subsequently that enquiry appeared to be wrong and so in the light of the correct information then received necessary amendment was made in the plaint. In this view of the matter, the description of Sm. Dasumoni Debya in the plaint by the name of Subhadra Kumari cannot be said to be a case of *bona fide* mistake. The claim, therefore, as against Sm. Dasumoni Debya stands barred by limitation. The case of *Seodeyal Khemka* v. *Joharmull Manmull*(1), is not applicable to the facts of the present case. It had arisen out of a partnership suit. In the plaint of that suit two members were described as Joharmull Manmull. Subsequently the plaint was allowed to be amended by putting in their full name and description of Joharmull and Manmull separately. In these circumstances it was held that such an amendment was not covered by the provisions of section 22 of the Limitation Act. It is clear that in that case the two partners of the firm were on the record though not described fully and accurately but their defective

(1) (1923) I. L. R. 50 Cal. 549.

1953.

D. S. DEBYA v. RAKHAHARI.

description could be connected with their full names and descriptions. In the present case it cannot be said by any stretch of imagination that Sm. Dasumoni Debya can be connected with another individual by the name of Subhadra Kumari. Similarly the case of *Jogendra Narain Roy Choudhury* v. *P. J. Forbes*(1) was, in my opinion, decided on its own facts. The suit in that case was instituted for the correction of certain entry in the record-of-rights. The person recorded was one Miss P. J. Forbes. The description attached with the name in the entry was that of mokararidar. The plaintiff in the suit pleaded that the description of mokararidar was wrong and that it should be corrected to malguzar istamrari. In the plaint, however, the party originally pleaded as defendant was described as Mr. P. J. Forbes and not Miss P. J. Forbes. In those circumstances the court came to the conclusion that with the facts stated in the plaint along with the entry in the survey record-of-rights the name of the defendant could easily be connected with Miss P. J. Forbes and in that view of the matter the description originally given of the defendant in the plaint was a case of *bona fide* mistake, having arisen as observed by their Lordships in that judgment " in consequence of abbreviations frequently used in Hindi, for instance, ' Mi ' is used for both Mr. and Miss." These cases, therefore, are of no avail in accepting the contention that the change in the name of the defendant no. 2 from that of the first wife of Nandlal is a case of *bona fide* mistake in the description of defendant no. 2 originally intended to be made a party in the plaint. The case of *Krishnaji* v. *Hanmaraddi*(2) is, in my opinion, much nearer to the facts of the present case, though not exactly to the point. In that case also the mistake was not in the description of the party but in knowing

AHMAD, J.

(1) (1917) A. I. R. (Cal.) 420.
(2) (1934) I. L. R. 58 Bom. 536.

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

as to whether that suit should have been instituted in the name of that party or not, as in the present case the mistake was not in describing the widow alive but in the information as to which of the two wives of Nandlal was in fact alive and which one was dead.

The finding to the effect that the claim against Sm. Dasumoni Debya is barred is, however, not by itself sufficient to dispose of the point on limitation completely. It has further to be seen whether Subhadra Kumari was a necessary party in the present mortgage action or was only a proper party or whether she was already constructively a party to the suit though not actually so. In case she was only a proper party but not a necessary party, the suit against other parties will not be barred. A necessary party is a person who ought to have been joined as a party. He is a person necessary to the constitution of the suit, i.e., person in whose absence no effective degree at all can be passed. A person is a proper party if his presence before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. "In other words", as observed by Chitaley in his commentary on the Limitation Act, "the expression 'proper party' means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue. It is not necessary that any relief should be asked against him, the object of adding him being to avoid needless multiplicity of suits and to protect his interests or the interests of a party already on record." Order 34 Rule 1 of the Code of Civil Procedure specifies the persons who shall be made parties to a suit relating to a mortgage. "The Rule is, however", as again observed by Chitaley, "subject to the other provisions of the Code and is therefore subject to Order 1, rule 9 which enacts *inter alia* that no suit shall be defeated by reason of the nonjoinder

1953.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

of parties and that the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it ". The suit in appeal was one for the enforcement of a mortgage against the person interested in the equity of redemption. In the action originally only one such person, namely, defendant no. 1, the son of Nandlal, was made the defendant. Similar were the facts in the case of *Muhammad Yunus* v. *Champamani Bibi*(1). It arose out of a mortgage action. During the pendency of the mortgage action some of the defendants died and the death of those defendants was not reported to the court and no substitution of their heirs was made. The result was that the suit in appeal against them had abated by the operation of the law. In those circumstances it was contended " that as the result of the death of these defendants the entire appeal abated and no decree in the suit could be passed at all because it is said a mortgage is one and indivisible and in order to obtain a mortgage decree there must be present on the record not only all the persons interested in the mortgage but all the persons having an interest in the equity of redemption. If one or more of these are missing, it is said, the suit is not properly constituted and no decree can be passed at all." The learned Judges who decided the case relying on the case of *Mt. Waleyatunnissa Begum* v. *Mt. Chalaki*(2) held:

" ..... where the principle laid down in previous decisions was accepted that whereas the general rule is that all persons having the equity of redemption ought to be brought on the record, the failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy

(1) (1939) A. I. R. (Pat.) 49.
(2) (1930) I. L. R. 10 (Pat.) 341.

1958.

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

so far as regards the rights and interests of the parties actually before it."

On the principle laid down in that case, therefore, Sm. Dasumoni Debya was not a necessary party for the mortgage action though her interest in the mortgage property, if any, cannot be affected by the decree. I, therefore, hold that the entire suit does not fail for the non-impleading of Sm. Dasumoni Debya as a defendant within the period of limitation though the claim against her is barred. Mr. Majumdar in answer to the proposition laid down in the case reported in A. I. R., 1939, Patna, 49, relied on a number of authorities, namely, *Gendan Lal* v. *Babu Ram*(1); *Bhagola Koor* v. *Abdul Rahman*(2); *Girwar Narain Mahton* v. *Mussammat Makbunnesa*(3); *Mamraj Singh* v. *Hirday Ram*(4); *The New East India Press Co., Ltd.* v. *Rameshwar Nandlal*(5) and *Ka'vasji Sora'bji* v. *Barjorji Sora'bji*(6). These authorities are not relevant to the point under consideration and they do not speak on the point under discussion.

Lastly it was contended by Mr. De that the court was wrong in giving a finding that the debt due under the bond had been partially satisfied as alleged by the defendants. This point, in the light of my finding that the suit cannot proceed on the basis of the certified copy, has lost its importance. It has, however, been argued elaborately. I, therefore, think it desirable to give a finding on this point as well. The defendants on the point of part satisfaction of the debt due under the bond examined three witnesses at the trial. D. W. 1 is Jotindra Nath Ojha. His

(1) (1911) 13 Ind. Cas. 197.
(2) (1916) 36 Ind. Cas. 77.
(3) (1916) 1 Pat. L. J. 468.
(4) (1911) 11 Ind. Cas. 938.
(5) (1925) 34 Bom. L. R. 1410.
(6) (1873) 10 Bom. H. C. Rs. 224.

statement on the non-passing of the consideration under the bond has already been disbelieved by me. On the point under discussion he stated:

"Nandolal had paid Rs. 800 to Radhanath towards the mortgage bond. After his death he had paid Rs. 500 to the plaintiff, towards the mortgage bond. The second payment was made in my presence. The first payment was not made in my presence but I saw this payment endorsed on the mortgage bond."

In cross-examination he undoubtedly maintained his statement made in examination-in-chief about this part of the case. Still I would have been reluctant to accept his statement even on this point. The aforesaid statement, as it stands, however, gets support from the fact of non-production of the original bond by the plaintiff, and the trial court who had the advantage of seeing the witness in the witness box has in its discussion on this point believed his evidence. For the aforesaid reasons I think it is difficult for me to say that his statement on the point of partial satisfaction of the bond as claimed by him is also not worthy of reliance, specially when his evidence is supported by another witness (D. W. 2) whom I have no reason to disbelieve. He is Bhola Nath Kumhar. He is a tenant of Purnima. He stated:

"On each occasion he paid Rs. 400 to Radhanath Babu at his house at Purulia in my presence. The payments were endorsed on the back of the bond by Nandolal Ojha. When the first payment was made in Magh, Purnima had also come with us and she had gone to the house of Radhanath Babu. Purnima was not paid any money in my presence."

He has also therefore, proved the payment of Rs. 800, as alleged to have been made by D. W. 1. I have gone through his evidence and I find, as already stated, no substantial reason to differ with the trial court in accepting his evidence. D. W. 3 is Surya Narain Ojha. He has stated:

"I had once accompanied Nando Lall Ojha to Radhanath Babu's house at Purulia. Nandolal then paid Rs. 500 to Radhanath Babu's wife. This happened in Chaitra 1342. The payment was endorsed by Nando Lall on the back of the bond. I had also then signed my name on

1953

D. S. DEBYA v. RAKHAHARI.

AHMAD, J.

the bond. I had also then signed by name on the bond. Another client of Urma was then present there and he had also signed the endorsement as a witness."

In cross-examination he stated that Nandlal met him at Purulia court compound when he had gone there in connection with some work. Mr. De had criticised this part of his statement in cross-examination. His evidence also has, however, been believed by the trial court and it is difficult for me to say that the incident referred to in cross-examination by him is not the correct version of the fact. In view of the evidence of these witnesses supplemented by other circumstances referred to above by me, I think that the defendants have succeeded in proving their case of partial satisfaction to the extent of Rs. 1,800 as alleged by them. The plaintiff in challenging the case of partial satisfaction laid reliance on exhibit 1, which contains a list of documents said to have been prepared by P. W. 3 on the death of Radhanath, and also on the evidence of P. W. 3 himself. These evidences have been dealt with in detail by the trial court and in my opinion the learned Subordinate Judge rightly came to the conclusion that they were not to be relied upon. This finding by itself, however, on the point of partial satisfaction of the due under the bond could not have disentitled the plaintiff for a decree for the balance of the amount due under it, had there been no other hitch in her way. The main obstacle in the way of the plaintiff, as held by me, is that the suit cannot in the circumstances of the present case proceed in the absence of the original mortgage bond on the basis of its certified copy. In law the certified copy cannot be taken in evidence in the absence of any reliable account given by the plaintiff for not filing the original document.

The appeal is accordingly dismissed with costs.

NARAYAN, J.—The plaintiff is the appellant, and the appeal arises out of a suit to enforce a mortgage

1953.

D. S. DEBYA v. RAKHAHARI.

bond, dated the 9th Bhadra, 1338 B. S., corresponding to 26th August 1931. The bond in suit had been executed by Nandlal Ojha, the deceased father of the present defendant no. 1 and the husband of the defendant no. 2. The facts of the case have been set out in detail in the judgment of my learned brother, NARAYAN, J., and it is not necessary for me to recapitulate them. The original mortgage bond could not be produced, and the suit was instituted on the basis of a certified copy. Various defences were set up, and the defendants strenuously contended that the mortgage bond was not binding on them.

I am in absolute agreement with my learned brother in his view that consideration for the mortgage transaction had passed. A fantastic defence had been taken that the bond had really been executed for the benefit of the two ladies Purnima and Amodebala, but this defence had to be rejected, and my learned brother has come to the conclusion that there is no substance in the contention that the bond was without consideration. It has further been found that the entire consideration of Rs. 2,799 went towards the satisfaction of antecedent debts. There was a decree for costs outstanding against the mortgager Nandlal, and the costs had been awarded in certain litigations to which Nandlal and the two ladies were parties. Rs. 2,349 was the amount of costs awarded in the said litigations, and before us it could not be contended that the remaining amount did not consist of antecedent debts. The balance left is only an insignificant amount, and as pointed out by my learned brother, the finding of the Court below that Nandlal required some more money for paying his other debts has not been challenged in this appeal.

If the finding is, as it must be, that the consideration had passed and that the entire amount of consideration went to satisfy antecedent debts then the heirs of Nandlal cannot escape liability. After a

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

review of the previous authorities their Lordships of the Judicial Committee laid down in *Brij Narain* v. *Mangla Prasad*(1) certain propositions which ever since this decision have been regarded by the Courts in India as containing the guiding principles. One of the propositions laid down in this case is that if the father purports to burden the estate by a mortgage, then unless this mortgage is to discharge an antecedent debt, it would not bind the estate, and their Lordships have further pointed out that antecedent debt means antecedent in fact as well as in time. The debt must be altogether independent of the transaction impeached. This standard has been complied with in this case, and the finding of the Court below and of my learned brother in agreement with the Court below is that by this mortgage antecedent debts of the value of Rs. 2,799 were satisfied. After these findings a discussion as to in what circumstances after the death of the father the payment of the consideration has to be proved by the creditor in order to bind the sons does not appear to be necessary. The evidence that has been adduced by the plaintiff for proving the payment of consideration and for proving that the consideration went to satisfy antecedent debts has been accepted by my learned brother. My learned brother has come to a definite finding that "the defendants on their side have failed to prove that the consideration did not pass under the bond as stipulated in the document and that on the other hand there is clear evidence on the record to prove that the bond was for consideration". With this finding I am in respectful agreement. The Judicial Committee in *Thakur Bhagwan Singh* v. *Bishambar Nath*(2) observed that the onus of proof on the question whether there was no consideration or whether the full consideration stated in the mortgage had in fact

(1) (1923) L. R. 51 Ind. App. 129.
(2 (1940) A. I. R. (P. C.) 114.

1953.

D. S. DEBTA v. RAKHAHARI.

NARAYAN, J.

passed was wholly on the defendants and that it was not for the plaintiffs to prove this matter affirmatively. Their Lordships further pointed out that when the question is whether there was legal necessity for the borrowing the onus of proving that there was legal necessity was on the plaintiffs. In the same volume there is another decision of the Judicial Committee, *Seth Kishori Lal* v. *Bhawani Shankar*(1), in which their Lordships pointed out that the burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu Law permits the interest of the minor members to be taken from them. It need hardly be pointed out that if a debt is incurred for legal necessity by the manager of a Hindu family, be he the father or any other member of the family, it would be binding on the other members of the family and the estate. It is also well-established that the father can sell or mortgage the joint family property including his son's interest for his own personal benefit, provided the debt was antecedent to the alienation and was not incurred for an immoral purpose. Their Lordships of the Judicial Committee, therefore, observed that it is for the mortgagee to establish the conditions requisite for taking the interest of the minor members from them. The mere passing of consideration in this case would not enable the creditor to obtain a decree on the foot of the mortgage. But, if the payment of the consideration is established, as it has been in this case, the mortgagee can proceed against the mortgaged property if he is further able to prove either legal necessity for the debt incurred or that the debt had been contracted for satisfying antecedent debts. As it has been satisfactorily proved in this case that the consideration went to satisfy antecedent debts, the mortgagee is entitled to a decree, if the other contentions urged by the defendants are not fit to succeed.

(1) (1940) A. I. R. (P. C.) 145.

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

Mr. Mazumdar appearing for the defendants-respondents vehemently contended that the debts for the satisfaction of which the mortgage bond in suit is said to have been executed should be held to be *avyavaharika* debt and that consequently no decree can be passed as against the present defendants on the foot of the mortgage. The basis for the contention is that Nandlal had engaged in a fruitless litigation. Costs had been awarded in First Appeal no. 141 of 1928 and First Appeal no. 142 of 1928 in both of which Nandlal was a respondent. The appeals were allowed with costs throughout, and undoubtedly Nandlal was unsuccessful in that litigation. First Appeal 141 arose out of Suit no. 50 of 1926 which had been instituted by Purnima, and this suit was a suit in which the Court below had held that a certain decree obtained by Nandlal was vitiated by fraud. In spite of a finding that the decree obtained by Nandlal was vitiated by fraud, the Court below had held that Nandlal was entitled to all the properties which he had claimed except the Jerka property and, as such, that Court had vacated the decree only with regard to village Jerka. Purnima had appealed to this Court and the result of that appeal was that her suit no. 50 of 1926, was decreed in full. First Appeal no. 142 arose out of suit no. 3 of 1926 which had been instituted by Nandlal for a declaration that he had got Barhmottar right in a certain land. The basis for the claim made in this suit was that Nandlal's cousin, whose widow is Purnima Debya and whose daughter is Amodebala, had died in a state of jointness with him and consequently neither his widows nor Amodebala could inherit his property. The finding of this Court was that Nandlal's brother had separated from Nandlal in his lifetime and that Nandlal was consequently not entitled to the property claimed by him. The question which arises is whether the decree for costs awarded in such litigations is

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

binding on the son and the widow of Nandlal. The general rule, of course, is that the sons, grandsons and great-grandsons are bound to pay all the debt contracted by the father, grandfather or great-grand father, except debts which are regarded as immoral or illegal. The debts excepted have been mentioned in important treatises on Hindu Law and also in several authoritative decisions, and they are as follows :—

" (1) debts for spirituous liquors;

(2) debts due for losses at play;

(3) debts due for promises made without consideration;

(4) debts contracted under the influence of lust or wrath;

(5) debts for being surety for the appearance or for the honesty of another;

(6) unpaid fines;

(7) unpaid tolls; and

(8) any debt which is *avyavaharika* ..... "

A decree for costs obtained in the circumstances indicated above, according to the contentions urged before us, has to be regarded as coming within clause (8), that is an '*avyavaharika*' debt. The meaning of the expression "*avyavaharika*" has also been explained in several decisions, and the Bombay High Court in *Durbar Khachar Shri Odha Ala* v. *Khachar Harsur Oghad*(1) treated the expression "not *vyavaharika*" as equivalent to "unusual" or "not sanctioned by law or custom". Mookerjee J. in *Chhakauri Mahton* v. *Ganga Prasad*(2) was not satisfied that this interpretation was accurate, and in his opinion the term "*vyavaharika*" may be accurately rendered as equivalent to "lawful, usual or customary". I do not consider it necessary to refer to the Sanskrit texts bearing on the subject, because, in my opinion, there is no reason why we should not accept the interpretation that has been given by the Judicial Committee in *Hemraj* v. *Khem Chand*(3). Their Lordships in

(1) (1908) I. L. R. 32 Bom. 348.
(2) (1911) I. L. R. 39 Cal. 862.
(3) (1943) L. R. 70 Ind. App. 171.

1950.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

this case, while recognizing the sharp difference of opinion as regards the precise significance of the term, accepted Colebrooke's translation and pointed out that the translation of the term as given by Colebrooke made the nearest approach to the true conception of the term as used in the Smriti text and might well be taken to represent its correct meaning. Sir Madhavan Nair who delivered the judgment of the Board said that in their Lordships' view the term did not admit of a more precise definition. In Colebrooke's opinion '*avyava-harika*' means a debt for a cause 'repugnant to good morals'. The interpretation put by the Judicial Committee on the word should be accepted, and a Bench of this court in a very recent decision *Kirit Singh* v. *Mt. Chandra Kali*(1) following the decision of the Judicial Committee in *Hemraj* v. *Khem Chand*(2) held that a decree for costs against a Hindu father who was a defendant in a suit for title and possession could not be said to be *avyavaharika* where the father resisted the suit on the strength of a *hukum-nama* which was found to be not genuine. This recent Bench decision of this Court is binding on us, but Mr. Mazumdar strenuously relied on an earlier Bench decision of this Court reported in *Darbeshwari* v. *Raghunath*(3).

The facts of *Darbeshwari* v. *Raghunath*(3) are shortly these. One Tejan Tiwari as the nearest agnate of one Bisundayal Tiwari deceased had succeeded to his properties after his death. Tejan sold the properties which he had inherited to Darbeshwari who obtained possession thereof. Several years after one Sarjug Prasad obtained a sale-deed from one Ramphal Dubey who claimed to be Bisundayal's daughter's son. Sarjug having failed to obtain possession instituted a suit against the defendant Darbeshwari for recovery of possession of the lands alleged to have been purchased by him. The Court of first instance passed a

(1) (1951) I. L. R. 30 Pat. 826.
(2) (1943) L. R. 70 Ind. App. 171.
(3) (1949) I. L. R. 28 Pat. 165.

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

decree in his favour, but on appeal the District Judge reversed its decision. A Second Appeal filed in this Court was dismissed and costs were awarded to the defendant no. 1 Darbeshwari. The decree for costs was executed, and in execution of the decree the defendant no. 1 Darbeshwari purchased the entire joint family property, and the auction sale was followed by delivery of possession. Sarjug's son then instituted a suit alleging that the decree for costs was an immoral debt and that his share in the joint family property had been wrongly sold. The defendant no. 1 contested the suit mainly on the ground that the plaintiff was under pious obligation to pay the decree for costs passed against his father. The Subordinate Judge held that Sarjug Prasad had made a false claim and that the decree for costs was consequently an *avyavaharika* debt and he granted a decree in favour of the plaintiff declaring his title to half share in the family estate. The defendant no. 1 Darbeshwari then preferred an appeal to this Court, and Ramaswami J. with whom Imam J. concurred held that Sarjug's claim in the previous suit was dishonest and fraudulent, that the decree for costs was in the nature of an *avyavaharika* debt and that therefore the interest of Raghunath, the son of Sarjug, was not liable to be sold in execution. In the judgment of Ramaswami J., there is a distinct finding to the effect that before instituting his suit Sarjug knew very well that Bisundayal had no daughter and that Ramphal was not his grandson and had no title to the property which could be conveyed by the sale-deed to him. After a perusal of this judgment one must feel that his Lordship was very much influenced by the consideration that Sarjug, when he instituted the suit, was actuated by a dishonest motive, inasmuch as he knew full well that Bisundayal had no daughter. His Lordship proceeds to say that on this conclusion of fact the question of law is whether the debt is *avyavaharika* and whether the plaintiff's share in the joint family estate

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

was validly sold in execution of the decree. Ramaswami J. distinguished the case of *Hemraj* v. *Khem Chand*(1) with the observation that the Judicial Committee had held in that case that the father's debt at its inception was a just and true debt and his subsequent dishonest conduct would not make it *avyavaharika* or render the shares of the son exempt from execution of the decree for payment of the debt. In the case of *Hemraj* v. *Khem Chand*(1) a partition decree had been passed in terms of an award, and it was a suit to which two members of a joint family, namely Hemraj and Danpal, were parties. By virtue of the award a promissory note had been allotted to Hemraj, besides other items of property and this promissory note was a document standing in the name of Danpal. Though it was Danpal who had advanced the handnote money out of the family funds it was provided under the award that Danpal should produce the handnote within seven days from the date of the decree for the benefit of Hemraj. Danpal, however, did not produce the handnote until it had become time-barred. It is further very important to note so far as the facts of that case are concerned that Danpal had filed another handnote, dated June 21st, 1926, which was held to be a forgery. The proceedings showed that Danpal had allowed the promissory note to become time-barred by acting fraudulently towards Hemraj. When Hemraj filed a suit in the Court of the Subordinate Judge of Agra for the amount due under the promissory note, making the executants of the note, defendants 1 to 3, and Danpal, defendant no. 4, the Subordinate Judge remarked as follows :

" Danpal defendant has all along been acting dishonestly towards the plaintiff, and he cannot be allowed to take advantage of his cleverness and fraud."

Danpal preferred an appeal to the High Court against the decree passed by the Subordinate Judge, and the High Court observed :

(1) (1943) L. R. 70 Ind. App. 171.

"We consider that the duty was cast on him (Danpal) of making over to the plaintiff the documents in regard to this particular debt due from defendants 1 to 3, and we consider that he has not proved that he carried out that duty."

These findings undoubtedly amounted to a finding of fraud as against Danpal, and when Hemraj filed an application for the execution of the decree an objection was taken by the sons or heirs of Danpal to the effect that the debt had been created on account of the misconduct and stupidity of Danpal, and consequently there was no liability on their part to pay the debt. Even if Ramaswami J. could distinguish the facts of the Privy Council case from the facts of the case before him in the manner in which he has done. I do not think that the principle that has been laid down by their Lordships of the Judicial Committee cannot be invoked by the plaintiff-appellant in this present case before us. This appears to me to be a much stronger case for the creditor than the one which had to be decided by their Lordships of the Judicial Committee in the case of *Hemraj* v. *Khem Chand*(1). In this case Nandlal was claiming properties which had once belonged to his cousin Ramlal according to the rule of survivorship, and the learned Subordinate Judge has rightly pointed out that Nandlal was fighting out the suit not only for his own benefit but also for the benefit of his children and wives. The family having been governed by the Mitakshara school of Hindu law, the question naturally arose whether Nandlal was living separate from Ramlal, or, being the surviving member of the joint family, had succeeded to the entire family properties after Ramlal's death. A Hindu who comes forward with a plea of jointness cannot easily be characterised as a dishonest person. And it is important to note that the court of first instance had actually decided the suit, in favour of Nandlal. One of the suits was a suit instituted by Purnima for setting aside the decree obtained by Nandlal in Title Suit no. 48 of 1923 on the ground of fraud, and the other suit was a suit instituted by Nandlal Ojha upon the allegation that

(1) (1943) L. R. 70 Ind. App. 171.

1953.

D. S. DEBTA v. RAKHAHARI.

NARAYAN, J.

Ramlal Ojha had died in a state of jointness with him. The main relief sought was that the plaintiff had *barkmottar* right in the suit land and that the widows or the daughter of Ramlal had no right thereto. The decree that had been obtained in Title Suit no. 48 of 1923 was held by this Court to be a fraudulent one and was set aside. The sole ground on which the decree for costs is said to be an *avyavaharika* debt is this finding of the Court that the decree that had been obtained by Nandlal in Suit no. 48 of 1923 was a fraudulent one. If it is at all necessary to distinguish the decision of Imam and Ramaswami JJ., in this case, I have only to point out that their Lordships were satisfied on the evidence adduced in the very case before them that before instituting the previous suit Sarjug had known that Bisundayal had no daughter. We in this case cannot be satisfied on the evidence which is forthcoming, apart from the findings recorded in the judgment of this Court by Fazl Ali and Wort JJ., that the decree that had been obtained against Purnima was really fraudulent. And the principle that had been laid down by the Judicial Committee in *Hemraj* v. *Khem Chand*(1) can easily be invoked in this case, because in the case before their Lordships as well there was a clear finding to the effect that Danpal had fraudulently withheld the promissory note which had been allotted to Hemraj. Hemraj could not have been able to obtain a decree against Danpal for the amount due on the promissory note which had become time-barred unless it had been established that the latter had fraudulently withheld the promissory note, thereby causing serious loss to Hemraj. The conduct of Danpal was certainly fraudulent and, but for the fraud perpetrated by him, there could be no question of Hemraj obtaining a decree against him for the amount due on a promissory note executed by others.

(1) (1943) L. R. 70 Ind. App. 171.

1953.

D. S. DEBTA v. RAKHAHARI.

NARAYAN, J.

In this case before us there was a decree obtained in a Court of law, and while one side had put forward the contention that the decree was a valid one and had been honestly obtained, the other side contended that the decree had been obtained by fraud. Merely because this Court set aside the decree on the ground of fraud, it cannot be held with certitude in this case that the decree was really a fraudulent one, but in the case of *Hemraj* v. *Khem Chand*(1) it was a position established beyond all reasonable doubt that Danpal had suppressed the handnote till it became time-barred. Unless this would have been established, there could not be any case made out against Danpal, and because the handnote that had been actually filed by Danpal was a forged one, that added to the enormity of the fraud. Still, their Lordships of the Judicial Committee held that the sons were liable, and his Lordship Sir Madhavan Nair observed as follows:

"If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-discharge of his debts; but this position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed."

Their Lordships further observed that it appears to be clear upon principle, and upon authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If on such examination it is found that at its inception the debt was not tarnished

(1) (1943) L. R. 70 Ind. App. 171.

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

with immorality or illegality, then it must be held that it would be binding on the son. The decisions of the Madras High Court in *Ramasubramania* v. *Sirakami Ammal*(1) and in *Natasayyan* v. *Ponnusami*(2) were quoted with approval. And I should like to quote the following passage from the judgment in *Natasayyan* v. *Ponnusami*(2):

> "Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled money he has unlawfully retained."

About the decree for costs of a litigation awarded by a Court of justice it cannot be said that the father was not liable to pay it in the ordinary course, and a judgment debt is certainly to be regarded as a debt of the most sacred obligation. While commenting on the conduct of Danpal who had suppressed the hand-note, their Lordships observed as follows:

> "The subsequent dishonest conduct of Danpal, which led to the suit and the decree, so much relied upon by the Courts in India and made the basis of their decision, cannot, in their Lordships' view, affect the nature of the father's debt, which at its inception was a just and true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has

(1) (1925) A. I. R. (Mad.) 841.
(2) (1892) I. L. R. 16 Mad. 99.

1953.

D. S. DEBYA v. RAKHAHARI.

been shown by the respondents, the debt sought to be realised is not an *avyavaharika* debt and the appellants are therefore entitled to proceed against the ancestral property in their hands in execution of the decree for payment of that debt."

NARAYAN, J.

I respectfully agree with the view of Lakshmikanta Jha, C. J. in *Kirit Singh* v. *Mt. Chandra Kali*(1) that if the Court in exercise of its discretion had awarded costs, this liability cannot be said to have been created on account of any immoral conduct (of Nandlal in this case). The conduct of Nandlal before the institution of the suits in which the costs were awarded cannot be taken into account just as the fraudulent conduct of Danpal was not taken into account by their Lordships of the Judicial Committee. As pointed out by the Madras High Court in *Ramasubramnia* v. *Sivakami Ammal*(2) the exception provided under the Hindu law could not be extended to transactions however unconscientiously imprudent or unreasonable they might be. The son can claim immunity only when the father's conduct is "utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest". The case of *Chhakauri Mahton* v. *Ganga Prasad*(3) is also referred to in the judgment of their Lordships in *Hemraj* v. *Khem Chand*(4) and in this case Mookerjee, J. had pointed out that there was no substantial difference between the principle of the case in which a person was under an obligation to repay money which he had actually borrowed and the case in which he was bound to discharge an obligation created by a judgment of Court. To quote the language used by Mookerjee, J., "after a decree has been made in favour of the successful plaintiff, he is entitled to realise from his defeated opponent a sum of money precisely in the same manner

(1) (1951) I. L. R. 30 Pat. 826.
(2) (1925) A. I. R. (Mad.) 841.
(3) (1911) I. L. R. 39 Cal. 662.
(4) (1943) L. R. 70 Ind. App. 171.

1953.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

as if he had actually advanced to the latter a sum of money by way of loan '. The conduct of the opponent before or after the decree would be an irrelevant consideration. Chatterji, J., in the case of *Prayag Sahu* v. *Kasi Sahu*(1) pointed out that a decree for costs could not come within the meaning of the word "dand", as used in the tent of Yagnavalkya inasmuch as the Hindu Courts of Justice did not allow costs to successful litigants but imposed upon the party who took a false plea a fine payable to the king. Such a debt could not, therefore, be characterised as *avyavaharika*. The other important relevant decisions have been referred to in the judgment of Lakshmikanta Jha, C. J, in the case of *Kirit Singh* v. *Mt. Chandra Kali*(2). I respectfully agree with his Lordship's view that cases which lay down *dicta* which are not in consonance with the decision of the Judicial Committee in *Hemraj's case*(3) should not be followed. Some of the observations, I may respectfully say, that have been made by Ramaswami J., in *Darbeshwari* v. *Raghunath*(4) cannot also be followed in view of what has been held by the Judicial Committee, though it is manifest that his Lordship's final decision was based on the particular facts of the case before him. I, therefore, agree with my learned brother that the contention that the decree for costs should be regarded as an *avyavaharika* debt must be repelled.

I agree with my learned brother that the provisions of section 65 and section 66 of the Evidence Act have not been properly complied with and, as such, the certified copy of the mortgage bond could not be taken in evidence. In a very recent decision of the Calcutta High Court reported in *Nityananda Roy* v. *Rashbehari Roy*(5), the well-known principle has been

(1) (1910) 11 Cal. L. J. 599.
(2) (1951) I. L. R. 30 Pat. 826.
(3) (1943) L. R. 70 Ind. App. 171.
(4) (1949) I. L. R. 28 Pat. 165.
(5) (1953) A. I. R. (Cal.) 456.

1953

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

reiterated, and it has been emphasised that in order that secondary evidence of documents mentioned in section 65(*a*) may be given, it is essential that the procedure laid down in section 66 should be strictly complied with, and that where no notice as required by section 66 is given the secondary evidence is not admissible. The loss of the document has not been established in this case. What is established is only this much that in the compromise petition that had been filed by the plaintiff and Beni Madhab Sarangi, the brother of the plaintiff's husband, in suit no. 28 of 1933 which was a suit for partition, the latter had stated that he would make over the original document to the lady after searching out the same. This compromise was arrived at about eleven years before the institution of this suit, and it does not appear that the lady ever made any serious demand for the document. Though at one time the relations between the lady and her husband's brother were very much strained, the learned Subordinate Judge has pointed out that there is no ground for holding that the relations between them are still strained. Unfortunately, the learned Subordinate Judge had marked the certified copy as an exhibit without considering as to how far secondary evidence was admissible under the circumstances of the case, but certainly in the judgment he appears to have correctly held that the document could not be admitted on account of the failure of the plaintiff to comply with the provisions of section 65 and section 66 of the Evidence Act. But, I think I ought to mention that in the written-statement there is an admission to the effect that there was a mortgage bond for Rs. 2,349 executed by Nandlal in the name of the plaintiff. The written-statement however states several other facts with regard to the document, namely, the facts that the plaintiff or her husband had not advanced any cash money at the time of the execution of the bond and that the document was really intended to be a document in favour of the ladies Amodebala and Purnima on

1950.

D. S. DEBYA v. RAKHAHARI.

NARAYAN, J.

whose behalf the plaintiff's husband was acting as a lawyer in the suits which gave rise to First Appeals nos. 141 and 142. It is further stated in the written-statement that for suppressing the payments endorsed on the bond, the mortgage bond has not been produced by the plaintiff. The law appears to be that where a person uses the admission of another as evidence, the whole admission has to be put in. A defendant's admission if taken at all must be taken as a whole, and there are several rulings in which this principle has been stressed. I may cite the case of *Motaphoy Mulla Essabhoy* v. *Mulji Haridas*(1) in which their Lordships said that though it is permissible for a tribunal to accept part and to reject the rest of any witness's testimony, an admission in pleading cannot be so dissected, and that if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. Section 58 of the Evidence Act is in these terms:

> "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Analogous to it are the provisions of rule 5 of Order VIII of the Code of Civil Procedure, and there is a proviso attached to section 58 as well as to rule 5 which lays down that 'the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions'. In this case there were good grounds for the Court requiring the facts admitted to be proved otherwise than by such admissions. While section 58 refers to the "rule of pleading in force at the time", rule 5 says, that the allegation of fact in the plaint shall be taken to be admitted except as against a person under disability. The defendant no. 1 is a minor, and the defendant no. 2 is a *pardanashin* lady, and we see no reason to differ from the

(1) (1915) L. R. 42 Ind. App. 198.

1953.

D. S. DEBYA v. RAKHAHARI. NARAYAN, J.

finding of the learned Subordinate Judge that payments had been made towards the mortgage bond for which no credit has been given by the plaintiff. The conduct of the plaintiff in withholding the document is, therefore, a fraudulent one, and if there were payments, we are not able to have a correct account of the amount due after crediting the payments. The minor defendant can legitimately demand an account of the amount which was due on the basis of the mortgage bond after crediting the payments, and because the original bond has been withheld it is not possible to know how the payments were credited, and therefore it is not proper to pass a decree against the defendants in this suit. The finding of the learned Subordinate Judge that the original bond has been intentionally suppressed, though it is not supported by any direct evidence, is strongly supported by the circumstances of the case. The payments have not been acknowledged, the steps required by law for the production of the original document have not been taken, and it is very unlikely that for a period of eleven years after the compromise the plaintiff would not care to demand from Beni Madhab, her husband's brother, the mortgage bond to which she was entitled.

The suit must, therefore, fail, and I do not express myself on the question as to whether the claim as against Dasumoni, the defendant no. 2, is barred or not. If the secondary evidence would have been admissible and if it would not have been found that the plaintiff has fraudulently withheld the document, it would have been possible to pass a decree at least against the defendant no. 1 and therefore the question whether the claim as against Dasumoni Debya is barred or not is not very material in the case. In the result, therefore, I agree to the order proposed by my learned brother.

K. D.

Appeal dismissed.

SUPREME COURT

(Application for leave to Appeal.)

Before Imam, A. C. J. and Narayan, J.

1953.

July, 27.
August, 5.

BASUDEVANAND

v.

R. S. RASTOGI.*

Constitution of India, Article 133—"*final order*", *meaning of—tests of finality—explanation to Article* 132, *whether material—High Court rejecting objection to execution in appeal—order, whether appealable.*

The explanation to Article 132 of the Constitution regarding the meaning of "final order" cannot be applied to the provisions of Article 133 of the Constitution.

The test of finality is whether the order finally disposes of the rights of the parties. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under Article 133 of the Constitution.

Where in an appeal against an order in execution the High Court over-ruled the objection to the execution;

Held, that the order of the High Court was not a "final order" within the meaning of Article 133 of the Constitution and as such was not appealable.

Abdul Rahman v. *D. K. Cassim and sons*(1) and *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratan chand*(2), relied on.

Kuppuswami Rao v. *The King*(3), *Gaya Electric Supply Co., Ltd.* v. *State of Bihar*(4) and *Salaman* v. *Warner*(5), referred to.

* Supreme Court Appeal no. 55 of 1953. In the matter of an application under Article 133 of the Constitution of India.

(1) (1932) L. R. 60 Ind. App. 76.
(2) (1920) L. R. 47 Ind. App. 124.
(3) (1949) A. I. R. (F. C.) 1.
(4) (1951) I. L. R. 30 Pat. 853.
(5) (1891) 1 Q. B. D. 734.

Application for leave to appeal.

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

S. C. Sinha, for the petitioner.

K. D. Chatterji and *Chuni Lall*, for the opposite-party.

IMAM, A. C. J.—This is an application for a certificate under Article 133 of the Constitution of India that the case fulfils the requirements of the said Article and is otherwise a fit case for appeal to the Supreme Court. It is unnecessary to state the facts which are to be found in the order of this Court. For the purpose of the present application, however, it is sufficient to state that in an execution proceeding in the court of the Subordinate Judge at Hazaribagh an objection was taken that the proceedings in execution could no longer proceed in view of the provisions of section 4(*d*) of the Bihar Land Reforms Act. The Subordinate Judge found in favour of the objection and ordered the dropping of the execution proceedings. Against his order there was an appeal to this Court and it was held here that the provisions of section 4(*d*) of the Land Reforms Act did not stand in the way of the execution proceedings having regard to the facts and the circumstances appearing in the case. It was further held by this Court that the objection that section 4(*d*) of the Land Reforms Act stood in the way of the continuance of the execution proceedings could not be raised on the ground of constructive *res judicata*, having regard to the order of the District Judge of Patna, dated the 6th of December, 1952, declaring that the provisions of section 4(*d*) of the Land Reforms Act was not a bar to the execution proceedings. This Court accordingly held that Raghubir Saran Rastogi, appellant, was entitled to execute the mortgage decree by attaching

1953.

BASUDEVANAND v. R. S. RASTOGI.

IMAM, A. C. J.

the amount of Rs. 83,000, being the compensation money paid by the Central Government for the four villages of Mahal Gaddi Masnodih, and set aside the order of the Subordinate Judge, dated the 8th of December, 1952, by which he held that the execution proceedings could not proceed in view of the provisions of section 4(*d*) of the Land Reforms Act.

There can be no question that the value of the subject-matter of the dispute in the court of first instance and still in dispute in the appeal is not less than Rs. 20,000. There can also be no question that the order of this Court in the appeal was an order of reversal. The main consideration which arises in this case is as to whether the order of this Court is a final order. In Article 133 of the Constitution it is provided that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding if the High Court grants the requisite certificate. The order of this Court in the appeal was certainly not a decree it certainly was a judgment and an order.

As to what is the meaning of the words "judgment" and "decree" was considered by the Federal Court in *S. Kuppuswami Rao* v. *The King*(1), and the decision of the Federal Court as expressed by Kania, C. J. was in the following words :—

"In India, for civil suits, the words judgment and decree are defined in section 2, Civil Procedure Code, 1908. A judgment means the statement given by the Judge of the grounds of a decree or order passed by the Court. A decree is defined

"as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

(1) (1949) A. I. R. (F. C.) 1.

'As a judgment is only the grounds for an order, it is not the order, and this distinction is maintained by omitting the word judgment from section 109, Civil Procedure Code, which deals with the right of appeal to the Judicial Committee from the High Court. In that section a right of appeal is given against the decree or final order only. The definitions given in the Code are, however, for the purposes of the Code only. In our opinion, the decisions of the Courts in India show that the word 'judgment', as in England, means the determination of the rights of the parties in the matter brought before the Court."

The effect of the decision of this Court was to keep the execution proceedings alive and in those proceedings the rights of the parties have yet to be finally determined. The matter before the court of first instance was a proceeding for the execution of a decree. In execution proceedings various objections can be taken having regard to the particular circumstances of a case. In the present case an objection was taken that the execution proceedings could no longer proceed in view of the provisions of section 4(*d*) of the Land Reforms Act. The executing court thought that the objection was a valid one and dropped the execution proceedings. This Court, however, held that the objection was not a valid one, having regard to the interpretation given to the various provisions of the Land Reforms Act and also because the objection was concluded by the application of the principle of constructive *res judicata*. Although a vital issue was determined by this Court, the decision of this Court did not finally determine the rights of the parties in the execution proceedings. Although there was no specific order of remand made by this Court, the effect of the decision was to keep alive the execution proceedings because the order of the Subordinate Judge dropping the execution proceedings

1953.

BASUDEVANAND v. R. S. RASTOGI.

IMAM, A. C. J.

was set aside. There is, therefore, no judgment of this Court determining the rights of the parties in the matter brought before the Court, nor is there a final order to that effect. In the case of *Gaya Electric Supply Co., Ltd.* v. *State of Bihar*(1) various decisions in England and in India were reviewed in which it has been decided as to what is the meaning of the expression "final order". In *Salaman* v. *Warner*(2) Lord Esher M. R. dealing with the meaning of the expression "final order" observed :—

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

These observations of Lord Esher amply cover the present case, because on the objection raised the decision of the Subordinate Judge finally disposed of the matter, but the decision of this Court to the contrary allowed the execution proceedings to continue. In the case of *Abdul Rahman* v. *D. K. Cassim and sons*(3) Sir George Lowndes expressing the opinion of the Judicial Committee referred to the observations of Lord Cave in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand*(4) and observed :—

"The objection was upheld and the appeals were dismissed. Lord Cave in delivering the judgment of the Board laid down, as the result of an

(1) (1951) I. L. R. 30 Pat. 853.
(2) (1891) 1 Q. B. D. 734.
(3) (1932) L. R. 60 Ind. App. 76.
(4) (1920) L. R. 47 Ind. App. 124.

examination of certain cases decided in the English courts, that the test of finality is whether the order 'finally disposes of the rights of the parties', and he held that the order then under appeal did not finally dispose of those rights, but left them 'to be determined by the courts in the ordinary way'. It should be noted that the appellate court in India was of opinion that the order it had made 'went to the root of the suit, namely, the jurisdiction of the court to entertain it', and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109 (*a*) of the Code. Their Lordships would only add that the enforcement of this principle involves no practical hardship, inasmuch as, in a proper case, it is always open to the appellate court to give a special certificate under section 109(*c*). It was pointed out in argument that there is some divergence in the views expressed in the English cases upon which the judgment in *Ramchand Manjimal's case*(1) founds; that no doubt is so, but the rule deduced for guidance under the Indian Act is clear and unambiguous, and must, their Lordships think, be decisive in all cases where the question is whether an order is appealable to His Majesty in Council under the provisions of the section in question."

The view expressed by Sir George Lowndes has been consistently followed in India. Sir George Lowndes did not regard a decision as to whether the point raised went to the root of the suit, namely, the jurisdiction of the court to entertain it, as sufficient, and he thought that the finality must be a finality in relation to the suit. In the present suit the finality of the decision of this Court must be considered in

(1) (1920) L. R. 47 Ind. App. 124.

1953.

BASUDEVANAND v. R. S. BASTOGI.

IMAM, A. C. J.

relation to the execution proceedings. As the decision of this Court did not put an end to those proceedings, it could not be said that the decision was final in relation to the execution proceedings. After the decision of this Court the execution proceedings are still live proceedings in which the rights of the parties have still to be determined. In *Kuppuswami's case*(1) Kania, C. J. relied on the observations of Sir George Lowndes in holding that to constitute a final order it was not sufficient to decide an important or even a vital issue in the case, but the decision must not keep the matter alive and provide for its trial in the ordinary way. In my opinion, the decision of this Court was not a final order, nor was it a judgment which determined the rights of the parties in the matter brought before the Court.

It was, however, argued that the expression "final order" is also to be found in Article 132 of the Constitution and that the explanation to that Article states that the expression "final order" includes an order deciding an issue which if decided in favour of the appellant would be sufficient for the final disposal of the case. It is, however, to be noticed that the explanation is only for the purposes of the said Article. Article 132 of the Constitution provides for an appeal to the Supreme Court from any judgment, decree or final order of a High Court, whether in a civil, criminal or other proceeding, where the case involves a substantial question of law as to the interpretation of the Constitution. I do not think that the explanation to Article 132 stating as to what the expression "final order" means can be applied to the provisions of Article 133. The words "judgment, decree or final order" in Article 133 of the Constitution must be construed in the same manner as they were done in *Kuppuswami's case*(1) and the expression "final order" must be construed in the

(1) (1949) A. I. R. (F. C.) 1.

same manner as was done by Lord Cave and Sir George Lowndes. 1953.

BASUDEVANAND v. R. S. RASTOGI.

It was next urged that this was a fit case in which a certificate for leave to appeal to the Supreme Court could be granted under Article 133(1) (c) of the Constitution. Although the order of this Court decides an important question of law, I do not think it is possible to grant such a certificate.

IMAM, A. C. J.

I would accordingly dismiss the application with costs. Hearing fee Rs. 80.

NARAYAN, J.—I agree.

Leave refused.

K. D.

APPELLATE CRIMINAL.

Before Reuben, C. J. and Misra, J.,

STATE, THROUGH CHAIRMAN, C. MUNICIPALITY. 1953.

January, 8, 12. March, 20, 23. August, 17.

v.

ISHRI.*

Bihar and Orissa Municipal Act, 1922*(Bihar and Orissa Act VII of* 1922*), section* 180*, initiation of proceeding, whether barred—section* 375*, applicability and scope of—section* 392.

A continuing offence as contemplated by section 375 of the Bihar and Orissa Municipal Act, 1922 is an offence which is deemed to have been committed from day to day, the last date being the expiration of the period for which licence is required to be taken out. The requisite period of six months referred to in the section must be calculated from the last date of that period on which alone the offence could be deemed to have been committed afresh by a person violating the provisions of section 180 of the Act;

* Government Appeal no. 18 of 1951, against an order of Mr. K. P. Dubey, Magistrate with second class powers, Bhagalpur, dated the 30th December, 1950.

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

Held, therefore, that a person against whom a complaint was filed on the 31st of March, 1950 for keeping a pucca platform over a Municipal drain in the year 1949-50 and for not paying the licence fee and not renewing the licence for those years was guilty of an offence under section 180(2) of the Bihar and Orissa Municipal Act, 1922 and the prosecution was not barred by time;

Held, further, that pre-existing contractual rights are protected by section 392 of the Act but does not apply to rights which are inconsistent with the Act.

Lutti Singh v. *The Bihar Municipality*(1) and *Jai Narain* v. *Syed Ali Murtaza*(2), distinguished.

Howrah Municipality v *Barada Prasanna Pain*(3), *Noni Lal Sett* v. *Corporation of Calcutta*(4) and *N. K. Sarkar* v. *Howrah Municipality*(5), relied on.

Appeal by the State under section 417 of the Code of Criminal Procedure, 1898.

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

Standing Counsel, for the appellant.

Rajkishore Prasad and *Bindeshwari Prasad Sinha*, for the respondent.

MISRA, J.—This is one of a batch of six appeals preferred by the State of Bihar under section 417 of the Code of Criminal Procedure against the acquittal of the respondent by Mr. K. P. Dubey, Magistrate with second class powers at Bhagalpur, which have been heard together for the sake of convenience as they involve more or less identical questions of law. The respondent was prosecuted under section 180, clauses 2, 3 and 4, of the Bihar and Orissa Municipal

(1) (1897) 1 Cal. W. N. 492.
(2) (1951) A. I. R. (Pat.) 190.
(3) (1919) 31 Cal. L. J. 127.
(4) (1903) 7 Cal. W. N. 853.
(5) (1921) 22 Cr. L. J. 559.

Act, being Act VII of 1922, for "keeping a pucca platform in his building no. 85 situated in Bazar Road, Ward no. 2 Mohalla Bazar within the limit of Colgong Municipality in the year 1949-50 and also for not paying the license fee in respect of the aforesaid platform for the said year and also for not renewing the license for the same platform in the said year." A petition of complaint, exhibit 8, was filed before a Magistrate at Bhagalpur by Shri S. N. Mukherjee, M.C. in-charge, bearing date 31st of March, 1950. It contained also a reference to the fact that prosecution was sanctioned by the Chairman, Colgong Municipality.

The Municipality put in evidence the necessary documents to prove that the respondent kept the platform as alleged during the period in question (exhibits 1, 2 and 2/1) and the relevant resolutions passed by the Municipal Board on various dates (exhibits 3, 4, 5, 6 and 9) and a copy of memo. from the Senior Deputy Collector to the Chairman, Colgong Municipality, dated the 25th December, 1947 (exhibit 7) to show compliance with the formalities and the requirements of law before prosecution could be launched by the Municipality against the respondent.

The respondent raised a number of pleas against the prosecution case to show that no offence was committed. The main plea, however, was that the respondent derived his interest in the house in holding no. 85 and the platform appertaining thereto from Ram Charan Sahu, who executed a kabuliyat in favour of the Colgong Municipality on 11th July 1902 by which he was authorised to construct the platform or arches over the drain on condition of paying an annual rental of Re. 1. It was provided in that kabuliyat that the executant would have no objection to the arches being demolished if they were disapproved at any time by the Government or the officers, and

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

the Municipality would have absolute right to undertake the demolition. Accordingly it was urged on behalf of the respondent that it was not necessary for him to take out any licence for the maintenance of the platform or arches in question, nor was it necessary for him to pay any fee for the purpose over and above the amount mentioned in the kabuliyat as the annual rental.

The learned Magistrate, who tried the case, convicted the accused person and sentenced him to pay a fine of Rs. 15, in default to undergo simple imprisonment for ten days under section 180 (5) of the Bihar and Orissa Municipal Act. The respondent filed an appeal against the judgment and order of the learned Magistrate, and the case was remanded back to him for a fresh consideration. The learned Magistrate, on remand, however, acquitted the accused person. He accepted the evidence led on behalf of the Municipality on the questions of fact, but based his acquittal on the solitary ground

> "that the accused only objected to the payment of the increased rate. Since the main dispute is not with respect to taking out a license but the payment of the fee at the particular rate. The accused has got a kabuliyat (Ext. A) in support of his claim to pay at the rate of Re. 1 while the Municipality has got its right to realise at the rate of 4 annas per sq. foot for the platform by the resolution (Ext. 6) which has got the approval of the Government vide letter, dated the 25th December 1947 (Ext. 7). This is a question which a civil court alone is competent to decide."

Thus the acquittal was based upon a particular view of law with regard to the rights of the parties as governed by the kabuliyat (Ex. A) to which reference has been made.

The State of Bihar has filed the present appeal against that acquittal on the main ground that the question of law involved in the present case is one of considerable public importance as it governs the right of the Municipality to realise certain tax or fee, as it is empowered to do under the Municipal Act,

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI MISRA, J.

which is being affected by the decision in question. Learned Standing Counsel for the State contends that the order passed by the learned Magistarate is erroneous, because the real point for decision in the present case is not the interpretation of exhibit A, but the scope of the power of the Municipality. It may incidentally be mentioned that the Bihar and Orissa Municipal Act, 1922, was amended in 1947. This amendment modified the power of the Municipality in certain respects with regard to the rate at which the fee is to be levied. Learned Standing Counsel, with reference to this amended provision, has argued that this power cannot be curtailed by any other consideration. Section 180 of the Bihar and Orissa Municipal Act as amended reads as follows:—

"180. (1) No platform shall be erected, re-erected or extended upon or over any public road or drain without the previous sanction of the Commissioners.

(2) The owner of every platform, except platform which are used for giving such access to the houses as the Commissioners may consider necessary; shall if the Commissioners at a meeting so direct, take out a licence for keeping the platform.

(3) Every such licence shall remain in force for one year and shall be renewable annually.

(4) For every such licence there shall be paid a fee to be fixed by the Commissioners at a rate of not less than four annas nor more than one rupee for each square foot of the superficial area of the platform except such portion thereof as is used for giving such access to a house as the Commissioners may consider necessary.

Provided that different rates may be fixed by the Commissioners for different local areas according to the importance of the locality in the municipality.

(5) Any person who contravenes any of the provisions of this section shall be liable to a fine not exceeding fifty rupees."

It is pointed out that the Municipal Act is a special Act and the provisions of it will prevail over the provisions of any general enactment.

It is next urged that the respondent was prosecuted not for erecting or re-erecting or extending any

1958

STATE (THROUGH C. MUNICIPALITY) v. ISHRI MISRA, J.

platform which in fact he had already erected under the kabuliyat, exhibit A, but he was prosecuted under clause (2) which was meant to provide for the right of the Municipality to realise a license fee from every owner of a platform within the limits of the municipal area, as no one could keep such platforms without taking out a license for the purpose. The respondent undoubtedly had failed to take out a license and, therefore, he was guilty of the contravention of the provisions of this section and was liable to pay the necessary penalty under clause (5) of the section.

Mr. Rajkishore Prasad, who appears on behalf of the respondent, has raised the following points in answer to the arguments on behalf of the State. He is supported in his contentions by Mr. U. N. Sinha, who appears in some of these appeals and their arguments supplement each other. The main contention on behalf of the respondent is one of limitation based on section 375 of the Municipal Act. It is said that the offence in this case is alleged to have been committed sometime in the year 1949-50 and it was brought to the notice of the Chairman of the Municipality on the 8th June 1949 (exhibit 2) and as such the prosecution was beyond six months of the date of the first commission of that offence, as also beyond six months from the date when it was brought to the notice of the Chairman of the Municipal Board. He has referred in this connection to the provisions of section 375 which lays down the period of limitation for initiation of a prosecution for violation of any penal provisions of the Act as well as other matters. Section 375 of the Bihar and Orissa Municipal Act may, therefore, be quoted in extenso:—

"375. No prosecution for an offence under this Act or any by-law made in pursuance thereof shall be instituted without the order or consent of the Commissioners, and no such prosecution shall be instituted except within six months next after the commission of such offence unless the offence is continuous in its nature, in which case a prosecution may be instituted within six months of the date on which

the commission or existence of the offence was first brought to the notice of the Chairman of the municipality:

1953.

Provided that the failure to take out any licence under this Act shall be deemed to be a continuing offence until the expiration of the period for which such licence is required to be taken out."

(THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

It is urged that the omission in the present case is one of failure to take out a license under the Act, and it would undoubtedly be a continuing offence, but since the offence was committed, according to the prosecution case, at any time between 1949-50, the prosecution which was launched on 31st March 1950 fell beyond the period of six months from the date of the first commission of the offence. Since, however, it was continuing offence, prosecution might be started within six months of the date on which the commission or the existence of the offence was brought to the notice of the Chairman of the Municipality, but in this case it was brought to his notice much beyond the period of six months, as the documents on record will show, and hence prosecution was clearly barred under that section. I have carefully considered the argument on behalf of the respondent. At one time we were inclined to accept it, but on a fuller consideration it appears that the argument cannot succeed because in the case of a continuing offence, what the law contemplates is that it is an offence which is deemed to have been committed from day to day, the last date being the expiration of the period for which a license is required to be taken out. The requisite period of six months referred to in the section must, therefore, be calculated from the last date of that period on which alone the offence could be deemed to have been committed afresh by a person violating the provisions of section 180 of the Act. A contrary view, if accepted, as urged by learned Counsel on behalf of the respondent, would result in the position that, after the expiry of six months from the date when the matter was first brought to the notice of the Chairman of the Municipality, an offender will be deemed to be doing nothing

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

wrong in failing to take out a license and maintaining a platform. In that view, the proviso to the section which says " that the failure to take out any licence under this Act shall be deemed to be a continuing offence until the expiration of the period for which such licence is required to be taken out " would be rendered wholly nugatory. In fact this would curtail and modify the meaning of " continuing offence ". There is no warrant for such a view on the terms of section 375 of the Act. Mr. U. N. Sinha, who appears in some of the appeals, brought to our notice a case reported in *Lutti Singh* v. *The Bihar Municipality*(1) for the proposition he is trying to support before us. It is true that there appears to be an expression of opinion in general terms to that effect in that decision, but the learned Standing Counsel for the State has brought to our notice a decision of the Calcutta High Court reported in the *Chairman of the Howrah Municipality* v. *Berada Prasanna Pain*(2), where a contrary view has been expressed. The case reported in 1 Calcutta Weekly Notes, 492 is a decision under the Bengal Municipal Act of 1884 whereas the case reported in 31 Calcutta Law Journal, 127 relates to the Calcutta Municipal Act III of 1899. Section 353 of the Bengal Municipal Act and section 631 of the Calcutta Municipal Act correspond to section 375 of the Bihar and Orissa Municipal Act, VII of 1922. The case of *Lutti Singh* v. *The Bihar Municipality*(1) was an *ex parte* decision where the respondent Municipality was not represented and we are unable to accept the view of law expressed in that judgment. In the case of *Chairman of the Howrah Municipality* v. *Barada Prasanna Pain*(2), it was distinctly held that the prosecution started within the period of limitation from the last day of the commission of the continuing

(1) (1897) 1 Cal. W. N. 492.
(22 (1919) 31 Cal. L. J. 127.

1958.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

offence was not time-barred. The Howrah Municipality started, as required, a prosecution against a pleader failing to take out a licence. It may be useful to refer to the observation of Richardson, J:

"But it by no means follows from that provision that the prosecution must be commenced within three months of the first of a number of days on which the offender practises without a license. The offence, as I have said, is committed afresh or continues to be committed on every day on which he practises without a license and the prosecution may be commenced within three months of the last of such days."

The period of limitation in that case was three months. There is a similar expression in the case of *Noni Lal Sett* v. *Corporation of Calcutta*(1). The point has also been indirectly considered in *N. K. Sarkar* v. *Howrah Municipality*(2) and other decisions. It must accordingly be held that prosecution is not barred under section 375 of the Act. The provision with regard to the institution of the prosecution within six months of the date on which the offence is brought to the notice of the Chairman of the Municipality is intended to widen the power of the Municipality and not to curtail it, nor to modify the meaning of continuing offence.

The next substantial point urged on behalf of the respondent is that in view of section 392 of the Bihar and Orissa Municipal Act, the rights and liabilities of the parties arising out of the contract, exhibit A, must be held to be governed by the terms thereof. The argument has been like this. The Bihar and Orissa Municipal Act was enacted in the year 1922, and prior to that, the Bengal Municipal Act, Act III

(1) (1903) 7 Cal. W. N. 853.

(2) (1921) 22 Cr. L. J. 559.

1958.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

of 1884, governed the municipalities within the limits of what later on came to be the province of Bihar. In the year 1902, the Colgong Municipality fell within the province of Bengal as it was then constituted. There was no provision like section 180 of the present Act with regard to the rights of a municipality to levy and realise a fee for the erection or maintenance of platforms under Bengal Municipal Act (Act III of 1884) and it was necessary for the parties to enter into a contract so that the respondent could erect the platform or arches in question. When the present Act came into force in 1922, section 392, which reads as follows:—

> "All property, all rights of whatever kind used, enjoyed or possessed by, and all interests of whatever kind owned by, or vested in, or held in trust by or for the commissioners of a municipality constituted under the Bengal Municipal Act, 1884, as well as all liabilities legally subsisting against the said commissioners, shall pass to the commissioners of the municipality as constituted under this Act."

made provision for safeguarding contractual rights which arose under the Act preceding that of 1922. It is said that in view of this provision it must be held that section 180 would not apply to a case which was governed by section 392 of the Act. The argument, on examination, cannot be sustained. Section 392 of the Act refers only to rights and liabilities which the municipality acquired or undertook as a corporate body prior to 1922, but it did not, and could not, fetter any rights which the successor-in-office of the then Municipal Board would enjoy under any subsequent enactment. It transpired in the course of discussion on the point that what was granted to the respondent was a lease and not a license, and what was payable by the respondent to the Municipality was a rental as adverted to in the kabuliyat, and not merely a license fee. It was, therefore, urged that the rights of the lessee were certainly protected by section 392 of the Act and could not be modified or affected by the right to levy

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

a tax or fee conferred on the Municipality at a subsequent period. Reference was made to *Jai Narain* v. *Syed Ali Murtaza*(1) for the proposition that the respondent acquired a right of occupation of the platform, and as such he had not only possession but exclusive possession which would give the kabuliyat the character of a lease. We have considered A. I. R. 1951, Patna, 190 and also the other decisions which have been referred to in that case, but I am satisfied that the case cited does not bear out the contention of the learned Counsel for the respondent It considers the well-known criteria to be kept in view in deciding whether a particular document is a lease or a license, but does not carry the matter further than that. The preliminary point to be considered is the definition of section 105 of the Transfer of Property Act and section 52 of the Easements Act where in different contexts the terms lease and license have been defined. A bare reading of the section would disclose that 'lease' presupposes the creation of an interest in immovable property by the lessor in favour of the lessee. In the present case, what is referred to in the kabuliyat is the drain which would continue to be in possession and ownership of the municipality as before. What the respondent was granted under the document was merely the right to erect at his convenience certain platforms which were not in existence. The platforms, apart from the drain over which they stood could not be held to be immovable property as defined in section 3 of the Transfer of Property Act itself. In any case, it was merely a right to do something over the drain but not the creation of any interest in the drain itself, and, therefore, the grant of this right to the respondent could not be construed as the right to be enjoyed by him as a lessee. Section 392 of the Bihar and Orissa Municipal Act, therefore, does not help the respondent. But assuming for the sake of argument that

(1) (1951) A. I. R. (Pat.) 190.

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

it is so, the respondent still cannot escape liability for not taking out a license, because section 180 (2) of the Act provides for the right of a Municipal Board to levy a fee for the maintenance of certain platform within the municipal area. This right must be over and above any right the respondent may have acquired to erect a platform. The extra burden—if at all it can be called an extra burden—which is imposed on the respondent by section 180 of the Act cannot be challenged by any owner of the platform, because it is within the competence of the legislature in a special enactment to provide for the imposition of any tax or fee. It is not contended on behalf of the respondent that section 180 is *ultra vires*, and as long as it is good law, the respondent is bound to pay the fee as required, irrespective of whether what he was granted was the right of a lessee or a licensee. The learned Standing Counsel has drawn our attention to section 236 of the Bengal Municipal Act XV of 1932 where the Legislature incorporated a saving clause in respect of platforms erected prior to the enactment of that statute and the same not having been done in the present Bihar and Orissa Act of 1922, it should be held that the Legislature in this case intended no exception. The argument has a relevant bearing but will, of course, not be conclusive as the absence of such an explicit provision will not necessarily rule out the argument, our attention has also been drawn to Craies on Statute Law, 5th edition, pages 232, 250 and 522 in the main for the proposition that if a contract involves in its operation either directly or collaterally the doing of something which would be in contravention of a statute creating duties or imposing obligation, it would be void, and, likewise, if any statute is enacted for public benefit, it cannot be dispensed with. Since they converge upon the same conclusion at which we have arrived, it is unnecessary to enter into any elaborate discussion of

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

the matter. Allied to this branch of the argument is another line taken up by Mr. Rajkishore Prasad, which is that the Municipality is estopped from going against the contract. In disposing of the argument above, I have answered in substance this argument as well, as there is no estoppel against a statute, and, as a matter of fact, the question of estoppel cannot arise in such legislations which define and enlarge the powers of a body corporate from time to time passed by the Legislature competent to legislate on the subject. Mr. Rajkishore Prasad, who adopted the argument of Mr. U. N. Sinha, over and above those he advanced, therefore, can well be said to have raised the point of want of sanction and proper promulgation of the provisions of the Bihar and Orissa Municipal Act. We have considered them and I can see no force in these contentions either. The evidence on record, particularly the resolutions passed at various meetings of the Municipal Board, would show that the Board had considered duly the question of the violation of the provisions of section 180 in pursuance of which the Tax Daroga prepared a list of the platforms within the municipal area duly signed and verified by Mr. K. P. Mandal, Chairman, Colgong Municipality. The very petition of complaint, exhibit 8, would show that the Chairman of the Colgong Municipality also ordered prosecution of the respondent under clauses 2, 3, and 4 of the Act. There is, therefore, nothing defective in the sanction so as to invalidate the prosecution, nor is there anything in the promulgation of the new provisions of section 180 which would go against the validity of the prosecution in this case. The section as it stood prior to its amendment in 1947 fixed the minimum limit to two annas and maximum limit to eight annas for each square foot of superficial area whereas it was raised to four annas and one rupee respectively by the amendment. The learned Magistrate referred to the various documents on record to show that the

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

increased rate of fee was duly approved at a meeting of the Colgong Municipality (exhibit 6) sanctioned by the Government by Memo. no. 12614, dated 25th December 1947 (exhibit 7). All this taken together with the evidence of the Tax Daroga, who proved the preparation of the Register of Platforms and the non-payment of the license fee by the respondent, would show that he had due notice of the increased rate of payment under the amended provision of the Act. As a matter of fact, the learned Magistrate has observed, as noted above, that the main contention of the defence is that there was an agreement with respect to this platform by which he was to pay Re. 1 per annum as the rent of the platform. Even the written statements actually filed do not raise the point of want of notice, and section 356 of the Act, to which reference was made by Mr. U. N. Sinha, does not apply to this case, as the approval of the enhanced rate by the Municipal Commissioners is not one of the provisions which the Act directs to be published. The amended provision is not even a bye-law, order, notice or other document contemplated under the section, and hence the question of its publication in the manner prescribed does not arise. This point must also fail.

A few minor points raised by Mr. Rajkishore Prasad in regard to section 403(1) of the Code of Criminal Procedure being a bar, however, have not been seriously pressed and need not be elaborately dealt with, as these arguments have obviously no substance in the case of a continuing offence where a new prosecution is for a new offence and the question of previous acquittal is immaterial. The acquittal relied upon in this case was by the appellate judgment in Appeal no. 20 of 1947.

Having come to the conclusions referred to above, it must be held that the judgment of the learned Magistrate is erroneous in law and it must be set

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

MISRA, J.

aside. The respondent is accordingly found guilty under section 180(2) of the Bihar and Orissa Municipal Act, 1922. He is convicted, therefore, of the offence under section 180(5), Bihar and Orissa Municipal Act. The question of sentence, however, is not of any material importance in the case. As a matter of fact, the State filed the appeal for an adjudication of the principle involved in the prosecution, and the respondent also stood upon a certain kind of contractual right as having been acquired under the kabuliyat executed by his predecessor-in-interest. The offence, therefore, is purely of a technical nature, and I accordingly impose a sentence of fine of Re. 1 only, in default to undergo simple imprisonment for one day.

REUBEN, C. J.—I agree and would like to add a few words.

Sub-section (1) of section 180 of the Municipal Act of 1922 relates to the erection, re-erection or extension of a platform. It is admitted that the platform with which we are concerned is in its original state. Hence sub-section (1) has no application. But sub-section (2), which is the relevant provision here, is in more general terms. It relates to " every platform except platforms which are used for giving such access to the houses as the Commissioners may consider necessary ". There is nothing in the terms of the sub-section to exclude from its application an already existing platform. Reliance is placed on the pre-existing contractual relationship between Ramcharan Sahu and the Municipality. Pre-existing contractual rights are protected by section 392 of the Act but this does not apply to rights which are inconsistant with the Act.

I was inclined at first to be impressed with the contention about limitation. A continuing offence is being committed at every moment during which it continues. Hence, under the main provision in

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

REUBEN, C. J.

section 375 a prosecution for a continuing offence would be entertainable till the expiry of six months after the cessation of the offence. Under the proviso the prosecution for a continuing offence "may be instituted within six months of the date on which the commission or *existence* of the offence was first brought to the notice of the Chairman of the Municipality". I have placed the word "existence" in italics. The "existence" of a continuing offence can be brought to the notice of the Chairman only while the offence is still continuing. That is to say the period of limitation under the proviso expires before the last date indicated by the main provision. At first sight it appeared to me that if the main provision was intended to apply to a continuing offence, the proviso was unnecessary, and therefore, since the proviso applies expressly to a continuing offence, it follows that the main provision has no application. On further consideration I am satisfied that this is not the right view. There is a purpose which the proviso serves even if the main provision applies to a continuing offence. There are cases in which the period of duration of a continuing offence is of importance, for instance, default after notice under sub-section (2) of section 289 of the Act. The effect of the proviso is to prevent the Municipality, by allowing the default to continue for a long time, to make the defaulter liable to an unreasonably heavy penalty. The Municipality must prosecute within six months of knowledge. If it does not, the defaulter will not be liable to penalty for the period beyond six months of the institution of the prosecution.

There is no force in the contention about promulgation. Section 356 of the Act has no application, and it is sufficient if knowledge, actual or constructive, is proved. In accordance with sub-section (2) of section 180 of the Act, the enforcement of the provision requiring licences for the

1953.

STATE (THROUGH C. MUNICIPALITY) v. ISHRI.

REUBEN, C. J.

maintenance of platforms was decided at a meeting of the Commissioners held on the 30th April 1948, (*vide* Ex. 5). Before this the rate of the fee had been decided and had been approved by Government (*vide* Exs. 6 and 7). Effect must have been given to the Resolution immediately and it is difficult to believe that the accused Isri Bhagat did not know of it. In fact the Tax Daroga (P. W. 1) mentions that there was an earlier case against this accused person "for not taking out licence and not paying the enhanced rate of rent". I may also refer to sub-section (1) of section 48 of the Act which provides that the minutes of the proceedings of all meetings of the Commissioners are open to the inspection of the tax-payers. The evidence is that at least as early as the 19th June 1950 the Tax Daroga and the President of the Municipality went to the spot and measured the platform for determining the fee payable. Even if Isri Bhagat did not know of the Resolution before, this was sufficient to put him on enquiry and he must be taken to have had constructive knowledge.

Appeal allowed.

S. H.

APPELLATE CIVIL.

Before Imam and Narayan, JJ.

1953.

August, 18, 17, 18, 19, 20.
September, 2.

A. KUMAR

v.

MT. SANJOGA.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 68, *scope of—usufructuary mortgage—mortgagor not in possession—mortgagee not getting possession—suit by mortgagee for possession, maintainability—representative of a deceased, how to be chosen—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXII.*

* Appeal from Original Decree nos. 234 and 237 of 1947, from a decision of Mr. Rajkishore Sinha, Additional Subordinate Judge, Arrah, dated the 29th March, 1947.

1952.

A. KUMAR v. MT. SANJOGA.

The provisions of section 68, Transfer of Property Act, 1882, are designed for the purpose of indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property, and they are provisions of an enabling nature. These provisions do not preclude a mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession. There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which section 68 of the Act empowers him to claim;

Held, *therefore*, that usufructuary mortgagee can sue for recovery of the mortgaged property even though his mortgagor was not in possession of the mortgaged property at the date the mortgage bond was executed.

Kanchan Singh v. *Musammat Jafri Begam*(1), followed.

Lal Narsingh Partab Bahadur Singh v. *Mohammad Yaqub Khan*(2), *Bechu Sahu* v. *Arjun Sahu*(3), *Modun Mohun Chowdhry* v. *Ashad Ally Beparee*(4), *Ram Padarath Singh* v. *Himar Singh*(5) and *Harnath Singh* v. *Maiya Ambika Devi*(6), relied on.

Where there are two rival claimants to the estate of a deceased, the plaintiff or the decree-holder has to choose the legal representative. One who appears to have the *prima facie* title may be preferred.

The conditions necessary for making the representation effective against the true representative are that the plaintiff or the decree-holder must have acted *bona fide* and the decree obtained must be free from fraud or collusion.

Sanna Govappa v. *Rodda Sanna Govappa*(7), relied on.

First appeal no. 234 by the plaintiffs.

(1) (1911) 10 Ind. Cas. 190.
(2) (1929) A. I. R. (P. C.) 139.
(3) (1917) 3 Pat. L. J. 162.
(4) (1883) I. L. R. 10 Cal. 68.
(5) (1941) I. L. R. 17 Lucknow 362.
(6) (1941) A. I. R. (Pat.) 301.
(7) (1929) A. I. R. (Mad.) 482.

1953.

A. KUMAR
v.
MT.
SANJOGA.

First appeal no. 237 by defendants 2 to 6.

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

Rajkishore Prasad and *Shivanugrah Narain*, for the appellants.

Kailash Roy, *Angad Ojha*, *B. K. Sharma* and *Gauri Shankar Prasad*, for the respondents.

NARAYAN, J.—These two appeals arise out of a suit for declaration of title and confirmation or recovery of possession with regard to 21 bighas 6 kathas 6 dhurs of land which was once the property of one Ramtahal Pandey and his three brothers, Sablaik Pandey, Ramyad Pandey and Dasrath Pandey. The brothers of Ramtahal had died before the survey, and according to the plaintiffs' allegation they had all died in a state of jointness with Ramtahal who as the surviving member of the joint family came into possession of the entire family property. Defendant no. 1, Musammat Sanjoga Kuer is the widow of Sablaik Pandey, and defendant no. 7 who died during the pendency of these appeals was the widow of Ramyad Pandey. The plaintiffs' case is that Ramtahal had a sister Mahesa Kuer who has left five sons, Ramsingasan Rai and others. On 24th May 1932 Ramtahal executed a will in respect of all his properties in favour of the two widows and his sister's sons. The will provided that so long as the ladies were alive they would be the owners of the entire moveable and immoveable properties left by the testator and that after their death Ramsigasan Rai and others would be sole owners of the properties. On 19th April 1938 Ramtahal executed another will, by which he revoked the first will and bequeathed his entire properties to his sister's sons imposing the condition that they would maintain the two ladies. On 20th June 1941 Sanjoga Kuer filed an application

1953.

A. KUMAR
v.
MT. SANJOGA.

NARAYAN, J.

for permission to sue Ramtahal in *forma pauperis* for her maintenance praying that the maintenance be made a charge upon the properties which are the subject-matter of this suit. On 10th August 1941 Ramtahal sold to the plaintiffs nos. 1 to 3, 11 bighas 6 kathas 18 dhurs of land out of the disputed 21 bighas 6 kathas 6 dhurs under a registered sale-deed. Ramtahal died on 30th August 1941, and on 16th September 1941 Ramtahal's sister's sons applied for probate of the last will. On 17th September 1941 Sobhi Pandey, the father of the defendants 2 to 5 and Chandradip Pandey, defendant no. 6, were substituted in place of Ramtahal in the pauper application on the ground that they were Ramtahal's nearest agnates. Sobhi Pandey also died during the pendency of the pauper application, and the defendants 2 to 5 were substituted in his place. Tapeshar, one of the sons of Sobhi and Chandradip also died during the pendency of these appeals. The application for permission to sue in *forma pauperis* was allowed in April 1942, and it was registered as a suit. This suit was decreed on 16th July 1942, and on 31st July 1942 Ramtahal's sister's sons executed an *ijara* in respect of the remaining portion of 21 bighas and odd in favour of the plaintiffs 1 to 3. In 1943 Sanjoga Kuer executed the decree granted to her, and on 3rd September 1943, the plaintiffs 1 to 3 preferred a claim on the basis of the sale and the *ijara* executed in their favour. On 27th January 1944 plaintiffs 1 to 3 sold to the plaintiffs 4 to 5 plot no. 1274 having an area of 1.32 acres out of the land purchased from Ramtahal. This sale-deed was executed when the claim case was pending. In execution of the decree obtained by Sanjoga Kuer plot no. 1274 was sold, and after the sale of this property the plaintiffs' claim petition was dismissed. As only plot no. 1274 had been sold the learned Munsif who decided the claim case treated this plot alone as the subject of the dispute and disposed of the claim application by rejecting it. On 10th July 1944 possession

1953.

A. KUMAR v. MT. SANJOGA.

NARAYAN, J.

of plot no. 1274 was delivered to Sanjoga Kuer, and on 14th August 1944 this present suit was filed. On 4th October 1945 probate with regard to the second will was granted to Ramtahal's sister's sons. This suit was contested by the defendant no. 1 Sanjoga Kuer and by the defendants nos. 2 to 6, the alleged agnates. Their defence was that Ramtahal had no sister and had not left any sister's son, that the husband of Sanjoga Kuer had separated from Ramtahal and did not die in a state of jointness with him, that the sale-deed and the *rehan*-deed propounded by the plaintiffs were fraudulent and without consideration, that the defendants 2 to 6 as the nearest heirs of Ramtahal have been in possession of all his properties since his death, and the maintenance decree obtained by Sanjoga Kuer is binding on the estate left by Ramtahal.

The learned Subordinate Judge has held that the defendants 2 to 6 are the nearest agnatic relations of Ramtahal and have been in possession of his properties since his death, that Mahesa Kuer was the sister of Ramtahal and Ramsigasan Rai and others are Ramtahal's sister's sons, that the brothers of Ramtahal had died in a state of jointness with him and consequently all the family properties had come into the possession of Ramtahal, and that the decree obtained by Sanjoga Kuer is binding on the estate of Ramtahal. As a result of these findings the suit was dismissed as against the defendant no. 1 but it was decreed against the defendants nos. 2 to 6, the agnatic relations. First Appeal no. 234 of 1947 has been filed by the plaintiffs, and it is directed against the finding of the learned Subordinate Judge to the effect that the decree obtained by Sanjoga Kuer is binding on the estate of Ramtahal and also against his finding that the defendants 2 to 6 are the nearest agnates of Ramtahal. The other appeal has been filed by the alleged agnatic relations of Ramtahal whose contention is that the learned Subordinate Judge should have held

1953.

A. KUMAR v. MT. SANJOGA.

NARAYAN, J.

that Ramtahal left no sister or sister's son and that the plaintiffs have acquired no title by virtue of the documents executed in their favour.

Mr. Rajkishore Prasad who has appeared before us on behalf of the plaintiffs-appellants has pressed the following contentions:—(1) Defendants 2 to 6 have not been proved to be the agnatic relations of Ramtahal. (2) The maintenance decree obtained by Sanjoga Kuer is not binding on the estate of Ramtahal and consequently not binding on the plaintiffs. (3) The sale and the *rehan* in favour of the plaintiffs are not hit by the doctrine of *lis pendens*, and the plaintiffs' suit should, therefore, have been decreed in full.

Mr. Kailash Roy, Counsel for the appellants who have preferred First Appeal no. 237 of 1947, has contended that the plaint discloses no cause of action in respect of 19 bighas and odd; that the suit as framed is not maintainable and is bad for defect of parties; that because of the amendment allowed in this Court, an opportunity should have been given to the defendants to file an additional written-statement; that the sale-deed and the *rehan*-deed propounded by the plaintiffs are fraudulent transactions; that Mahesa was not the sister of Ramtahal and Ramsigasan and others are not his sister's sons; and that the learned Subordinate Judge has given no finding on the question as to whether the brothers of Ramtahal had died in a state of jointness with or separation from him.

It is impossible to differ from the learned Subordinate Judge with his findings on questions of fact. Mr. Rajkishore Prasad referred us to the evidence of P. W's 3 and 4 and to the two wills for the purpose of showing that Ramtahal had no agnates. P. W. 3 is a youngman aged 32 years, and he is one of the alleged sister's sons of Ramtahal. He does not even know the name of the grand-father of Ramtahal, and so far as the defendants are concerned he knows only their father's names. If such a man comes

forward to say that the defendants 2 to 6 are not the *gotias* of Ramtahal, it will be impossible to accept his evidence. P. W. 4 cannot also give the pedigree of the defendants and Ramtahal, and he had deposed for Ramtahal in a previous Title Suit which he had filed against Sanjoga Kuer. The wills do not state that Ramtahal had any agnatic relations. But Exhibit E is the genealogical table produced by the defendants, and it has been rightly accepted by the learned Subordinate Judge. This pedigree along with the oral evidence establishes beyond all reasonable doubt that the defendants 2 to 6 are the agnatic relations of Ramtahal. The pedigree no doubt shows that there are some other agnatic relations of Ramtahal also alive who can be regarded as relations of the same degree as Sobhi and Chandradip.

Similarly, there is no force in the contention of the clients of Mr. Kailash Roy that Ramtahal did not leave any sister or sister's son. In the year 1932 when the first will was executed there was no dispute whatsoever between Ramtahal and his agnatic relations or between Ramtahal's sister or sister's sons and his agnatic relations. But still the will recites that except his sister's sons the testator had no other near and *Shastrik* heirs. The dominant intention of the testator was to make an arrangement with regard to his properties, and though his second will shows that at the time of its execution he was not very favourably inclined to the ladies, his first will shows that his original intention was to make the two ladies the sole owners of his properties during their lifetime. But it is manifest that even at a time when there was no dispute he regarded Ramsigasan Rai and others as his sister's sons. The evidence, documentary as well as oral, has been carefully considered by the learned Subordinate Judge, and there does not seem to be any good ground for rejecting the evidence of the plaintiffs' witnesses who have come forward to prove that

1953.

A. KUMAR
v.
MT.
SANJOGA.

NARAYAN, J.

Mahesa Kuer was Ramtahal's sister and that Ramsigasan and others are the sons of Mahesa Kuer.

We must also agree with the learned Subordinate Judge that the defendants have been in possession of the properties left by Ramtahal ever since his death. It has been proved that the defendants have amalgamated their own plots with the plots left by Ramtahal. The papers of the Canal Department also prove the possession of the agnates. The alteration statement, exhibit 9, is not really a document in favour of the plaintiffs, inasmuch as it shows that the plaintiffs were substituted in place of Chandradip and Tapeshar, the original rate-payers. Canal *parchas* stand in the names of the defendants, and they are certainly admissible in evidence for the purpose of proving possession. As pointed out by me in *Inderdeo Singh* v. *Janeshwar Singh*(1) the value to be attached to Canal papers as evidence of possession is a matter for the Court of fact and its decision on the evidentiary value of those papers as proof of possession is a decision on a question of fact and not a decision on a question of law. In *Ramraja* v. *Deonarain*(2) Canal papers were treated as evidence of possession. Certainly, a certain amount of weight should be attached to these papers, and along with the other evidence on the record they do establish the possession of the agnates over the property in suit ever since the death of Ramtahal.

The finding of the learned Subordiante Judge to the effect that the brother of Ramtahal had died in a state of jointness with him also appears to be unassailable. Mr. Kailash Roy at one stage pointed out that the court has disposed of this issue merely on the ground of *res judicata* and has not discussed the evidence with a view to showing that it establishes that Sablaik, the brother of Ramtahal,

(1) (1952) A. I. R. (Pat.) 429.
(2) (1945) I. L. R. 24 Pat. 379.

had died in a state of jointness with him. But, Mr. Kailash Roy who submitted a very fair argument in this case conceded without any hesitation that no evidence had been adduced on behalf of his clients for the purpose of proving that Sablaik was separate from Ramtahal.

It is not also open to the clients of Mr. Kailash Roy to challenge the consideration of the sale-deeds and the *rehan* bond. On the basis of a statement made by P. W. 3 which is to the effect that his mother Mahesa Kuer died 4½ years ago, Mr. Kailash Roy submitted that the *rehan*, exhibit 8, must have been executed when Mahesa Kuer was alive. But, if the defendants meant to urge that the *rehan* was invalid because it had been executed by the sister's sons even when the sister was alive, this point should have been specifically taken by them, and if the point had been specifically taken by them the other party would have been able to meet it. A witness speaking from memory may not give the date of death accurately, and a slight mistake as to time is excusable. When he says that his mother died 4½ years ago, it cannot be said that his mother died exactly 4½ years before the date on which he was deposing. The defendants cannot, therefore, successfully challenge the *rehan* and the sale transactions. The plea of defect of parties, though raised by Mr. Kailash Roy, was ultimately given up, and he has conceded that even though the sister's sons have not been impleaded in this suit, the suit cannot be dismissed on that account.

The objection as to the frame of the suit is not also sustainable. The plaint discloses a cause of action not only with regard to the plot regarding which the claim of the plaintiffs was dismissed but also with regard to the other lands. In paragraph 10 of the plaint it is stated that the defendant no. 1 in collusion and concert with defendants 2 to 6 took out execution of the fraudulent maintenance decree and in the said execution case put up to sale the entire

1953.

A. KUMAR v. MT. SANJOGA.

NARAYAN, J.

property described in Schedule A of the plaint which is the 21 bighas 6 kathas 6 dhurs of land. In the subsequent paragraphs also it is said that whatever was done by the defendant no. 1 was done in collusion with the other defendants, and it is pointed out that the defendant no. 1 intentionally brought on the record the agnates of Ramtahal, though the proper heirs were the nephews of Ramtahal. It would not, therefore, be sound to urge that the plaintiffs had no cause of action with regard to the plots other than plot no. 1274. By an order passed by a Bench of this Court on 14th November 1952 the plaintiffs were called upon to pay *ad valorem* court-fee on the value of the plots other than plot no. 1274, and the *ad valorem* court-fee on the plaint as demanded by this Court has been paid by the plaintiffs. It was not necessary for the Court to give an opportunity to the defendants to file an additional written-statement after this amendment. The claim in the original plaint had been laid with regard to the entire Schedule A lands, and no new case has now been put forward by the plaintiffs. The order was passed by this Court in the presence of Mr. Kailash Roy who also wanted to amend the valuation of First Appeal no. 237 of 1947. His prayer was allowed, and at that time he did not press that his clients should be given the opportunity of filing an additional written-statement. It is really no alteration in the nature of the suit, if the suit has been changed from a declaratory suit to a possessory suit. While discussing the question of the frame of the suit Mr. Kailash Roy has also submitted that the other agnates of equal degree have not been impleaded as party defendants in the suit. It was not necessary for the parties to implead those agnates who did not raise any objection with regard to their claim and who had never put forward any claim to the property in suit.

The most substantial contention urged by Mr. Kailash Roy was that because on the findings the

mortgagors were not at all in possession at the time when they executed the usufructuary mortgage, it was not open to the plaintiffs as mortgagees to sue for the possession of the property which is covered by the *rehan*. In *Lal Narsingh Partab Bahadur Singh* v. *Mahammad Yaqub Khan*(1) the Judicial Committee had held that where in a mortgage which was a combination of a simple and a usufructuary mortgage the mortgagors had failed to discharge their obligation of making over possession to the mortgagee and had thereby deprived the mortgagee of part of his security then under section 68 of the Transfer of Property Act the money became payable and the mortgagees were entitled to a money decree for the same. Their Lordships further said that if the money had become payable under section 68, under section 67 a decree for sale could be made. It is noteworthy that the claim was for the recovery of money in that case and a mortgage decree and, in the alternative, a simple money decree had been sought by the plaintiffs. A Benoh of this Court had pointed out in *Bechu Sahu* v. *Arjun Sahu*(2) that the provisions of section 68 of the Transfer of Psoperty Act were designed for the purpose of indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property, and that they were provisions of an enabling nature. These provisions do not preclude a mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession. And Mullick J., who delivered the judgment of this Court said that there was nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which section 68 empowers him to claim from his mortgagor. In *Modun Mohun Chowdhry* v. *Ashad Ally Beparee*(3)

(1) (1920) A. I. R. (P. C.) 139.
(2) (1917) 3 Pat. L. J. 162.
(3) (1883) I. L. R. 10 Cal. 68.

1953

A. KUMAR v. MR. SANYOGA.

KARKAN, J.

their Lordships of the Calcutta High Court laid down that under a mortgage deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage money, the mortgagee, as absolute owner of the property, has twelve years from the time at which his right to possession commences, during which period he may bring his suit for possession. The position in law appears to be that if it is implicit in the mortgage deed that the mortgagee shall get possession, then the claim for possession made by the mortgagee cannot be dismissed. In *Ram Padarath Singh* v. *Himar Singh*(1) it was held that where a deed of usufructuary mortgage provides that if the mortgagee does not obtain possession or if he loses possession, he could recover his money with interest by sale of the mortgaged property and possession is not delivered, it is open to him to sue either for possession or for the mortgage money. The Privy Council case mentioned above has been referred to in this judgment, and Bennett, J., has also pointed out that in the suit which went up to the Privy Council there was no claim for possession. Mr. Kailash Roy had to concede after a perusal of these authorities that it is open to a mortgagee to sue for possession if possession has not been delivered by the mortgagor to him, but he sought to distinguish these cases by submitting that in this case before us the mortgagor was not at all in possession. There is one authority reported in *Kanchan Singh* v. *Musammat Jafri Begam*(2) in support of the view that although the property was not in the possession of the mortgagor when he had mortgaged it, yet that circumstance could not prevent the mortgagee from asserting his right under the terms of the mortgage deed, and therefore he would be entitled to recover possession of the property mortgaged. I

(1) (1941) I. L. R. 17 Luck. 362.
(2) (1883) 10 Ind. Cas. 190.

1953

A. KUMAR
v.
MT.
SANJOGA.

NARAYAN, J.

respectfully agree with the view of Chamier, J.C., as indicated in this case, and I see no reason why these plaintiffs as *rehandars* cannot obtain a decree for possession which cannot be refused on the mere ground that the mortgagor was not in possession on the date the mortgage was executed. The case of *Harnath Singh* v. *Maiya Ambika Devi*(1) also seems to support the view which I am taking. The plaintiffs in that case were usufructuary mortgagees, and it had been found that they had not been put in possession as stipulated in the document. Their Lordships held that under section 68 of the Transfer of Property Act they were entitled to either a decree for the amount which they had advanced or for possession. We have got the mortgage bond translated, and it appears from a perusal of the document that the executants had bound themselves to repay the principal *rehan* money by Jeth 1355 Fasli which would correspond to June 1948. The present suit was instituted on 14th August 1944, and as the term of the mortgage had not expired till then, the plaintiffs were entitled to sue for possession. I would, therefore, repel the most substantial contention put forward by Mr. Kailash Roy for the appellants in First Appeal no. 237 of 1947.

As already stated, the plaintiffs' claim is based on two sale-deeds and also on a *rehan*-deed. The *ijara* or the *rehan* had been executed by Ramtahal's sister's sons on 31st July 1942 and the sale-deed had been executed by Ramtahal himself. About three years after the sale by Ramtahal, plaintiffs 1 to 3 sold to plaintiffs 4 and 5 plot no. 1274, and this sale was effected when the claim case was pending. Though probate was granted to the sister's sons on 4th October 1945, they had the right to execute the *rehan*, inasmuch as independently of the will they had title to the property under Act II of 1929. They acquired title to the property as soon as Ramtahal died, that is on

(1) (1941) A. I. R. (Pat.) 301.

1953.

A. KUMAR v. Mr. SANJOGA.

NARAYAN, J.

30th August 1941 and, therefore, on 31st July 1942 they could give the property in *rehan* to the plaintiffs. Of course, Mr. Kailash Roy rightly submitted that as the pauper application had been filed on 20th June 1941 and as the execution arising out of the decree passed in the pauper suit did not terminate before April or May 1944, the transactions of sale and *rehan* are hit by the doctrine of *lis pendens*, and the acquisitions made by the plaintiffs during the pendency of the pauper application or the pauper suit would be subject to the result of that suit. The purchaser or the transferee *pendente lite* is bound by the result of the litigation, and it is a well-settled rule now that when an application to sue in *forma pauperis* is admitted the suit must be treated as pending from the time of the presentation of the application to the Court (but not if it is rejected). It is also a settled rule that an execution proceeding is a continuation of the suit, and *lis pendens* continues during the execution. It is further settled by authority that the doctrine of *lis pendens* applies to maintenance actions. Even in an action for maintenance the decree does not terminate the litigation, but the *lis* continues even after the decree, and any transfer of the property sought to be charged effected during the pendency of the execution proceeding, would be affected by *lis pendens*. I may refer in this connection to the cases reported in *Dose Thimmanna Bhutta* v. *Krishna Tantri*(1), *Sathuluru Seetharamanujacharyulu* v. *Narra Venkatasubbamma*(2), *Ramasami Pillai* v. *The Trichinopoly Co-operative Credit Bank, Ltd.*,(3), *Kallawa Shidlingappa Angadi* v. *Parappa Sankappa*(4), *Ahsan Hussain Abdul Ali Bohari* v. *Maina*(5) and *Sudhamoyee Singha* v. *Jessore Loan Company, Ltd.*(6). Mr. Rajkishore Prasad had

(1) (1906) I. L. R. 29 Mad. 508.
(2) (1930) I. L. R. 54 Mad. 132.
(3) (1935) I. L. R. 59 Mad. 101.
(4) (1946) A. I. R. (Bom.) 207.
(5) (1938) A. I. R. (Nag.) 129.
(6) (1945) A. I. R. (Cal.) 322.

ultimately to agree that this position in law is now indisputable, but he submitted that the decree that was obtained by Sanjoga Kuer for maintenance was a collusive decree, and he further submitted that the maintenance decree is not at all binding on the estate of Ramtahal. There is no reason for supposing that the decree was a collusive one. The person sued by the lady was Ramtahal himself, and it was only after his death that his agnates were substituted in his place. There being no collusion, it will be immaterial how the decree had been obtained in that suit, whether with or without contest or by consent or whether the decree was right or wrong. A Court invited to apply the doctrine of *lis pendens* cannot sit in judgment on a previous decree. The fact that concerns us is only this much that there was a decree for maintenance passed, and the maintenance was declared to be a charge on the family properties including the property which is the subject-matter of this suit. I have already rejected the contention of Mr. Rajkishore Prasad that defendants 2 to 6 have not been proved to be the nearest agnates of Ramtahal, and I must also reject his contention that the maintenance decree is not binding on the estate of Ramtahal. That decree is binding on the estate of Ramtahal, and the transactions of sale and *rehan* which took place during the pendency of the maintenance proceeding would be subject to the result of that litigation.

The only point which now remains to be considered is as to whether the decree that had been obtained against the agnates would be binding on the estate of Ramtahal and on the present plaintiffs who, according to the findings, were the rightful heirs of Ramtahal after his death. I do not think, there should be any difficulty in deciding this point. Sanjoga Kuer had never admitted that Mahesa Kuer was the sister of Ramtahal and that Ramsigasan and others were his sister's sons. She had filed the pauper application

1953.

A. KUMAR v. MT. SANJOGA.

NARAYAN, J.

against Ramtahal himself, and it is only after Ramtahal was dead that his agnates were substituted in his place. Having seriously taken the position that the so-called sister's sons were mere impostors, the lady could not but substitute the agnates, and I think the principle that was laid down by the Madras High Court in *Sanna Govappa* v. *Rodda Sanna Govappa*(1) would be fully applicable to this case. This was a decision cited by Mr. Rajkishore Prasad himself, and it lays down certain propositions which, in my opinion, answer the contention raised by Mr. Prasad. If there are two rival claimants to the estate of the deceased, the plaintiff or the decree-holder has to choose as the legal representative one who, in the circumstances as they exist, would appear to have the *prima facie* title. Here, possession has been found to be with the agnates, and if ever since the date of death of Ramtahal only the agnates had been in possession of the properties left by him, then certainly the substitution made by the lady would be taken to be a *bona fide* substitution. The fact that the lady has never admitted Mahesa Kuer to be the sister of Ramtahal, and the fact of possession are very material circumstances for judging as to whether her conduct was *bona fide* or not. There was a litigation between Ramtahal and Sobhi and others, the agnates, after the lady had executed an *ijara* with regard to certain plots in favour of Sobhi and others. It is very significant that the judgment in that case, exhibit 3(*a*), does not at all show that the existence of the sister's sons was alleged. The only question which appears to have been agitated seriously was as to whether Ramtahal's brothers had died in a state of jointness with him. All these circumstances go to establish that when the lady substituted the agnates in place of Ramtahal she did that in a *bona fide* manner. What is going to be decided in this present litigation should

(1) (1929) A. I. R. (Mad.) 482.

1977.

A. KUMAR v. MT. SANJOGA.

NARAYAN, J.

not be a criterion for judging as to how the lady had acted in her pauper suit. The conditions necessary for making the representation effective against the true representative are that the plaintiff or the decree-holder must have acted *bona fide*, the decree obtained must be free from fraud or collusion, the person wrongly impleaded must have been impleaded in a representative capacity and the decree or order must have been passed against him as representing the estate of the deceased, the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative, and the person having the real title must not have intervened. There was no fraud or collusion in this case, the suit or the application had been filed against Ramtahal and not as against anybody as his heirs, and the person having real title did not intervene in the litigation. In view of the circumstance that the agnates were in possession and also in view of the circumstance that the lady has all along contended that the so-called sister's sons were mere impostors, it cannot be urged that when she substituted the agnates she did that with the intention of prejudicing the cause of the sister's sons. All the circumstances have to be taken together, and cumulatively they go to establish that the conduct of the lady was a *bona fide* one. It is immaterial that all the agnatic relations were not brought on the record. It was sufficient if only some of the agnatic relations were brought on the record, especially when the other agnatic relations had never set up any title to the estate of Ramtahal. Under the enlarged definition of 'legal representative' which is to be found in the Civil Procedure Code of 1908 a person in possession of the estate belonging to the deceased must be deemed to be competent to represent the deceased defendant. 'Legal representative' as defined in section 2(11) of the Code of Civil Procedure means a person who in law represents the estate of a deceased person and

1953,

A. KUMAR
v.
MT. SANJOGA.

NARAYAN, J.

includes any person who intermeddles with the estate of the deceased. If after the death of Ramtahal the agnates came in peaceful possession of the properties left by him and have been in possession of all those properties up till now, they would certainly be deemed to be legal representatives within the meaning of section 2(11) of the Code of Civil Procedure, and it would not to my mind be sound to urge that even under the enlarged definition of 'legal representative' a person in possession of the estate belonging to the deceased cannot be regarded as an intermeddler. The contentions urged by Mr. Rajkishore Prasad, therefore, appear to me to be without any substance, and First Appeal no. 234 of 1947 must also fail. Though the submissions of Mr. Rajkishore Prasad related to the entire lands in suit, and though I have decided the entire First Appeal no. 234 of 1947 on the merits, I find from the valuation of the appeal that it is directed against the decision with regard to 2 bighas 2 kathas and odd only which had been sold in execution of the decree. Unfortunately, when court-fee was paid on the plaint under the orders of this Court the valuation and the grounds of the appeal were overlooked. However, I find that there is no merit in this appeal.

In the result, I would dismiss both the appeals with costs.

IMAM, J.—I agree.

Appeals dismissed.

S. H.

MISCELLANEOUS JUDICIAL.

1953.

August, 24, 25.

Before Ramaswami and Sinha, JJ.,

RAMNATH

v.

SUKUMARI*

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III of 1947) and its subsequent amendments, whether violate the guarantee provided by the Constitution—section 11, meaning of—Constitution of India, 1950, Articles 19(1)(b), 226.

The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 and its subsequent amendments do not violate the guarantee provided by Article 19(1) (*b*) of the Constitution so far as the tenants are concerned, and the object of the Act is the protection of tenants by regulating the rent of the building and preventing unreasonable eviction.

Section 11(2) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 must be interpreted to mean that the Controller should be reasonably satisfied that the tenant is liable to be evicted under the provisions of sub-section (1) before he makes the actual order of eviction, and the satisfaction contemplated in section 11(2) of the Act is not a subjective but an objective satisfaction liable to be tested in appeal and revision and hence the restriction imposed by the section is reasonable within the meaning of Article 19(5) of the Constitution;

Held, that the petitioner was not entitled to any relief.

*Miscellaneous Judicial Case nos. 271 and 272 of 1953 with Civil Revision no. 477 of 1953.

M. J. C. 271: in the matter of an application under Article 228 of the Constitution of India.

M. J. C. 272: in the matter of an application under Articles 226 and 227 of the Constitution of India.

C. R. 477: against an order of Mr. Radha Prasad Singh, Additional District Judge, 2nd. Court, Patna, affirming an order of Mr. Raghoji Prasad, Munsif, 3rd. Court, Patna, dated the 21st. May, 1953.

1953.

RAMNATH v. SUKUMARI.

Manglu-lal v. *Radha Shyam*(1), *Nakkuda Ali* v. *M. F. De S. Jayratne*(2), *Dr. N. B. Khare* v. *The State of Delhi*(3) and *State of Madras* v. *V. G. Row*(4), relied on.

Liversidge v. *Sir John Anderson*(5), *Nek Mohammad* v. *Province of Bihar*(6) and *Raghubir Singh* v. *Court of Wards, Ajmer*(7), distinguished.

Kedarnath Gupta's case, In re.—(8) and *Rai Brijraj Krishna* v. *S. K. Shaw*(9), referred to.

Applications by the tenant-petitioner.

The facts of the cases material to this report are set out in the judgment of the court.

B. C. Ghosh, Kailash Ray, B. K. Sharma and *Kamleshwar Prasad Sinha*, for the petitioner.

A. C. Sinha, Rajkishore Prasad, Dineshwar Prasad and *A. S. Sinha*, for the opposite-party.

Lalit Mohan Sharma, for the State.

RAMASWAMI AND SINHA, JJ.—The petitioner, Ramnath Sahani, is tenant of a house located in holding no. 92, Mithapur B. and C. area, Patna. The opposite party, Shrimati Sukumari Sinha, is the landlord of the house. On the 11th October, 1952, the opposite party applied before the House Controller of Patna for evicting the petitioner on the ground that there had been non-payment of rent for September, 1952. The petitioner showed cause before the House Controller alleging that the rent for the house up to

(1) (1953) A. I. R. (Pat.) 14.
(2) (1951) App. Cas. 67.
(3) (1950) S. C. Rep. 519.
(4) (1952) S. C. Rep. 597.
(5) (1942) App. Cas. 206.
(6) (1948) I. L. R. 27 Pat. 773, F. B.
(7) (1953) A. I. R. (S. C.) 373.
(8) (1953) M. J. C. 319 of 1952 (unreported).
(9) (1951) S. C. Rep. 145.

1953.

RAMNATH v. SUKUMARI. RAMASWAMI AND SINHA, JJ.

August, 1952, had been paid and that repairs had been effected to the building to the extent of Rs. 52-6-0. The petitioner claimed that there was an oral agreement between him and the landlord that repairs would be made to the building and the cost would be set off towards the amount of rent due. The House Controller did not accept the case of the petitioner that there was an oral agreement between the landlord and the tenant or that repair work to the extent of Rs. 52-6-0 had been effected. The House Controller found that there was non-payment of rent on the part of the petitioner, and passed an order of eviction. An appeal was taken by the petitioner to the Collector against the order of the House Controller, but the appeal was dismissed. An application in revision was filed before the Commissioner, but that application was also rejected. Thereafter, the petitioner instituted a title suit in the Court of the Munsif at Patna for a declaration that the order of the House Controller was illegal and without jurisdiction. The petitioner also asked for an order of injunction, pending the hearing of the suit, restraining the opposite party from taking out execution of the order of the House Controller. On the 21st May, 1953, the Munsif refused to grant temporary injunction. An appeal was preferred against that order in the Court of the District Judge. An *ad interim* injunction was granted, in the first instance, by the District Judge. After hearing the parties, the Additional District Judge, to whom the case was transferred vacated the order of *ad interim* injunction.

Civil Revision no. 477 of 1953 is preferred on behalf of the petitioner against the order of the Additional District Judge, dated the 4th June, 1953, refusing to grant temporary injunction. Miscellaneous Judicial Case no. 271 of 1953 is an application made on behalf of the petitioner under Article 228 of the Constitution

1953.

RAMNATH v. SUKUMARI. RAMASWAMI AND SINHA, JJ.

for transfer of the title suit to the High Court on the ground that it involves substantial question of law as to the interpretation of the Constitution. Miscellaneous Judicial Case no. 272 of 1953 is an application under Article 226 of the Constitution for an appropriate *writ* " restraining or prohibiting the opposite party from executing the orders of the House Controller dated the 26th January, 1953 " on the ground that the order of the House Controller was beyond his competence and jurisdiction.

It would be convenient to deal with Miscellaneous Judicial Case no. 272 of 1953 in the first instance. The main question argued related to the constitutional validity of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, as amended by various Amending Acts, including Bihar Act V of 1953. The argument on behalf of the petitioner was :

(1) that the Bihar Legislature had no power to create the office and jurisdiction of the House Controller;

(2) that the Bihar Act V of 1953 could not revive and re-enact the Act of 1947 which had already expired; and

(3) that the Bihar Act V of 1953 was constitutionally invalid since the legislative authority was exercising judicial power.

All these arguments were examined by this Bench in *Kedarnath Gupta* v. *Nagendra Narayan Sinha*(1), in which judgment was pronounced on the 4th August, 1953. All the arguments were rejected as unsound, and it was held that the Bihar Act III of 1947, as amended by the various Amending Acts, was constitutionally valid and operative.

Mr. B. C. Ghosh nevertheless took an additional point in this case. The contention of learned Counsel was that the Bihar Act of 1947, as subsequently amended, violated the guarantee under Article 19(1)(*f*) of

(1) (1953) M. J. C. 319 of 1952 (unreported).

the Constitution. It was contended, in the first place, that under section 11 of the Act the authority of the House Controller in making an order of eviction against a tenant, if he was satisfied that the tenant was liable to be evicted under the provisions of sub-section (1), was too wide. Learned Counsel also referred to section 18(3) of the Act which made the decision of the House Controller final subject to the decision of the Commissioner and the further provision that it shall not be liable to be questioned in any Court of law whether in a suit or other proceeding by way of appeal or revision. In this connection, learned Counsel also referred to the decision of this Bench in *Kedarnath Gupta's case*(1), and to the decision of the Supreme Court in *Rai Brijraj Krishna* v. *S. K. Shaw*(2) in which it was held that, as a matter of construction, section 11 of the Act has entrusted the Controller with a jurisdiction, which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. The complaint of the learned Counsel, in the first place, is that the matter of eviction is left to the " subjective satisfaction " of the House Controller, and the procedure is not reasonable within the meaning of Article 19(5) of the Constitution of India. In the second place, learned Counsel said that the decision of the House Controller, as to whether there was non-payment of rent or whether the other conditions for the eviction of a tenant were fulfilled or not, is not a justiciable issue which can be agitated in a Court of law. The argument is that unless the decision of the Controller can be tested in a Civil Court, and unless the Act makes a provision to this effect, the restriction imposed on the right of the tenant is

(1) (1953) M. J. C. 319 of 1952 (unreported).

(2) (1951) S. C. R. 145.

1953.

RAMNATH v. SUKUMARI.

RAMASWAMI AND SINHA, JJ.

not reasonable within the meaning of Article 19(5) of the Constitution of India.

Before dealing with these two questions, it is necessary, at the outset, to examine whether the impugned Act prejudicially affects the rights of the tenants under Article (19)(1)(*f*) of the Constitution. On this point, it was submitted by learned Counsel that section 11 makes provision for evicting a tenant on the ground of non-payment of rent even though it may not be a breach of the conditions of the tenancy. There appears to be some force in this argument, but on further consideration it will be apparent that the provisions of section 11 as also the other provisions of the impugned Act have been passed in the interests of tenants. The question has been discussed at some length in the Full Bench decision of this Court in *Mangtulal* v. *Radha Shyam*(1). It was pointed out in that case that section 111(*h*) of the Transfer of Property Act empowered a landlord to determine a lease of immovable property by giving a notice to quit. Section 106 of that Act provided that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes should be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. These provisions of the Transfer of Property Act are superseded by section 11 of the impugned Act. Under section 11, a tenancy may not, therefore, be determined by the landlord on giving a notice to quit nor is the lessee liable to put the lessor into possession of the property

(1) (1953) A. I. R. 14, F. B.

on the determination of the lease. Section 2 of the Act is also important. That section defines a " tenant " to mean any person by whom, or on whose account, rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour. By giving this artificial meaning to the word " tenant " the landlord is prevented from evicting a person whose tenancy has been determined by a valid notice to quit and who is in possession of the building as a trespasser. Section 11, therefore, adversely affects the rights of the landlord and to that extent is a provision which is beneficial to the tenant. Section 12(1) of the Act provides that if a tenant, who is in possession of any building for a limited time, intends to extend the time limited by such lease by not less than six and not more than twelve months, he may give the landlord, at least one month before the expiry of the time limited by the lease, a written notice of his intention to do so; and upon the delivery of such notice, the said time shall, subject to the provisions of section 11, be deemed to have been extended for the period specified in the notice. There are other provisions, like sections 5, 6, 7 and 13 of the Act, which are manifestly passed for the protection of the tenant. Upon a consideration of all these provisions of the impugned Act, it is clear that there is no violation of the guarantee under Article 19(1)(*f*) of the Constitution so far as the tenants are concerned, and the object of the Act is the protection of tenants by regulating the rent of the building and preventing unreasonable eviction.

Assuming, however, in favour of the petitioner that the Act violates the guarantee under Article 19(1)(*f*), the question must be examined whether the restrictions imposed are reasonable. The first point taken on behalf of the petitioner is that the satisfaction of the Controller under section 11 of the Act is a

1953.

RAMNATH v. SUKUMARI.

RAMASWAMI AND SINHA, JJ.

"subjective satisfaction"—and the restriction is not, therefore, reasonable from the procedural aspect. Learned Counsel relied upon the wording of section 11(2) which states:—

> "A landlord who seeks to evict his tenant under sub-section (1) shall apply to the Controller for direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of sub-section (1), he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

The argument of Mr. B. C. Ghosh on this point is, in our opinion, unsound. There is no justification for interpreting section 11(2) to mean that the satisfaction of the House Controller must be a subjective satisfaction. The use of the expression "if the Controller is *satisfied*" is not conclusive. The question whether the satisfaction is objective or subjective is to be determined with reference to the whole Act. The word "satisfied" used in section 11(2) must mean "reasonably satisfied" and cannot import an arbitrary or irrational state of being satisfied. The satisfaction of the Controller must be based upon the materials placed before him by the parties concerned, for section 11(2) provides that the Controller may pass the order of eviction only after giving the tenant a reasonable opportunity of showing cause against the application. Section 16 is also important in this context. Section 16(2) empowers the Controller to summon and enforce the attendance of witnesses, and to compel the production of documents by the same means as is provided in case of a Court by the Code of Civil Procedure. Section 18 is also an important provision. It states that any person aggrieved by an order passed by the Controller may within fifteen days from the date of receipt of such order by him prefer an appeal in writing to the appellate authority. Section 18(2) provides

that if such an appeal be preferred, the appellate authority may—(*a*) summarily dismiss the appeal, or (*b*) call for the records of the case from the Controller and after examining such records and, if necessary, making such further inquiry as he thinks fit either uphold the order of the Controller or reject it. Section 18B enables the Commissioner, either of his own motion or on application made to him, to revise any order passed by the Controller or by the appellate authority on appeal under this Act. The provision for an appeal under section 18 and the provision of making an application in revision under section 18B are inconsistent with the view put forth on behalf of the petitioner that the satisfaction of the House Controller in section 11 is subjective and not objective satisfaction. Construed in the light of these provisions and the context of the whole Act, it is manifest that section 11(2) of the Act must be interpreted to mean that the Controller should be reasonably satisfied that the tenant is liable to be evicted under the provisions of sub-section (1) before he makes the actual order of eviction, and the satisfaction contemplated in section 11(2) is not a subjective but an objective satisfaction liable to be tested by the appellate authority under section 18 and by the Commissioner in revision under section 18B. The argument on behalf of the petitioner on this point must, therefore, be rejected.

Mr. B. C. Ghosh referred, in the course of his argument, to the case of *Liversidge* v. *Sir John Anderson*[1] in which a question arose as to the meaning of the expression "if the Secretary of State has reasonable cause to believe any person to be of hostile association". It was held by a majority of the House of Lords that the expression in that particular context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the

(1) (1942) A. C. 206.

1953.

RAMNATH v. SUKUMARI. RAMASWAMI AND SINHA, JJ.

required fact. On that basis, it was held that the matter was one of subjective satisfaction of the Secretary of State and a Court of law could not enquire whether the Secretary of State had reasonable ground to believe. That case is not an authority for the proposition that the expression " has reasonable cause to believe " ought always to be interpreted in a subjective sense wherever it occurs in a statute irrespective of the context or the subject-matter of the particular enactment. The decision in *Liversidge* v. *Anderson*(1) does not lay down any general principle that the expression must be so understood in every enactment irrespective of the context. The decision in *Liversidge v. Anderson*(1) only means that in the context and the attendant circumstances of that particular enactment in question the expression " has reasonable cause to believe " must be interpreted in the subjective sense and a Court of law cannot enquire whether the Secretary of State had reasonable grounds for his belief. The decision in the Full Bench case of *Nek Mohammad v. Province of Bihar*(2) also proceeded on the same grounds. The legislation, in question in that case was a piece of emergency legislation, and, in the context and the attendant circumstances of that legislation, it was held by the Full Bench that though the word " satisfaction " must be interpreted to mean a reasonable satisfaction, a Court of law cannot sit in appeal over the decision of the authority making the order of detention provided always that the authority making the order acts in good faith. The matter was fully considered in the decision of the Judicial Committee in *Nakkuda Ali* v. *M. F. De S. Jayratne*(3) in which the question at issue was whether in regulation 62 of the Defence (Control of Textiles) Regulations, 1945, the words " where the Controller has

(1) (1942) A. C. 206.
(2) (1948) I. L. R. 27 Pat. 773, F. B.
(3) (1951) A. C. 67.

reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" were to be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation. It was held by the Judicial Committee that the words should be interpreted in an objective sense and the Regulation meant that there must in fact exist reasonable grounds known to the Controller before he can validly exercise the power of cancellation. At pages 76—77 Lord Radcliffe states:

"Their Lordships do not adopt a similar construction of the words in regulation 62 which are now before them. Indeed, it would be a very unfortunate thing if the decision of *Liversidge's case*(1) came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words 'if A. B. has reasonable cause to believe' are capable of meaning 'if A. B. honestly thinks that he has reasonable cause to believe' and that in the context and attendant circumstances of Defence Regulation 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning 'if there is in fact reasonable cause for A. B. so to believe'. After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether

(1) (1942) A. C. 206.

1953.

RAMNATH v. SUKUMARI.

RAMASWAMI AND SINHA, JJ.

the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships, therefore, treat the words in regulation 62 ' where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer ' as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation. "

The second point taken by learned Counsel on behalf of the petitioner is that unless the Act provides that the decision of the Controller should be tested in a Civil Court, the restrictions imposed cannot be held to be reasonable within the meaning of Article 19(5) of the Constitution. In support of this proposition, Mr. B. C. Ghosh relied upon certain dicta in the Supreme Court's judgment in *Raghubir Singh* v. *Court of Wards, Ajmer*(1). It was argued in that case that the Ajmer Tenancy and Land Records Act, 1950, read with the Ajmer Government Wards Regulation (1 of 1888) enabled the Court of Wards, in its own discretion and on its subjective determination, to assume the superintendence of the property of a landlord who habitually infringes the rights of his tenants and that the exercise of this discretion cannot be questioned in any manner in a Civil Court. It was further argued that the law enacted in section 112 was not a reasonable restriction inasmuch as it completely negatived the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive. The argument succeeded in the Supreme Court, and it was held that section 112 was

(1) (1953) A. I. R. (S. C.) 373.

1953.

RAMNATH v. SUKUMARI. RAMASWAMI AND SINHA, JJ.

invalid and was not saved either by clause (5) of Article 19 or by Article 31-A of the Constitution, but the material facts of that case have no parallel to those of the present case. In the Supreme Court case there was no machinery provided in the Act to determine the question whether the landlord was guilty of habitually infringing the rights of his tenants nor was there any right of appeal provided to the aggrieved landlord from the declaration of the Court of Wards. There was no provision for an appeal from the order of the Court of Wards to the Government or any other executive authority. It was observed by Mahajan, J. that the provisions of section 112 of the Act of 1950 were penal in nature and were intended by way of punishment of a landlord who habitually infringed the rights of his tenants; and that when a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law could not be held to be " reasonable " in any sense. The material facts of the present case are obviously different. There is a provision made in the Act to enable a tenant to show cause. There is provision made for an appeal and revision to higher authorities. There are other provisions made in the Act empowering the House Controller to summon witnesses and to call for production of documents. It is true that the decision of the Controller is not justiciable in a Civil Court. It was argued by learned Counsel on behalf of the petitioner that the restriction must be held to be unreasonable since the Legislature has not provided for an ultimate decision of the matter by a Civil Court. We cannot accept this argument as correct. A decisive answer to the argument is the decision of the Supreme Court in *Dr. N. B. Khare* v. *The State of Delhi*(1) in which the scope of the guarantee under Articles 19(1) (*d*) and 19(5) was fully considered. In that case, the

(1) (1950) S. C. R. 519.

1953.

RAMNATH v. SUKUMARI.

RAMASWAMI AND SINHA, JJ.

subjective satisfaction of the State Government, regarding the necessity for externment of a person, coupled with a reference of the matter to the Advisory Board, whose opinion had, however, no binding force, was considered by the Supreme Court to be a "reasonable" procedure for restricting the right conferred under Article 19(1)(*d*). The truth of the matter is that there is no uniform standard, no uniform pattern of reasonableness which can be laid down in the abstract. The test of reasonableness prescribed under Article 19(5) must depend upon the scope, the subject-matter and the context of each individual statute which is impugned. That is the principle enunciated by the learned Chief Justice of India in *State of Madras* v. *V. G. Row*(1).

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the

(1) (1952) S. C. R. 597, 607.

elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

Applying the principle in the present case, it is clear that the impugned Act provides a complete machinery for determining whether the tenant is liable to be evicted or not and in what conditions he can be evicted. It provides a complete machinery for investigation of the matters upon which the jurisdiction of the Controller to order eviction of a tenant depends. There is provision made in the Act for appeal and revision against the order of the House Controller. Section 16 empowers the Controller to make enquiries and summon and enforce attendance of witnesses. In view of these provisions, which are embodied in the Act, it is impossible to accept the argument of learned Counsel that the procedure prescribed is unreasonable within the meaning of Article 19(5) of the Constitution. It is true that the jurisdiction of the Civil Court is barred, and the decision of the House Controller is not justiciable in a regular Court of law. But these considerations are not decisive on the question whether the restriction, from the procedural point of view, is reasonable within the meaning of Article 19(5). The argument of Mr. B. C. Ghosh on this point must, therefore, fail.

A third objection presented on behalf of the petitioner is that, even as a matter of construction of section 11, the House Controller had no jurisdiction to investigate the question whether there was oral agreement between the parties providing setting off of the cost of repair towards the arrears of rent. The argument of learned Counsel is that the Controller had jurisdiction under section 11 only to determine the question whether there was payment or non-payment of rent and that he had no jurisdiction to decide whether there was an oral agreement in existence which provided for setting off of the cost of repair towards the amount of rent accrued. The argument is that

1953.

RAMNATH v. SUKUMARI. RAMASWAMI AND SINHA, JJ.

the question of the existence of agreement was a question for the Civil Court to decide, and the House Controller had, in this case, usurped the jurisdiction of a Civil Court by deciding that the agreement which was pleaded on behalf of the petitioner was not substantiated. The argument is interesting, but, in our opinion, wholly unsound. The question whether there was an oral agreement or not was only ancillary to the main question whether there was non-payment of rent. This question the Controller had ample jurisdiction to decide. The Controller had jurisdiction, in express terms of section 11, to decide the question of non-payment of rent, and, as a matter of necessary implication, he had jurisdiction to decide all matters relevant for deciding the question of non-payment of rent. In the present case, the question of the existence of an oral agreement is relevant for determining the question of non-payment of rent, and we think that the House Controller had undoubted jurisdiction to decide this question also.

A further point was taken on behalf of the petitioner that the Controller did not give an opportunity for producing oral evidence and necessary documents in support of the petitioner's case. It is not alleged in the affidavit of the petitioner that the House Controller was asked to grant adjournment or to postpone the case in order to enable the petitioner to adduce oral or documentary evidence. No such allegation has been made either in Miscellaneous Judicial Case no. 271 or Miscellaneous Judicial Case no. 272 of 1953. If the petitioner was really aggrieved, it is obvious that he should have asked the House Controller to grant postponement of the case in order to enable him to adduce necessary evidence. It appears from the order-sheet that, on the date the order was passed, the petitioner was present in person before the House Controller and made his submissions upon which the order was passed. On behalf of the opposite party,

1953.

RAMNATH v. SUKUMARI.

RAMASWAMI AND SINHA, JJ.

learned Counsel said that there was no allegation in the plaint of the title suit that the House Controller granted no opportunity to the petitioner to adduce evidence. We are, therefore, not satisfied that the allegation of the petitioner is correct on this point or that the order of the House Controller suffers from lack of jurisdiction on this ground.

For the reasons which we have attempted to state, we are of the opinion that no case has been made out for grant of any *writ* under Article 226 of the Constitution nor for grant of a temporary injunction in the title suit brought by the petitioner in the Court of the Munsif at Patna. It is also obvious that the questions of constitutional importance raised in the suit have already been decided by this Bench in Miscellaneous Judicial Case no. 319 of 1952 decided on the 4th August, 1953. There is no reason, therefore, for transferring the suit to the High Court under Article 228 of the Constitution.

In the result, Miscellaneous Judicial Case nos. 271 and 272 of 1953 and Civil Revision no. 477 of 1953 are all dismissed with costs. There will be one set of cost payable to the contesting landlord opposite party. Hearing fee seven gold mohurs.

S.H.

Applications dismissed.

APPELLATE CIVIL.

Before Narayan and Ahmad, JJ.

RAMSEWAK

v.

RAMGIR.*

1953.

April, 1, 2, 6, 7. *September*, 8.

Riparian owners, rights of—rights, whether depend on grant or ownership—riparian owners, whether can erect a

*Appeal from Original Decree no. 32 of 1947, from a decision of Mr. Janki Prasad Singh, Additional Subordinate Judge, Motihari dated the 29th November, 1946.

1953.

RAMSEWAK
v.
RAMGIR.

dam across a stream—riparian lands, what constitutes—natural stream, defined.

It is a mistake to suppose that a natural stream must have its origin in a mountain spring, or that it must flow continuously throughout the year, and must at every single point of its course flow through a clearly defined channel. Even if such a stream does not flow continuously throughout the year it will be regarded as a natural stream.

A river may be fed by the rains directly without any intermediate collection of the water in the bowels of the earth and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it becomes dry.

Stollmeyer v. *Trinidad Lake Petroleum Company Limited*(1), *Harihar Prasad Singh* v. *Mt. Janak Dulari Kuer*(2) and *Maung Bya* v. *Maung Kyi Nyo*(3), relied on.

The rights of a riparian owner over a natural stream do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturae*. Each riparian owner has the right to use the water provided he does not interfere with the quantity or the quality of the water to which the lower riparian owner is entitled.

Embrey v. *Owen*(4), *Miner* v. *Gilmour*(5), *Secretary of State* v. *Sannidhiraju Subbarayudu*(6) and *Debi Prasad Singh* v. *Joynath Singh*(7), relied on.

Holker v. *Porritt*(8), *Baily* v. *Clark*(9) and *Ram Kripal Singh* v. *Hanuman Singh*(10), referred to.

(1) (1918) A. I. R. (P. C.) 60.
(2) (1941) A. I. R. (Pat.) 118.
(3) (1925) L. R. 52 Ind. App. 385.
(4) (1851) 6 Exch. 369.
(5) (1852) 12 Moo. P. C. 156.
(6) (1953) A. I. R. (P. C.) 40.
(7) (1897) L. R. 24 Ind. App. 60.
(8) (1875) L. R. 10 Exch. 59.
(9) (1902) 71 L. J. (Ch.) 396.
(10) (1921) A. I. R. (Pat.), 51.

1953.

RAMSEWAK v. RAMGIR.

In India riparian land must be confined to land which is on the bank of a stream and which extends from the bank to a reasonable depth inland.

Emani Lakshminarasu Avadhanulu v. *Secretary of State*(1), relied on.

When a riparian owner acquires a right by prescription to maintain a *dam* over a stream, it does not obtain a kind of immunity in respect of all other obstruction that may arise in the natural course of things by reason of the existence of the *dam*.

The obstruction caused to the free flow of water in the stream by accumulation of silt owing to existence of *dam*, amounts to a " nuisance " and the riparian owner who is injured thereby may take steps to avoid it even by going on the other person's land, if only he can do it peacefully.

Secretary of State v. *Kattari Nagayya Kama Rajendra Ramaswami Kamya Naicker, Zamindar of Saptpur*(2), relied on.

John White Sons v. *J. & M. White*(3) and *Brown* v. *Best*(4), referred to.

Appeal by the defendants.

Cross-objection by the plaintiffs.

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

Rajkishore Prasad and *K. P. Varma*, for the appellants.

J. C. Sanyal, for the respondents.

NARAYAN, J.—The defendants are the appellants, and the appeal arises out of a suit in which a declaration was sought that the plaintiffs were entitled to irrigate their fields lying in four villages from the water of a river called eastern Sheoraha and that the defendants had no right to obstruct the course of the river. The plaintiffs are the residents of villages

(1) (1919) A. I. R. (Mad.) 1152.
(2) (1938) A. I. R. (Mad.) 180.
(3) (1906) A. C. 72.
(4) (1747) 95 Eng. Rep. 557.

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

Gujra Motihari, Belwa alias Balua, Bairia alias Barheya and Turkolia, and they have got lands in the first three villages mentioned above and in village Jamunia. The defendants are the residents of villages Mahui, Sonbarsa and Bankatwa. The plaintiffs have instituted the suit in a representative capacity, that is, as representatives of the residents of the four villages, the lands of which are, according to them, irrigated by the water of eastern Sheoraha. The defendants also have then sued in a representative capacity, that is, as representing the residents of villages Mahui, Sonbarsa and Bankatwa. The case which the plaintiffs have sought to make out is that there is a natural stream called eastern Sheoraha, having its slope towards the south. This stream emerges from the jungles in the Himalayas, and after passing through Bankatwa and Sonbarsa flows to the south and to the villages of the plaintiffs mentioned above. According to their allegation the lands of the four villages are irrigated from the water of eastern Sheoraha from time immemorial, no other source of irrigation being available to them. The cause of action for this suit is said to have arisen in Asarh 1351 when the defendant no. 1 after taking earth from his plots nos. 51 and 52 of village Sonbarsa raised the level of that portion of the river which lies to the west and the south of survey plot no. 52 and constructed a bundh across the river Sheoraha to the north-west of plot no. 52. When the plaintiffs came to know of the construction of the bundh and the raising of the level of the river they took serious objection, with the result that the defendants got a proceeding under section 144, Cr. P. C. started against them. The plaintiffs then filed a petition before the Subdivisional Magistrate of Bettiah praying that a proceeding under section 133, Cr. P. C., be drawn up, but the learned Subdivisional Magistrate by his order dated 13th September 1944 started a proceeding under section 147, Cr. P. C. After

taking evidence he made the rule absolute against the plaintiffs, and thereafter the present suit was instituted. The prayer in the plaint is for a declaration that the plaintiffs are entitled to irrigate their fields from the water of the river and that the defendants who are the residents of Mahui, Sonbarsa and Bankatwa have no right to obstruct the natural flow of the stream. It is further prayed that the defendants be ordered to remove the bundh and to bring the bed of the river to its original level, failing which the bundh be removed and the bed of the river brought back to its original level under the orders of the Court. A permanent injunction is also sought restraining the defendants from obstructing the natural flow of the river. Rs. 4,500 is claimed as compensation for the damages caused to the paddy fields lying in the villages of the plaintiffs.

The defendants resisted the plaintiffs' claim on various grounds, and the pleas on which they mainly rely are that the eastern Sheoraha is an ordinary nala and not a natural stream, that bundhs have to be constructed for utilising the water of the stream and the bundh mentioned in the plaint is not a recent construction and, that only the surplus water of eastern Sheoraha flows down the disputed bundh up to the lands of village Bairia where the stream terminates. It is, therefore, contended by the defendants that the plaintiffs had no cause of action for the suit and are not entitled to any decree.

The suit has been decreed in part by the learned Subordinate Judge who has held that the plaintiffs are entitled to irrigate the southern portion of Belwa and Bairia and the lands lying north of pyne no. 216 in village Jamunia from the eastern Sheoraha. The learned Subordinate Judge has further directed that the disputed bundh will remain intact with its height at 3 feet and the surplus water of the river would flow down in its natural course for irrigating the plaintiffs'

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

fields. The defendant no. 1 has been ordered to remove the earth from the portion of the stream lying just below the disputed bundh. The issue regarding damages has not been finally decided by the learned Subordinate Judge who acceded to the prayer of the plaintiffs that this issue should remain undetermined until the main issues were decided.

The defendants who have preferred this appeal against the decision of the learned Subordinate Judge have pressed the following three points before us:— (1) The eastern Sheoraha is not a natural stream but an artificial water-course, and consequently the owners of the lands in the four villages, Gujra Motihari, Belwa alias Balua, Bairia alias Barheya and Jamunia cannot be regarded as riparian owners. (2) Even if the eastern Sheoraha is held to be a natural stream, all the lands of the said four villages are not riparian lands. (3) Even if some of the lands lying in the villages of the plaintiffs are riparian lands, no declaration can be granted to the plaintiffs.

The plaintiffs have preferred a cross-objection which is directed against the order for maintaining the bundh up to a height of 3 feet. The cross-objection is also directed against the finding of the learned Subordinate Judge to the effect that the plaintiffs have not the right to irrigate all the lands of the four villages from the water of the river eastern Sheoraha.

The only substantial point which calls for a decision in this case is whether the stream called eastern Sheoraha can be regarded as a natural stream. The other points will lose much of their importance if the finding is that the stream is a natural stream in view of the facts conceded by Mr. J. C. Sanyal, Counsel for the plaintiffs-respondents. In my opinion, there is no difficulty in holding that the stream which is called eastern Sheoraha is a natural stream. The

1953.

RAMSEWAK v. RAMGIR

NARAYAN J.

Subordinate Judge made a local inspection in this case, and he says that he was shown several nalas issuing from Jharjhari jungle situate at the foot of a hill which forms part of the Himalayan range. The water issuing from these nalas has formed the stream called eastern Sheoraha. It could not be contended before us that the river has not got its origin in the Himalayas. The evidence adduced on behalf of the plaintiffs for proving that the river issues from the hills is very convincing. The witnesses have stated that the river starts from the Himalayas and passes through Jharjhari jungle. D. W. 2 has admitted that the eastern Sheoraha issues from the jungle of Hasti Bairya and that the jungle of Hasti Bairya is attached to the hills which are part and parcel of the Himalayas. He further admits that the rain-water from the hills comes down through the jungles to the stream known as eastern Sheoraha. As was pointed out by Lord Sumner in *Stollmeyer* v. *Trinidad Lake Petroleum Company Limited*(1) a river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry. The river Vessigny, as appears from their Lordships' judgment, was formed by the water collected in a number of steep gullies or ravines in a hilly scrub-clad district in Trinidad and emptied into the Gulf of Paria. The contention urged before their Lordships was that the river was not such a river or natural water-course that its lower riparian proprietors could complain of anything that might be done in dealing with the water flowing down. It was found that sometimes there was no water in the water-courses and sometimes whatever water there was could not be

(1) (1918) A. I. R. (P. C.) 60.

1953.

RAMSEWAK v. RAMGIR NARAYAN, J.

deemed to be a course. It was further found that the water-course was never fed by springs. But these circumstances were not deemed to be critical. This Privy Council decision was followed by a Bench of this Court in *Harihar Prasad Singh* v. *Mt. Janak Dulari Kuer* (1), and Meredith J. pointed out that it was quite a mistake to suppose that a natural stream must have its origin in a mountain spring, or that it must flow continuously throughout the year, and must at every single point of its course flow through a clearly defined channel. In this case the reasonable conclusion will be that the stream has its origin in the Himalayas. The obvious inference is that it is formed out of the water which comes down from the Himalayas through the jungles, and anybody who has got some idea of the conditions prevailing in the Himalayas will at once understand that in that biggest mountain range on the earth streams are formed out of the snow water flowing from the glaciers which may include the water of the rains falling on that big mountain; and, as was pointed out by Meredith J., even if such a stream does not flow continuously throughout the year it will be regarded as a natural stream. Here, it is not the defendants' case that it does not flow continuously throughout the year. There is, therefore, no reason for holding that eastern Sheoraha which emanates from the Himalayas cannot be regarded as a natural stream. The case of *Maung Bya* v. *Maung Kwi Nwe*(2) appears to lay down that a water-course which is styled as a canal after having been widened and deepened and having been used in a way in which a natural stream is used could be regarded for all practical purposes as a natural stream, and riparian owners have the same right over it as they would have over a natural stream. If it is held, as it must be held, that the eastern Sheoraha is a natural

(1) (1941) A. I. R. (Pat.) 118.
(2) (1925) L. R. 52 Ind. App. 385.

stream, then the consequences are well-known. To quote the observation of Parke, B. in *Embrey* v. *Owen*(1).

" The right to have a stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state, but is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. "

The dictum laid down by Lord Kingsdown in *Minor* v. *Gilmour*(2) has been quoted in several decisions, and in view of the defence which has been taken in this case has got great relevance here :—

" By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which

(1) (1851) 6 Exch. 369.
(2) (1858) 12 Moo. P. C. 156.

1953.

RAMESHWAR v. RAMGIR.

NARAYAN, J.

such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

The natural rights do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturae* incident to the ownership of the soil of the land abutting upon the stream. There are cases in which the rights which the riparian owners of a natural stream enjoy have been extended to the owners possessing lands on the two sides of an artificial channel which had been made by the hand of man for diverting the water of the natural stream. [*See Holker* v. *Porritt*(1) and *Bailu* v. *Clark*(2).] Das. J. while referring to these two decisions in *Ram Kripal Singh* v. *Hanuman Singh*(3) observed as follows:—

"The law that I deduce from all these cases is that the proper inference from the user of the water of a natural stream though flowing in an artificial channel is that the artificial channel had been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one. If that be so, then the plaintiffs, as riparian proprietors, have an undoubted right to have the water

(1) (1875) L. R. 10 Exch. 59.
(2) (1902) 71 L. J. Ch. 306.
(3) (1921) A. I. R. (Pat.) 51.

1953.

RAMESWAR v. RAMGOPI

NARAYAN, J.

come to them without obstruction in its ordinary and accustomed course, undiminished in flow, quantity and quality. ".

In *Secy. of State* v. *Sannidhiraju Subbarayudu*(1) Viscount Dunedin observed that the right of a riparian owner is a natural right not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. The following observation of Lord Macnaghten was quoted with approval in this case :—

" In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary, but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for these purposes substantially undiminished in volume and unaltered in character. "

The stream known as ' eastern Sheoraha ' being a natural stream the riparian owners south of the place where the bundh has been constructed and the level of the river bed raised have the right to use the water of the stream for irrigating their lands. It is an admitted position that a bundh has been constructed across the river to the north-west of plot no. 52 which lies in village Sonbarsa. Plots nos. 51 and 52 are kasht lands belonging to the defendant no. 1 and what the defendant no. 1 or the other defendants have done is that they have raised the level of the bed of the river lying to the west and the south

(1) (1932) A. I. R. (P. C.) 46.

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

of survey plot no. 52 and have constructed a bundh completely obstructing the flow of the water downwards. There was a criminal proceeding after this construction in which the decision was against the plaintiffs and that has led to the institution of this present suit. The defendants had raised a plea that on account of natural causes this eastern Sheoraha had become filled up and cultivable, and that the defendant no. 1, after it had been filled up, had taken settlement of the cultivable portion about twelve years before the institution of the suit from a concern known as Narainpur concern. This alleged settlement has not been proved, but evidence has been adduced by the defendants for proving that bundhs are raised for making use of the water of the stream for irrigational purposes. The real position with regard to the bundh appears to have been very truthfully stated by the plaintiffs' witnesses. We are getting it in the evidence of P. W. 3 that for irrigating their lands they have to put temporary bundhs in the river which are demolished as soon as the fields have been irrigated. There is no reason for disbelieving his statement that the entire water of the river is not obstructed by such a bundh and that only a portion of the water is taken out through the diversion into an attached pyne. Other witnesses also speak about the construction of temporary bundhs, and the position appears to have been very well clarified in the evidence that has been adduced by the plaintiffs. There appears to be no truth in the statement of the witnesses that the bundhs are permanent bundhs. D. W. 3 had to admit that these bundhs give way every year and that they are repaired annually at the time of irrigation. No value can be attached to the statement of D. W. 5 that though the two other bundhs, namely, the bundhs in Hasti Bairva and Mahuawan are broken at places on account of rains and floods, the disputed bundh has not at all been affected by the rains and the floods. D. W. 14 has gone to

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

the length of stating that the disputed bundh has been in existence since before his hosh. According to D. W. 10 the bundh in Mahuawan is not even a complete bundh, and a portion of the river water is allowed to pass downwards through the river channel. He again stated that the bundh is right across a branch of the river and that another branch of it brings water downwards. But he had to admit that in the disputed bundh no arrangement has been made for allowing the water to go further down. And D. W. 13 has substantially corroborated the statements of the plaintiffs' witnesses that the bundh in question is completely obstructing the flow of the water. He states as follows:

"South of the disputed bandh there is high land for a certain distance. To its further south and to the north of the disputed bandh the river is deep."

These bundhs could not be permanent structures, and they are bound to be affected during floods and the rains. As a matter of fact, in a hilly stream the bundhs must be washed away every year, and for the purposes of carrying the water of the stream to their fields some arrangement has to be made by the cultivators of the riparian lands. It is, therefore, simply reasonable that we should accept the case that has been put forward by the plaintiffs so far as the bundh and the raising of the river bed are concerned, and there is no reason why the evidence of the plaintiffs' witnesses should not be preferred to the evidence of the defendants' witnesses on the point as to whether the bundh is a recent construction or has been in existence from long before. The learned Subordinate Judge made an inspection of the locality and it appeared to him to be an old bundh. The inspection was made by the learned Subordinate Judge in the month of November 1946 which must be after the rainy season, and with the greatest respect for the views of the learned Subordinate Judge I must say that it was very difficult for him to say whether this bundh

1959.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

was old or new. The circumstances unmistakably go to show that bundhs have to be raised every year for diverting the water or for utilizing the water of the natural stream for irrigational purposes. And the right of a riparian owner to divert water for the purpose of irrigation has been explained in the following manner by Lord Watson in *Debi Pershad Singh* v. *Joynath Singh*(1).

"The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right claimed by the appellants in the first conclusion is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land, and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor in the position of the appellants is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the river or stream and the proportion which the water abstracted bears to its entire volume."

Undoubtedly, by the construction of the bundh and by the raising of the level of the bed the defendants have materially diminished the quantity which could

(1) (1897) L. R. 24 Ind. App. 60.

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

descend for the use of the riparian proprietors below. In fact, the bundh which the defendants insist on maintaining has completely obstructed the flow of water, and the act of the defendants must, therefore, be regarded as illegal and improper. They could take only so much of the water of the stream as could be abstracted without diminishing the quantity to which the proprietors below were ordinarily entitled. The evidence adduced by the plaintiffs as to the construction of the bundh and the raising of the level of the river bed has to be accepted in its entirety, and if this evidence is accepted, the conclusion is irresistible that what has been done by the defendants is prejudicial to the interest of the plaintiffs or the riparian owners below the point at which the bundh has been constructed. The riparian owners are, therefore, certainly entitled to have the bundh removed or demolished and to have the bed of the river brought to its original level. What has been done by the defendants is not sanctioned by law, and there is no justification for allowing this present bundh to stand. I have tried to quote the law on the subject with a view to making it clear that each riparian owner has the right to use the water provided he does not interfere with the quantity or the quality of the water to which the proprietors below are entitled. Certainly, the quantity of water to which the defendants are entitled is a question of circumstances, but the defendants have to conduct themselves in a manner sanctioned by law, and they have no right whatsoever to cause any prejudice to the proprietors below who have the natural right to use the water of the stream for irrigational purposes. In *Secretary of State* v. *Katari Nagayya Kama Rajendra Ramaswami Kamya Naicker, Zamindar of Saptur*(1) the High Court of Madras pointed out that even when a party acquires the right by prescription to maintain

(1) (1938) A. I. R. (Mad.) 180.

1953.

RAMSEWAK v. RAMGIR.

NARAYAN, J.

a dam, it does not obtain a kind of immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. The obstruction caused to the free flow of water in the stream by accumulation of silt owing to existence of dam, amounts to a "nuisance" and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and for damages. Their Lordships further observed as follows: "We may state at the outset that the acquisition by the defendant of a prescriptive right to maintain the dam will not of itself entitle him to all the waters intercepted by the dam but only to such water as he has been accustomed to take by the Sivaneri channel *see John White and Sons* v. *J. and M. White*(1). If he is entitled to draw water through a channel with certain dimensions, he cannot enlarge the dimensions of that channel: *See Brown* v. *Best*(2)." In this case we cannot hold on the evidence that the defendants have acquired the right by prescription to maintain a dam. I need not repeat that I have accepted the plaintiffs' version and the evidence of the plaintiffs' witnesses to the effect that the bundh is not a permanent thing. The defendants' action is, therefore, absolutely unjustified.

The next point is whether the lands of the four villages can be regarded as riparian lands. The learned Counsel for the appellants has submitted that even if the eastern Sheoraha is held to be a natural stream, the lands of the four villages cannot be regarded as riparian lands. This point now presents no difficulty in view of the admission made before us on

(1) (1906) A. C. 72.

(2) (1747) 95 Eng. Rep. 557.

1953.

RAMSEWAK RAMOIR.

NARAYAN, J.

behalf of the plaintiffs-respondents. Mr. Sanyal, Counsel for the plaintiffs-respondents, conceded that in this particular case only the owners of the lands abutting on the stream and coming within the purview of the water-shed of the river should be held to be the riparian owners and that a declaration should be granted only to this effect that the owners of the lands abutting on the stream and coming within the purview of the water-shed can use the stream. Quite naturally, after this concession had been granted, Mr. Rajkishore Prasad, Counsel for the defendants-appellants, did not urge the second point. A declaration in this litigation would be granted only in terms as suggested by the Counsel for the plaintiffs-respondents, but still it is necessary to point out that no land of village Jamunia is on the bank of the river or the stream. The declaration, therefore, may not apply to village Jamunia. But even though the declaration is not exactly applicable to the lands of village Jamunia, it is noteworthy that according to the *farde-ab-pashi* the water of the stream is utilized for irrigating the lands of this village, and the water is carried through pynes. The *farde-ab-pashi* of village Jamunia is exhibit D(3) and 3(*c*). Column no. 2 shows that the water is carried through pynes, and the pynes have been indicated in the maps. Column no. 8 shows that irrigation is done with the permission of the thikadars who are the proprietors of Kothi Narainpur, and column no. 9 shows that " the tenants decide mutually by means of the panchait system ". On account of the concession so generously granted by the clients of Mr. Sanyal the declaration so far as Jamunia is concerned may mean that the rights as entered in the *farde-ab-pashi* are being recognized, though in view of the position taken before us it is not necessary to determine as to whether the water can be utilized for the irrigation of Jamunia lands through the pynes mentioned in the *farde-ab-pashi* or not,

1953.

RAMSEWAK v. RAMGIR

NARAYAN, J.

The Counsel for the plaintiffs-respondents has further conceded that there is no pyne attached to the eastern Sheoraha for the irrigation of Gujra Motihari and that all the pynes of this village are connected with the western Sheoraha. But admittedly Gujra Motihari is on the bank of the river, and the rights which are *jure naturae* incident of the ownership of the soil of the land abutting on the stream are certainly available to the persons who have their lands abutting on the stream. The declaration in the form conceded can, therefore, be granted even with regard to Gujra Motihari lands.

The *farde-ab-pashi* of village Belwa is exhibit 3(*e*) and exhibit D(1). It shows that the water is brought from the river Sheoraha and that the tenants irrigate their fields without the permission of anybody. It is distinctly shown in column no. 8 that they have got the right of irrigation. Belwa is certainly a riparian village and the irrigation of the lands of this village, as the map shows, must be done by the eastern Sheoraha. The eastern Sheoraha terminates at plot no. 171.

The *farde-ab-pashi* of village Bairia is exhibit D and exhibit 3(*d*), and column no. 2 shows that there are several pynes through which the water is taken. The entry in column no. 8 is that the water comes from the nala of village Mahui to the pyne of this village bearing khesra no. 70. A bundh is made on the bank of the river and water is brought to the pyne no. 13 and then to the other pynes of the village. The lands are irrigated without the permission of the malik. Pyne no. 13, as the map shows, is in this village.

The learned Subordinate Judge has held that only the southern portion of Bairia lying south of pyne no. 13 is irrigated by the eastern Sheoraha. Similarly, he has held that the northern lands of village Jamunia

lying north of pyne no. 216 are irrigated by the eastern Sheoraha. With regard to Belwa his finding is that the southern portion of this village is irrigated from eastern Sheoraha. In view of the concession granted, the declaration will only be in the form suggested by the Counsel for the respondents, but, as I have already pointed out, the right of irrigation as entered in the *farde-ab-pashi* which has not been questioned before us will not be affected by the declaration made in this suit. The concession solves the difficulties which might otherwise have arisen in this case. The judges and text writers have not been uniform as to the description of a riparian land, and I am inclined to agree with the view expressed in *Emani Lakshminarasu Aradhanulu* v. *Secy. of State*(1) that in India riparian land must be confined to land which is on the bank of a stream and which extends from that bank to a reasonable depth inland. The learned Counsel for the respondents was careful enough to submit that the right would be confined to the owners of the lands abutting on the stream and coming within the purview of the watershed of the river. With respect, I would adopt the observation of Sadasiva Aivar, J., in the Madras case just cited which is to the following effect:—

"Having however regard to the customs and necessities of a tropical agricultural country like India, Indian Courts should, it seems to me, be liberal in recognizing irrigational rights as natural rights of as strong a character as any other, provided, of course, the lower riparian owners are not injured to an unreasonable extent and 'the equality and the wide participation of the benefits' of the natural stream are not interfered with to an unreasonable extent."

The plaintiffs, therefore, are entitled to a declaration in terms indicated above with regard to the lands

(1) (1919) A. I. R. (Mad.) 1152.

1953.

RAMSEWAK v. RAMGIR

of all the four villages. Point no. 3 as formulated by the Counsel for the appellants is thus decided on the basis of the concession made by the Counsel for the respondents.

NARAYAN, J.

The appeal as well as the cross-objection succeed in part in view of the findings recorded above. I have already given my reasons for holding that the present bundh ought to be removed and the river bed must be brought to its normal level.

The appeal and the cross-objection are therefore allowed in part, and the declaration is granted with regard to all the lands of villages Gujra Motihari, Belwa, Bairia and Jamunia abutting on the stream and coming within the purview of the water-shed of the river. If the bundh is not removed and the river bed is not brought to its normal level within one month from today, the plaintiffs will have that done with the help of the Court, and the costs thereof will be realised from the defendants. Parties will bear their own costs of both the Courts.

AHMAD, J.—I agree.

K. D. *Order accordingly.*

1953.

August, 28.
September, 8.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sinha, JJ.

S. M. UMAIR

v.

R. C. SINGH.*

Interpretation of Statute—rule of—Representation of People Act, 1951 (Act XLIII of 1951), object and scope of—all persons nominated not impleaded as party to an election petition—election petition, whether bad for non-joinder of parties—section 82, whether mandatory—order setting aside

*Miscellaneous Judicial Case no. 78 of 1953, in the matter of an application under Articles 226 and 227 of the Constitution of India.

1958.

S. M. UMAIR v. R. C. SINGH.

election on ground of non-joinder, whether without jurisdiction—High Court, whether can interfere—Constitution of India—Article 227—High Court's power of superintendence.

No general rule can be laid down as to whether a provision in a statute is imperative or more directory.

The mere use of the word " shall " in section 82 of the Representation of People Act, 1951 does not necessarily make the provision imperative, the nature of the provision must depend upon the context and the collocation in which the word "shall" is used, and must be gathered from the intention of the Legislature from the four corners of the Act itself.

The Liverpool Borough Bank v. *Turner*(1), *Ashutosh Sikdar* v. *Behari Lal Kirtunia* (2) and *Dharendra Krishna Mukherji* v. *Nihar Ganguly*(3), referred to.

Where the language employed in an Act is capable of two interpretations, the Court must always lean to the interpretation which is reasonable one and discard the literal interpretation which does not fit in with the scheme of the Act under consideration.

Birch v. *Vigan Corporation*(4), referred to.

Though section 82, Representation of People Act, 1951, is couched in mandatory form its provision is merely directory and non-compliance with section 82 does not affect the jurisdiction of the Election Commission or the Election Tribunal to hear and determine the election petition.

That being the position, an Election Tribunal had no jurisdiction to dismiss an election petition on the ground that some of the duly nominated candidates, who had withdrawn their candidatures, were not made parties to the election petition.

Sitaram Hirachand Birla v. *Yograjsing Shankarsing Parihar*(5) *and Shri Sheo Kumar Pandey* v. *K. G. Oak I. C. S.*(6), not followed.

(1) (1861) 30 L. J. Ch. 379.
(2) (1907) 11 Cal. W. N. 1011.
(3) (1943) A. I. R. (Cal.) 266.
(4) (1953) 1 Q. B. D. 136.
(5) (1953) A. I. R. (Bom.) 298.
(6) (1953) All. L. J. 323.

1953.

S. M. UMAIR v. R. C. SINGH.

The order of the Election Tribunal dismissing the election petition in the case on the ground of non-joinder was without jurisdiction and the High Court exercising its power of superintendence under Article 227 of the Constitution of India set aside that order.

Bimla Prosad Roy v. *State of West Bengal*(1) and *Girish Chandra Majhi* v. *Girish Chandra Maity*(2), relied on.

Shri Sheo Kumar Pandey, In re(3), not followed.

Application under Articles 226, 227, Constitution of India.

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

Balbhadra Prasad Singh and *Shamsul Hussain*, for the petitioner.

Awadhesh Nandan Sahay, *Madan Mohan Prasad*, and the *Government Advocate*, for the opposite party.

SINHA, J.—This is an application under Articles 226 and 227 of the Constitution, and arises out of an election petition filed by the petitioner, Shah Mohammad Umair, for a declaration that the election of Ram Charan Singh, opposite party no. 1, to the Bihar Legislative Assembly from the Kurtha Constituency was void, and also for a declaration that the petitioner had been duly elected. Three other persons, besides Ram Charan Singh, namely, Parasnath Sharma, Rajaram Singh, son of Sri Dukharan Singh, and Rajaram Singh, son of Sri Mukhlal Singh, were made respondents to the election petition. These three persons and the opposite party no. 1 and the petitioner were validly nominated candidates at the election, that is to say, they had not withdrawn their candidature. There were three other persons, namely, Siasaran Singh, Ramprakash Mahton and Balmiki Mahton,

(1) (1951) A. I. R. (Cal.) 258.
(2) (1951) A. I. R. (Cal.) 574.
(3) (1953) All. L. J. 323.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

who were duly nominated candidates for the election, but, within the time allowed, they had withdrawn their candidature and they were not in the field at the time of the actual election. These three persons were not made parties to the election petition. A point was raised on behalf of Ram Charan Singh, the only contesting respondent, that the election petition should be dismissed on the preliminary ground of non-joinder of these three persons and that the Election Tribunal need not go into the merits of the petition. Issue no. 2 ran as follows:—

"Is the petition liable to be dismissed on the ground of non-joinder of parties?"

Sometime later, the petitioner filed an application for amendment of the election petition by adding the aforesaid three persons as respondents.

The election petition was heard on issue no. 2 only and also on the question as to whether the petition for amendment should be allowed. The Election Tribunal, by a majority of 2 to 1, held that the election petition was not maintainable because of the non-joinder of the aforesaid three persons, and the amendment of the petition sought for should not be allowed; and the election petition was dismissed.

Article 329, sub-clause (*b*), of the Constitution provides that

"no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

In accordance with the provision aforesaid, the Representation of the People Act (XLIII of 1951) providing

"for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and

1958.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such electoin ",

was enacted by Parliament in 1951. This Act will hereafter be referred to as the Act in the course of my judgment.

Section 80 of the Act says that

" no election shall be called in question except by an election petition presented in accordance with the provisions of this Part "

(Part VI) and section 81 lays down the procedure for presentation of election petitions. It says that

" an election petition calling in question any election may be presented on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 to the Election Commission by any candidate at such election or any elector in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed. "

The explanation to the section defines ' elector ' and mentions the authority to whom the election petition should be presented and the manner in which it should be presented, namely, by the person making the petition, or by a person authorised in writing in this behalf by the person making the petition; or by registered post. Section 82 runs as follows:—

" A petitioner *shall join* as respondents to his petition all the *candidates who were duly nominated at the election* other than himself if he was so nominated. "

The important words have been italicised by me. Section 83 deals with the contents of the petition; section 84 mentions the relief that may be claimed. Section 85 is in the following words:—

" If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition:

Provided that, if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may, in its discretion, condone such failure. "

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

Chapter III of Part VI dealing with trial of election petitions starts with section 86 and it deals with the appointment of Election Tribunal. Sub-section (1) of section 86 runs as follows :—

" If the petition is not dismissed under section 85, the Election Commission shall appoint an Election Tribunal for the trial of the petition. "

Section 90 prescribes the procedure to be followed before the Tribunal. Sub-section (1) of section 90 says that

" The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be published in the Official Gazette, and at any time within fourteen days after such publication, any other candidate shall, subject to the provisions of section 119, be entitled to be joined as a respondent. "

Sub-section (2) says that the

" election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908), to the trial of suits. "

The provisos to sub-section (2) are not important for the purpose of this application. By sub-section (3) of section 90, the provisions of the Evidence Act are made applicable subject to the provisions of this Act; and sub-section (4) is in the following words :—

" Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117. "

Section 91 deals with the procedure regarding appearance before the Tribunal. Section 92 defines the powers of the Tribunal and says that it shall have the powers which are vested in a Court under the Code of Civil Procedure when trying a suit in respect of the following matters—

(*a*) discovery and inspection;

(*b*) enforcing the attendance of witnesses, and requiring the deposit of their expenses;

1958.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

(*c*) compelling the production of documents;

(*d*) examining witnesses on oath;

(*e*) granting adjournments;

(*f*) reception of evidence taken on affidavit; and

(*g*) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

Section 93 deals with documentary evidence and section 94 with secrecy of voting. Section 98 relates to the decision of the Tribunal, and it runs as follows:—

"At the conclusion of the trial of an election petition the Tribunal shall make an order—

(*a*) dismissing the election petition; or

(*b*) declaring the election of the returned candidate to be void; or

(*c*) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or

(*d*) declaring the election to be wholly void."

Section 99 mentions the other orders which may be passed by the Tribunal in case any charge is made in the petition of any corrupt or illegal practice having been committed at the election and also regarding fixation of the amount of costs payable specifying the persons by and to whom to be paid. Section 100 deals with grounds for declaring an election to be void, and section 101 enumerates the grounds for which a candidate other than the returned candidate may be declared to have been elected. Section 108 refers to withdrawal of petitions before appointment of Tribunal and section 109 with withdrawal of petitions

after appointment of Tribunal. Section 110 prescribes the procedure for withdrawal of petitions before the Election Commission or the Tribunal. Sections 112, 113 and 114 deal with abatement of election petition on the death of the sole petitioner or of the survivor of several petitioners. Sections 115 and 116 refer respectively to substitution on death of petitioner and abatement or substitution on death of respondent. Section 115 says that

" any person who might himself have been a petitioner may, within fourteen days of such publication (publication of the fact of death as provided for in sections 113 and 114), apply to be substituted as petitioner and upon compliance with the conditions of section 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit.",

Section 117 says,

" The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition ".

Other sections of this Chapter are not relevant. I have referred to these sections to show that the Act deals exhaustively in regard to the presentation of election petition, the parties to the petition, the contents of the petition, the reliefs which may be claimed, the dismissal of the petition on preliminary grounds by the Election Commission, the appointment of the Election Tribunal, the procedure to be followed before such Tribunal, the powers of the Tribunal, the decision of the Tribunal and withdrawal and abatement of election petition and substitution.

Now the question for consideration is whether the Election Tribunal in question had any jurisdiction to dismiss the election petition on the ground that some of the candidates who had been duly nominated but who had withdrawn their candidature were not made parties to the election petition. Mr. Singh, learned

1963.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

Counsel on behalf of the petitioner, has not challenged the decision of the Tribunal refusing to amend the petition. His sole contention is that the Tribunal had no jurisdiction to dismiss the petition on the ground of non-joinder of those candidates who, though duly nominated, had withdrawn their candidature and were not candidates at the actual election. It will be seen that section 85 makes it obligatory upon the Election Commission to dismiss the election petition if the provisions of section 81 (regarding presentation of petition), section 83 (regarding contents of the petition) or section 117 (regarding costs to be deposited by the petitioner) have not been complied with. The commission has, however, been given the power under the proviso to that section to condone the delay on sufficient cause being shown by the petitioner for his failure to present the petition within the prescribed period. Section 86 says that if the petition is not dismissed under section 85, the Election Commission shall appoint an Election Tribunal for the trial of the petition. When the Tribunal is appointed, the Tribunal is also given the discretion under section 90(4) to dismiss the election petition on the grounds mentioned in section 85, namely, for non-compliance with the provisions of section 81, section 83 or section 117, but it is not obligatory upon the Tribunal to dismiss the petition on those grounds. Now section 82, which deals with " parties to the petition " finds no place in section 85 or section 90(4). It is obvious from the exclusion of section 82 from section 85 or section 90(4) that mere non-compliance with section 82 was not intended to make it obligatory upon the Election Commission to dismiss the election petition under section 85 or to give any discretion to the Election Tribunal to dismiss the petition under section 90. sub-section (4). The Tribunal in this case has held by a majority view that the word " shall " in section 82 makes it absolutely essential to join all candidates who were duly nominated at the

election as respondents to the petition, and further that as the word " shall " is mandatory, non-compliance with the provisions of section 82 is fatal and the election petition was bound to be dismissed on such non-compliance. The questions that arise for consideration are: (1) whether the provision contained in section 82 is imperative and mandatory in the sense that failure to join all candidates, who were duly nominated at the election, entails dismissal of the petition on that ground alone, and (2) whether the expression " candidates who were duly nominated at the election ", occurring in section 82, can cover the case of those candidates who had withdrawn their candidature after nomination.

Mr. Sen Gupta, the Chairman of the Tribunal, with whom Mr. Nirmal Krishna Ghose, another member, agreed, has held that these persons were necessary parties to the election petition under section 82, that the provision for dismissal for non-compliance is inherent in the section (section 82) itself; that the Election Tribunal is not only empowered but is bound to dismiss the election petition for failure to comply with the provisions of section 82, and that he had no discretion to proceed with the election petition if there was no compliance with the provisions of section 82. That non-compliance, in his view, is fatal. The third member of the Tribunal, Mr. Govind Saran, has given a dissentient judgment and has held that these persons, who had withdrawn their candidature, were mere proper parties, that section 82 is merely directory and the election petition cannot be dismissed on failure to implead such persons. I find myself absolutely unable to accept any of the findings of the Tribunal, and, in my view, the Chairman and the other member have entirely misconceived the scope of the election petition, their jurisdiction and the provision of section 82 of the Act, and I mainly agree with the view of Mr. Govind Saran.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

The mere use of the word "shall" does not necessarily make the provision imperative; the nature of the provision must depend upon the context and the collocation in which the word "shall" is used, and must be gathered from the intention of the Legislature from the four corners of the Act itself. The Parliament has prescribed that the Election Commission itself shall dismiss the election petition if there is failure to comply with the provisions of section 81, section 83 and section 117. If it was ever meant or intended that failure to comply with the provisions of section 82 should be fatal to the election petition, there was no reason why section 82 should have been omitted from section 85 or section 90(4). All the candidates, who were duly nominated and who had not withdrawn, have been made parties to the election petition. Those duly nominated candidates, who had withdrawn, under section 37, and whose names were not mentioned in the list of valid nominations, under section 38, had no interest greater than the interest of any other elector or voter. These persons were not candidates at the time of the actual election, and their position, therefore, can be no better than the position of any other elector of the constituency. As I have said, if the intention was that the election petition should be dismissed *in limine* on the ground of non-joinder of a duly nominated candidate, who had withdrawn his candidature under the provisions of this Act, there was nothing to prevent the Parliament from saying so or from mentioning section 82 in section 85 which provides for dismissal of the petition by the Election Commission for non-compliance of the provisions of some of the sections mentioned in that section. It has been seen that non-compliance with sections 81, 83 and 117 of the Act entails dismissal of the petition by the Election Commission itself as provided for by section 85. When, however, the petition survives the stage envisaged in section 85, and Election Tribunal is appointed, the

non-fulfilment of the provisions of sections 81, 83 and 117, which entailed dismissal of the petition, under section 85, does not make it imperative for the Election Tribunal to dismiss the same, but makes it optional with the Tribunal to dismiss it or not to dismiss it [Section 90(4)]. This also shows that the Act does not contemplate dismissal of the petition once the Tribunal has been appointed under section 86 on grounds (section 85) which made it obligatory on the Commission to dismiss the petition and much less on grounds not mentioned in section 85.

The provision of section 90(1) of the Act gives option to any other candidate, to be joined as respondent to the petition subject to the provision of section 119 regarding security for costs, within fourteen days of the publication of the copy of the petition in the Official Gazette, at the instance of the Tribunal. This provision also lends support to the argument that the provisions of section 82 were not imperative, and failure to comply entailed no dismissal of the petition. If the Tribunal was authorised to dismiss the petition because all the duly nominated candidates were not made parties, the provisions of section 90(1) are bound to be made nugatory and useless. If the Tribunal had the option of dismissal on account of non-compliance of section 82, there was no meaning in giving other candidates, not mentioned in the petition, the right to be made party respondents to the petition within the period mentioned in the section [90(1)]. If the provisions of section 82 are mandatory and the Tribunal is competent to dismiss the petition on account of non-joinder of some of the duly nominated candidates, the compelling nature of the command of Parliament will disappear if, in their own right, the remaining candidates, not made parties originally in the petition, are made parties under section 90(1); certainly, the compelling nature of the command of the

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

Legislature cannot be made to depend upon this uncertain event. This also shows that the provisions of section 82 are not imperative.

There is still another aspect of the matter. The proceeding before the Election Tribunal is of a representative character. It is not merely a matter between two or more individuals. The matter is of very great importance to the entire electorate, viz., the right of being represented in the Legislature by a duly elected representative, and that matter falls to be decided by the Tribunal. For this reason, extraordinary provisions have been made in the Act in regard to withdrawal and abatement of the petition and substitution (sections 108 to 116). No withdrawal is permitted without the leave of the Election Commission or the Tribunal as the case may be; withdrawal must be made with the consent of all the petitioners and the petitioner has to pay the costs to the respondents if withdrawal is desired. If the petition for withdrawal is made to the Tribunal, notice of withdrawal is to be published in the Official Gazette and any person who could have challenged the election might, within the given period, apply for being substituted as petitioner, and, on compliance with section 117, regarding security, has a right to be substituted and continue the petition. Similar provision is made in regard to abatement of the petition on the death of the petitioner, the fact of abatement is to be published in the Official Gazette, and any person who could have been the petitioner, could be substituted and continue the petition; and like provision is made for substitution in case the respondent dies or does not intend to oppose the petition. These provisions unmistakably indicate the importance given to the decision of the election petition, on its merits and the representative character of the proceeding on election petitions.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

The matter can be seen from still another point of view. According to the Act and subject to its provisions, the Code of Civil Procedure applies to the Election Tribunal in dealing with election petitions. Apart from the provisions which I have already mentioned, there is no provision for joinder of respondents to the petition except sections 82 and 90(1). The relevant provisions of the Code of Civil Procedure are to be found in Order 1, rule 3, rule 6 and rule 9. According to rule 3 of Order 1, all persons may be joined as defendants against whom

> " any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise. "

It is obvious that no relief was claimed or could have been claimed in the election petition against those nominated candidates who had withdrawn their candidature. Rule 6 refers to joinder of parties liable on the same contract. This rule also, therefore, has no application. Rule 9 says,

> " No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. "

In my opinion, upon the provisions of the Code of Civil Procedure also, the Election Tribunal should have held that those persons were not necessary or even proper parties, and that it had absolutely no jurisdiction to dismiss the petition on that ground. In the case of *Sital Prasad Ray* v. *Asho Singh*(1), it has been held that Order 1, Rule 9, of the Code of Civil Procedure is not subordinate to Order 34, Rule 1, but if no decree can be passed without affecting the rights of absent parties the suit cannot proceed in their absence and it should be dismissed. But if the rights of the parties

(1) (1922) I. L. R. 2 Pat. 175.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

actually before it can be determined in the suit leaving the rights and interests of others unaffected, then, even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present. In the light of these provisions of the Code of Civil Procedure it cannot be said that the duly nominated candidates, who had withdrawn, were necessary parties to the petition.

I have endeavoured to get at the intention of Parliament in enacting this Act and the intention, as appears to me, is that non-compliance with the provisions of section 82 is not fatal. The mere use of the word " shall ", torn from its context, cannot make the provision of that section obligatory and imperative. No general rule can be laid down as to whether a provision in a statute is imperative or mere directory, and, as was said in *The Liverpool Borough Bank* v. *Turner*(1).

" No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. "

This view was applied with approval in *Ashutosh Sikdar* v. *Behari Lal Kirtunia*(2) where section 99 of the Transfer of Property Act was being construed, and the word " shall " found place in the section. To the like effect is the decision in *Dharendra Krishna Mukherji* v. *Nihar Ganguly*(3). In my judgment, on the various considerations set out above, the only

(1) (1861) 30 L. J. Ch. 379.
(2) (1907) 11 Cal. W. N. 1011.
(3) (1943) A. I. R. (Cal.) 266.

reasonable interpretation of section 82 is that it is merely directory.

Upon a consideration of the whole Act, the interpretation which I have put on the construction of section 82 appears to be the only reasonable interpretation. Where the language employed in an Act is capable of two interpretations, the Court must always lean to the interpretation which is a reasonable one, and discard the literal interpretation which does not fit in with the scheme of the Act under consideration. This principle of construction has been re-iterated only recently in *Birch* v. *Wigan Corporation*(1) where Denning, L. J., at page 142, makes the following observation:

"When there is a fair choice between a literal interpretation and a reasonable one—and there usually is—we should always choose the reasonable one."

On the considerations mentioned above, I hold that the Tribunal had no jurisdiction to dismiss the election petition because of non-joinder of the three persons who were duly nominated but had withdrawn their candidature.

The next question is whether these duly nominated candidates, who had withdrawn their candidature, came within the provisions of section 82—"all the candidates who were duly nominated at the election". I was first impressed with the argument that the expression "candidates who were duly nominated at the election" had reference to the candidates whose nominations were held valid and who had not withdrawn and were candidates even up to the time of the poll, and, therefore, this expression would eliminate candidates who though duly nominated, had withdrawn their candidature. In this Act, sometimes the expression "candidates for election" and sometimes

(1) (1953) 1. Q. B. D. 136.

1953.

S. M. UMAIR v. R. C. SINGH. SINHA, J.

" candidates at the election " has been used, and I thought that these two different expressions were used with a purpose to draw distinction between the two. But it appears, that these two expressions have been used indiscriminately and without any idea of drawing a distinction between the connotation of these two expressions. The expression " candidate for election " is used in section 32 and section 39. Section 32 relates to nomination of candidates for election, and it runs as follows :

" Any person may be nominated as a candidate for election to fill a seat in any constituency if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act. "

Section 39, sub-section (1) is in the following words:

" Any person may be nominated as a candidate for election to fill a seat in the Council of States to be filled by election by the elected members of the Legislative Assembly of a State or by the members of the electoral college for a Part C State.....if he is qualified to be chosen to fill that seat under the Constitution and this Act. "

Reading only these two sections together, I was of the opinion that the expression " candidate for election " has been used with reference to a candidate before he has withdrawn his candidature, and that the expression " candidate at the election " meant a " validly nominated candidate" [Rule 2(*f*) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951], that is to say, a candidate who has been duly nominated and has not withdrawn his candidature. But section 40, which refers to appointment of election agents, does not support this interpretation because sub-section (1) of that section in terms says that the appointment of election agents must be made before delivery of the nomination paper, and it runs as follows :

" Every person nominated as a candidate at an election shall before the delivery of his nomination paper under sub-section (1) of section 33 or under that sub-section read with sub-section (4) of section 39, as the case may be, appoint in writing either himself or some one other person to be his election agent. "

This is the only section brought to my notice in which the expression " candidate at an election " has been used in regard to a candidate whose nomination has not even passed the stage of scrutiny and withdrawal. The use of the prepositions " for " in sections 32 and 39 and " at " in section 82 cannot, therefore, help in construing the expression " at the election " to mean a validly nominated candidate. If similar words and expressions used in different parts of the statute must be used in the same sense, I am unable to hold that " candidates who were duly nominated at the election " excluded these three persons in question. In the case of *Sitaram Hirachand Birla* v. *Yograjsing Shankarsing Parihar*(1), it was held as follows :—

" The object of section 82 is that all parties who were concerned with the actual election and who contested the election should be before the Tribunal, but a person who did not contest the election and who withdrew from the fight does not stand in the same position as candidates who not only were duly nominated but who were candidates at the election. "

It appears emphasis was laid on the expression " at the election " occurring in section 82, and it was pointed out that there was a difference between a person nominated as a candidate for election and a candidate at the election. I am unable to take the same view of the expression " candidate at the election " used in section 82 as was taken by their Lordships of the Bombay High Court and, it appears, the provision of section 40 of the Act was not brought to their Lordships' notice. The same view was taken in the case of *Shri Sheo Kumar Pandey* v. *K. G. Oak*, I.C.S.(2), and the decision of the Bombay High Court in the aforementioned case was quoted with approval.

(1) (1953) A. I. R. (Bom.) 293.
(2) (1953) All. L. J. 823.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

In this case also, it does not appear that the attention of their Lordships was drawn to the language of section 40 of the Act. I am, therefore, compelled to hold upon construction of the language used in the different sections that the candidates duly nominated but who had withdrawn their candidature are covered by the provisions of section 82 of the Act.

I have already held, however, that the provision is not mandatory, and the failure to join as respondents such candidates who were duly nominated but who had withdrawn their candidature does not entail the dismissal of the petition on that ground alone. Such persons, in my view, are not only not necessary parties but not even proper parties to the election petition, but, as the language of section 82 stands, they should have been made parties to the petition although the failure to make them parties does not entail dismissal of the petition, and its non-compliance was a mere irregularity. I would, therefore, hold that the dismissal of the petition in the case in hand was without jurisdiction.

Mr. Singh, on behalf of the petitioner, has not challenged the judgment of the Tribunal in regard to the amendment of the petition. I am, therefore, not called upon to deal with that point; but, if, as I have held, a duly nominated candidate, who has withdrawn his candidature, is covered by the provisions of section 82, then, he should have been made a party to the petition, and if he was not made a party at the time of the filing of the petition, there was absolutely no bar to make him a party sometime later by an amendment of the petition and to such an amendment, which was of formal nature, there was no question of limitation. Section 90(1) of the Act reads as follows:

"The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be

published in the Official Gazette, and at any time within fourteen days after such publication, any other candidate shall, subject to the provisions of section 110, be entitled to be joined as a respondent."

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

Section 119 is to the following effect:

"No person shall be entitled to be joined as a respondent under sub-section (1) of section 90 unless he has given such security for costs as the Tribunal may direct."

Reading these two sections together, it is clear that if any other candidate wants to be joined as a respondent, he must do so within fourteen days from the date of the publication in the Official Gazette, as required by section 90(1), and must deposit such security for costs as the Tribunal may direct. There is no other provision which bars the right of amendment of the petition. Order 1, rule 10, of the Code of Civil Procedure, sub-rule (2) entitles the Court, at any stage of the proceedings, either upon or without the application, and on such terms as may appear to the Court to be just, to order the name of any person to be struck off who was improperly joined whether as plaintiff or defendant, and to add the name of any person who ought to have been joined either as plaintiff or defendant and whose presence the Court thinks necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Sub-rule (5) of rule 10 of Order 1 says that proceedings as against any person added as defendant shall be subject to section 22 of the Limitation Act and shall be deemed to have begun only on the service of summons. Sub-rule (5) of rule 10, in my view, has no application to the present case. No relief can be asked for against a candidate who, though duly nominated, had withdrawn his candidature and was not a candidate at the time of the actual election. If this point had been pressed, I should have held that the Tribunal should have allowed the application for amendment of the petition by adding the names of those candidates who were duly nominated but who had withdrawn their candidature.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

It is conceded that the Election Tribunal has been dissolved, and it is no longer in existence. In that view of the matter, a writ of *certiorari* under Article 226 of the Constitution cannot possibly issue. The petitioner has, however, invoked the aid of Article 227 of the Constitution. The relevant portion of Article 227 is sub-clause (1) which runs as follows:—

"Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

There is no doubt that this Court can exercise superintendence over the Election Tribunal in question, but the question is whether under this clause of the Article this Court can judicially interfere with the judgment and order of the Tribunal. In my opinion, the answer must be in the affirmative. The earliest enactment on the power of superintendence of the High Court is to be found in section 15 of the High Courts Act (24 and 25 Victoria, Chapter 104) of 1861. The relevant portion of section 15 was as follows:

"Each of the High Courts established under this Act shall have superintendence over all courts which may be subject to its appellate jurisdiction, and shall have power to call for Returns....."

This Act was followed by the Government of India Act, 1915 (5 and 6 George, V Chapter 61). Section 107 of that Act repeated almost all the provisions of section 15 of the High Courts Act, 1861, and it read as follows:

"Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,

'(a) call for returns'....."

Both these Acts give the High Courts power of superintendence over Courts subject to their appellate jurisdiction. This Act was followed by the Government

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

of India Act, 1935 (26 George, V Chapter 2), and section 224 of the Act having enacted all the provisions of section 107 of the Government of India Act, 1915, added another sub-clause (2) which ran as follows:

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision."

Whereas under the earlier Acts the High Court used to interfere judicially with the orders and judgments of the Courts subject to its appellate jurisdiction, this right of judicial interference of the High Court was taken away for the first time by the Act of 1935. It would serve no useful purpose to cite the many instances where the High Court's power of judicial interference was exercised under the Acts of 1861 and 1915. In the case of *Parmessar Singh* v. *Kailaspati*(1) which was followed in *Manmathanath Biswas* v. *Emperor*(2), it was held that a chartered High Court had power under section 107 of the Government of India Act, 1915, to interfere with an order passed by a Magistrate under section 145, Code of Criminal Procedure, where the Magistrate had acted without jurisdiction or had exceeded his jurisdiction. Roe, J., one of the Judges constituting the Bench, upon a review of the previous cases, made the following observation which is worthwhile quoting:

"the power of superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law.

(1) (1916) A. I. R. (Pat.) 202. F. B.
(2) (1932) I. L. R. 60 Cal. 618.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity had been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be."

The Act of 1935, however, found it necessary to take away that power of the High Court. This was the position when the Constitution was made in 1950, and sub-section (2) of section 224 of the Government of India Act, 1935, was deleted from Article 227 of the Constitution. This, in my opinion, clearly shows that the right of judicial interference of the High Court under the Acts of 1861 and 1915 were not only restored but enlarged by deleting the expression "subject to its appellate jurisdiction" occurring in the aforesaid Acts from the Constitution.

I am supported in the view, which I have taken of Article 227 of the Constitution, by a number of cases of different High Courts in India, and it is sufficient to mention the case of *Bimala Prosad Ray* v. *State of West Bengal*(1) and that of *Girish Chandra Majhi* v. *Girish Chandra Maity*(2). In the latter case, it was held that:

"Where a Tribunal has been set up under a Special Act, it is the duty of the High Court to see, in the exercise of its power of superintendence, that such tribunal acts within the limits of the statute creating it, and applies correctly and properly the laws it is authorised to administer."

(1) (1951) A. I. R. (Cal.) 258.
(2) (1951) A. I. R. (Cal.) 574.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

Reliance was placed by Mr. Sahay, for the opposite party, upon certain observations of their Lordships in the case of *Shri Sheo Kumar Pandey*(1), already referred to, to the effect that the question as to the proper meaning of the words " duly nominated candidate at the election " in section 82 was a question of law on which the Tribunal's view should be regarded as final and that it was well known that certiorari and prohibition would not issue to rectify pure errors of law. It was suggested that because the Tribunal had dismissed the petition in the exercise of its jurisdiction, the decision may be right or may be wrong, this Court ought not to interfere under Article 227 of the Constitution. I am unable to countenance this view in its entirety. If the Tribunal has decided a question of law which affects its very jurisdiction, then, in my opinion, this Court must interfere. The result of the decision of the Tribunal that the provisions of section 82 are mandatory has been the dismissal of the petition *in limine* without its being tried on merits, that is to say, on erroneous view of the law, the petitioner has been denied the right to fair trial. Thus it will be seen that because of its wrong decision the Tribunal has refused to exercise the jurisdiction vested in it to come to a decision on the merits of the election petition. I have already held that this is not a mere error of law in the exercise of jurisdiction but it was without jurisdiction to have dismissed the petition on the ground it has dismissed. Mr. Sahay also referred to the judgment of Lord Esher, M.R., in the well known case of The *Queen* v. *The Commissioners for Special Purposes of the Income-Tax*(2), in regard to the jurisdiction of inferior Courts or Tribunals, which has been followed by the Supreme Court in the case of *Rai Brijraj Krishna*(3). In my opinion

(1) (1953) All. L. J. 323.
(2) (1888) 21 Q. B. D. 313.
(3) (1951) A. I. R. (S. C.) 115.

1953.

S. M. UMAIR v. R. C. SINGH.

SINHA, J.

that judgment does not affect the present question and does not run counter to the view I have taken. Mr. Sahay also faintly argued that Article 329(2) of the Constitution prevented this Court from interfering with the judgment of the Tribunal. On being pointed out that the Article in question did not bar interference with the decision of the Tribunal set up under the Act enacted to carry out the very purpose of the Article of the Constitution, the argument was not pressed.

Mr. Singh referred to the case of the *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank, Delhi*(1) and to that of *Veerappa Pillai* v. *Raman and Raman Ltd.*(2) on the extent of the powers to issue *writs* of *certiorari* under Article 226 of the Constitution. But as I have already indicated that no *writ* can issue under Article 226 in this case, no useful purpose will be served by reference to those cases. I would, therefore, hold that the view of the majority of the Tribunal was wrong and the view of Mr. Govind Saran, who gave a dissentient judgment, was right in regard to the construction of section 82 of the Act. I would, therefore, acting under the power of superintendence under Article 227 of the Constitution, set aside the order of dismissal of the election petition made by the Tribunal which was published in the *Gazette of India* (Extraordinary) in its issue, dated the 5th February, 1953, at page 302, Part II. I would further hold that the petitioner is entitled to his costs of this petition; hearing fee ten gold mohurs.

RAMASWAMI, J.—The main question argued in this case is whether the provision of section 82 of the

(1) (1950) S. C. R. 459.

(2) (1952) S. C. R. 583.

1953.

S. M. UMAIR v. R. C. SINGH.

RAMASWAMI, J.

Representation of the People Act is imperative or merely directory. Section 82 states:

"A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated".

The argument put forward on behalf of the opposite party is that the provision of section 82 is imperative and the Election Tribunal was justified in dismissing the election petition on the ground that the petitioner had not impleaded three other persons, *viz.*, Siasaran Singh, Ramprakash Mahton and Balmiki Mahton who are duly nominated candidates for the election. The argument proceeds upon a misconception. The question whether the provision of section 82 is imperative or directory must be answered in the context of the other provisions of the Act. Section 85 states—

"If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition...."

Section 90(4) makes similar provision with respect to the Election Tribunal. Section 90(4) states—

"Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117".

It is manifest that section 85 and section 90(4) expressly enact that the Election Commission or Tribunal may dismiss an election petition which does not comply with the requirements of section 81, section 83 or section 117. Section 82 is not one of the sections mentioned in section 85 or section 90(4) and these sections do not provide that an election petition may be dismissed for non-compliance with the provisions of section 82. If the provision of section 82 is examined in the context of section 85 and section 90(4) it is obvious that though section 82 is couched in mandatory form its provision is merely directory and non-compliance with section 82 does not affect the jurisdiction of the Election Commission or the Election

1953.

S. M. UMAIR v. R. C. SINGH.

RAMASWAMI, J.

Tribunal to hear and determine the petition. In a case of this description the principle to be applied is clear. The principle is embodied in the maxim *expressio unius exclusio alterius*. The view that section 82 is not peremptory is also supported by the language of section 90(1) of the Act. Section 90(1) states—

> "The Tribunal shall, as soon as may be, cause a copy of the petition together with a copy of the list of particulars referred to in sub-section (2) of section 83 to be served on each respondent and to be published in the Official Gazette, and at any time within fourteen days after such publication, any other candidate shall, subject to the provisions of section 119, be entitled to be joined as a respondent ".

It is therefore open to the Election Tribunal to join as respondent any other candidate to the election petition under the provision of section 90(1) at any time within fourteen days after the publication of the notice in the Official Gazette. This is an additional reason for holding that the duty cast under section 82 upon the petitioner as to joinder of respondents is not imperative in its character. The majority of the Judges constituting the Election Tribunal had therefore no justification for dismissing the election petition on the preliminary ground that the provision of section 82 was not complied with. They have proceeded on a complete misconception of section 82 and on account of that misconception they have refused to exercise the jurisdiction vested in them by law.

In this case a *writ* under Article 226 cannot be issued for various reasons; but I agree with my learned brother that we should exercise our power of superintendence under Article 227 and set aside the order of dismissal of the election petition made by the Tribunal on the 29th of January 1953.

K. D.

Order set aside.

APPELLATE CIVIL.

1953.

April, 28, 29, 30. May, 1, 4, 5. September 9.

Before Narayan and Ahmad, JJ.,

SARANGDHAR

v.

PARVATI.*

Hindu Law—joint family—life insurance policy in name of individual member, whether joint family property—Code of Civil Procedure, 1908 (Act V of 1908), Order XI—litigant may obtain inspection and production of document—evidence—admission in a previous pleading, value of—Evidence Act, 1872 (Act I of 1872), section 34—books of accounts, entries in, relevancy—Practice—minor attaining majority in appeal—amendment not made—decision in suit, whether affected.

There is no warrant for the proposition that there should be another standard for judging income and expenditure on account of the insurance policies than what has been laid down in the Hindu Law as it is administered by the courts of India at present. The Hindu Law has no doubt been modified or supplemented in certain respects by certain Acts, but there is no special Act with regard to insurance policies as it applies to the Hindus up till now. The criterion still is to consider from what source the money came with which the *premia* were paid.

A life insurance policy is certainly a contract between a person who is called the "Assured" and the Insurance Company, but it cannot be said that an insurance policy cannot be taken for the benefit of the joint family and out of the joint family funds.

The essence of a coparcenary under the *Mitakshara* is *unity of ownership* and the ownership is in the whole body of coparceners. No individual member of the family, whilst it remains undivided, can predicate, of the joint and undivided property, that is, that particular member has a definite share in it.

Held, that the life insurance policy in the case belonged to the joint family.

*Appeals from Original Decree, nos. 69 and 91 of 1947, from a decision of Mr. Shyam Nandan Prasad, Additional Subordinate Judge, Patna, dated the 21st September, 1946.

1953.

SARANGDHAR v. PARVATI.

Bilas Kunwar v. *Desraj Ranjit Singh*(1) and *Dhurm Das Pandey* v. *Shama Soondri Dibiah*(2), referred to.

It is open to a litigant to refrain from producing any document which he considers to be irrelevant, and that, if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents.

Chandra Narayan Deo v. *Ramchandra*(3), applied.

Bilas Kunwar v. *Desraj Ranjit Singh*(1), referred to.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading was delivered.

Ramabai Shriniwas Nadgir v. *Government of Bombay*(4), referred to.

Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire.

Certain respondents who were minors attained majority at the appellate stage and the necessary amendment was not made, *held*, that the defect was not fatal to the suit.

Ratan Prasad Marwari v. *Bridhi Chand Shroff*(5), *Gulab Chand* v. *Mt. Kishori Kuer*(6) and *Bibi Ashgari* v. *Muhammad Kasim*(7), referred to.

First Appeal 69, by the plaintiffs.
First Appeal 91, by the defendant no. 1.

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

(1) (1915) I. L. R. 37 All. 557 P. C.
(2) (1843) 3 Moo. Ind. App. 229.
(3) (1945) I. L. R. 24 Pat. 541.
(4) (1941) A. I. R. (Bom.) 144.
(5) (1939) A. I. R. (Pat.) 601.
(6) (1942) A. I. R. (Pat.) 348.
(7) (1951) A. I. R. (Pat.) 323.

1953.

SARANGDHAR v. PARVATI

Mahabir Prasad, U. N. Sinha, K. N. Moitra, A. B. Saran, P. B. Ganguli and *K. N. Chaturvedi*, for the appellants.

Lalnarain Sinha, Lakshman Saran Sinha, Tarkeshwar Nath, Madan Mohan Prasad and *Gopi Krishna Sinha*, for the respondents.

NARAYAN, J.—These two appeals arise out of a suit in which a declaration was sought by the plaintiffs that they were entitled to the money due under the insurance policies and the shares, stocks and securities and to the profits, benefits and interests covered by them as specified in Schedule A of the plaint. The plaintiffs who are the brothers of one Rai Bahadur Ram Ran Vijaya Sinha deceased are claiming these amounts as surviving coparceners of an alleged joint family consisting of themselves and the said Rai Bahadur. The Rai Bahadur died on 27th October 1936 leaving surviving two step-brothers who are the plaintiffs in this litigation, a widow who is the defendant no. 1 and three daughters who are the defendants nos. 2, 3 and 4. The defendant no. 2 Srimati Sharada Sinha is his daughter born of a deceased wife of his, and the defendants nos. 3 and 4 are his daughters born of Srimati Parvati Kuer, the defendant no. 1. The case put forward by the plaintiffs is that when the Rai Bahadur died the joint family was possessed of a flourishing printing and publishing business known as the Khadga Vilas Press and also other moveable and immoveable properties in the districts of Patna and Ballia and that out of the income of the joint family business and properties, properties had been acquired in the names of the different members of the joint family, most of them being in the name of the Rai Bahadur. The allegation is that among other investments the joint family invested moneys in purchasing shares and stocks, in Government securities and in

1953.

SARANGDHAR v. PARVATI-

NARAYAN, J.

various companies and also in Life Insurance Companies by effecting insurance on the life of the Rai Bahadur and on the lives of the plaintiffs. All these are characterised as provisions for the joint family consisting of the Rai Bahadur and the two plaintiffs, his step-brothers. After the death of the Rai Bahadur the defendant no. 1 applied for a Succession Certificate in respect of the insurance money arising out of three policies which had been taken in the name of the Rai Bahadur. These three policies are insurance policies nos. 36483, 36484 and 36485 of the Great Eastern Life Assurance Co., Ltd., who have been impleaded as defendant no. 5 in this suit. Each of the policies is for a sum of Rs. 17,000. In spite of the objection raised by the present plaintiffs the District Judge of Patna by his order, dated 13th December 1940, directed succession certificate to be issued to the defendant no. 1 on her furnishing securities, but up till now no certificate has been issued as no security has been furnished. The plaintiffs have instituted the suit on the allegation that on account of the wrongful claim made by the defendant no. 1 and on account of the order passed by the District Judge, a cloud has been cast on their title with regard to the insurance moneys and the stocks, shares and Government securities held by the family. They, therefore, seek a declaration that they are entitled to the amounts payable under the policies and on account of the shares, stocks and securities.

The contesting defendant was only the defendant no. 1, and her contentions substantially were that the Rai Bahadur had separated from the plaintiffs in the year 1906 and that the properties described in Schedule A of the plaint consisting of the insurance moneys, stocks, shares and securities were his personal properties which had been acquired by him out of his separate money and for the benefit of his own wife and children. Regarding the Khadga Vilas Press the

allegation of the defendant is that it had been started by Babu Saheb Prasad Singh, the first father-in-law of the Rai Bahadur, and that it had been gifted by him to the Rai Bahadur shortly after the Rai Bahadur's first marriage.

1953.

SARANGDHAR v. PARVATI.

The learned Subordinate Judge has decreed the plaintiffs' claim with regard to the money payable under the shares, stocks and securities and to the profits arising out of them, but he has dismissed the plaintiffs' claim with regard to the amounts payable under the three insurance policies mentioned above.

NARAYAN, J.

First Appeal no. 69 of 1947 has been filed by the two plaintiffs, and it is directed against the order of the learned Subordinate Judge dismissing the claim of the plaintiffs with regard to the three insurance policies. First Appeal no. 91 of 1947 has been filed by the defendant no. 1 Srimati Parvati Kuer, and it is directed against the decree that has been passed by the learned Subordinate Judge with regard to the shares, stocks and securities.

The learned Subordinate Judge has negatived the case of the defendant no. 1 that the press was the property of Babu Saheb Prasad Singh, and according to the findings arrived at by the learned Subordinate Judge the press was a family property having been started by Babu Ramdin Sinha, the father of the plaintiffs and the Rai Bahadur. The story of the defendant no. 1 that the press had been gifted by Babu Saheb Prasad Singh, the first father-in-law of the Rai Bahadur, to him had to be rejected because of the finding that the press was the property of Babu Ramdin Sinha. It has further been found by the learned Subordinate Judge that the Rai Bahadur was joint with the plaintiffs and that he died in the year 1936 in a state of jointness with them. These findings have not been challenged before us by the defendant no. 1 Srimati Parvati Kuer, and her Counsel Mr. Lalnarain

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J.

Sinha has argued on the assumption that these findings are absolutely correct.

On the evidence which is forthcoming in this case there cannot be the least doubt that the press business was the most important business of this joint family, and the statement of the plaintiff Sri Sarangdhar Sinha to the effect that the surplus income from the press was invested in acquiring life insurance policies and in buying shares and stocks must be accepted as correct. The learned Subordinate Judge has rightly found that the money invested in stocks and shares was the money saved out of the income of the press and that there is no substance in the contention of the defendant no. 1 that the stocks and shares were purchased by the Rai Banadur out of a separate fund belonging to him. The lady Srimati Parvati Kuer though she had stated in her examination-in-chief that she had come to know from her husband that the shares and the stocks had been acquired by him out of his personal fund, had to admit in her cross-examination that all these properties were acquired by her husband out of the income of the press. The press was as is admitted now, a joint family business, and if the shares and the stocks had been acquired out of the income of the press then they must be regarded as joint family properties. The lady further admits that account-books were maintained regarding the purchase of the shares and other properties in the life-time of her husband and that the accounts used to remain in the iron-safe of her husband. She has made another important statement in her deposition, and it is this that accounts of income and expenditure of the press were maintained during the life-time of her husband and that the income from all the properties were noted in the account-books. Her statement that the accounts of the press have not been produced in this case and that her *pairvikars* had told her that forged bahis had been filed by the plaintiffs deserves no serious

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J.

consideration. Obviously, she is not able to swear that the account-books that had been filed are fabricated books, and she never insisted on the production of the real account-books if she and her *pairvikars* had taken these account-books as fabricated documents. I am afraid the lady is depending a bit too much on her *pairvikars*, and the unfortunate result of this dependence is that her Counsel in this Court had to give up the main defences on which she had sought to rest her case. Because there was no division of the press and because it is out of the income of the press that all these acquisitions had been made, the lady had to say that the press was not divided because it was the separate property of her husband a statement to which she is not able to stick now. Because the account-books show that the plaintiffs were paid monies for their personal expenses out of the income of the press, the lady says in her deposition that the plaintiffs used to get something from her husband by way of help. But, she had to admit in her deposition in the Succession Certificate case that the press belonged to all the three brothers as their joint property and that the income was divided among them. Her clear statement in the previous deposition was that " each brother used to divide the income of the press amongst themselves and they used to spend on their household affairs from their separate shares ". These statements must now be regarded as absolutely incorrect statements, and the irresistible conclusion is that the press was the only business of the family out of the income of which the properties which are in dispute in this case were acquired. The lady herself says that the Rai Bahadur had no business besides the press business, and we have got before us the evidence of certain very respectable witnesses from which it appears that the Rai Bahadur had no separate fund or business or any separate property and that

1953.

SARANGDHAR v. PARVATI-NARAYAN, J.

the income from the press was practically the only income out of which the shares and stocks were purchased. Those respectable witnesses are Sri Ramdayalu Singh, Speaker of the Bihar Legislative Assembly; Sri Chandreshwar Prasad Narayan Singh, a big zamindar, a Member of the Legislative Assembly and Leader of the Opposition in the Legislative Assembly, and Sri Shyama Prasad Singh, another big zamindar and Deputy President of the Bihar Legislative Council. Of course, the depositions of Dr. Rajendra Prasad (now the President of the Indian Republic) and Sri Srikrishna Sinha (now the Chief Minister of Bihar) have been wrongly admitted by the learned Subordinate Judge under section 33 of the Evidence Act. The provisions of section 33 of the Evidence Act having not been strictly complied with these two depositions must be rejected as inadmissible in evidence. Mr. Lalnarain Sinha did not advance before us any serious argument so far as the finding of the learned Subordinate Judge with regard to the stocks, shares and securities is concerned, and his submission was that if the Insurance policies standing in the name of the Rai Bahadur are taken to be policies which had been acquired by the Rai Bahadur for his own personal benefit and for the benefit of his wife and children, the stocks and shares standing in the name of the Rai Bahadur should also be taken to be properties which had been acquired by the Rai Bahadur for his own benefit and the benefit of his wife and children. The learned Counsel could not fail to appreciate that the presumption of the Hindu Law in a joint undivided family is that the whole property of the family is a joint estate and that the onus lies upon a party claiming any part of such property as a separate estate to establish that fact. It is true that there can be no presumption that a joint family possesses joint family property, but here on the findings and also on the admissions it must be taken to be an established fact that whatever acquisition was

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J.

made was made from the income of the press which was a joint family business. Here, there is no evidence given that the Rai Bahadur had any separate property or any separate income and that out of his personal funds the purchase money with regard to the stocks and the shares was paid. As has been laid down in several cases, the criterion is to consider from what source the money comes from which the purchase money is paid. It has been established as well as admitted that the purchase money came from the fund which had accumulated out of the savings of the income of the press. The learned Subordinate Judge was, therefore, justified in passing a decree with regard to the stocks and the shares, and the learned Counsel who appeared on behalf of the lady before us rightly, I say with respect, did not advance any argument in support of his client's appeal, no. 91 of 1947, independent of what he submitted in the other appeal which has been preferred by the two brothers. We have, therefore, to address ourselves seriously only to the question as to how far the Insurance policies can be regarded as the personal properties of the Rai Bahadur.

Mr. Lalnarain Sinha formulated the following three points so far as the plaintiff's appeal is concerned :— (1) Life Insurance policy is by its very nature not capable of being a part of a joint family asset. (2) Premia paid towards Life Insurance policies, even when paid out of joint family funds, are monies appropriated by the insured, and the policies, as such, must be presumed to be his separate property. (3) So far as the burden of proof is concerned a policy must be proved to be joint family property. While elaborating his arguments on these points the learned Counsel submitted that the source out of which the premium was paid will not be the determining factor and that when a joint family fund is utilized by a particular member for paying premium that should be regarded as appropriated by him personally. In the opinion of the learned Counsel a Life Insurance policy is for

1953.

SARANGDHAR v. PARVATI-NARAYAN, J.

personal protection and that from its very nature such a property is a property of a peculiar kind, the primary intention being to provide for a risk and not to make investments. But, before I discuss the question of law raised by the learned Counsel it is necessary to point out that there cannot be the least doubt in this case that the premia were paid out of the joint family fund and that whenever the family got the amount of a matured policy the amount so received was treated as an acquisition by the joint family and not only by the individual member, the policy in whose name had matured. I do not think it is necessary for us to refer to the entire evidence in this case for the purpose of establishing that the premia were being paid out of the joint family funds and that the amounts of the matured policies received were treated as acquisitions of the joint family. Mr. Lalnarain Sinha again conceded that the premia were being paid out of the joint family funds, but he submitted that in absence of the ledger it could not be held with certainty whether the amount spent over insurance was ultimately treated as amount spent for the joint family or for the individual member in whose name the policies stood. If the defendant thought that the ledger would be the only document which could throw light on the question as to whether the amount spent over premia was treated as amount spent for the joint family or for the individual member, she should have insisted on the production of the ledger, and no point can be made out of the non-production of the ledger, if its production was not insisted on by the defendant. My own opinion is that the production of the ledger would not have in any way advanced the case of the defendant. Sri Sarangdhar Sinha is perfectly correct when he says that ledgers corresponding to cash-books are maintained and that they contain nothing else except the total of the separate khatas. If the entries in the account-books and the correspondence filed by the plaintiffs cannot throw any light on the question raised,

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J

certainly the ledgers would be of no assistance to us on the point. A Bench of this Court held in *Chandra Narayan Deo* v. *Ramchandra*(1), following a Privy Council decision (37 All. 557), that it is open to a litigant to refrain from producing any document which he considers irrelevant, and that, if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. Their Lordships of the Privy Council had said that if he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. Though in view of the facts conceded it is not necessary to refer to the entire documentary evidence which goes to show that the premia were paid out of the joint family funds, I should like to refer to some of the items. Though the bank account was in the name of the Rai Bahadur, the amounts received from the bank were treated as amounts belonging to the joint family, and that must be so because the deposits in the bank were made out of the income of the press which had never been divided. For some years there was the system of Haveli Khata, meaning thereby that a consolidated sum used to be taken and entered in the Haveli Khata. The expenses of the entire family, including the two plaintiffs and the Rai Bahadur, were met out of this consolidated amount. But, only after a few years this system was given up, and the family reverted to the old system of taking as much money as was needed by them, and each item was entered in the account-books. This is sufficiently borne out by the papers, but the papers do not show that the premium was ever paid out of the Haveli Khata or the Amanat Khata (suspense account). The amounts received from the banks were entered on the credit side and the amounts paid to the Insurance

(1) (1945) I. L. R. 24 Pat. 541.

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J.

Companies were entered on the debit side, e.g., there is one item of Rs. 250 received from the Bihar Bank on 6th August 1927, and out of that amount Rs. 102-6-6 was paid to the Bharat Insurance Company. Similarly, a sum of Rs. 274-9-0 was paid on 9th July 1927 to the Bharat Insurance Company through Hajuri Singh out of the cash in hand. To the Great Eastern Life Insurance Company a sum of Rs. 755 was paid on 22nd September 1927. The entries on the credit side show that on or about that date amounts were received from the Bihar Bank and from one Ram Saran Sao. On Friday, the 3rd of February 1928, insurance premia were paid to the Great Eastern Company on account of the policies standing in the name of Sri Sarangdhar Sinha and Sri Ramji Sinha. On 10th March 1928, Rs. 380-6-0 was received from the Bihar Bank, and on that very date the Great Eastern Company was paid this amount. When the same figure which is shown on the debit side is not shown on the credit side that means that the payment was made from cash in hand. On 11th November 1928, premia on account of the policies standing in the names of the three brothers were paid, and the payment appears to have been made out of the cash in hand. It appears that on that date Rs. 1,407 and odd was the cash in hand, and out of that only Rs. 946 had to be paid as premia. It is not necessary to quote other items when it is conceded that the premia were paid out of the joint family fund. There is one letter, dated 9th January 1934, exhibit 9(*d*), written by the Rai Bahadur to the Great Eastern Life Assurance Company, Ltd., which appears to be very important, inasmuch as it shows that the Rai Bahadur had sent a cheque for Rs. 1,706-12-0 for payment of the premia on account of the policies standing in the names of the three brothers. I would not refer to the letters of the Managers of the Assurance Companies to the Rai Bahadur, because those Managers had not been called as witnesses, and it is not known whether

they are alive or dead. There are also various items which go to show that the amounts received from the Assurance Companies were treated as money belonging to the joint family. The Bharat Life Insurance policy matured in 1934, and a payment of Rs. 18,874-1-0 was made by cheque. The amount was credited in the Amanat Khata. Rs. 5,196-12-0 was received from the Empire of India Life Assurance Company, and on the credit side it is shown in the Haveli Khata. This amount was spent in commemorating the memory of Ramdin Sinha, the father of the plaintiffs. Norwich Union Life Insurance policy in the name of the Rai Bahadur matured in 1927, and it is credited in the account under the head 'Life Insurance Khata'. Thus, the plaintiffs have rightly submitted that money received out of matured policies, even in the name of the Rai Bahadur, was blended with the joint family fund and treated as joint family money. On these facts the question arises as to whether simply because a policy was taken in the name of an individual member and in that policy the words 'family provision' were entered against the column "For whose benefit the Assurance to be effected", the insurance amount can be treated as the separate and the personal property of the individual member in whose name the policy stood. It is true that the framers of the Hindu Law had no idea of what is called an 'Insurance' in the present age. This is entirely a modern concept, but the question arises as to whether the Hindu Law as it has descended to us (unamended by any statute up till now) can be applied in an abridged or in an extended form to what is called in the present age as an Insurance policy. There is no warrant for the proposition that there should be another standard for judging income and expenditure on account of the insurance policies than what has been laid down in the Hindu Law as it is administered by the Courts of India at present. The Hindu Law has no doubt been modified or supplemented in certain

1953.

SARANGDHAR v. PARVATI-

NARAYAN, J.

respects by certain Acts, but there is no special Act with regard to insurance policies as it applies to the Hindus up till now. The criterion still is to consider from what source the money came with which the premia were paid. The Judicial Committee in *Bilas Kunwar* v. *Desraj Ranjit Singh*(1) pointed out that the exception in the English Law by way of advancement in favour of wife or child did not apply in India and that the general rule in India in the absence of all other relevant circumstances had been thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Shama Soondri Dibiah*(2) :— " The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid." The essence of a coparcenary under the *Mitakshara* Law is *unity of ownership* and the ownership is in the whole body of coparceners. No individual member of the family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share in it. As has been pointed out by the Privy Council in several cases, the rights of each coparcener until a partition takes place consist in a common possession and common enjoyment of a coparcenary property. There can be no exception with regard to money received out of Insurance policies, the sole criterion being how and from what source the premia of the policies had been paid. A Life Insurance policy is certainly a contract between a person who is called the " Assured " and the Insurance Company, but it cannot be said that an Insurance policy cannot be taken for the benefit of the joint family and out of the joint family funds. The onus, if any, on the plaintiffs for showing that the policies were taken as an investment and that the premia were paid out of the joint family funds, has been sufficiently discharged in this case. And the

(1) (1915) I. L. R. 37 All. 557, P. C.
(2) (1843) 3 Moo. I. A. 220.

1953.

SARANGDHAR v. PARVATI.

NARAYAN, J.

learned Counsel for the lady could not support his proposition that the source of premium will not be the determining factor and that by its very nature a Life Insurance policy is not capable of being a part of the joint family asset by any authority. It is absolutely clear from the facts that even when the monies of matured policies were received they were treated as monies belonging to the entire joint family. Individual members of a coparcenary can no doubt have separate properties, and though, loosely speaking, an insurance is not an investment, where the facts are absolutely clear for the purpose of showing that premia were paid out of the joint family funds and monies received from the Insurance Companies were treated as the income of the joint family and were blended with the joint family fund, the conclusion will be irresistible that the intention was not to treat the Insurance money as the separate money of the person in whose name the policy stood. A reference was made to a litigation which the plaintiffs and the lady had with the Bihar Bank on account of the overdraft account. The Bihar Bank's Money Suit was dismissed against the plaintiffs but decreed against the lady, and the written-statement filed by the plaintiffs is an exhibit in this case. It has not been contended that there is any such admission in this written-statement which can be prejudicial to their case in this litigation. Certainly, the plaintiffs anyhow wanted to escape liability, and as pointed out by Sir John Beaumont in *Ramabai Shriniwas Nadgir* v. *Government of Bombay*(1), a party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered and that it frequently happens that if a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, such an admission is not binding in any other suit, and certainly not for

(1) (941) A. I. R. (Bom.) 144.

1953.

SARANGDHAR v. PARVATI-NARAYAN, J.

all time. The learned Subordinate Judge appears to have made some inconsistent observations while dealing with the questions relating to the Insurance policies. At one place he says that the account-books cannot show separate khata for all the brothers because the press is a joint family business, and at another place he says that

> " if the premia were paid by the deceased by taking money from joint family funds, it became his personal money ".

He further observes that as the premia were paid out of the income of the joint family press, there must be one common khata for payment of Insurance premia. And he thinks that because of this the contention of the plaintiffs that there were no separate insurance khatas for the three brothers in the press account-books has no substance. The finding of the learned Subordinate Judge that the premia were paid out of the separate money of the Rai Bahadur, although they were paid out of the income of the press, is inconsistent and unsound, nor is his view about the Amanat and Haveli Khatas correct. For some reason or other there is a mention of Amanat and Haveli Khatas in the account-books, but an examination of the account-books unmistakably goes to show that all items entered under such khatas were treated as monies belonging to the joint family. The learned Subordinate Judge says that money paid to a coparcener for his personal use and policy acquired by such money becomes his self-acquired property. The account-books do not show that the amounts of the Insurance premia were treated as monies paid to a coparcener for his personal use. On the other hand, I have already referred to a letter of the Rai Bahadur himself from which it appears that it is he who sent a cheque for the amounts payable as premia on account of the policies standing in the names of the three brothers. The cheque was issued on the Bihar Bank where no other money except the joint family money was kept. I must, therefore,

1959.

SARANGDHAR v. PARVATI.

NARAYAN, J.

hold, in disagreement with the learned Subordinate Judge, that not only the stocks, shares and securities are the property of the joint family, but even the Insurance policies which had been acquired out of the joint family fund are property belnoging to the joint family. As already pointed out, the lady has admitted so far as the stocks and shares are concerned that they were acquired out of the income of the press. I need not repeat that this admission reflects a good deal on the defence which has been set up by the lady in this case. Her whole attempt was to show that the press was the personal property of her husband, and if she has failed to show that, as undoubtedly she has, then her entire defence in this suit is bound to be rejected as untenable. All acquisitions were made out of the income of the press, and the press has always been a joint family business. This finding, in my opinion, is conclusive of the case and conclusive of it as against the lady.

Lastly, the learned Counsel for the lady raised some objection as to the admissibility of the account-books. I must confess that the several relevant entries in the account-books have not been separately marked as exhibits. The entire books are exhibits in the case, and therefore the contention has been raised that particular entries cannot be relied on. There are several answers to this contention in this case. The lady in her evidence admits that account-books were maintained with regard to the stocks and the shares, and when these account-books were marked no objection whatsoever was raised on her behalf. Because of her statement in her deposition and also because no objection was raised as to the admissibility of these papers at the time when they were admitted, these documents can be treated as admitted documents in the case. As a matter of fact the judgment of the learned Subordinate Judge shows that even the lady had placed reliance on the entries in these account-books. The learned Subordinate Judge says that

1953.

SARANGDHAR v. PARVATI-NARAYAN, J.

there are several entries in the Haveli Khata of the press account-books which go to show that each of the three brothers withdrew from time to time certain amount of money which they deposited in the Amanat Khata in their own names. The position in this case, therefore, appears to be that the account-books were treated as admitted documents in the case. No objection was raised as to the admissibility of these papers, rather each party attempted to interpret and construe the entries in their own way. Sri Sarangdhar Sinha has proved that the accounts were written in regular course of business, and the formal proof of a document can be waived by the party against whom it is sought to be used. The entry of " no objection " in the exhibit list and the manner in which the entries have been used by both sides undoubtedly go to show that the formal proof of the entries was waived. The document cannot, therefore, be rejected on the ground that the items have not been separately proved. It will not be correct to say that these documents are being used in this case to charge anybody with liability in the sense in which those words are used in section 34 of the Evidence Act. The present section is in effect a reproduction, with some alteration, of section 43 of Act II of 1855. The old section ran thus:

> " Books proved to have been regularly kept in the course of business, shall be admissible as corroborative but not as independent proof of the facts stated therein ".

The section as it stands now runs thus:

> " Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability ".

Undoubtedly, the section as it stands now means that when any person has to be charged with liability the statement in the books of account will not be sufficient for the same. But the section lays down that entries in books of account, regularly kept in the course of

business, are relevant whenever they refer to a matter into which the Court has to enquire. Here, both parties relied on the entries not for the purpose of charging any person with liability, but for the purpose of showing as to how the items relating to the Insurance policies were entered in the books. In this case, if any person can be charged with liability it is the Great Eastern Life Assurance Company, but this Company, as they have said in their written-statement, are neither interested in the title of the plaintiffs nor in the title of defendants. Obviously, they will pay the money to the person found entitled and have little interest in this litigation. In a very recent case decided by a Division Bench of this Court, *Ramgobind Prasad* v. *Gulab Chand Sahu*(1), the following observation was made:

"What would amount to independent evidence sufficient to corroborate the entries in the account-books depends upon the facts of each case and particularly on the issues between the parties. What is necessary to be seen in each case is whether besides the entries in the account-books, there is any evidence to prove that the transactions referred to in those entries actually took place. Where the transactions sued upon are numerous and extend over some length of time, it is hardly reasonable to expect independent evidence to be given to prove each and every particular transaction. In such case the genuineness of the account-books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account-books will not be enough. There must be some evidence to corroborate those entries. Such corroboration will be best afforded by the evidence of the person who wrote the account-books and in whose presence the transactions took place. He cannot possibly have independent recollection of the various transactions

(1) (1914) A. I. R. (Pat.) 430.

1958.

SARANGDHAR v. PARVATI-NARAYAN, J.

and he may, as provided in section 159, Evidence Act, refresh his memory by referring to the account books. But it is not necessary for him to prove that 'such and such articles valued at such and such amount were supplied on such and such dates'. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect will substantially be the same. Where however the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions."

Of course, the suit which came to be decided by their Lordships was a suit for the recovery of money on the basis of bahi khatas, and hence that was a suit in which a certain person was sought to be charged with liability. This is not the position here, and I need not repeat that in this case the documents should be treated as practically admitted documents.

It appears that the daughters of the Rai Bahadur have now attained majority, but they have still been shown as minors. This defect, however, will not prove fatal to the suit, and in support of this view I may refer to the decisions of this Court in *Ratan Prasad Marwari* v. *Bridhi Chand Shroff*(1), *Gulab Chand* v. *Mt. Kishori Kuer*(2) and *Bibi Asghari* v. *Muhammad Kasim*(3). Mr. Lalnarain Sinha did not in fact make any point out of the omission of the plaintiffs to discharge the guardian of the minors.

In the result, therefore, I would allow First Appeal no. 69 of 1947, filed by the plaintiffs, with costs. The decree passed by the learned Subordinate

(1) (1939) A. I. R. (Pat.) 601
(2) (1942) A. I. R. (Pat.) 348.
(3) (1951) A. I. R. (Pat.) 329.

1958

SARANGDHAR v. PARVATI. NARAYAN, J.

Judge will be varied and the entire suit of the plaintiffs will stand decreed with costs. First Appeal no. 91 of 1947 which is the appeal filed by the defendant no. 1 will stand dismissed with costs. The Insurance Company will not be liable for costs in any of the appeals.

AHMAD, J.—I agree.

K. D.

Order accordingly.

APPELLATE CIVIL.

Before Imam, C. J. and Narayan, J.,

DHANUKHA

v.

SAUDAGAR.*

1958.

September, 10, 11,

Appeal, abatement of—joint Hindu family—partition—one person dying during pendency of appeal—widow not substituted, whole appeal abates—Hindu Women's Rights to Property Act, 1937 (*Act XVIII of* 1937), *section* 3.

R, governed by the Mitakshara School of Hindu Law, was a party in a partition suit. *R* died during the pendency of the appeal and in his place his sons were substituted but not his widow *W*.

Held, that the Hindu Women's Rights to Property Act, 1937, has created a special statutory right in favour of *W*. *W*. could claim an interest in the property of *R* and could seek a partition thereof. Therefore *W's* interest was not represented in the case, *i.e.*, the representation was incomplete and therefore the whole appeal abated.

Hindu Women's Rights to Property Act, In re.-(1), *Siveshwar Prasad Narain Singh* v. *Lala Harnarain Mal Bahal*(2), *Saradambal* v. *S. Subbarama Ayyar*(3), *Jonnagadla Seethamma* v. *Jonnagadla Veerana*(4), *Sheo Hari Lal* v.

*Appeal from Original Decree no. 215 of 1946, from a decision of Mr. Tribhuwan Nath Singh, Additional Subordinate Judge, Gaya, dated the 11th March, 1946.

(1) (1941) A. I. R. (F. C.) 72.
(2) (1945) A. I. R. (Pat.) 116.
(3) (1942) A. I. R. (Mad.) 212.
(4) (1950) A. I. R. (Mad.) 785.

1953.

DHANUKHA
v.
SAUDAGAR.

Ramesher Lal(1), *Awadh Bihari Prasad* v. *Jhaman Mahton*(2) and *Churaman Mahto* v. *Bhatu Mahto*(3), referred to.

Appeal by defendants 18 to 21.

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

G. P. Das and *Shyamnandan Prasad Singh*, for the appellants.

Lalnarayan Sinha, *Lakshmi Narayan Sinha* and *Ganesh Sharma*, for the respondents.

NARAYAN, J.—This appeal arises out of a suit for partition. The plaintiff who is the son of one Halkhori Singh sued for the partition of several properties which have been described in four Schedules in the plaint. The defendants nos. 1 to 3 are the sons of the plaintiff, and the defendant no. 4 is the wife of the plaintiff. The defendant no. 5 was Ramsaran Singh, another son of Halkhori Singh, who died during the pendency of this appeal. The sons of Ramsaran were impleaded as defendants nos. 6,7 and 8 in the action. The defendant no. 9 is the son of Ramkeshwar Singh who was another son of Halkhori Singh, and the defendants nos. 10 to 12 are the sons of defendant no. 9. Besides these defendants, there are another set of defendants namely, the defendants third-party, and they have been described in the plaint as the co-sharers of the plaintiff and the defendants first and second parties in respect of several properties sought to be partitioned. Khatas nos. 51 and 52 are included within Schedule no. 3 of the plaint, and partition is sought with regard to these khatas as well.

Besides other defendants, the suit was resisted by the defendants nos. 18 to 21, and their defence was confined to khatas nos. 51 and 52. The plea set up by these defendants was that khatas nos. 51 and 52

(1) (1946) F. A. no. 124 of 1946 (unreported).
(2) (1953) Bihar L. J. 65.
(3) (1937) 16 Pat. L. T. 308.

1953.

DHANUKHA v. SAUDAGAR.

NARAYAN, J.

were property which had been acquired by Mana Singh, the deceased brother of the defendants 18 and 19 and the father of the defendants nos. 20 and 21. The contention urged on their behalf is that the plaintiff or the defendants first and second parties could not seek a partition of these lands, inasmuch as these lands were the exclusive property of Mana Singh and had been acquired by him under certain sale-deeds.

The learned Subordinate Judge after examining the evidence with regard to the lands of khatas nos. 51 and 52 came to the conclusion that Mana Singh was a mere farzidar for Halkhori Singh, the ancestor of the plaintiff and the defendants first and second parties, and the father of Ramkeshwar Singh, Ramsaran Singh and Saudagar Singh.

The defendants nos. 18 to 21 have, therefore, come up in appeal, and the only contention put forward on their behalf is that the Court below was wrong in coming to the conclusion that this property (khatas nos. 51 and 52) had been acquired by Halkhori Singh in the farzi name of Mana Singh, who is the son of one Deonath who was Halkhori's sister's son.

The short point which arises for determination in this appeal, therefore, is whether the plaintiff has succeeded in proving that the property in dispute, namely the lands of khatas nos. 51 and 52, is a property belonging to Halkhori Singh and his defendants. Though we find that this appeal has abated as both parties have submitted their arguments even on the merits of the case, I should like to record a finding on the question as to whether the plaintiff has succeeded in proving that the lands of khatas nos. 51 and 52 are property belonging to his family in which he is entitled to have a share on partition. There can be no doubt that the plaintiff has succeeded in establishing his

1958.

DHANUKHA v. SAUDAGAR.

NARAYAN, J.

claim with regard to these lands. Admittedly, Mana Singh was a close relation of Halkhori Singh, and the lands had been acquired under four sale-deeds which are marked as exhibits 15, 15(*a*), 15(*b*) and 15(*c*) in this suit. Exhibits 15, 15(*a*) and 15(*b*) were executed in the name of Mana Singh in August 1901, and the unregistered sale-deed, exhibit 15(*c*), was executed in the name of Halkhori Singh himself on 30th Jeth 1304, which would correspond to the English calendar year 1897. It is significant that in the survey record not only the lands covered by exhibits 15, 15(*a*) and 15(*b*) were recorded in the name of Mana Singh, but even the land covered by exhibit 15(*c*) was recorded in his name. As these documents had been executed before the survey, they could not contain the plot numbers, but admittedly in the survey operations the lands covered by these sale-deeds were recorded under khatas nos. 51 and 52. No explanation could be offered as to how the land covered by the unregistered sale-deeds, exhibit 15(*c*), standing in the name of Halkhori Singh could be recorded in the name of Mana Singh. At one stage of his argument Mr. G. P. Das, who argued this appeal on behalf of the appellants, was inclined to think that it had not been established that the land covered by the unregistered sale-deed was included under khatas nos. 51 and 52. But the learned Subordinate Judge has stated quite clearly in his judgment that it had been admitted before him that the lands covered by all the four kebalas were recorded under khatas nos. 51 and 52. Moreover, the ground no. 14 of this appeal runs as follows:

> "For that the Court below should not have drawn any adverse inference against defendants 18 to 21 by the fact that the lands covered by 'the registered Kebala' (which is a misprint for 'the unregistered Kebala') Ext. 15 (*c*) was recorded in the name of Mana Singh in survey."

Thus, even the appellants have proceeded on the assumption that the land covered by the kebala, exhibit 15(*c*) is recorded in the name of Mana Singh in the survey. It is undoubtedly a very important circumstance to indicate the farzi nature of the transaction if it is found that even the land covered by the sale-deed standing in the name of Halkhori Singh was recorded in the survey in the name of Mana Singh. Besides this circumstance, the plaintiff has adduced very satisfactory documentary evidence for the purpose of showing that possession has always been with him or the other members of his family. The original sale-deeds as well as the original survey khatian and the rent receipts standing in the name of Mana Singh and covering a fairly long period have been filed by the plaintiff. The rent receipts which are exhibits 11 series are very important evidence in this case for proving that the plaintiff or the members of his family have been paying the rent of these lands. Most of these receipts show that the payment of rent was made by Saudagar Singh, the present plaintiff, and there can be no reasonable explanation for Saudagar paying the rent for so many years on behalf of Mana Singh. The learned Subordinate Judge has further rightly pointed out that the entries in these receipts are supported by the entries in the plaintiff's account-books, exhibit 12 series. The entries in the account-books go to establish that payment of rent was actually made by the plaintiff. The formal proof of these account-books was waived, and they are, therefore, to be treated as documents admitted by the defendants. In my opinion, the entries in the receipts showing payment by the plaintiff supported as they are by the entries in the account-books produced by the plaintiff are conclusive of the point of farzi and conclusive of it as against the present appellants. There are other documents also which go to establish that the persons really in possession of these lands were the plaintiff

1951.

DHANUKHA v. SAUDAGAR.

NARAYAN, J.

and the members of his family. There were two rent decrees obtained in the year 1940 with regard to these khatas, and these decrees had been paid by the plaintiff Saudagar Singh, Ramsaran Singh (defendant no. 5) and Ragho Prasad Singh (defendant no. 9). The petition of satisfaction filed on behalf of the decree-holder is an exhibit in the case and it shows that the decretal amount had been paid by Ramsaran Singh, Saudagar Singh and Ragho Prasad Singh. Certainly, no reasonable explanation could be offered as to why in the satisfaction petition the names of the e three men are mentioned as persons who had paid the decretal amount. The learned Subordinate Judge has referred to the other documents which support the plaintiff's version that Mana Singh was a mere farzidar for him or the members of his family, and the learned Counsel for the appellants was not able to point out any error of record in the discussion of the learned Subordinate Judge with regard to these documents. It is not therefore necessary for us to mention all the documents which have been referred to by the learned Subordinate Judge. It will be enough to say that the documentary evidence goes to establish conclusively the possession of the plaintiff and the members of his family over the lands in question. As against the evidence that has been adduced by the plantiff for proving that Mana Singh was a mere farzidar for Halkhori and that Halkhori and his descendants have all along been in possession of these lands, there are only a few documents produced by the defendants which are of very recent dates. Certain copies which had been obtained in 1945 are of no consequence, and even the certified copy of the rent roll which was obtained in 1942 cannot improve matters for the defendants, inasmuch as, obviously, at that time some dispute must have arisen between the parties. There is only one rent receipt produced by the defendants which is a rent receipt for the year 1351 fasli, corresponding to

1953.

DHANUKHA v. SAUDAGAR. NARAYAN, J.

the English calendar year 1944, and which is marked as exhibit C. This rent receipt stands in the name of Mana Singh who died long before 1944. Even in the Rent suits which had been instituted in the year 1939 the sons of Mana Singh had been impleaded as defendants. Mana Singh was dead before the year 1939, and his name could not find place in the rent receipt, exhibit C, which was granted in January 1944. The Canal parchas, exhibits G series, are also of very recent dates. The learned Subordinate Judge has discussed the oral evidence adduced by the parties on the question of possession, and we have no hesitation in agreeing with him that the oral evidence adduced by the plaintiff for proving his possession over the lands in question is preferable to the oral evidence adduced by the defendants. None of the defendants, who are elderly men, was examined in this case, the person examined on their behalf being D W. 1 who is the son of defendant no. 18, a young man aged about 32 years. His evidence stands thoroughly discredited, inasmuch as he has stated that there were more than 100 palm trees on the *als* of the land. A pleader was deputed to hold local inspection, and he reported that the number of palm trees there was only 32. The learned Subordinate Judge was absolutely justified in rejecting the evidence of this witness as untrustworthy. Thus, I must hold, in agreement with the learned Subordinate Judge, that Mana Singh was a mere farzidar for Halkhori and that ever since these lands were purchased they were in possession of Halkhori and his descendants. The transactions of sale took place long ago, and after a lapse of so many years it was not possible for the plaintiff to produce direct evidence for proving the payment of the consideration. The motive for the benami transactions cannot also be properly ascertained after a lapse of so many years since the date of the

1953.

DHANUKHA
v.
SADDAGAR.
NARAYAN, J.

transactions. On the merits, therefore, this appeal is bound to fail.

It appears that Ramsaran Singh died during the pendency of the appeal, and besides his three sons, who are respondents nos. 7, 8 and 9, he has left a widow who has not been substituted in his place. Because the widow has not been substituted, it was urged on behalf of the respondents that the whole appeal had abated. Ramsaran, as appears from the petition field by the appellants on 3rd March 1951, had died on 2nd October 1950. In this petition it was wrongly stated that his sole heirs and legal representatives were his three sons. On 2nd April 1951 the respondents filed a petition of objection to the prayer for substitution as made by the appellants, and in this petition it was stated that Ramsaran had also left a widow named Ajhola Kuer. The office had pointed out that the date of death of Ramsaran being 2nd October 1950 the petition for substitution was not in time and that it had not been accompanied by a petition for setting aside the abatement. In spite of the objection that was filed on behalf of the respondents and in spite of the office note that the petition for substitution was not filed in time, the appellants did not file any petition for setting aside the abatement or any petition for bringing the widow on the record, and on 24th April 1951, when the Counsel for the parties were heard with regard to the substitution matter, the following order was passed by a Bench of this Court:

> "We have heard learned Counsel for the parties. It is stated by learned Counsel for the appellants that the widow of deceased respondent no. 6 is not a necessary party to this appeal. The question as to what is the effect of not substituting the widow of deceased respondent no. 6 will be considered at the time of the hearing of the appeal ....."

It is, therefore, manifest that in spite of the objection that was raised by the respondents, the appellants did

1953.

DHANUKHA v. SAUDAGAR.

NARAYAN, J.

not move this Court for setting aside the abatement or for bringing on the record the widow of the deceased respondent no. 6. But the Counsel for the appellants was at pains to impress upon us that the interest of the widow should be deemed to have been represented by the sons—an argument which appears to me wholly unsound in view of the status which has been created for the widow by Act XVIII of 1937. This Act lays down that when a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had. Sub-section (3) lays down that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that *she shall have the same right of claiming partition as a male owner*. The position, therefore, is that because of sub-section (3), the widow takes her husband's interest subject to the restrictions placed on her powers by this sub-section, which however recognizes her right of partition. The right of alienation may have been restricted by this sub-section, because she is to be regarded only as a limited owner, but the right of partition has been given by the sub-section and she can claim partition like any male owner. The Federal Court, while discussing this Act in *In re Hindu Women's Rights to Property Act*(1) observed that the Act ought to receive a beneficial interpretation, inasmuch as it was a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief. Their Lordships quoted a passage from *Gorer's Case*(2) which runs as follows :

(1) (1941) A. I. R. (F. C.) 72.
(2) (1877) 1 Ch. D. 182.

1953.

DHANUKHA v. SAUDAGAR.

" If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit. "

NARAYAN, J.

In *Saradambal* v. *S. Subbarama Ayyar*(1) Venkataramana Rao, J. has pointed out that the Act has taken away the rule of survivorship and allowed the property to descend to his wife and that once the rule of survivorship has ceased to operate, there is nothing to preclude a creditor from attaching the property. There was the question of attachment, and the view taken by the Madras Judge was followed by a Bench of this Court in *Siveshwar Prasad Narain Singh* v. *Lala Harnarain Mal Bahal*(2). Fazl Ali C. J. referred to the Madras case with approval, and quoted the passage where Venkataramana Rao, J., had said that a widow acquired under the Act the interest of her husband not as a survivor but as an heir of her husband, and therefore, the interest was an asset of her husband in her hands and was liable to be proceeded against by a creditor of the husband even though the interest be an undivided interest in the joint family property. Even in *Jonnagadla Seethamma* v. *Jonagadla Veerana Chetty*(3) which was cited by Mr. Das on behalf of the appellants the Chief Justice of the Madras High Court has said that the status of a Hindu widow of a deceased member of a joint Hindu family governed by the Mitakshara under the provisions of the Act is not that of a coparcener but that of a member of the joint family with *certain special statutory rights*. I should like to quote the following passage from their Lordships' judgment:

" In our opinion, the status of a Hindu widow of a deceased member of a joint family governed by the

(1) (1942) A. I. R. (Mad.) 212.
(2) (1945) A. I. R. (Pat) 116.
(3) (1950) A. I. R. (Mad.) 785.

Mitakshara under the provisions of the Act is not that of a coparcener, but that of a member of the joint family with certain special statutory rights. The death of a coparcener who is a member of a Hindu joint family does not effect a severance or disruption of the joint family, merely because he leaves behind him a widow who has certain statutory rights under the Act. The widow cannot be regarded in any sense as the widow of a divided member. The result is that the joint family will continue as before except that the widow *would have a special limited statutory right.* "

Thus, the authorities are unanimous in holding that by this Act a *special limited statutory right* has been created in favour of the widow, and if this is the position in law, then it will not be correct to contend that the interest of the widow of Ramsaran was represented by his sons. This was a suit for partition, and one of the contentions which was urged on behalf of the defendants was that a simple suit for partition was not maintainable because the property stands in the name of a stranger. In other words, the point which the defendants have sought to make out was that because the property stands in the name of a stranger, it was incumbent on the plaintiff to seek a declaration of title with regard to it and to pay the court-fee according to the value of the property. Fortunately, Mr. Das did not press before us the untenable point that without a declaration of title the plaintiff could not maintain this action for partition with regard to the lands covered by khatas nos. 51 and 52. The plaintiffs had made out a case that like other properties these lands had also been treated as family property and had been in possession of the descendants of Halkhori Singh. It is the defendants who contended that the property did not belong to the

1953.

DHANUKHA v. SAUDAGAR.

NARAYAN, J.

plaintiff but to Mana Singh who had absolute title to it. The adjudication that has been made in this suit to the effect that the property belongs to the family of the plaintiff is certainly an adjudication of which the lady, namely the widow of Ramsaran, can take advantage. She can, as a result of this adjudication, claim an interest in this property and seek a partition with regard to her share. In *Churaman Mahto* v. *Bhatu Mahto*(1) it was held by a Bench of this Court that where, in a partition or a mortgage suit, the death of one of the respondents does not make the representation of the interests involved incomplete, there is no abatement and the appeal can proceed, but where such death makes the representation incomplete, an abatement of the appeal as a whole takes place. In *Sheo Hari Lal* v. *Ramesher Lal*(2), disposed of on the 29th January 1952, a Bench of this Court held with regard to an appeal from a mortgage decree that the whole appeal must be deemed to have abated as the widows of a deceased decree-holder had not been substituted in his place. This decision was referred to and followed by another Bench of this Court in *Awadh Bihari Prasad* v. *Jhaman Mahton*(3), and their Lordships said that the case was governed by the aforesaid decision where it had been held that it was necessary to substitute the widows of the plaintiff who had died during the pendency of the appeal in this Court, and that in the absence of substitution being effected, the whole appeal must be deemed to have abated. I have no doubt that in view of the peculiar status created for the widow under the Act the sons could not represent her interest and, therefore, it was incumbent on the present appellants to substitute her in place of the

(1) (1934) 16 Pat. L. T. 308.

(2) (1952) F. A. no. 124 of 1946 (unreported).

(3) (1953) Bihar, L. J. 65.

deceased Ramsaran. In a suit for partition every defendant is in the position of the plaintiff, and the widow can claim the property on the basis of the decree which has been passed by the learned Subordinate Judge. If, therefore, this appeal is allowed to proceed, there is the chance of having two inconsistent or contradictory decrees, which under the law must be avoided. I am, therefore, of the opinion that this appeal must be deemed to have abated.

1953.

DHANUKHA v. SAUDAGAR. NARAYAN, J.

Ths learned Counsel for the appellants had submitted during the course of his argument that the suit had abated because no substitution had been made in place of the deceased defendant no. 22, and in fact one of the grounds taken in this appeal is that the suit should be held to have abated because no substitution had been made in place of the deceased defendant no. 22. But it has been pointed out before us that the defendant no. 22 had no interest whatsoever in Schedule no. 3 property in which are included the two khatas, namely khatas nos. 51 and 52. The description of Schedule no. 3 property as given in the plaint shows that only the plaintiff and the defendants first and second parties have got interest therein. The defendant no. 22 was one of the defendants third-party and had got no concern whatsoever with Schedule no. 3 property which includes the present disputed land, and ultimately Mr. Das had to concede that this objection was not fit to be entertained. As a matter of fact it appears from the written statement of defendants 18 to 21 themselves (paragraph 10) that the defendant no. 22 had been impleaded because he had interest in the milkiat property of mauza Aslampur Abdullah which is one of the properties sought to be partitioned. The statement in paragraph 10 is that these defendants have purchased 3 annas and odd share from defendant no. 22 under a sale-deed dated

1953.

DHANUKHA v. SAUDAGAR.

ARAYAN, J.

2nd July, 1944 which was executed after the institution of this suit. In view of this statement and the description given in respect of Schedule no. 3 property of the plaint the learned Counsel had to give up this point. Moreover, if the appeal itself has abated, even this contention cannot be entertained here.

In the result, therefore, I hold that this appeal has abated, and I would dismiss it with costs.

IMAM, C. J.—I agree.

Appeal dismissed.

K. D.

BGP (ILR) 7—1,600—Lino—18-2-1954—KBLR and Others.

APPELLATE CIVIL.

Before Narayan and Ahmad, JJ.

1953,

March, 25, 26, 27, 31.
April, 9, 10, 16, 17.
May, 12.

KAMESHWAR SINGH

v.

RAM JANKI.*

Bengal Alluvion and Diluvion Regulation, 1825 (*Beng. Reg. XI of* 1825), *section* 4(1), *word "tenure" in, significance and scope of*—reformation in situ—*gains of land from bed of river—gains subject to private property of particular superior landlord—provisions of the regulation, how far applicable.*

The word "tenure" in clause (1) of section 4 of Regulation XI of 1825 has been used both in relation to the land held by the tenant under a superior landlord as also in relation to an estate held by a superior landlord under the Government. The restriction placed on the interpretation of the clause on the two types of tenures will have different results on the character of the tenure involved.

Where the tenure is an estate held by a superior landlord under the Government, the claim by him on the basis of gain by gradual accession can arise only when the bed of the river is a public domain or public property. In the case of this class of tenure there can be no claim on the basis of gain by gradual accession in case the bed of the river which gives rise to the gain is a private property of any other individual. For in that case the gain must necessarily be a formation on a site which is the property of that individual and that being so that gain will be a part of his property and cannot be said to have become a part of the superior landlord of the riparian estate simply because the gain has got itself acceded to that estate by slow and gradual accretion.

The reason is clear. In such a case the reformation of the land though by slow and gradual accretion shall always be on a site which shall be the property of the one or the other. Or, in other words, the reformation shall always be

* Appeal from Original Decree no. 478 of 1946, from a decision of Mr. Ram Ratna Singh, Additional Subordinate Judge, 2nd Court, Muzaffarpur, dated the 20th July, 1946.

1953.

KAMESHWAR SINGH v. RAM JANKI

a case of *reformation in situ* and for that reason in a competition between two titles, namely, the title of the superior landlord of the riparian estate to which the gain has got itself annexed on the basis of the rule of gradual accession and that of the other individual who is the owner of the bed of the river the title of the owner of the bed of the river shall prevail and his title shall not be allowed to be forfeited as a result of the operation of the rule laid down in clause (1) of section 4 of the Regulation.

In this class of cases, therefore, whenever the bed of the river is the private property of an individual or individuals any gain arising out of it cannot be claimed by the superior landlord of a riparian estate only on the footing that the gain has by gradual accession annexed itself to his estate. The gain shall always in that case go to the individual, who owns the bed of the river.

The position will be entirely different when the tenure concerned is not a riparian estate of a superior landlord held under the Government but only a subordinate tenure held by a tenant in the estate to which the land gained by gradual accession has been annexed. In such a case the conflict is originally and essentially between the tenant and the landlord and that conflict can arise only when the land gained by gradual accession, which has been annexed to the land of the tenant, is undisputably a part of the estate of the superior landlord. In case that gain is not a part of the estate of the superior landlord, the tenant cannot raise a claim to it either against his superior landlord and much less against any body else.

Once it is found that the land gained had come out from that part of the bed of the river which is the private property of the particular superior landlord, the gain formed on that part shall as a rule go to that landlord and the law of gain by gradual accession as laid down in clause (1) of section 4 of the Regulation shall not come into play.

Rama Nath Thakore v. *Chundernarain Chowdhury*(1), *Lopez* v. *Muddun Mohan Thakoor*(2), *Gajadhar Prasad* v. *Dulhin Gulab Kuer*(3), *Raja Shiva Prasad Singh* v. *Hira*

(1) (1862) 1 Marsh. 136.
(2) (1870) 13 Moo. I. A. 467.
(3) (1920) 5 Pat. L. J. 632.

1952.

Singh(1), *Khubi Mahton* v. *Mahanth Lachmi Das*(2), *Maharaja of Dumraon* v. *Secretary of State for India in Council*(3), *Bishundeo* v. *Harnarain*(4) and *R. K. Pandey* v. *J. P. Choudhary*(5), referred to.

LAKHEWAR SINGH v. RAM JANKI

Appeal by the defendant.

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

B. C. De and *S. P. Srivastava*, for the appellant.

S. N. Dutt, *Prem Lall* and *K. N. Verma*, for the respondents.

AHMAD, J.—This appeal is by the Maharajadhiraj of Darbhanga, who has been impleaded in the plaint as the defendant second party. During the pendency of the appeal the estate of the Maharajadhiraja vested in the State of Bihar and the State of Bihar has been added as a co-appellant.

The suit was for a declaration of title and recovery of possession in respect of 45 bighas of lands, which are at present admittedly attached with the lands of the Maharajadhiraj in village Ghosaut, and also for mesne profits. It is the admitted case of the parties that out of the aforesaid 45 bighas of lands, 32 bighas are culturable lands and the rest are either jungle or waste. The present appeal is confined only to the culturable land having an area of 32 bighas as already stated.

The suit was instituted by two sets of plaintiffs—plaintiffs first and plaintiffs second party. Plaintiffs 1 to 8, who formed the plaintiffs first party, are the co-sharer maliks of village Barabharthi, appertaining to touzi no. 13341 within the jurisdiction of police-station Minapur in the district of Muzaffarpur

(1) (1921) 6 Pat. L. J. 478, F. B.
(2) (1922) I. L. R. 2 Pat. 18, F. B.
(3) (1927) I. L. R. 6 Pat. 481, P. C.
(4) (1946) I. L. R. 25 Pat. 429.
(5) (1949) I. L. R. 28 Pat. 691.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

and of village Madhuban Kanti, a village which is adjoining to Barabharthi on its east appertaining to touzi no. 1356/170, police-station Minapur, and which is also in the district of Muzaffarpur. Plaintiffs 9 to 12, who formed the plaintiffs second party, are the raiyats of village Madhuban Kanti wherein the plaintiffs first party also hold some raiyati interest.

On the side of the defendants in the plaint there were impleaded three parties. Defendants 1 to 9, who constituted the defendants first party, were the tenants of village Ghosaut appertaining to touzi no. 4576 (old) and 20850 (new) in the district of Muzaffarpur lying just west and north of the aforesaid village Barabharthi. Defendant no. 10, the present appellant, who was impleaded in the suit as defendant second party, owns about three annas share in village Ghosaut. Defendant no. 11, who was defendant third party in the plaint, and is known by the name of Raghoi Kothi, was another co-sharer proprietor of village Ghosaut and that of Madhuban Kanti.

In between village Ghosaut on one side towards the north and the villages Barabharthi and Madhuban Kanti on the other side towards the south is the river Gandak, which flows from west to east. It appears that this river always changes its course from time to time, causing alluvion and diluvion on the side of its banks. In the plaint it is alleged that at the time of cadastral survey, which was in the year near about 1895 or 1896, the course of the river near the aforesaid three villages was through a semi-circular curve with the result that the river there at that time coming from west ran towards north and then after flowing for a distance from south to north took its direction again from west to east, thus forming on that spot a semi-circular curve. In that position of the river the lands in dispute forming a block of land known as chaki lay on the east and south of the semi-circular curve and was then admittedly a part of the estate of

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

the plaintiffs, while the bed of the river itself to the extent of half towards south was the land of villages Barabharthi and Madhuban bearing survey plot nos. 1 and 460 respectively and the other half on the north bearing survey plot no. 702 lay in village Ghosaut belonging to the defendant second party and his co-sharers. Sometime after survey the river Gandak changed its course and as a result thereof it stopped flowing from south to north via the semi-circular curve and instead it broke through in a straight line from west to east with the result that the *chaki* from its position on the east and south of the river was ultimately thrown completely on the north of it and got itself annexed with the lands of Ghosaut. According to the allegations in the plaint, this happened in the year 1934 as a result of sudden change and after the sudden change in the course of the river the lands coming out of water when dried up began to be cultivated by the plaintiffs first party, as usual, as a part of their village either khas or through bataidars and some part of it appertaining to survey plot no. 1 became jungle covering kharhur and trees of various descriptions. In this way all the culturable land in dispute though submerged for a time remained again on their re-formation in possession of the plaintiffs as a part of their estates and they enjoyed the usufruct thereof till their having been dispossessed therefrom by the defendants in the third week of April, 1942, subsequent to the order passed on 14th April, 1942, against the plaintiffs in a proceeding between the parties under section 145 of the Code of Criminal Procedure, and hence the present suit on 14th April 1945 by the plaintiffs for the declaration of their title and the ejectment of the defendants from that land. The case of the plaintiffs is that the law of alluvion and diluvion is not applicable to the facts of the case and the defendants cannot be said in law to have acquired any semblance of title to any portion of the land in suit. The possession of the defendants according to the plaint is that

1953.

LAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

of a trespasser and they are liable to pay the mesne profits with interest for their wrongful possession of the land. It has been further alleged in the plaint that the land in dispute is each year subject to seasonal submergence during monsoon time.

On the other hand, the case of the defendants second and third parties, who only contested the suit, was that the river shifted towards south in the course of several years beginning soon after the survey and as a result of a slow, gradual and imperceptible change formed accretions towards north on the side of village Ghosaut and gradually diluviated lands towards south on the side of villages Barabharthi and Madhuban. These accretions, as and when they came out of water, came in possession of the defendants as gains by gradual accession to their lands in village Ghosaut. In the alternative, the defendants also pleaded that as they had been coming in possession of the disputed land for more than twelve years, therefore even if the plaintiffs had any title to the suit lands at the time of survey, the said title was extinguished long ago by adverse possession of the defendants and their tenants. In short, the defendants though admitting the land in dispute originally to have been a part of the plaintiffs' estate claimed that subsequently those lands became diluviated out of the estate of the plaintiffs and accreted to the estate of the defendants and their co-sharers by slow and gradual accessions and that they have been since then in possession thereof openly in assertion of their own title in opposition to the title of the plaintiffs.

On the allegations made by the parties, the trial court framed the following issues:—

"1. Have the plaintiffs any cause of action or right to sue?

2. Is the suit bad for misjoinder of parties and multifariousness?

3. Is the suit barred by limitation and adverse possession?

4. Was there a sudden change in the course of river Gandak in 1934 as alleged by the plaintiffs?

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

5. Whether the disputed lands are accretions to the lands of village Ghosaut?

6. Is the story of possession and dispossession set up by the plaintiffs true?

7. Are the plaintiffs entitled to any decree for recovery of possession? If so, to what extent?

8. Are the plaintiffs entitled to any washulat? If so, to what extent or what basis?

9. To what relief, if any, are, the plaintiffs entitled? "

The finding on issue no. 4 given by the trial court is—

" This general feature is inconsistent with the sudden change of the course of the river in Bhado 1934. This issue is, therefore, decided against the plaintiffs."

Issue nos. 5 and 6 were discussed together by the trial court and the findings given on those issues are in the following words:—

" These facts lead to the conclusion that the survey river near the disputed land began to shift some time after April 1931 and not before."

And thereafter the court found—

" .....I hold that the disputed lands are accretion to the lands of village Ghosaut and the story of possession and dispossession as alleged by the plaintiffs after the river changed its course is not correct; but at the same time I hold that the disputed culturable area became culturable only from 1934 onwards and the jungle area has been in possession of the plaintiffs throughout, though the culturable area has been in possession of the Raj since 1934.

These issues are decided accordingly."

On issue no. 3 the finding given is—

" It has been found above that the Raj is in possession of the disputed culturable area since 1934. The plaintiffs have instituted the suit for recovery of possession within 12 years of 1934, i.e., on 14th April 1945, I have already said that defendants 3rd party does not claim any disputed jungle land and so the plaintiffs' *ex parte* evidence regarding their possession must be accepted. This issue is, therefore, decided in favour of the plaintiffs."

Issue no. 2 was disposed of in the following terms:—

" Hence. I find that though the two defendants were improperly sued in the same suit, the suit cannot fail on that account."

1953.

KAMESHWAR SINGH v. RAM JANKI

AMEER, J.

Lastly, the four issues, namely, 1, 7, 8 and 9 were disposed of by a common finding, which is to the following effect:—

"In view of my findings above, the plaintiffs have got cause of action and they are entitled to a decree for possession with mesne profits to be ascertained in subsequent proceedings. So far as the kast lands of Dahaur and Ramlakhan Tewari are concerned, the plaintiffs will get possession of their milkiat interest only."

In view of the findings stated above, the suit was decreed with costs on contest against the defendants first and second parties and *ex parte* against the defendant third party.

The present appeal, as already stated, has been filed only by the Maharajadhiraj of Darbhanga, who is the defendant second party in the case. The decree passed by the trial court, therefore, now stands concluded against the defendants first party, who claimed to be in possession of the lands as tenants settles from the Maharajadhiraj of Darbhanga and also against defendants third party, who were alleged to have dispossessed the plaintiffs from the jungle portion of the lands in dispute.

Mr. B. C. De appearing for the appellant has in appeal raised two points. His first contention is that the defendant second party has been defeated on a case not made out in the plaint, and, therefore, the decree passed by the trial court should be reversed. His argument on this point is that if it is held, as in fact it has been found by the trial court, that the land in dispute was a gain from the river as a result of slow and gradual accession then the plaintiffs having been found to have failed in proving their case of sudden change as pleaded in their plaint must fail in the suit unless it were found that they had also pleaded the case of *reformation in situ* and that they had proved it. In the present case, however, what the plaintiffs, only pleaded, according to Mr. De, was that their land accreted to the land of village Ghosaut as a result of sudden change in the course of the river

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

and not that it was a case of gradual reformation of the land on its old side. In this view of the pleading it was contended that there were only two cases to be tried before the court: one that of sudden change in the terms of clause 2 of section 4 of the Regulation as alleged by the plaintiffs and the other of slow and gradual accretion in the terms of clause 1 of section 4 of the Regulation as claimed by the defendants. Mr. De strongly stressed that there was no third case of a *reformation in situ* of the land before the court trying the case. It was, therefore, argued that the court having once found that it was not a case of sudden change should have dismissed the plaintiffs' suit and should not have decreed it on the ground that though it was a case of slow and gradual recess of the river as claimed by the defendants and not that of sudden change in its course as pleaded by the plaintiffs, yet the land accreted by the slow and gradual recess of the river was identifiable with the old land which was diluviated by the fluvial action of the river and, therefore, it did not lose its bond with its parent estate and remained a part of it as a property of the plaintiffs.

The second point raised by Mr. De is on the point of limitation. He has challenged the finding given against the appellant on the point of possession and has contended that the appellant even on the footing of the finding given by the trial court to the effect that the land came out of water in the year 1931 should have been found to have come in possession of the land in dispute since at least that time, i.e., the year 1931 and, therefore, it should have been held that the claim of the plaintiffs was barred by limitation; the present suit having been instituted in the year 1945.

In support of his first contention Mr. De has taken us through the plaint, written statement and also the evidence deposed to by the witnesses on the side of the plaintiffs and the defendants. There can

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

be little doubt that the case of *reformation in situ* has at least not been pleaded in clear words in the plaint and what has been specifically alleged therein is only this much that the land has come out as a result of sudden change in the course of the river. In that view of the allegations made by the plaintiffs and the evidence given by them in support thereof, the contention of Mr. De might have deserved some consideration by us in case we were of opinion that the law of alluvion and diluvion as laid down in clause 1 of section 4 of Regulation XI of 1825 was in fact applicable to the facts of the present case and also that there were no admission made by the defendants and their witnesses themselves on the basis of which the plaintiffs could have been held to be entitled to get the decree.

We think that the facts of the present case are not at all covered by the rule of law laid down in clause 1 of section 4 of Regulation XI of 1825, and that over and above it even if it were held that the terms of clause 1 of section 4 of the Regulation did technically apply to the facts of the case, it is manifest on the admissions made by the defendants and their witnesses themselves that the land in dispute has been reformed on its old site after its diluvion by the action of the river.

In this view of the case we are of opinion that the contention raised by Mr. De that the plaintiffs are not entitled to get the decree on their pleading has no substance and the authorities relied upon by him in the cases of *Firm Srinivas Ram Kumar* v. *Mahabir Prasad*(1), *Siddik Mahomed Shah* v. *Mt. Saran*(2), *Dammu Vighnesam* v. *Varanasi Lakshmi Narasingha Murty*(3) and *Lala Hem Chand* v. *Lala Pearey Lal*(4) are of no assistance to him on this point. Rather they

(1) (1951) A. I. R. (S. C.) 177.
(2) (1930) A. I. R. (P. C.) 57.
(3) (1940) A. I. R. (Pat.) 187.
(4) (1942) A. I. R. (P. C.) 64.

support the contention raised by Mr. Dutt appearing for the respondents that a case though not pleaded in the plaint may be decreed even on admissions made by the defendants. In the case reported in A. I. R. (1951) Supreme Court, 177, their Lordships of the Supreme Court observed:

" The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Ct. to give him relief on that basis. The rule undoubtedly is that the Ct. cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff, to a separate suit."

The facts of the case reported in A. I. R. 1930 Privy Council, 57, are, I think, entirely different. The claim was based on grounds other than the gift raised at the time of hearing in that case. In the course of hearing the claim pleaded in the pleading having been found not to have been proved, reliance was attempted to be had on the basis of the gift. The case of gift had not been pleaded nor any of the parties had at any stage either in evidence or pleadings referred to that aspect of the case. In those circumstances their Lordships held:

1953,

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

"..... secondly upon the ground that it was a gift made by the widow herself but that claim was never made in the defence presented and the learned Judicial Commissioners, therefore, very truly find that no amount of evidence can be looked into upon a plea which was never put forward."

I think the facts are not like that in the circumstances of the present case. The case reported in 1940 Patna, 187, was one concerning the insolvency of the appellants of that appeal. The respondents in their application had prayed that the appellants should be adjudged insolvents on specific acts of insolvency alleged in the petition. Those allegations perhaps were not proved but the court on other grounds declared the appellants insolvents. In that connection their Lordships observed:

"It is well established by a number of decisions of their Lordships of the Judicial Committee that a Court should be careful to see that cases are decided in accordance with the pleadings or upon the facts proved at the trial but consistent with the allegations made in the pleadings; in other words, a variation between pleadings and proof ought to be carefully watched to see that the opposite party is not taken by surprise. For instance, if the nature of the case is entirely altered from the case made out in the pleadings, the plaintiff must fail or if the case put forward by the plaintiff is found to be false in all the material allegations which he has made, it is not open to the Court to grant relief upon the case made by the defendant, because that case of the defendant is really an answer to the case set up by the plaintiff. In this particular case I do not think that there is such a variation in the case set up by the respondents as would justify us in holding that they ought not to be allowed to get a declaration that the appellants have committed an act of insolvency."

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

In the present case we also find that in fact there is no substantial variation in the case pleaded in the plaint of a character spoken of in the observation referred to above. Neither the variation even if any is completely inconsistent with the allegations made in the plaint. This case also, therefore, does not support Mr. De. The case reported in 1942 Privy Council, 64, arose out of a suit instituted by the plaintiffs, on behalf of the members of the brotherhood of the Digambar Jains, for recovery of possession from the defendant of a house described as "Jain Dharamsala". The question for decision in that appeal was whether the plaintiffs had established their title to, and right to recover possession of, the suit property from the defendant. In the course of litigation it appeared that some important facts forming the basis of the case as presented to the lower court for decision were disclosed with connected facts in the course of evidence and had not been mentioned in the pleadings by either party; nor had any issue been raised regarding them. In that connection it was observed:

"Their Lordships desire to observe that, though the case has been decided on all the points which arose on the evidence led by the parties, the procedure adopted by the trial court of allowing the parties to adduce evidence on points not raised in the pleadings or issues was irregular and should not have been allowed without amending the pleadings and raising the necessary issues."

Their Lordships, however, found that the decision given on the facts on the record was correct and that in that view of the matter dismissed the appeal. In this case it is true that the case of *reformation in situ* was not specifically pleaded though it was said in the plaint that the law of alluvion and diluvion (by which I think they meant the rule of alluvion and diluvion as laid down in clause 1 of section 4 of the

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

Regulation) did not apply to the facts of the case. This part of the allegation, I think in the present case has been clearly proved both by the evidence of the plaintiffs' witnesses and also by the admissions made by the defendants and their witnesses, which I shall refer to presently in my discussion on other points. In that view of the matter, I think, the observation made by their Lordships of the Privy Council in the case stated above and other cases relied upon by Mr. De do not help him in his proposition that on the allegations made in the plaint of the present case the suit should have been dismissed, as the trial court came to the conclusion that the land in dispute had not been formed by the sudden change in the course of the river.

Coming back to the merits of the case, I may before proceeding further place here the propositions laid down by Mr. Dutt in answer to the contention advanced in appeal on behalf of the appellant. He has formulated two propositions before us: (1) When the bed of a river is the property of a private individual and is not a public domain or a public property, as is the admitted case in the present dispute, then any gain of land as a result of its fluvial action from such a river is not a gain as contemplated by clause 1 of section 4 of Regulation XI of 1825. That clause, according to Mr. Dutt, refers to a gain from a river the bed of which is a public domain or a public property. (2) That even in a case of slow and gradual accession if it is established even on the admission of the defendants themselves that the accession is a case of *reformation in situ*, though it is not pleaded in the plaint, then the plaintiffs are entitled to the land accreted unless the title thereof is proved to have been lost by the plaintiffs on some other ground. The first of these two propositions has been vehemently challenged by Mr. De and as to the second, his contention is that there is no admission whatsoever made by the defendants either in the written statement or

in the evidence given by the defence witnesses to the effect that the land gained was reformed on the old site. I now take up the two propositions in the order in which they have been laid down.

The relevant passage of clause 1 of section 4 of Regulation XI of 1825 reads:—

"When the land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a Zamindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever."

The word "river" or "sea" used in this clause is not in the clause itself qualified by any adjective. The terms of this first clause of section 4 taken literally and by themselves may be said to be sufficiently wide to include both kinds of rivers, that is, the river the bed of which is the property of a private individual and also the river the bed of which is a public domain. The clause, however, as pointed out by their Lordships of the Privy Council in the case of *Maharaja of Dumraon* v. *Secretary of State for India in Council*(1) has been the subject of judicial decisions, some of them by the Judicial Committee, which appeared to their Lordships to place a limitation upon the application of the first clause. In the case of *Lopez* v. *Muddun Mohan Thakoor*(2) their Lordships of the Privy Council has defined that qualification in the following words:—

"It is to be observed, however, that the clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication.

(1) (1927) I. L. R. 6 Pat. 481, P. C.
(2) (1870) 13 Moo. I. A. 467.

1953.

KAMESHWAR SINGH & RAM JANKI AHMAD, J.

It would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense—that is to say, the sea belonging to the State; a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable."

To the same end was the view expressed by Sir Barnes Peacock in *Rama Nath Thakore* v. *Chundernarain Chowdhury*(1). Therein it was observed:

"We are of opinion that the word 'gained' in section 4 of Regulation XI of 1825 does not extend to cases of land washed away and afterwards re-formed upon the old site, which can be clearly recognised..... In such a case we think the land formed by accretion of the old recognised site remains the property of the owner of the original site.

The principle is that where the accretion can be clearly recognised as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner."

Similar was the view expressed by Das, J. in *Gajadhar Prasad* v. *Dulhin Gulab Kuer*(2). The

(1) (1862) 1 Marsh. 186.
(2) (1920) 5 Pat. L. J. 682.

learned Judge in that case held:

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

" That being so, there is nothing in the Regulation which takes away the land from the plaintiffs and gives it to the defendants. I have more than once expressed my opinion on this point, and I still adhere to the view which I have more than once expressed in this Court, that the case is taken out of the Regulation when it is shown that the land, washed away and re-formed on its old site, is identifiable and recognisable as land belonging to the owner of the site."

This view of Das, J. was re-iterated by this Court in the case of *R. K. Pandey* v. *J. P. Choudhury*(1) decided by Manohar Lall and Mahabir Prasad, JJ., in the following words:—

" The rule which awards alluvial accretion to the owner of the adjoining land is subject to one very important qualification, namely, that the site over which the accretion forms is not proved to belong to another private individual because in determining the right of competing claimants to such accretion the law prefers the owner of the submerged but identifiable site to the owner of the bank. So long as the bed of a navigable river remains covered with water and is not vested in any private individual, it is regarded as " public domain " or " public territory " by means of alluvion. It is only where a portion of such " public domain " adjoining the bank as here is vested in any private individual, that the title of the riparian proprietor of accretion yields to the title of the owner of the submerged site by what is called " reformation ".

In the light of these judicial decisions, it is by now, I think, an established rule of law that the word " gain " as used in clause (1) of section 4 of the Regulation has been used therein in a limited sense. In that limited sense it contemplates only those gains

(1) (1949) I. L. R. 28 Pat. 631.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

which do not give rise to any forfeiture of title or confiscation of any other man's property. To that extent, therefore, it is correct to say that the terms of first clause of section 4, though literally and by themselves sufficiently wide and general, have been put as a result of judicial decisions to a restriction stated above.

The application of the aforesaid restriction placed by the judicial decisions on the operation of the rule of gain by gradual accession, as laid down in clause 1 of section 4 of the Regulation, may have different effects on different class of cases covered by that clause. Under that clause the word "tenure" has been used both in relation to the land held by a tenant under a superior landlord as also in relation to an estate held by a superior landlord under the Government. The restriction placed on the interpretation of clause 1 of section 4 on the two types of tenures will, as I shall presently show, have different results depending on the character of the tenure involved.

In the case where the tenure is an estate held by a superior landlord under the Government, the claim by him on the basis of gain by gradual accession can arise only when the bed of the river flowing by the side of the estate is a public domain or public property. In the case of this class of tenure there can be no claim on the basis of gain by gradual accession in case the bed of the river which gives rise to the gain is a private property of any other individual. For in that case the gain must necessarily be a formation on a site which is the property of that individual and that being so that gain will be a part of his property and cannot be said to have become a part of the superior landlord of the riparian estate simply because the gain has got itself annexed to that estate by slow and gradual accretion. The reason is clear. In such a case the reformation of the land though by slow and gradual accretion shall always be on a site

which shall be the property of one or the other. Or, in other words, the reformation shall always be a case of *reformation in situ* and for that reason in a competition between two titles, namely, the title of the superior landlord of the riparian estate to which the gain has got itself annexed on the basis of the rule of gradual accession and that of the other individual who is the owner of the bed of the river, the title of the owner of the bed of the river shall as laid down by the authorities prevail and his title shall not be allowed to be forfeited as a result of the operation of the rule laid down in clause 1 of section 4 of the Regulation. In this class of cases, therefore, whenever the bed of the river is the private property of an individual or individuals any gain arising out of it cannot be claimed by the superior landlord of a riparian estate only on the footing that the gain has by gradual accession annexed itself to his estate. The gain shall always in that case go to the individual, who owns the bed of the river. For the cases of this class, therefore, where the claimant of the gain is a superior landlord of a riparian estate, it can be safely laid down, as contended by Mr. Dutt, that if the bed of the river, which flows by the side of that estate, is the property of a private individual and not a public domain, the gain of land as a result of its fluvial action from such a river is not a gain as contemplated by clause 1 of section 4 of Regulation XI of 1825 and, therefore, in that case the superior landlord of a riparian estate cannot be allowed to claim the gain on the basis of gradual accession of it to his land. I must not, however, be anyway misunderstood here. And in order to avoid it I repeat that what I have stated will apply only in the case of a claim by a superior landlord of a riparian estate situated on the bank of a river the bed of which is the private property of an individual or individuals. To this class of cases only in fact belong the decisions reported in *Lopez* v. *Muddun Mohun Thakur*(1), *Ramanath*

1953.

KAMESHWAR

A.

(1) (1870) 13 Moo. I. A. 467.

1953

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

Thakore v. *Chundernarain Chowdhury*(1), *Gajadhar Prasad* v. *Dulhin Gulab Kuer*(2), *R. K. Pandey* v. *J. P. Chouhary*(3) and *Raja Shiva Prasad Singh* v. *Hira Singh*(4). Therefore, for the reasons stated above it has been observed in those cases that the term " gain " is a gain from the sea or a river the bed of which is a public property or public domain and not the property of a private individual.

The position will be entirely different when the tenure concerned is not a riparian estate of a superior landlord held under the Government but only a subordinate tenure held by a tenant in the estate to which the land gained by gradual accession has been annexed. In such a case the conflict is originally and essentially between the tenant and the landlord and that conflict can arise only when the land gained by gradual accession, which has been annexed to the land of the tenant, is undisputably a part of the estate of the superior landlord. In case that gain is not a part of the estate of the superior landlord, the tenant cannot raise a claim to it either against his superior landlord and much less against anybody else. Now the estate of the superior landlord can claim the gain as a part of that estate only on two grounds: firstly on the ground that it has come to it by gradual accession from the recess of a river and secondly on the ground that it is the land formed on its old site, that is, the site which before the formation of gain was the property of the superior landlord of that estate. The gain to the estate as a result of gradual accession from the recess of the river shall always be, as shown above, in the case where the gain is out of the bed of a river which is public domain or public property and not the property of a private individual. On the other hand, the gain to the estate on the basis

(1) (1862) 1 Marsh. 136.
(2) (1920) 5 Pat. L. J. 632.
(3) (1949) I. L. R. 28 Pat. 631.
(4) (1921) 6 Pat. L. J. 478, F. B.

1953

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

of the *reformation in situ* may be either from the bed of a river which is a public domain but which happens to include in it some land of the riparian estate as well or it may be from a river the bed of which is exclusively the private property of the superior landlord of that estate. That being so, in the class of cases where the tenure concerned is the holding of a tenant in a riparian estate, and the claimant of the gain is the tenant of the holding against the superior landlord of the estate wherein the holding lies, the first proposition laid down by Mr. Dutt to the effect that when the bed of a river is the property of a private individual and is not a public domain or a public property then the gain as a result of its fluvial action from such a river is not a gain as contemplated by clause 1 of section 4 of Regulation XI of 1825 will not apply. To that extent, therefore, the contention of Mr. Dutt laid down in his first proposition is not correct. It has, therefore, to be conceded that the challenge by Mr. De to the first proposition laid down by Mr. Dutt was partially substantial. But at the same time it has also to be accepted that Mr. De was not all in all correct in his contention that the first proposition as laid down by Mr. Dutt was completely wrong and that it had no application even in the class of cases which I have dealt with above, that is, wherein the tenure concerned is a riparian estate held by a superior landlord under the Government and the claimant to the gain is the superior landlord himself. To the same effect, I think, is the rule of law laid down even in the authorities relied upon by Mr. De in the cases of *Khubi Mahton* v. *Mahanth Lachmi Das*(1) and *Bishundeo* v. *Harnarain*(2). It has to be clearly understood that these two authorities refer to that class of cases wherein the conflict was between the superior landlord of the riparian estate and the tenant of the holding in that estate to which the gain

(1) (1922) I. L. R. 2 Pat. 18, F. B.
(2) (1946) I. L. R. 25 Pat. 423.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

has been annexed. The rule of law laid down in these cases has, therefore, to be understood with reference to that context. The case reported in I. L. R. 2 Patna 18, which is a Full Bench decision of this Court, was decided by the learned Chief Justice Dawson Miller sitting with Mullick and Jawala Prasad, JJ. In that case the fight was between the tenants of *raiyati* holdings as an increment to their holdings of certain land adjacent thereof which had been gained by gradual accretion from the bed of the river and their landlords who had the proprietary interest in the bed of the river as well as in the tenants' holdings. The point raised was that it being admitted that the bed of the river belonged to the zamindar, there was in fact no case to be tried under clause 1 of section 4 of the Regulation as that section applied only to a case where the bed of the river was the property of the Crown. In answer to that question the Full Bench held:—

"On a perusal of the first clause of the fourth section of the Regulation it appears to me to apply clearly both to the case of a superior landlord, who holds from the Crown, and to the case of the holder of a subordinate estate or tenure-holder from a landlord intermediate between himself and the Crown, and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what, in effect, would be confiscation of another man's land. This consideration,

however, does not apply where the claim is by a tenant against the land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which, by the same proviso, carries with it the liability to pay an increase of rent."

In the course of their discussion their Lordships reviewed all the important cases on the point and in answer to the contention raised there that the interpretation placed upon the Regulation in *Lopez's case*(1) clearly lays down the broad proposition that it applies only to the sea or the public river belonging to the State, the learned Chief Justice said:—

"I agree that this is so in cases where the claimant is a superior landlord holding under the Crown but I cannot believe that it was the intention of their Lordships in that case to lay down a broad general proposition applying a state of affairs which was not then under consideration, nor can I find anything in the section itself which would limit the rights of subordinate tenure-holders or under-tenants to cases in which the accreted lands formed part of the public domain."

Then the learned Chief Justice discussed other cases and observed:—

"It is sufficient to say that in each of those cases the dispute was between rival proprietors and in none of them was the right of a tenant against his landlord under consideration."

This case, therefore, in clear words has on one hand accepted that in cases where the tenure involved is a riparian estate held by a superior landlord under the Government and the claimant of the gain is the superior landlord of that riparian estate, the terms

(1) (1870) 13 Moo. I. A. 476.

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

of clause 1 of section 4 of the Regulation will come into play only if the bed of the river flowing by the side of the riparian estate and which has given rise to the gain in the land is the property of the public, or, in other words, is a public domain. On the other hand, it has with equal emphasis enunciated that in the case where the claimant is a tenant or any sub-ordinate tenure-holder of the village over the land annexed to his tenure by a slow and gradual process, that rule of law will not hold good and in that case the operation of clause 1 of section 4 of the Regulation will not be restricted to a case where the bed of the river is a public domain. The same was the principle laid down in the case of *Bishundeo* v. *Hemnarain*(1). There also the dispute was between the landlord and tenants. The leading judgment in that case is by Ray, J., who on having discussed a series of decisions observed:—

"In my judgment the *ratio decidendi* of the decisions above referred to was not based upon the character of the river (whether public or private) but upon the equitable principle that the previous ownership, if ascertainable, of the lands newly formed after diluviation should not be allowed to be destroyed merely on account of the fact that those very lands re-appearing on their old ascertained site become accretions by slow and gradual process of the river to another man's land. This principle, however, leaves untouched the cases in which without involving confiscation of the old proprietor's or owner's property the lands can be said to be gained by another by the process of gradual accretion. Such a case is the case between a landlord and his tenant. The lands are gained to the tenancy by process of gradual accretion but not lost to the proprietor on whose bed they are formed, because his proprietary right of receiving rent is recognised under the law."

(1) (1946) I. L. R. 25 Pat. 423.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

It is true, therefore, that theoretically it cannot be said as a general rule that the provision laid down in clause 1 of section 4 does not apply at all to the gains made out of a river the bed of which is the property of the private individual. But it is clear, as already discussed, that the rule is applicable, as contemplated by Mr. Dutt, in the case where the claimant is a superior landlord though it is not applicable in the case where the claimant is the subordinate tenure-holder of the tenancy.

In the present case it is an admitted fact that the bed of the river is the private property of the superior landlords of the estates situated on the two banks of the river. It is also clear that the conflict of claim in the present case is between those superior landlords. In this case, therefore, the proposition laid down by Mr. Dutt is applicable with all its force and once it is found that the land gained had come out from that part of the bed of the river which is the private property of the particular superior landlord, the gain formed on that part shall as a rule go to that landlord and the law of gain by gradual accession as laid down in clause 1 of section 4 of the Regulation shall not come into play. This conclusion is, as I have already said based on the assumption that the bed of the river is the private property of the individual. In this connection I now refer to the pleadings of the parties and the evidence given by the witnesses on that point. In paragraph 3 of the plaint the allegation made is to the following effect:—

"The bed of the river aforesaid belongs to the extent of half in Barabharthi and Madhuban appertaining to survey plots nos. 1 and 460 respectively belonging to plaintiff nos. 1 to 7 plaintiffs 1st party appertaining to the aforesaid tauzis and the other half appertaining to S. P. no. 702 in village Ghosaut, T. nos. 4576 (old) and 20840 (new) ....."

In answer to this allegation by the plaintiffs, the defendants in paragraph 8 of their written statement have stated:—

"That the allegations of the plaintiffs in paragraph 3 of the plaint that river Gandak flowed in between village Ghosaut belonging to this

1953

KAMESHWAR SINGH v. RAM JANKI

defendant and villages Barabharthi and Madhuban belonging to other maliks and that half the river bed appertained to village Ghosaut and the remaining half to other villages are substantially correct."

And further in paragraph 15 of their written statement the defendants have averred:—

AHMAD, J.

"..... the facts that these lands became diluviated out of the estate of the plaintiffs and accreted to the estate of this defendant and other maliks will be amply supported by the Collectorate Batwara papers of village Barabharthi which was subjected to partition on various occasions."

That being so, any gain out of the bed of the river cannot be a gain out of a property which is a public domain. All gains in such a case out of the river shall be formed either on the bed owned by the proprietors of the village on one side or on the bed owned by the proprietors of the villages situated on the other side. In this case it has also been admitted that the land in dispute, which is said to have been annexed to the land of the defendants as a result of slow and gradual accretion, was not originally the part of the villages owned by the defendants. They claim the land only as accretion to their land. This accretion, as I have already said in the circumstances of the present case, cannot be a gain out of the public domain and, therefore, if they are not the part of the villages owned by the defendants they must necessarily be the part of the estate owned by the plaintiffs. On this ground alone, therefore, I think, it has to be held that the land annexed to the defendants' estate, which is the subject-matter of dispute, not being a gain from public domain and also not being a gain from that part of the bed which belonged to the defendants, is a formation on that part of the bed which is owned by the plaintiffs and as such the plaintiffs are entitled to have that land as their property. Perhaps it was in this light that the plaintiffs in paragraph 9 of their plaint alleged:—

"The plaintiffs beg to submit that the law of alluvion and diluvion is inapplicable and the defendants have no semblance of title to any portion of the plots in suit....."

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

In my opinion, in view of this case having been pleaded in the plaint, the trial court should have framed an issue on the point as to whether the law of alluvion and diluvion is at all applicable to the facts of the present case. Unfortunately it was not done so with the result that the discussions were led on wrong lines. This, however, by itself cannot be a substantial ground to contend that the defendants have been taken by surprise or that they have been prejudiced as a result of the determination of the case on a point not covered by the issues framed by the trial court. In their own pleading they have admitted, as already shown, that the bed of the river is a private property of the superior landlords of the estates situated on the two banks of the river. In face of their admission it cannot be said that the result arising out of the application of law on that admission has anyway prejudiced the defendants.

Now I take up the second proposition laid down by Mr. Dutt. His contention is that even if it be conceded that the case of *reformation in situ* has not been pleaded specifically in the plaint but if it is found established from the admissions alone made by the defendants and their witnesses that the specific land in dispute has been formed on a site which is the property of the plaintiffs then on those admissions at least his clients are entitled to get the decree in the suit. In support of this contention he has referred to the relevant portion of the statements made by the defendants' witnesses in their depositions in court.

* * * * * *

The statements quoted above of the witnesses examined by the plaintiffs and defendants leave no margin of doubt that the land in dispute though on its reformation was annexed to the village Ghosaut of the defendants has accreted out of the estate of the plaintiffs and that it has been reformed on its old site and is in fact identifiable and recognisable as such.

1952.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

Mr. De tried to persuade us to believe that the statements of the witnesses referred to above in fact do not lead to the admission that the land in dispute has been reformed on the site which originally belonged to the plaintiffs. I fail to understand how this contention can at all stand the scrutiny in the face of the facts stated by the witnesses, whose relevant statements I have quoted above. I have no doubt that the statements of witnesses amount to clear admission of the fact that the land in dispute is a case of *reformation in situ*. Therefore, looked at from this point of view also, the plaintiffs are entitled to claim the land in dispute as their property.

It is true that even in this respect the learned Subordinate Judge has fallen into error in neither framing any issue on the point of *reformation in situ* nor in dealing with the case of *reformation in situ* as a separate and independent point in his judgment. On that ground, therefore, Mr. De was justified in vehemently arguing that the final order passed in the case is not consistent with the findings given on the issues framed at the trial. Mr. Dutt in his argument did not contest the finding that the land had come out of water not as a result of sudden change in the course of the river but by slow and gradual recess of it. His main argument, however, was that once it is found that the land in dispute had been formed on the old site, whether that reformation may be the result of a sudden change in the course of the river or the result of slow and gradual recess of it, the land shall continue to belong to the proprietor of the site on which it had been reformed though it may appear as an accretion to the land of other riparian estate, unless the title of it is lost by the proprietor in some other way in accordance with law. In my opinion, this proposition is correct. All that in fact had to be found in this case was as to whether there were admissions to prove that the land in dispute is a case of *reformation in situ*. I have already discussed the

admission made on this point which go clearly to establish that it is a case of *reformation in situ*. I, therefore, have no hesitation in holding that the plaintiffs are entitled to claim the land in dispute as their property also on the ground that it is a case of *reformation in situ* and the rule of pleading relied upon by Mr. De in this connection will not stand in the way of the plaintiffs in getting the decree. The cases cited by Mr. De on the point of pleading have already been discussed by me and they also, in my opinion, support the view that a case though not pleaded but if consistent with the plaint and admitted by the defendants may be the basis of the decree in favour of the plaintiffs.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

Next point raised by Mr. De is the point of limitation. The trial court has found that the appellant came in possession of the property since the year 1934. This finding has been attacked both by the appellant and the respondents. According to the allegations made in the written statement, the accretion started soon after the survey and the appellant gradually came in possession of the accreted land since that time. This part of the appellant's case has not been accepted by the trial court, and no attempt has been made on his behalf to press it in appeal. What is contended now is that even if the case of the plaintiffs given in the written statement be rejected, as has been done by the trial court, it at least on its own finding to the effect that the land accreted out in the year 1931 should have held that the appellant came in possession of it since at least that time, i.e., 1931. Mr. Dutt, on the other hand, has contended that on the evidence on the record it cannot be established that the appellant came in possession of the property even since 1934. The true fact according to him is that it was only after the order passed in the proceeding under section 145 of the Code of Criminal Procedure that the appellant got possession over the land in dispute. I may mention here that Mr. De

1953.

RAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

as a part of his argument on this point raised a contention that if it is found that the land accreted is to be governed by the rule of alluvion and diluvion, as laid down in clause 1 of section 4 of the Regulation then the title by accretion should be held to begin from the date of accretion, that is, from the year 1931, and not from the date of possession, that is, from the year 1934. This point in the light of the findings already arrived at by me does not now arise for consideration. So the only point that deserves serious consideration about limitation is as to when for the first time the plaintiffs lost their possession of the land in dispute and when the appellant came in possession of it; in other words, whether the plaintiffs even if they have succeeded in establishing their title to the land, which I think they have done, had their title left subsisting on the date of the institution of the suit or that the defendant appellant had already by that time acquired a title, if not by slow and gradual accession under clause 1 of section 4 of the Regulation, at least by the law of adverse possession.

On the point of possession the plaintiffs have not filed any document in support of their claim. They have relied exclusively for this purpose on the oral evidence of the witnesses examined on their behalf. All these witnesses have uniformly deposed on four broad points—(1) That the course of the river changed suddenly during the earthquake year, that is, 1934. (2) That the plaintiffs had been in possession of the land in dispute all along till the order passed in the proceeding under section 145 of the Code of Criminal Procedure. (3) That the plaintiffs were dispossessed by the appellant sometime after the order passed in the aforesaid proceeding. (4) That the land is subject to seasonal submergence every year from the month of Savan to Kartic.

1953.

KAMESHWAR SINGH v. RAM JANKI AHMAD, J.

In the result, therefore, we find that there is at least some oral evidence which is not unworthy of credit on the side of the plaintiffs in support of their story of possession though that evidence, as I have said, is not sufficient to prove conclusively their case but on the side of the defendant appellant there is no evidence whatsoever worthy of reliance in support of the story of possession set up by him. Such being the state of evidence on the record the evidence of the plaintiffs in such circumstances being corroborated by the presumption arising out of the title of the plaintiffs in the land according to the rule of law laid down in the case of *Matuk Singh* v. *Tian Sahu*(1) lends decisive weight in favour of the case of the plaintiffs on the point of their possession to the effect that they were in possession of the land till the year 1937 when they were admittedly dispossessed as a result of an order passed in the proceeding between the parties under section 145 of the Code of Criminal Procedure. In that view of the finding, the suit instituted by the plaintiffs cannot be said to be barred by limitation and the defendants cannot be said to have acquired a title over the land in dispute by adverse possession.

Next point that was canvassed in the course of the hearing of the appeal was the point of submergence. In the light of the finding arrived at above, this point in fact has got no importance left in it but all the same, as it has been argued, I would like to give my finding on this point as well. The case of the plaintiffs as given in the plaint is that the land being low, during the rains, they go under water every year rendering the same unfit for any *bhadai* cultivation. This case of the plaintiffs is supported fully by P. Ws. 1, 2, 3, 4, 5, 6, 7, 8 and 10 and their statement in this respect made in examination-in-chief has not been challenged even and much less demolished in cross-examination. Further this part of the

(1) (1922) I. L. R. 2 Pat. 1.

1953.

KAMESHWAR SINGH v. RAM JANKI

story has been even admitted by the defence witness themselves.

* * * * * *

I, therefore, think that there is no doubt that the case stated by the plaintiffs in their pleading about submergence is true and is fully supported by the evidence of plaintiffs' witnesses and admitted by the defence witnesses as stated above. I, therefore, hold that the land in dispute each year goes under water due to seasonal submergence. Therefore, even if the story of the appellant that they came in possession of the land in the year 1931 be held true, which I think cannot be held, that would not help him to claim a title over the land by adverse possession as the defendants could not have been due to seasonal submergence of the land under water in continuous possession of it for more than twelve years. Mr. De in his argument tried to prove that the evidence on the record does not establish that the law of submergence is at all applicable in the circumstances of the present case and laid reliance in support of his contention on *Secretary of State for India in Council* v. *Ram Bachan Lal*(1), and *Abdul Latif Khan* v. *Somar Kunjra*(2). His contention was that the land in dispute being *diara* land and it having been admitted by the plaintiffs' witnesses that no crop is sown on *diara* land between the months of Sawan and Ashwin, the mere fact of submergence of that land under water during that period cannot lead to the inference that the act of possession over it was any way disturbed as a result thereof. There is no substance in this contention. The crucial test as laid down by the authorities, in my opinion, in such cases is to find out as to whether the submergence of land under water has resulted in placing an obstruction in the way of the owner in utilising the land as he would have liked had there been no water on it. This view

AHMAD, J.

(1) (1940) I. L. R. 20 Pat. 497.
(2) (1942) I. L. R. 21 Pat. 441.

finds support from the decisions in the cases of *Kumar Basanta Roy* v. *Secretary of State for India in Council*(1), *Bhupendra Narayan Sinha* v. *Rajeswar Prosad Bhakat*(2), *Gajadhar Prasad* v. *Dulhin Gulab Kuer*(3), *Secretary of State for India in Council* v. *Krishnamoni Gupta*(4) and *Secretary of State for India in Council* v. *Ram Bachan Lal*(5). The very limitation imposed upon the land, though even on a permanent basis, as a result of submergence to the effect that it cannot be used for cultivation during the period it remained under water cannot be used to contend that the land is not cultivated during that period and as such no obstruction is caused to the acts of cultivation and possession over it by the owner at that time or period of the year. The case reported in 20 Patna, 497, is a decision of the Division Bench presided over by Harries, C. J., and Manohar Lall, J. In that case their Lordships held, as it appears from the *placitum* of that case:

"For submergence to interfere with continuous adverse possession it is not necessary to show that the submergence is such as interferes with the usual agricultural operations in the neighbourhood. It is enough if the submergence prevents such use and occupation as the possessor normally would have but for flooding and submergence."

In that case reliance had been placed on the decision of the Privy Council in *Basanta Kumar Roy* v. *Secretary of State for India* (1). In dealing with that case their Lordships observed:

"The statement of Lord Sumner is clear that there is no difference in principle between seasonal submersion and one which continues for a length of

(1) (1917) L. R. 44 Ind. App. 104.
(2) (1931) L. R. 58 Ind. App. 228.
(3) (1920) 5 Pat. L. J. 632.
(4) (1902) L. R. 29 Ind. App. 104.
(5) (1940) I. L. R. 20 Pat. 497.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

time. That view has been taken in a number of cases decided by different courts, some of which were in fact decided before the observation of Lord Sumner was made."

Having made this observation they have discussed the cases of different High Courts on that point and then they have observed:

"It has been argued, however, in this case that this Court has taken a different view and that we are bound by certain decisions of this Court. On behalf of the respondents, however, it was contended that, if there are any decisions of this Court contrary to the clear dictum of Lord Sumner, they must be disregarded. If I was in any doubt as to what the cases of this Court have held, I should have referred this point for decision by a larger Bench, as the cases to which I will refer shortly are Bench decisions and bind the present Bench. In my view, however, the cases relied upon by the appellant do not, when closely examined, dissent from the line of cases to which I have already made reference. They appear to be cases decided on their particular facts."

The cases referred to in this observation were those of *Nand Lal Mahton* v. *Rasdhari Lal*(1), *Jugal Kishore Prasad Singh* v. *Manaka Singh*(2) and *Ramasray Prasad Chaudhury* v. *Ramsurat Singh*(3). In reference to these three decisions their Lordships observed:

"In my judgment these three cases of this Court must be confined to their particular facts and they cannot be held to lay down a principle contrary to the principles enunciated by their Lordships of the Privy Council and in the decisions of other courts to which I have referred."

(1) (1932) 16 Pat. L. T. 659.
(2) (1939) A. I. R. (Pat.) 860.
(3) (1939) 21 Pat. L. T. 181.

1953.

KAMESHWAR SINGH v. RAM JANKI AMEER, J.

I have already shown that in the present case the flooding occurred regularly in the months of Sawan and Ashwin which made cultivation impossible during those months. If no flooding had taken place the land in dispute would in all probability have been cultivated and there can be no doubt about the flooding of that land during those months. I, therefore, think that this decision does not support the contention of Mr. De. The case of *Abdul Latif Khan* v. *Somar Kunjra*(1) is also a Division Bench case presided over by Rowland and Chatterji, JJ. Therein the question raised was as to what extent submergence affected possession over a small plot of land and in answer to that their Lordships came to the conclusion that in each case it is a question of fact whether the submergence was so prolonged and of such a kind as to make the land derelict and thus to interrupt adverse possession and that no general proposition has ever been laid down that there can be no possession of land while it is under water. I think that in the circumstances of the present case there can be little doubt, as already held by me, that the submergence during the months of Sawan and Ashwin did interrupt the agricultural portion of that area. That being so, I think these authorities are of no avail to Mr. De in his contention.

The last point raised by Mr. De was that in cases like this the provision laid down in Article 142 of the Limitation Act applies and not those laid down in Article 144. In support of this contention reliance was placed by him upon the cases of *Secretary of State for India* v. *Krishnamoni Gupta*(2) and *Raja Shiva Prasad Singh* v. *Hira Singh*(3). In the light of the findings already arrived at by me on the point of possession, I think this question does not substantially deserve consideration for a decision of the present

(1) (1942) I. L. R. 21 Pat. 441.
(2) (1902) I. L. R. 29 Cal. 518, P. C.
(3) (1921) 6 Pat. L. J. 478, F. B.

1953.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

case. I, however, think that the contention raised by Mr. De is not correct. I need not point out here that the applicability of the provision of the law laid down in Article 142 or Article 144 of the Limitation Act depends mostly on the facts ultimately found by the court as laid down in the case of *Badri Khatik* v. *Narain Singh*(1). In the present case I have already found that the plaintiffs remained in possession of the property till the year 1937 when they were dispossessed from it after an order passed against them in the proceeding under section 145 of the Code of Criminal Procedure. On that finding undoubtedly the provision of Article 142 of the Limitation Act will apply. To the extent, however, of the terms of Article 142 of the Limitation Act the plaintiffs have, in my opinion, proved their case that they were dispossessed within a period of twelve years, and, therefore, the plaintiffs' suit cannot be said to be barred by time. Even, however, if the contention of Mr. De in this Court be accepted that the plaintiffs did come in possession of the property in the year 1931 as and when the land came out of water, it can be hardly said that the provisions of Article 142 of the Limitation Act will apply in those circumstances. It is true that ordinarily in a suit for ejectment the onus is on the plaintiffs to prove not only their title but also their possession within a period of twelve years, what is known as subsisting title. That rule is, however, subject to certain exception as laid down in the case of *Mahomed Ali Khan* v. *Khaja Abdul Ganny*(2). That exception refers to those cases where the land is a jungle or waste or in a condition in which the usual act of possession over it is not in the nature of the circumstances possible. In those cases the rule of constructive possession applies and the owner is deemed to be in possession of it unless it is proved that he has been in fact dispossessed from a certain

(1) (1946) A. I. R. (Pat.) 185.
(2) (1883) I. L. R. 9 Cal. 744, F. B.

point of time. That being so, in a suit for ejectment in relation to a land of that character the plaintiff can rely on his constructive possession in order to prove his subsisting title unless it is proved by the defendant that he came in direct possession of it and remained in possession as such continuously for a period of twelve years openly and in a manner hostile to the title of the plaintiffs. That is, in such a case the Article 144 of the Limitation Act will apply. In the present case the land submerged into water and came out of it in the year 1931. On its emergence from water it was in the position of a derelict. If in that condition the plaintiffs did not come in possession but on the contrary the defendants are supposed to have taken possession of it in their absence while they had not yet entered into it, that act on the part of the defendants cannot be said to have amounted to an act of dispossessing the plaintiffs in the sense in which it has been used under Article 142 of the Limitation Act. This aspect of the question has been dealt with in the case of *Basanta Kumar Roy* v. *Secretary of State*(1) and elaborately discussed thereafter in the case of *Abdul Latif* v. *Nawab Khajeh Habibulla*(2). Therein their Lordships observed:

"It is well settled that Article 142 applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact be established that while in possession he was dispossessed by the defendant. In the plaint there is no admission which would bring the case within the first category. The plaintiffs were not in physical possession, either themselves or through persons holding under them at any time after their lands had reformed on the other side of the river. They never exercised acts of possession and they were not turned out neither physically expelled nor by reason of adverse acts on the part of the defendants their

(1) (1917) L. R. 44 Ind. App. 104.
(2) (1939) A. I. R. (Cal.) 854.

1958.

KAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

acts of possession were interfered with and effaced. Through a fiction of law they, the plaintiffs, were in possession till the lands became fit for possession. It may be taken that they were by reason of this fiction in possession right up to the time when the lands became fit for possession but the question is whether they were 'dispossessed' or whether they 'discontinued' their possession within the meaning of Article 142 after the lands had reformed and had become fit for possession. e.g., had become cultivable. There cannot be any question of discontinuance of possession on their part. That term connotes three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contact, a collision, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter. On these concepts it would be difficult to say that the rightful owner, who is only presumed to be in possession, till a chur becomes fit for enjoyment is dispossessed simply because he does not take possession as soon as it becomes so fit, but another person occupies it and begins to till. Such a case would in our judgment come within Article 144 and not Article 142 and the defendant must prove adverse possession for 12 years or over before suit. This is our reading of Lord Sumner in *Basanta Kumar Roy* v. *Secretary of State*(1)."

To the same effect was the observation made by a Bench of this Court in the case of *Madan Mohan*

(1) (1917) L. R. 44 Ind. App. 104.

1953.

RAMESHWAR SINGH v. RAM JANKI

AHMAD, J.

Singh v. *Braj Bihari Lal*(1). Therein their Lordships observed:

"That being so, the problem under Article 142 is not solved by a finding that the plaintiff has been out of possession for over 12 years. The sole question to which we must address ourselves is, what is the date of dispossession or discontinuance. Just as discontinuance implies the abandonment of possession followed by the actual possession of another person, so dispossession implies an ouster from possession followed by the possession of another person. It has been found by the courts below that the defendants have been in possession for less than 12 years. It must, on this finding, follow that the plaintiffs brought this suit within 12 years of dispossession or discontinuance."

There are two other cases to which I should like to refer. In the case of *Smith* v. *Lloyd*(2), Baron Parke laid down the law as follows:—

"We are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of it, and another in possession for the prescribed time; there must be the absence of possession by the person who has the right of actual possession, whether adverse or not, to be protected, to bring the case within the statute; and we entirely concur in the judgment of the Chief Justice Blackburne in *McDonnel* v. *McKinty*(3) and the principle upon which that decision is founded.

The principle laid down in the case was approved of in the celebrated case of *Trustees and Agency Co.* v. *Short*(4), which itself was followed by the Judicial

(1) (1921) A. I. R. (Pat.) 86.
(2) (1854) 9 Ex. 562.
(3) (1847) 10 Ir. L. R. 514.
(4) 59 L. T. 677.

1953.

RAMESHWAR SINGH v. RAM JANKI

SAHAD, J.

Committee in the case of *Secretary of State for India v. Krishnamoni Gupta*(1)."

I need not multiply cases on this point but for reference sake I may refer also to the cases reported in I. L. R. 29 Calcutta, 518, 58 I. A. 228 and I. L. R. 20 Patna 497. The same principle has been followed even in the case reported in 6 P. L. T. 478. I, therefore, hold that if it were held that the plaintiffs came in possession of the land in dispute in the year 1931 on its emergence from water, which I think in the circumstances of the present case cannot be held, then in that circumstance on the facts of the present case the provisions of Article 144 of the Limitation Act will apply and not those of Article 142. That being so, it is to be held even on this ground that the defendants have failed to prove that they have been in possession of the land in dispute at the time of the institution of the suit for a period more than twelve years which could have entitled them to get title by adverse possession. For this reason also, therefore, the decision has to be given against the appellant.

In the result, therefore, the appeal is dismissed with costs.

NARAYAN, J.—The evidence in this case undoubtedly established that this is a case of *reformation in situ*, and the plaintiffs are certainly entitled to a decree on the basis of the fact as they can be gathered from the evidence adduced by the defendants. The facts of seasonal submergence is also very well established and because of seasonal submergence, the question of limitation does not arise. I, therefore, agree with my learned brother that this appeal must be dismissed with costs.

Appeal dismissed.

K. D.

(1) (1902) L. R. 29 Ind. App. 104.

APPELLATE CIVIL.

1953.

Before Narayan and Ahmad, JJ.

ROHTAS INDUSTRIES, LTD.

v.

HUME PIPE CO., LTD.*

March, 5, 6, 11, 31. April, 1, 7, 8, 9. May, 15.

Patents and Designs Act, 1911 (Act II of 1911), section 29(1)—suit for perpetual injunction—injunction, when can be granted—mere proof of intention to infringe patent, whether justifies injunction—monopoly of machine and process, whether include articles made by such machine and process.

In a suit under section 29(1) of the Patents and Designs Act, 1911, for perpetual injunction, it is difficult if not impossible for a plaintiff to establish a case of infringement of patents by proving the presence of the patented machines or the products manufactured out of them in the custody of persons alleged to be responsible for the infringement. Even proof of an intention to infringe apart from actual infringement, may justify an injunction to restrain the infringement provided it is established to the satisfaction of the Court that the alleged infringer was doing something which tantamounts to dealing with the patented invention.

A monopoly for the process or for a machine includes a monopoly for the articles made by that process or machine.

Townsend v. *Haworth*(1), *Dudgeon* v. *Thomson*(2), *Marconi's Wireless Telegraph Co.* v. *Mullard Radio Valve Co., Ltd.*(3), *Frearson* v. *Loe*(4), *Dowling* v. *Billington*(5) and *British United Shoe Machinery Co., Ltd.* v. *Simon Collier, Ltd.*(6), relied on.

Appeal by the defendants.

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

* Appeal from Original Decree no. 328 of 1952, from a decision of Mr. P. K. Nag, District Judge, Shahabad, Arrah, dated the 20th August, 1952.

(1) *See* 12 Ch. D. 831.
(2) (1877) 3 App. Cas. 34, 44.
(3) 41 R. P. C. 323, 344.
(4) (1878) 9 Ch. D. 48, 65.
(5) (1890) 7 R. P. C. 191.
(6) 27 R. P. C. 567.

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

Mahabir Prasad, *K. D. Chatterji* and *S. N. Bhattacharyya*, for the appellants.

B. N. Mitter, *A. K. Mitter* and *S. S. Rakshit*, for the respondents.

AHMAD, J.—This is an appeal against a decree passed in a suit instituted under the provisions of clause (1) of section 29 of the Patents and Designs Act, 1911, for restraining the defendants by an order of perpetual injunction from making and using machines said to have been covered by the two patents bearing nos. 20709 and 26902 granted to them and from infringing their right thereunder in any other form or manner.

The plaintiffs in the suit are the Indian Hume Pipe Co., Ltd., having its registered office at Construction House, Witted Road, Bombay. The defendants are three, namely, (1) Rohtas Industries, Ltd., at Dalmianagar, pergana Sasaram, P.-S. Dehri, district Shahabad; (2) Dalmia Jain & Co., Ltd., Dalmianagar, Managing Agent of the Rohtas Industries, Ltd.; and (3) one Mr. A. K. Das Gupta, Manager of Spun Pipe and Pole Factory, which is a section of the Rohtas Industries, Ltd.

The plaintiffs claim to be the grantee amongst others of the aforesaid two patents granted to them under the provisions of Patents and Designs Act, 1911. The first patent bearing no. 20709 is said to be in respect of an invention entitled as "Improvements in or relating to cages or drums for forming thereon reinforcements for concrete pipes and the like", and the second patent bearing no. 26902 is in respect of the invention entitled as "Improved manner and means of making long concrete or the like pipes, poles or other hollow objects by centrifugal process". The substantive part of terms of the

grant in respect of patent no. 20709 is in the following words:—

"The patentees have the exclusive privilege of making, selling and using the invention throughout British India (including British Baluchistan, the Santhal Parganas and the Shan States) and of authorising others so to do for the term of sixteen years from the 19th day of March, 1934, subject to the conditions that the validity of this patent is not guaranteed by Government and also provided that the fees prescribed for the continuation of this patent are duly paid."

Similarly the substantive part of the terms of the grant of patent no. 26902 is to the following effect:—

"The patentees have the exclusive privilege of making, selling and using the invention throughout British India and of authorising others so to do for the term of sixteen years from the 26th day of September, 1936, subject to the conditions that the validity of this patent is not guaranteed by Government and also provided that the fees prescribed for the continuation of this patent are duly paid."

Along with each of the grants in respect of each of the patents is attached a detailed specification in relation to each of the inventions covered by the patents.

It is claimed by the plaintiffs that the defendants have infringed the said patents, and the rights said to have been infringed are given in paragraph 8 of the plaint in the following terms:—

"(*a*) The defendants have infringed the said patents by erecting and using without the consent of the plaintiffs one or more machines covered by the said patents at their factory known as Spun Pipe and Pole Factory at Dalmianagar within the jurisdiction of this court and are carrying on business thereby.

(*b*) The defendants have further infringed the said patents by sale and offering for sale in the normal course of business poles and pipes made with cages constructed in accordance with the said Patents without the consent of the plaintiffs.

(*c*) The defendants have infringed the said patents by selling many poles and pipes made with re-inforced cages constructed in accordance with the said patents and without the consent of plaintiffs to P. W. D., P. H. D., local bodies and other department of Government and to private customers as well."

1953.

ROHTAS INDUSTRIES, LTD. v. HOME FIRE CO., LTD.

On these allegations the plaintiffs in their suit seek amongst others the following main relief:—

"That a decree for perpetual injunction may be made on defendants, their servants and agents from infringing the said patents and in particular making and using machines covered by the said patents and selling or offering for sale poles and pipes with re-inforced cages made in accordance with the said patents."

AHMAD, J.

The trial court has decreed the suit and hence this appeal by the defendants. Defendants 1 and 2 filed a common written statement while defendant no. 3 filed a separate one though adopting therein substantially the defence set up by the other two defendants and further alleging therein that the suit as against him was instituted with an ulterior motive and as a counterblast to the suit already instituted by him against the plaintiffs. It is admitted by defendants 1 and 2 that they have been manufacturing and dealing with concrete products but in a manner different to that followed by the plaintiffs and that in that manner they have been doing it for over six years with the full knowledge of the plaintiffs company and assert that they have not infringed in anyway the plaintiffs patents nor have they ever erected or used any machine covered by those patents or sold or offered for sale to any party whomsoever, any pipe or pole or other material made with cages constructed in violation of the alleged patents.

There is no dispute about the fact, as it appears from the judgment of the trial court, that the patents claimed by the plaintiffs are subsisting and valid and this fact has not been challenged before us, and, therefore, that part of the case of the plaintiffs stands proved. The only substantial issue that was in fact fought out between the parties at the trial was:

"Have the defendants infringed the plaintiffs' patents?"

It is evident from the defence itself already stated by me yet I may make it clear here that the defendants have not set up any plea as contemplated

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

AHMAD, J.

by sub-section (2) of section 29 of the Act that the patents even if any originally granted stand revoked or that the plaintiffs' patents are invalid for want of novelty—a defence generally known in law as Lord Moulton's defence. In short, therefore, as it appears from the judgment and the pleadings, the only plea that has been raised in defence is that the acts of infringement alleged to have been committed were not done by the defendants. In this view of the matter, the other lines of defence generally set up in cases under the Law of Patent, namely, to the effect that the acts alleged to have been done, do not amount to infringement in relation to the terms of grant of the patents or to the effect that the acts alleged to have been committed were not of a nature in relation to the description as given in the specification should not have arisen for consideration in giving judgment over the present case. But in this Court the learned Advocate-General appearing for the defendants has also raised the point that the acts referred to and specified in sub-clauses (*b*) and (*c*) of paragraph 8 of the plaint do not amount to infringement in relation to the terms of the grant of the patents. The allegations in those sub-clauses are as to the sale and offer for sale of poles and pipes constructed in accordance with the patents. It is contended what the people in general excepting the guarantee are under the terms of the plaintiffs' grants forbidden to do are only "not to make", "sell" or "use" the invention covered by those patents and as the infringement of a patent is the doing, after the date of publication of the complete specification, of that which the patent prohibits being done, anything done other than that which is prohibited does not constitute infringement. The plaintiffs' grants do not prohibit the sale and offer for sale of the poles and pipes produced from those machines and, therefore, even if allegation to that effect is found to be true, that would not establish the case against the defendants. What is in fact, in substance, involved in this contention is whether a

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

AHMAD, J.

monopoly for a process includes a monopoly for articles made by that process. In the United Kingdom the answer to this question has been given in the affirmative and that has now become there a settled principle of law. In the book on patents by Terrell it is said:—

"In the case of a patent for a process or for a machine, the sale in this country of goods manufactured by that process or machine is an infringement. In *Townsend* v. *Haworth*(1) Jessel M. R., said: 'What is every person prohibited from doing? He is prohibited from making, using or vending the prohibited articles, and that, of course includes in the case of machinery the product, if I may say so, of the machinery which is the subject of the patent. It is what is produced by the patent [*United Horse Shoe and Nail Co., Ltd.* v. *Stewart & Co.*(2)].

Such a sale is also an infringement even though the manufacture took place abroad. In *Wright* v. *Hitchcock*(3) Kelly, C.B., said: 'If the law were otherwise then when a man has patented an invention, another might, by merely crossing the Channel, and manufacturing abroad and selling in London..... articles made by the patented process, wholly deprive the patentee of the benefit of his invention. It is, therefore, impossible to suppose that an exclusive right to vend is not given, and the defendants have therefore infringed the plaintiffs' right....."

In the present case, however, this question has only an academic value for even if it is accepted what is contended by learned Counsel for the plaintiffs that the sale and offer for sale of the poles and pipes produced from the machines or processes covered by the patents are included in the prohibition by the grant in favour of the plaintiffs' the plaintiffs will

(1) *See* 12 Ch. D. 831.
(2) 2 R. P. C. 122.
(3) (1870) L. R. 5 Ex. 37, 47.

have to show that the poles and pipes alleged to have been sold or offered for sale by the defendants were produced as a direct result of the use of a process or machine, substantially the whole of which is the subject of the patents. In other words, in order to prove the infringement alleged in sub-clauses (*b*) and (*c*) or paragraph 8 of the plaint, even if it is held that they constitute the infringement of the patent under the law, the plaintiffs will have to prove that the defendants did use the process or the machine covered by the patents, that is, exactly what is alleged in sub-clause (*a*) of paragraph 8 of the plaint, as it is nobody's case that the poles and pipes alleged to have been sold or offered for sale by the defendants were made by any person other than the defendants themselves. In this view of the matter, the infringement that has to be substantially enquired into is what is given in sub-clause (*a*) of paragraph 8 of the plaint, that is, the allegation about the erection and using of the machines covered by the patents. The defence in answer to that part of the allegation, as I have already stated, is the denial that the defendants have not made or used the machine covered by the patents.

According to the allegations made by the parties, the persons involved in and responsible for infringing the patents are two, namely, Mr. A. K. Das Gupta (defendant no. 3 in the suit) and one Judagi Mistri, who has appeared as plaintiffs' witness no. 3 in the case.

* * * * * *

In these circumstances I think, the evidence of Mr. A. K. Das Gupta is not worthy of reliance nor of any value as the evidence of an independent character.

In the result, therefore, we find that on behalf of the defendants there is practically no evidence worthy of reliance. The defendants have not taken the trouble of filing any of the papers from their office

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

AHMAD, J.

which could have at least demolished many of the allegations made by the plaintiffs. That also suggests circumstances adverse against them.

Such being the state of evidence, the court is practically left with the *ex parte* evidence of the plaintiffs' witnesses and specially those of Judagi Mistri and Mr. G. C. Raha. Even if some criticism is taken into consideration against the evidence of Judagi Mistri for the part he played in changing his loyalty from one company to the other, that criticism is at least not available against Mr. G. C. Raha. His evidence fully corroborates the statement of Judagi Mistri. In this view of the matter, I think, it is to be held that the plaintiffs have succeeded in proving the allegations made by them in the plaint.

Mr. Advocate-General appearing for the defendants has, however, contended that even if it be found that the defendants company did use for some time in the past the machines covered by the plaintiffs' patents that would not justify the grant of perpetual injunction against the use of those machines by them in future. According to this contention, even at the time when Mr. Bhide visited the factory, there was no trace available in the premises of the defendants company of the machines covered by the plaintiffs' patents. That is, according to him, sufficient to suggest that the defendants even if they had been using the machines covered by the plaintiffs' patents previously had by that time given up using them and removed them from their premises. In those circumstances the plaintiffs are not entitled to an order of permanent injunction against the defendants. This contention, in my opinion, has got no substance. Once it is held, which I think has to be held in this case, that the defendants did use the machines covered by the plaintiffs' patents, there is at least a potential likelihood of those machines being used again in future and the rights of plaintiffs secured to them under grants

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

AHMAD, J.

in their favour usurped. It is difficult if not impossible for any plaintiff to establish a case of infringement of patents by exactly proving the presence of the patented machines or the products manufactured out of them in the custody of the persons alleged to be responsible for the infringement. In my opinion, even proof of an intention to infringe, apart from actual infringement, may justify an injunction to restrain the infringement provided it is established to the satisfaction of the court that the alleged infringer, dealing with what he is doing as a matter of substance is taking the invention claimed by the patent [*Dudgeon* v. *Thomson*(1)]; *Marconi's Wireless Telegraph Co.* v. *Mullard Radio Valve Co., Ltd.*(2).

In the present case it is not said that the substance of the invention has been taken by the defendants. What is alleged, on the other hand, is that the very invention of the machines covered by the plaintiffs' patents were used by the defendants and their allegation to that extent as already held is, in my opinion, proved beyond reasonable doubt.

In the book on patents by Messrs. Terrel and Shelley it has been said:

"The basis of an injunction is the threat, actual or implied, on the part of the defendant that he is about to do an act which is in violation of the plaintiffs' right; so that not only must it be clear that the plaintiff has rights but also that the defendants have done something which induces the court to believe that he is about to infringe those rights. The fact that he has been guilty of an infringement of the patents' rights will, in most circumstances, be evidence that he intends to continue his fringement, but whether he has actually infringed the patents or not, it will be sufficient if he has threatened to infringe it. Actual

(1) (1877) 3 A. C. 34, 44.
(2) 41 R. P. C. 323, 344.

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD

AHMAD, J.

infringement is merely evidence upon which the Court implies an intention to continue in the same course.

In *Frearson* v. *Loe*(1) Jessel, M.R., said: I am not aware of any suit or action in the Court of Chancery which has been successful on the part of a patentee, without infringement having been proved, but in my opinion, on principle there is no reason why a patentee should not succeed in obtaining an injunction without proving actual infringement. I think for this reason, where the defendant alleges an intention to infringe, claims the right to infringe, the mischief done by the threatened infringement of the patent is very great, and I see no reason why a patentee should not be entitled to the same protection as every other person is entitled to claim from the Court from threatened injury, where that threatened injury will be very serious. No part of the jurisdiction of the old court of Chancery was considered more valuable than that exercise of jurisdiction which prevented material injury being inflicted, and no subject was more frequently the cause of bills for injunction than the class of cases which were brought to restrain threatened injury, as distinguished from injury which was already accomplished. It seems to me, when you consider the nature of a patent right that where there is a deliberate intention expressed, and about to be carried into execution, to infringe certain letters patent under the claim of a right to use the invention patented, the plaintiff is entitled to come to this court to restrain that threatened injury. Of course, it must be plain that what is threatened to be done is an infringement."

In the present case there is a positive evidence as already held by me that the defendants did use the machines covered by the plaintiffs' patents. This is sufficient to prove the injury threatened for future.

(1) (1878) 9 Ch. D. 48, 65.

1933.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO., LTD.

AMMAD, J.

In *Dowling* v. *Billington*(1) " two acts which fell within the claims of the plaintiffs' patent were proved, the first of which took place prior to the acceptance of the complete specification by the Comptroller while the second was committed a few days after the commencement of the action. Chatterton, V. C., held that neither of these acts constituted an actionable infringement, but inasmuch as the conduct of the defendants showed a deliberate intention to infringe the plaintiffs were entitled to an injunction upon the principles laid down by Jessel, M.R., in *Frearson* v. *Loe* (*supra*)(2) ". In *Shoe Machinery Co., Ltd.*, v. *Cutlan*(3) Romer, J., said:—

" Two kinds of action may be brought by a plaintiff patentee. The one is based on this that the defendant has infringed before action brought, and in respect of this the plaintiff is entitled to claim damages, or an account and an injunction to prevent similar infringements in the future. The other action is based on the fact, not that the defendant has infringed, but that he threatens and intends to infringe, and in this case the plaintiff may claim an injunction to restrain the threatened infringement. Of course you may find both kinds of action combined in one but they are distinct in themselves in several respects. In the first the plaintiff has to give particulars of breaches..... In the other, of necessity, there can be no particulars of breaches but to avoid unfairness to the defendant, care is always taken that he shall have fair notice as to the nature and particulars of the special infringement he is alleged to be contemplating and then no doubt if after action he commits that special infringement of substantially that infringement, evidence of it can be given as it is evidence to show that the plaintiff was right in his allegation that at the date of action brought

(1) (1899) 7 R. P. C. 191.
(2) (1878) 9 Ch. D. 48.
(3) 12 R. P. C. 342, 357.

1958.

ROHTAS INDUSTRIES, LTD. v. HOME PIPE CO., LTD.

AHMAD, J.

the defendant was threatened and intending to infringe. I may add that if an action, as originally brought by a plaintiff patentee, is of the first class only, but he finds that the defendants have, since action brought, infringed in a way substantially different from his former infringement, leave would be given by the court to the plaintiff in a proper case and on proper terms, to amend his action and to bring these subsequent infringements before the court to be dealt with once and for all with the prior infringements."

So the actual infringement of a patent is taken by courts to imply an intention to continue the infringement, notwithstanding any premise not to do so and unless, in my opinion, it is clear that there is no intention to continue the infringement, an injunction will be granted. In the present case there is no conclusive evidence to the satisfaction of the court that the defendants do not intend to continue the infringement any more. There is also no evidence that the defendants though they might have removed the machinery are not still in possession of the same. Possession of those machines is sufficient to give rise to a presumption of a threat to infringe unless that presumption is rebutted by the evidence of non-user or the absence of such intention as held in the case of *British United Shoe Machinery Co., Ltd.* v. *Simon Collier, Ltd.*(1). I, therefore, think that the plaintiffs have not only proved in this case that the defendants have infringed but also that there is no evidence on the record to suggest that there is no danger of the injury being repeated in future. I, therefore, think that it is a fit case in which injunction should be granted against the defendants as sought by the plaintiffs in their plaint.

Further the law is clear on the point that a person may infringe a patent, as in this case the defendants company have done by making the article themselves

(1) 27 R. P. C. 567.

1953.

ROHTAS INDUSTRIES, LTD. v. HUME PIPE CO. LTD.

AHMAD, J.

or by their agent—which is the position of defendant no. 2 in this case or by their servant—which is the position of defendant no. 3 in such cases action may be taken against the servants and agents individually or collectively along with their employer and principal, as it has been done in the present case. It is clear in this case that the infringement, if any, has been committed jointly by all the defendants. I, therefore, think that each one of the defendants in this case is liable for the infringement of the plaintiffs' patents as claimed by them.

The appeal is, in my opinion, without any substance and is accordingly dismissed with costs.

NARAYAN, J.—I agree.

Appeal dismissed.

S. H.

MISCELLANEOUS CRIMINAL.

Before Das and Rai JJ.

LEGAL REMEMBRANCER

v.

B. B. DAS GUPTA.*

1954.

August, 19, 20. *September*, 1.

Contempt of Courts Act, 1926 (*Act XII of* 1926), *High Court's power to punish for contempt—article criticising magistrate and his prohibitory order—Constitution, Article* 19(2), *whether infringed—Subdivisional Magistrate passing prohibitory order, whether a court subordinate to the High Court within the meaning of the Contempt of Courts Act*, 1926—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 6—*Case-law, reviewed.*

Some of the tests of contempt of court are, (1) a criticism calculated to interfere with the due course of justice or proper administration of law, (2) a criticism intended to create distrust in the popular mind and impair the confidence of the people in the courts of law. These tests have been part of the meaning of the expression "contempt of court" from before the Constitution and are still a part of its meaning—

* Original Criminal Miscellaneous Case no. 8 of 1953.

1958.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

a meaning which the framer of the Constitution must have known when they used the expression " contempt of court " in Article 19(2) of the Constitution, and it is idle to contend that such a connotation imports any unreasonable restriction on freedom of speech and expression.

Brahma Prakash Sharma v. *The State of Uttar Pradesh*(1), and *Andre Paul Terence Ambard* v. *The Attorney-General of Trinidad*(2), referred to.

The Contempt of Courts Act, 1926, cannot be held to be nugatory on the ground of the absence of a definition of the term "contempt of court " in the Contempt of Courts Act.

A Subdivisional Magistrate is a court within the meaning of the Code of Criminal Procedure, 1898, when he passes an order under section 144 of the Code and is subordinate to the High Court within the meaning of the Contempt of Courts Act.

Held, that the article in question amounted to contempt of court.

In the matter of an application under section 3 of the Contempt of Courts Act.

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

Standing Counsel, for the State.

— *B. C. Ghosh*, *S. K. Mazumdar*, *Ranen Roy* and *A. C. Mitra*, for the opposite party.

RAI, J.—This case was started on an application of the Legal Remembrancer, Bihar, representing the State of Bihar for issue of notice on the opposite party to show cause why they should not be proceeded against for contempt of court.

(1) (1953) S. C. A. 694.
(2) (1936) A. I. R. (P. C.) 141.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

The events leading to the filing of the present application may shortly be stated as follows. On the 18th of January, 1953, the sub-inspector of police in charge of Bandwan police-station, in the district of Manbhum, made a report to the Subdivisional Magistrate of Purulia to the effect that there was likelihood of a breach of the peace between two groups of people in Bandwan over the staging of a drama called " Deshar Dabi " on the 23rd of January, 1953, by one of the groups. The police officer prayed for the issue of a notice under section 144, Criminal Procedure Code, against both the parties. Acting on the aforesaid report of the police officer, the Subdivisional Magistrate of Purulia passed an order under section 144, Criminal Procedure Code, and issued notice against both the parties named in the report not to stage the drama or to do any act likely to cause a breach of the peace and to show cause, if any, on the 28th of January, 1953. In spite of the service of the notice under section 144, Criminal Procedure Code, the drama was staged at the premises of the Rishi Nibaran Chandra Vidyapith on the 23rd of January, 1953. On the 26th of January, 1953, an article was published in a weekly Bengali newspaper called " The Mukti " in its issue, dated the 26th of January, 1953, under the head line: " The incident of section 144 promulgation in Bandwan: the newest sample of Governmental highhandedness." The petitioner has attached a copy of the article as annexure A and an English translation thereof as annexure B to the petition. The opposite party no. 1, Sri Bibhuti Bhushan Das Gupta, is the editor of the newspaper and opposite party no. 2, Sri Ramchandra Adhikary is its printer and publisher. The article in question was published over the name of Sri Arun Chandra Ghosh, opposite party no. 3. According to the petitioner, the opposite party are guilty of contempt of court on the ground of their having published the article in question during the continuance of the proceeding

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

BAI, J.

under section 144, Criminal Procedure Code, and on the ground of their having scandalised the Subdivisional Magistrate of Purulia in particular and the magistracy of that district in general by calling them conspirators with the police and the ministry, and further on the ground of their having interfered with the due course of justice and proper administration of law. According to the petitioner, the opposite party are guilty of contempt of court of a grave nature.

The opposite party have appeared and filed three sets of written statements. Opposite party 1 and 2 have accepted the responsibility for publishing and printing the article in question. They have also averred that in case it be found that they had committed contempt of court by publishing or printing the article, they will deem it a privilege to suffer any punishment that may be inflicted on them for the same. Opposite party no. 3, Sri Arun Chandra Ghosh, admitted to have written the article in question. In paragraph 6 of his written statement he has pleaded:

> " That the article in question did not tend to and could not have tended to pollute ' the fountain of Justice ' or ' proper administration of law ' nor even calculated to do either of them. On the contrary the object of the article was to protect the fountain of justice from being polluted by the local police and magistracy acting in league and with the active support and connivance of the State Government and its high officials and to keep the administration of justice free from unclean politics which was invading the sacred citadel of justice and jeopardising the civic rights of the people of Manbhum."

In paragraphs 12 and 13 of his written statement he further averred that the magistracy in Purulia was in league with the local police. Paragraph 13 of the written statement runs thus:

> " That the Bandwan matter referred to in the aforesaid article is but a link in the long chain of events in pursuit of the neo-imperialist policy of the Ministry of Bihar by the local police and magistracy in league and directed and inspired by the Imperialist Ministers of the State of Bihar."

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

In paragraph 17 of his written statement opposite party no. 3 pleaded:

"That in writing the article in question the intention of this respondent had been to vindicate justice and hold the standard of justice high and if by doing that he has committed contempt of court he is prepared for any punishment for the same."

RAI, J.

Learned Counsel for the petitioner contended before us that the article in question had been written and published with the object of scandalising the Subdivisional Magistrate in particular and the magistracy of the district in general so as to undermine the confidence of the public in them, and to hinder the administration of justice. According to him, all the three members of the opposite party were aware of the pendency of the proceeding under section 144, Criminal Procedure Code, but in spite of that they published the article wherein a motive had been attributed to the learned Subdivisional Magistrate of Purulia in passing the order under section 144, Criminal Procedure Code. The Subdivisional Magistrate, nay the entire magistracy, have been denounced as acting in conspiracy with the police of the district. He contended that some passages in the article do amount to contempt of court for which the opposite party are liable to be punished under the Contempt of Courts Act (Act XXXII of 1952).

Mr. Sinha further submitted that what constitutes a "contempt of court" has been the subject-matter of discussion in several decisions of English and Indian courts. In this connection he referred to the decisions in the cases of *Queen* v. *Gray*(1), *In re. Murli Manohar Prasad*(2), *Andre Paul Terence Ambard* v. *The Attorney-General of Trinidad*(3) *and In the matter of Tulsidas Amanmal Karani*(4).

(1) (1900) 2 Q. B. 36.
(2) (1928) I. L. R. 8 Pat. 323, F. B.
(3) (1936) A. I. R. (P. C.) 141.
(4) (I. L. R. (1941) Bom. 548.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

In the case of *Queen* v. *Gray*(1), Lord Russell of Killowen had observed:—

"Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C.., characterised as 'scandalising a Court or a judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

This view of Lord Russell has been followed by their Lordships of the Judicial Committee and also by the various High Courts in India. In the case of *Andre Paul Terence Ambard* v. *The Attorney-General of Trinidad*(2) Lord Atkin also quoted with approval that portion of the judgment of Lord Russell which I have quoted above. Lord Atkin further observed in this connection:—

"But whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public

(1) (1900) 2 Q. B. 36.
(2) (1936) A. I. R. (P. C.) 141.

act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

The tests laid down by the above two English decisions have been adopted in the cases of *In re Murli Manohar Prasad*(1) and in the matter of *Tulsidas Amanmal Karani*(2).

According to Mr. Sinha, the article in question does, in clear terms, impute evil motives to the learned Subdivisional Magistrate of Purulia who had passed the order under section 144, Criminal Procedure Code. He submitted that the article does not stop there: it goes further and denounces the entire magistracy as being in league with the police of the district. In this connection Mr. Sinha drew our attention to several passages in the article in question including the following passage:—

"After the promulgation of notice under section 144 on the 9th Magh 23rd January, I declared in Bandwan on my own responsibility in a procession that it was not a law if any conspiracy be made in the name of law and it should not be obeyed and consequently the play would be acted on our responsibility and in it the conduct of police of Bandwan and the Inspector of Balrampur and the Subdivisional Officer, real breakers of law, would be discussed and it was made known to the police."

At another place in the article it was said:—

"He who applies the law in such a manner on the police report is really actively participating in conspiracy and highhandedness.."

(1) (1928) I. L. R. 8 Pat. 323, F. B.
(2) I. L. R. (1941) Bom. 548.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

Could there be a more glaring instance wherein an attempt was made to undermine the confidence of the people in the justice administered by the courts of magistrates, urged Mr. Sinha?

Learned Counsel for the petitioner further submitted that the courts of magistrates are subordinate to the High Court within the meaning of section 3 of the Contempt of Courts Act, and this Court is competent to take action under the Act if his argument is accepted that several passages in the article do amount to contempt of court.

Mr. B. C. Ghosh, learned Counsel for the opposite party, contended that as the Contempt of Courts Act provides no definition of the expression "contempt of court" the Act will be deemed to impose an unreasonable restriction on the fundamental right granted to the citizens of the Indian Union under Article 19(1)(*a*) of the Constitution. He submitted that as the Act in question does impose an unreasonable restriction on the fundamental rights of the people of this Union, it is void. In this connection he directed our attention to Article 19(1)(*a*) and to Article 19(2), as amended, of the Constitution which run thus:—

"19. (1) (*a*) All citizens shall have the right to freedom of speech and expression.

19. (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

In my opinion, this submission of Mr. Ghosh is without any merit. The expression "contempt of court" has not been defined in the Constitution itself, yet it has been used at another place under Article 215 which runs thus:—

"Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for *contempt* of itself."

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

Thus, it is quite clear that the framers of the Constitution had in their mind the well recognised judicial interpretation of the term "contempt of court" while incorporating it in Articles 19(2) and 215 of the Constitution. Similarly, the Constitution has provided for issue of writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* without defining those writs in the Constitution itself. Thus, it is quite clear that the framers of the Constitution considered it unnecessary to define those terms as they all carry a set meaning given to them by well-known judicial pronouncements of the English and Indian courts. In my opinion, the Contempt of Courts Act cannot be held nugatory on the ground of absence of a definition of the term "contempt of court" in that Act. It may also be mentioned that Mr Ghosh failed to point out any unreasonableness in any of the provisions of the Contempt of Courts Act. In my view, there is no merit in this contention of Mr. Ghosh which must be rejected.

Mr. Ghosh thereafter characterised the order under section 144, Criminal Procedure Code, as merely a police action. According to him, the Subdivisional Magistrate was not functioning as a court while passing that order because he does not in that proceeding examine witnesses, nor has he been invested with any power to enforce the orders passed by him. While making this submission Mr. Ghosh, probably, had in his mind the following passage from the decision in the case of *Musammat Dirji* v. *Srimati Goalin*(1):—

"It is evident that a Court cannot function properly unless it is armed with certain powers, such as the power to receive evidence bearing on the matter which it is called upon to decide, the power to enforce

(1) (1940) I. L. R. 20 Pat. 373, F. B.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

the attendance of witnesses and the production of documents and material objects before it and 'the power to pronounce judgment and carry it into effect between the person and parties who bring a case before it for decision' (*see* Bouvier's Law Dictionary). Thus a Court must not only be charged with judicial function but must also be invested with judicial powers."

In that case the question for decision was whether a commissioner appointed under the Workmen's Compensation Act, 1923, was a court, and it was held there that such a commissioner performs the functions of a court. A similar question was agitated in the case of *Abdul Razak* v. *Kuldip Narain*(1) where it was held that the Election Commissioner referred to in the Bihar District Board Election Petition Rules, 1939, was a court subordinate to the High Court within the meaning of section 115, Civil Procedure Code. In the case of *A. Hasan* v. *Mohammad Shamsuddin*(2) a Division Bench of this Court held that the prescribed authority under section 15 of the Payment of Wages Act, 1936, functions as a court.

But apart from decided cases, the Code of Criminal Procedure itself has under Chapter II, made provisions for constitution of criminal courts and offices. Section 6 of the Code provides:—

"Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely,—

I—Courts of Session;

II—Presidency Magistrates;

III—Magistrates of the first class;

IV—Magistrates of the second class;

V—Magistrates of the third class."

The magistrates of 1st, 2nd and 3rd class do hold courts in the district of Purulia. The Subdivisional Magistrate is a magistrate of the 1st class. The order

(1) (1943) I. L. R. 22 Pat. 577.
(2) (1951) A. I. R. (Pat.) 140.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

under section 144, Criminal Procedure Code, was passed in the present case by the court presided over by him. Sometimes courts have to pass prohibitory orders but they do not thereby cease to be courts. It is also true that magistrates have sometimes to perform executive functions as well, but that in itself will not debar them from acting as courts as provided by section 6, Criminal Procedure Code. In my view the court of a magistrate is a court subordinate to the High Court within the meaning of section 3 of the Contempt of Courts Act.

Mr. Ghosh next submitted that the powers conferred on this Court under section 3 of the Contept of Courts Act should be exercised sparingly after the enforcement of the Constitution. In this connection Mr. Ghosh relied on the decision of *McLeod* v. *St. Aubyn*(1). The relevant passage out of this judgment on which Mr. Ghosh laid great emphasis runs thus:—

"It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

Mr. Ghosh also referred to the decisions in the case of *Debi Prasad Sharma* v. *The King-Emperor*(2) and *Parashuram Detaram Shamdasani* v. *King-Emperor*(3). In my view these decisions have no

(1) (1899) A. C. 549.
(2) (1943) L. R. 70 Ind. App. 216.
(3) (1945) L. R. 72 Ind. App. 189.

1953.

LEGAL REMEMBRANCER v. B. B DAS GUPTA.

RAY, J.

application to the facts and circumstances of the present case. In the case of *Debi Prasad Sharma* v. *The King-Emperor*(1) the appellants before the Judicial Committee had been convicted under the Contempt of Courts Act for publishing the following news item in a newspaper called the 'Hindustan Times':—

"Judicial Officers for War Work. Raising Subscriptions. New Chief Justice's Circular" (From Our Correspondent). Meerut, August 1. With the judicial officers also now co-operating actively in the war efforts, the 'efforts' are bound to receive a heavy push forward. The judicial officers all over the province have been, I reliably learn, asked by the new Chief Justice of the Allahabad High Court, who, it is understood, has been requested by His Excellency the Governor for co-operation in war efforts, to raise subscriptions for the war funds. The judicial officers raising money make it quite clear to the persons whom they ask to contribute that the donations were voluntary and they were not exercising any compulsion in asking for funds. They could donate as much or as little as they pleased."

It was held in that case that the editorial committee wrongly mentioning in the news item about the issue of a circular by the Chief Justice of the Allahabad High Court to the Judicial Officers under his jurisdiction enjoining on them to raise contributions to war fund does not amount to criticism of any judicial act of the Chief Justice or any imputation on him for anything done or omitted to have been done by him in the administration of justice, and in the circumstances the words used in the comment were not capable of being a contempt of court. In that case the Chief Justice was not alleged to have passed any order functioning as a court. In the present case, however, the order passed under section 144, Criminal Procedure Code, was an order passed by the Subdivisional Magistrate of Purulia as the presiding officer of a court.

(1) (1943) L. R. 70 Ind. App. 216.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

Briefly stated, the facts in the case of *Parashuram Dearam Shamdasani* v. *King-Emperor*(1) were as follows. The appellant before their Lordships was an unsuccessful plaintiff in a suit before the High Court of Bombay. He was taxed in the suit for costs, etc. He filed an application for review of the order of taxation. During the course of the hearing Counsel for the opposite party stated that the appellant was misleading the court as to the nature of the issues raised in the action. To this the appellant replied: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the court." This caused a protest from the Counsel for the opposite party; whereupon the appellant immediately apologized and expressed his regret for having used an unfortunate expression in the heat of the argument. Later, in dealing with the taxing master's statement, with regard to the allowance of discretionary items, the appellant said: "It is customary for the taxing masters to write what is written at the end of the paragraph, but is it considered at all?" No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when the judgment was given. On the next day learned Counsel for the opposite party accompanied by the Advocate-General of Bombay appeared and moved the Court for punishing the appellant for contempt in using the language he did regarding the Bar. During the course of the argument the learned Judge himself raised the question regarding the words used by the appellant the previous day concerning taxing masters. The appellant was convicted for contempt of court by the learned Judge for both the observations made by him. Their Lordships of the Judicial Committee, however, held that the words used by the appellant respecting the Bar did not and could not amount to

(1) (1945) L. R. 72 Ind. App. 189. 8 I. L. R.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

a contempt of court, and consequently there was no jurisdiction in the learned Judge to exercise his summary power in respect of them. With respect to the words used by the appellant against the taxing masters their Lordships of the Judicial Committee observed:

"With regard to the words relating to the taxing masters, no doubt if a litigant were to suggest in court that its officers were corrupt or habitually failed to carry out their duties the court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof or even comment from the Bench, it is impossible to suppose that they were treated, or, indeed, intended, as more than a tactless way of suggesting that taxing masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate-General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter, and then by the judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of court, and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen, J., coincide.

Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress method of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar

can surely maintain its dignity and prestige without having to invoke this jurisdiction."

1953.

LEGAL REMEMBRANCER v. R. B. DAS GUPTA.

RAI, J.

In my opinion, the imputation in this case, however, is of a graver nature. Here the article attributes an evil motive to the entire magistracy of the district including the Subdivisional Magistrate of Purulia who, according to the article, had passed the order under section 144, Criminal Procedure Code, in furtherance of the conspiracy between the magistracy and the police. It is true that the powers conferred by the Contempt of Courts Act should be exercised sparingly, yet as it is intended to safeguard the dignity of courts against wanton attacks by reckless persons imputing evil motives to them, one should not hesitate in exercising those powers if and when the circumstances of the case demand it.

Mr. Ghosh thereafter referred to two recent decisions of the Supreme Court in the cases of *Rizwan-Ul-Hasan* v. *State of Uttar Pradesh*(1) and *Brahama Prakash Sharma*(2). In the former case during the pendency of a proceeding under section 145, Criminal Procedure Code, before the Subdivisional Magistrate of Jalaun, the District Magistrate had forwarded to him an application sent on behalf of one of the parties to the proceeding. The application was accompanied with a recommendation from the Secretary, District Congress Committee. The Subdivisional Magistrate had returned that application with a direction to file a formal petition of complaint. The District Magistrate had thereafter returned the application to the applicant drawing his attention to the remark of the magistrate that a regular complaint petition should be filed. The Collector of the district and the Secretary of the District Congress Committee were both proceeded against under the Contempt of Courts Act and were convicted by the High Court of Allahabad. The Secretary of the District Congress

(1) (1953) A. I. R. (S. C.) 185.
(2) (1953) S. C. A. 694.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

Committee accepted the judgment of the High Court; but the gentleman who had acted as the District Magistrate at the relevant time moved their Lordships of the Supreme Court where it was held that the District Magistrate had forwarded the application to the Subdivisional Magistrate by way of a routine work and by so doing he never intended to interfere with the course of justice in relation to the proceeding under section 145, Criminal Procedure Code, pending before the Subdivisional Magistrate. Their Lordships of the Supreme Court further held in agreement with the view expressed in the case of *Anantalal Singh* v. *Alfred Henry Watson*(1) that the jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice and that the purpose of the Court's action is a practical purpose and it is reasonably clear on the authorities that the Court will not exercise its jurisdiction upon a mere question of propriety.

The case of *Brahama Prakash Sharma* v. *The State of Uttar Pradesh*(2) was by way of special appeal from a Full Bench decision of the Allahabad High Court reported in *State* v. *Brahama Prakash*(3) where almost all the points raised by Mr. Ghosh had been dealt with and repelled. The facts of the case may briefly be stated as follows. The appellants before their Lordships of the Supreme Court were members of the executive committee of the District Bar Association at Muzaffarnagar within the State of Uttar Pradesh. On the 20th of April, 1949, the President of the association sent a copy of the resolutions in question in that case with a covering letter marked confidential to the District Magistrate, Muzaffarnagar. Copies of the resolutions were similarly despatched to the Commissioner of the Division, the

(1) (1931) A. I. R. (Cal.) 257, 261.
(2) (1953) S. C. A. 694.
(3) (1950) A. I. R. (All.) 556, F. B.

Chief Secretary and the Premier of Uttar Pradesh. An application was ultimately filed before the High Court of Judicature at Allahabad for drawing up proceedings against the members of the executive committee of the Bar Association for contempt of court. The concluding portion of the judgment of the High Court on the question of sentence ran thus:

1953.

LEGAL REMEMBRANCER v. B. P. DAS GUPTA.

RAY, J.

"We think the opposite parties acted under a misapprehension as to the position; but they have expressed their regret and tendered an unqualified apology. In the circumstances we accept their apology, but we direct that they pay the costs of the Government Advocate which we assess at Rs. 300."

Before their Lordships of the Supreme Court, the Attorney-General of India who had appeared for the appellant had laid great stress on the fact that the resolutions passed and the representations made by the appellants in that case were not intended for exposing before the public the alleged shortcoming of the officers concerned. The whole object, according to him, was to have the grievances of the lawyers and the litigating public which were genuinely felt, removed by an appeal to the authorities who alone were competent to remove them. According to the learned Attorney-General such a conduct of the appellants could not have interfered with the due administration of justice. The relevant portion of the judgment of their Lordships runs thus:—

"It admits of no dispute that the summary jurisdiction exercised by superior courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the courts. It would be only repeating what has been said so often by various judges that the object of contempt proceedings is not to afford protection to judges personally from imputations to which they may be exposed as individuals; it is intended to be a protection to the public whose interests would be

1955.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAY, J.

very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened:

There are indeed innumerable ways by which attempts can be made to hinder or obstruct the due administration of justice in courts. One type of such interference is found in cases where there is an act or publication which 'amounts to scandalising the court itself'—an expression which is familiar to English lawyers since the days of Lord Hardwicke, *vide In re Read and Huggonson*(1). This scandalising might manifest itself in various ways but, in substance, it is an attack on individual judges or the court as a whole with or without reference to particular cases casting unwarranted and defamatory aspersions upon the character or ability of the judges. Such conduct is punished as contempt for this reason that it tends to create distrust in the popular mind and impair confidence of people in the courts which are of prime importance to the litigants in the protection of their rights and liberties.

* * * * * *

It seems, therefore, that there are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in case of contempt committed by 'scandalising' the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. 'The path of criticism', said Lord Atkin [*Ambard* v. *Attorney-General for*

(1) (1742) 2 Atk. 469, 471.

Trinidad & Tobago(1)]' is a public way. The wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice, or attempt to impair the administration of justice, they are immune'. 1953. LEGAL REMEMBRANCER v. B. B. DAS GUPTA. RAY, J.

In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court.

* * * * * *

The position there is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well-established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law. Per Mookerjee, J., *In re Motilal Ghose & ors*(2).".

(1) (1936) A. C. 322, 335.
(2) (1917) I. L. R. 45 Cal. 169, S. B.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

Their Lordships of the Supreme Court, on the facts and circumstances of that case, came to the conclusion that the contempt, if any, was only of a technical character, and that after the affidavits were filed on behalf of the appellants tendering an unqualified apology, the proceedings against them should have been dropped.

In the present case, however, I find that there is a deliberate attack on the Subdivisional Magistrate of Purulia attributing an evil motive to him for having passed the order under section 144, Criminal Procedure Code. The article in question also depicted him as a person wholly unfamiliar with law and devoid of all common sense. There is in the article mentioned in a triumphant manner how the order was disregarded and disobeyed at the instance of opposite party no. 3. In my opinion, the article in question not only scandalised the Subdivisional Magistrate in particular and the magistracy of the district in general, but also intended to interfere with the course of justice administered by the courts presided over by the magistrates in the district of Purulia. In my opinion, the opposite party are not entitled to claim on the basis of the above decisions of their Lordships of the Supreme Court that the proceedings against them should have been quashed.

Mr. Ghosh attempted to justify the aspersions cast on the Subdivisional Magistrate in the article in question on the ground that no breach of the peace had, in fact, taken place when the drama was actually staged on the 23rd of January, 1953, at the premises of Rishi Nibaran Chandra Vidyapith, Bandwan. He further submitted that after enquiry, opposite party no. 3, Arun Chandra Ghosh, had come to know that none of the persons named as the first party in the proceedings under section 144, Criminal Procedure Code, whom he could meet had any objection to the staging of the drama. In my opinion, there is no

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

merit in this argument of Mr. Ghosh as well. For aught one know the breach of the peace might have been averted because the members of the first party respected the order issued under section 144, Criminal Procedure Code, restraining them from doing anything which may tend to create the breach of the peace. Mr. Ghosh further submitted that the order passed under section 144, Criminal Procedure Code, had rightly been characterised as a ridiculous one in the article, because it had restrained both the parties from staging the drama. This according to him, was beyond any imagination as the drama was to be staged by only one section of the people and not by both the sections. I think, while putting forward this argument, Mr. Ghosh has, like his client, misappreciated the order. The magistrate appears to have restrained both the parties not to do any act likely to cause a breach of the peace, and to show cause, if any, on the 28th of January 1953. Paragraph 3 of the petition filed before this Court does refer to the order in question. It is clear from the article itself that opposite party no. 3 and his associates considered it necessary to make enquiry whether the members of the first party to the notice under section 144, Criminal Procedure Code, were really objecting to the staging of the drama. They alleged to have gone to the locality, contacted all the persons named as the first party in the notice except one Santosh Kumar Das, but none, whom they had met, had objected to the staging of the drama. Well, if the opposite party no. 3 had thought it expedient to make an enquiry about the alleged opposition to the staging of the drama, why did he blame the Subdivisional Magistrate when he issued notice under section 144, Criminal Procedure Code, for satisfying himself regarding the truth or otherwise of the report made by the police about the apprehension of a breach of the peace? Section 144, Criminal Procedure Code, provides for satisfaction of the magistrate on the report. There is no provision for making enquiry before issuing the preliminary

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

RAI, J.

notice. It is only when parties appear and show cause that the final order is passed. The Subdivisional Magistrate had fixed the 28th of January, 1953, as the date for showing cause on the notice which had been issued by him on the 19th of January, 1953. This was not a long interval between the date of issue of notice and the final hearing of the case. In my opinion, the article was intended to cast uncalled for aspersions on the Subdivisional Magistrate of Purulia which may incite people of the locality to treat his order with scant regard. In my view, the opposite party have committed contempt of court within the meaning of the Contempt of Courts Act. I hold them guilty for contempt of court and sentence them as follows. Sri Bibhuti Bhushan Das Gupta, opposite party no. 1, and Sri Ramchandra Adhikary, opposite party no. 2, are each sentenced to pay a fine of Rs. 150, while Sri Arun Chandra Ghosh, opposite party no. 3, is sentenced to pay a fine of Rs. 250. It is further ordered that in default of the payment of fine, the defaulters are to be confined in the Patna jail for three months; but they will be released earlier if and as soon as the fines are paid.

The opposite party are also jointly and severally liable to pay the costs of the petitioner. I assess the hearing fee at Rs. 150 only.

DAS, J.—I agree with my learned brother, and wish to add a few words only as respects the argument based on Article 19 of the Constitution.

The argument of Mr. Ghosh was that clause (2) of Article 19 as it originally stood saved all existing law relating to contempt of court; but clause (2) as amended by the Constitution (First Amendment) Act, 1951, has narrowed the scope of the clause. He has argued that after the amendment, the operation of any existing law in relation to contempt of court is saved only in so far as it imposes reasonable restrictions on the exercise of the right referred to in sub-clause (*a*)

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

DAS, J.

of clause (1). His contention has been that if contempt of court is given such a wide connotation as to cover every criticism of a Court or the order of a Court, then the law which gives such wide connotation imposes an unreasonable restriction on freedom of speech and expression and must be held to be void. He has said that in the context of the Indian Constitution and the changed circumstances consequent on the attainment of freedom, a criticism of Courts and judicial orders of Courts must be allowed; or else, the freedom guaranteed under sub-clause (*a*) of clause (1) will be illusory.

I think that the answer to the arguments of Mr. Ghosh is to be found in the words of Lord Atkin—"Justice is not a cloistered virtue". Any and every criticism is not contempt. One of the tests is, to use the words of Mukherjea, J., in *Brahama Prakash Sharma v. The State of Uttar Pradesh*(1), whether the criticism is calculated to interfere with the due course of justice or proper administration of law; whether it tends to create distrust in the popular mind and impair confidence of people in the Courts of law. These tests have been part of the meaning of the expression contempt of Court from before the Constitution and are still a part of its meaning—a meaning which the framers of the Constitution must have known when they used the expression. We are giving no wider connotation to it, and it is idle to contend that such a connotation imports any unreasonable restriction on freedom of speech and expression.

Rightly or wrongly, the opposite party felt that the order under section 144, Criminal Procedure Code, was unjustified and wrong. If they had confined their criticism to such a statement only, no objection could have been taken—whether one agreed with the statement or not. But the opposite party went much

(1) (1953) S. C. A. 694, 701, 705.

1953.

LEGAL REMEMBRANCER v. B. B. DAS GUPTA.

DAS, J.

beyond legitimate criticism: they said that the Subdivisional Magistrate was in conspiracy with the police and passed the order out of an evil mind; they imputed evil motives to the entire magistracy and said that defiance of the orders of conspirators should be shown. In saying all this, they were creating distrust in the popular mind and impairing the confidence of the people in the Courts of the locality.

I do not think that the affidavits filed by the opposite party make out any case of conspiracy on the part of the Subdivisional Magistrate or the magistracy in general—though there are many allegations to that effect. Imputations of this kind pollute the fountain of justice in the sense that they shake the confidence of the people in the Courts—a confidence which is the foundation for the protection of their rights and liberties and for the proper administration of justice.

The arguments that the Subdivisional Magistrate passing the order under section 144, Criminal Procedure Code, was a mere executive officer, that the order under section 144, Criminal Procedure Code had spent its force before the relevant date, that the comments made were comments on Raj-Karmacharis, that is, executive officers—these do not convince me at all. I agree with my learned brother that the Subdivisional Magistrate was a Court within the meaning of the Code of Criminal Procedure and subordinate to the High Court, when he passed the order under section 144. The order had not spent its force on the relevant date, and in making the comments they made, the opposite party were also prejudicing the decision in a pending case.*

Rule made absolute.

K. D.

[* Application for Special Leave to Appeal to the Supreme Court, viz., Criminal Miscellaneous Petition no. 366 of 1953, preferred by the opposite party was rejected by their Lordships Mahajan, Mukherjea and Das, JJ., on 28th September, 1953, though the imprisonment in lieu of fine was reduced to six weeks—*Reporter.*]

APPELLATE CRIMINAL.

Before Das and Rai, JJ.

SOBRATI

v.

STATE.*

1953.

September, 16, 17, 18.

Criminal Trial—murder and culpable homicide not amounting to murder—distinction—Penal Code, 1860 (*Act XLV of* 1860), *sections* 34, 302, 304, *applicability and scope of—death caused by the assault of two persons—intention not to kill—no proof as to whose blow proved fatal—accused, whether guilty of murder—one of the two assailants, whether can be convicted.*

It is not always easy to draw a distinction between murder and culpable homicide not amounting to murder.

Where the blows given and intended to be given are sufficient in ordinary course of nature to cause death or are so imminently dangerous that they must in all probability, cause death, the offence is one of murder.

Where, however, the injuries caused and intended to be caused are merely likely *to cause* death, the offence will be culpable homicide not amounting to murder.

Even in respect of this latter offence, there are again two categories :—first, where the act by which death is caused is done with the intention of causing such bodily injury as is likely to cause death; and secondly, where the act is done with the knowledge that it may cause death without an intention of causing such bodily injury as is likely to cause death. The distinction between these two categories is not always easy to define, because the distinction depends on the facts of each case, namely, the circumstances in which the assault is made, the weapon used, the violence with which the weapon is used, etc.

Where two persons dealt *danta* blows on a person with the common intention of causing bodily injuries on him and the person died as a result of those injuries but there was no proof as to whose blow caused the death and one of the assailants was convicted under section 302 of the Penal Code.

*Criminal Appeal no. 546 of 1952, from a decision of Mr. D. Prasad Additional Sessions Judge of Monghyr, dated the 19th November, 1952.

1953.

SOBRATI v. STATE.

Held, that the accused was guilty under the second part of section 304 of the Penal Code, 1860, by reason of the application of the principle of joint liability embodied in section 34 of the Code which can be read with the second part of section 304.

Dalip Singh v. *The State of Punjab*(1), distinguished.

Lachhman Singh v. *The State*(2). *Mahbub Shah* v. *King-Emperor*(3), *State* v. *Hira Dubey*(4) and *State* v. *Saidu Khan*(5), relied on

Appeal by the accused person.

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

Umesh Chandra Sharma, for the appellant.

Standing Counsel, for the State.

DAS, J.—The appellant is one Sobrati Mian, aged about twenty-five. The learned Additional Sessions Judge of Monghyr tried him with the aid of four assessors, and convicted him under section 302, Penal Code, for having killed one Ramdhani Sahni of village Haibatpur, police-station Begusarai. The trial was held with the aid of four assessors, three of whom found the appellant guilty of the offence of murder. The learned Sessions Judge agreed with them and sentenced the appellant to transportation for life.

The case against the appellant may be shortly stated. Ramdhani Sahni and Jadu Sahni were two brothers who lived in village Haibatpur. On a Thursday in June 1949, there was a quarrel between Ramdhani Sahni on one side and one Bhagwan Sao on the other. The quarrel arose over an allegation

(1) (1953) A. I. R. (S. C.) 364.
(2) (1952) A. I. R. (S. C.) 167.
(3) (1945) L. R. 72 Ind. App. 148.
(4) (1952) A. I. R. (Pat.) 135.
(5) (1951) A. I. R. (All.) 21, F. B.

1953.

SOBRATI
v.
STATE.

DAS, J.

that a young boy called Natho Sahni (P. W. 9), had plucked some mangoes of Bhagwan Sao. Bhagwan Sao was taking Natho Sahni to task when Ramdhani intervened and extricated the boy. This led to an altercation between Ramdhani on one side and Bhagwan on the other, resulting in a few slaps being given to Bhagwan. Early next morning, i.e., on the 3rd June 1949, Ramdhani Sahni went to answer a call of nature near an orchard at a short distance from his house. The orchard belonged to Jamun Sao, grandfather of Bhagwan Sao. Five persons, namely, Jamun Sao, his son, Lachmi Sao, his grandson, Bhagwan Sao and two brothers Aziz Mian and Sobrati Mian chased Ramdhani Sahni from the orchard. Two women, Mosst. Mankia (P. W. 1) and Mosst. Sanmukhia (P. W. 4), who had gone to a well in the orchard to draw water, saw this, and raised an alarm. In the meantime, Ramdhani ran from the orchard towards his house. He was pursued by the aforesaid five persons, Aziz Mian and Sobrati Mian leading the others. Near the house of one Kitar Sahni, Ramdhani was overtaken by Aziz and Sobrati, both of whom hit Ramdhani Sahni with a *danta*. Ramdhani fell down, and was still assaulted. On the alarm raised by the two women, Jadulal Sahni (P. W. 14) and some other persons including Mahadeo Sahni (P. W. 13) and Ghuran Lal Sahni (P. W. 17) came there. They saw the assault on Ramdhani Sahni. After the assault the accused persons fled away. Ramdhani Sahni received certain injuries on the head and was unable to speak. He was bleeding from the nose and the mouth. He was brought near his *dalan*, and an attempt was made to nurse him but without success. He died in about half an hour. The chaukidar and the daffadar of the village were informed and Jadulal Sahni (P. W. 14) went to the police-station which was at a distance of about nine miles from the village. At the police-station Jadulal Sahni gave an information at about 8-30 A.M., i.e., within about two and a half hours of the occurrence. In this

1953.

SOBRATI v. STATE.

DAS, J.

first information, Jadulal stated what he had seen. It was mentioned that besides the quarrel which had taken place between Bhagwan Sao and Ramdhani Sahni on the previous day, there was also ill-feeling between Ramdhani and the two brothers Sobrati Mian and Aziz Mian. That ill-feeling appeared to be due to a petition of complaint which Ramdhani Sahni had filed against the father of Aziz and Sobrati and certain other Muhammadans of the village, alleging that they had cut the branches of a *bar* tree, a tree held in respect by the Hindus. This petition of complaint was dismissed by the Subdivisional Magistrate on the 5th of April 1949 with a warning notice against the landlord not to allow the cutting of the branches of the *bar* tree. This, it was stated, was the reason for the ill-feeling between Ramdhani Sahni on one side and the two brothers Aziz and Sobrati on the other.

On the information given by Jadulal Sahni (P. W. 14), the officer in charge of the Begusarai police-station (P. W. 18) came to the village at about 1 P.M. He saw the dead body of Ramdhani lying south of the house of Kitar Sahni. He held an inquest over the dead body and sent it for *post-mortem* examination. He found blood at the place. He also found blood near the *dalan* of Ramdhani, which was at a distance of about 78 paces west of the place near Kitar Sahni's house. The *post-mortem* examination revealed that Ramdhani had sustained as many as eight injuries, three of which were on the head. Two of the injuries on the head were lacerated wounds on the right side of the head. On dissection, the doctor found that there was extensive extravasation of blood in the tissues underneath the scalp. The doctor found that the *fronto parietal suture* was loosened, with the fracture of a small piece of bone at the left end of the frontal bone. On opening the skull, the doctor found that the meninges were congested and covered with a thin layer of blood. There was hæmorrhage in the brain. In the opinion of the doctor, death was due

to shock and hæmorrhage caused by the aforesaid fracture. 1953.

SOBRATI v. STATE.

DAS, J.

Both Aziz and Sobrati remained untraced during the investigation of the case; and the original preliminary enquiry was held in this case against Jamun Sao, Bhagwan Sao and Lachmi Sao. These three persons were discharged by an order of the enquiring magistrate, dated the 24th of October 1949. Sobrati Mian was arrested and produced before the Subdivisional Magistrate on the 14th of December 1951. There was a supplementary enquiry against him, as a result of which he was committed to stand his trial in the Court of Session. The learned Additional Sessions Judge of Monghyr tried him with the result which I have already indicated in the first paragraph of this judgment.

The defence of the appellant was that he had not assaulted Ramdhani Sahni. In his written statement, the appellant stated that the witnesses who gave evidence against him were interested witnesses who did not tell the truth. It was suggested by the appellant that he was falsely implicated on account of the displeasure which he had incurred as a result of the complaint filed by Ramdhani Sahni against the appellant and his father some three months before the occurrence. In the cross-examination of the prosecution witnesses, a suggestion was made on behalf of the appellant that Ramdhani was killed by some unknown persons at night when he was sleeping under a jack fruit tree near his *dalan*; subsequently his dead body was removed to a place near the house of Kitar Sahni in order to manufacture a false case against the accused persons.

The learned Additional Sessions Judge accepted the prosecution case as substantially true, and held that Aziz and Sobrati, the two brothers, had assaulted Ramdhani Sahni by means of *lathis* or *dantas*. On

1952.

SOBRATI
v.
STATE.

DAS, J.

that finding, the learned Sessions Judge convicted the appellant of the offence under section 302 of the Penal Code.

Mr. Umesh Chandra Sharma has appeared on behalf of the appellant before us. He has taken us through the entire evidence in the record. His principal contention has been that the prosecution witnesses were interested witnesses, and their evidence was contradictory. Mr. Sharma has contended before us that the conviction of the appellant on the basis of such interested and contradictory evidence is bad. He has repeated the suggestion which was made in the court below that Ramdhani Sahni was killed by some unknown men at night when he was sleeping near his *dalan*.

That Ramdhani was killed has not been seriously disputed before us.

I am satisfied from the evidence given in this case that the appellant and his brother Aziz Mian assaulted Ramdhani with a *danta* in the morning of the 3rd of June 1949, in the circumstances alleged by the prosecution.

The next question is what offence the appellant has committed by reason of the assault which he made on Ramdhani. Learned Counsel for the appellant has urged two points of law in this connection. The prosecution evidence in this case does not show which of the two brothers gave the blows on the head of Ramdhani. The medical evidence is clear that Ramdhani's death was caused by the blows on his head; therefore, the question that naturally arises is if the appellant can be held guilty under section 302, Penal Code, when the prosecution has not established that he gave the blows on the head of Ramdhani.

1953.

SOBRATI v. STATE.

DAS, J.

The learned Standing Counsel for the State of Bihar has contended before us that section 34, Penal Code, will apply in the present case, and the appellant will be liable for each and every blow given to Ramdhani, inasmuch as the assault on Ramdhani was made in pursuance of the common intention of both the brothers. Mr. Umesh Chandra Sharma has contended that section 34 has no application in the present case. He has also contended that there can be no conviction of the appellant by an application of the principle of section 34 of the Penal Code, because no charge under that section was framed against the appellant. Mr. Sharma has referred us to the decision of the Supreme Court in the case of *Dalip Singh v. The State of Punjab*(1) where his Lordship Bose, J.. made the following observations: "Nor is it possible in this case to have recourse to section 34 because the appellants have not been charged with that even in the alternative, and the common intention required by section 34 and the common object required by section 149 are far from being the same thing." I do not read those observations as laying down any rule of law that a person cannot be convicted under section 34, Penal Code, because there is no separate charge under that section. Section 34 of the Penal Code, as is well known, does not create a new offence; it merely lays down a principle of joint liability. In the case cited above, their Lordships had before them a conviction under section 302, read with section 149, Penal Code; it was alleged that seven persons had taken part in the assault, three of whom were acquitted by the High Court. As the number fell below five, the question arose whether the conviction under section 149 could be upheld. Their Lordships pointed out that in some cases, even after the acquittal of some of the accused persons, it might be possible to convict the others under section 149 of

(1) (1953) A. I. R. (S. C.) 364.

1953.

SOBRATI v. STATE.

DAS, J.

the Penal Code, provided the number of persons who had taken part in the occurrence was five or more. While considering the application of section 34, the point which his Lordship Bose, J., made was that on the facts of that case section 34 did not apply, because there was no finding as to the common intention, and he further pointed out that the common intention required by section 34 was not the same as the common object required by section 149. The point urged by Mr. Sharma is directly covered by another decision of the Supreme Court in *Lachhman Singh* v. *The State*(1). At page 170, Fazl Ali, J. (as he then was), observed:

"It was also contended that there being no charge under section 302 read with section 34, Penal Code, the conviction of the appellants under section 302 read with section 149 could not have been altered by the High Court to one under section 302 read with section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34. The point has therefore no force."

In the case before us, the question for consideration is if on the facts of the case it can be found that the assault on Ramdhani was made in furtherance of the common intention of the two brothers, Sobrati and Aziz. If the assault was made in furtherance of such a common intention, the fact that there was no separate charge under section 34 of the Penal Code against the appellant will not stand in the way of applying that section. If one considers the entire facts beginning from the quarrel on Thursday, the meeting in the evening on the *bathan* of Jamun, the assault near the orchard, the chase and finally the assault near the house of Kitar Sahni—if one considers this entire chain of events, one is forced to the irresistible

(1) (1952) A. I. R. (S. C.) 167.

1953.

SOBRATI v. STATE.

DAS, J.

conclusion that the accused persons, at least the two brothers, were engaged in a common enterprise and they had the common intention of assaulting Ramdhani in order to teach him a lesson for his earlier conduct. I do not think that the common intention was to kill; but the common intention undoubtedly was to assault Ramdhani, and both Sobrati Mian and Aziz Mian shared that common intention. It was not merely a case of "same" or "similar" intention, as explained in the case of *Mahbub Sah* v. *King Emperor*(1). I must, therefore, overrule the contention of Mr. Sharma that section 34 has no application in the present case.

Finding that section 34 applies we have still to consider what offence the appellant committed when he and his brother assaulted Ramdhani in such a way that he died as a result of the assault. A similar question, on facts bearing some resemblance to the facts of the present case, was considered by a Division Bench of this Court in *State* v. *Hira Dubey*(2). That was also a case in which one Radha Pathak had received six or seven *lathi* blows, and one of the blows on the head had caused a fracture of the skull to which Radha Pathak succumbed the same day at the police-station. Shearer, J., considered the application of section 34 and then observed:

"If, on the other hand, the prosecution succeed in showing the existence of a common purpose or design, then each of the accused persons is liable for any act done in pursuance of that common purpose or design. When the acts done are similar, as where a number of blows are struck with *lathis*, then each of them is liable for every one of the blows struck, and if in the event of every blow having been struck by one man, that man would have been guilty of murder,

(1) (1945) L. R. 72 Ind. App. 148.
(2) (1952) A. I. R. (Pat.) 195.

1953.

SOBRATI v. STATE.

DAS, J.

each of them is guilty of murder, it being immaterial whose blow it was which was the direct and immediate cause of death."

Applying the test explained in the aforesaid observations of Shearer, J., the question before us is what offence had that man committed, who gave the blows on the head of Ramdhani? Of course, we do not know which one of the two brothers had given the blows on the head; but as the blows were given in furtherance of the common intention, each will be liable for the blows on the head irrespective of which of them gave those blows and the offence will be that offence which the man who gave the blows on the head committed.

In a border line case of this nature, it is not always easy to draw a distinction between murder and culpable homicide not amounting to murder. If the blows given and intended to be given are sufficient in the ordinary course of nature to cause death or are so imminently dangerous that they must, in all probability, cause death, the offence is one of murder. If, however, the injuries caused and intended to be caused are merely likely to cause death, the offence will be culpable homicide not amounting to murder. Even in respect of this latter offence, there are again two categories: first, where the act by which death is caused is done with the intention of causing such bodily injury as is likely to cause death; and secondly, where the act is done with the knowledge that it may cause death without an intention of causing such bodily injury as is likely to cause death. The distinction between these two categories is not always easy to define, because the distinction depends on the facts of each case; namely, the circumstances in which the assault is made, the weapon used, the violence with which the weapon is used, etc. It is not possible, nor do I desire, to give an exhaustive enumeration of all the circumstances on which the question will depend as to whether the act comes within the first part of

section 304, Penal Code or the second part. There are, however, two significant facts established by the prosecution evidence in this case. The evidence of Mosst. Mankia (P. W. 1) was that Ramdhani was assaulted with *dantas*. A *danta* means a stick, which is a much smaller and thinner weapon than a *lathi*. The second fact is that the medical evidence in the case shows that there were loosening of the *fronto-parietal suture* and fracture of a small piece of bone at the left end of the frontal bone. The doctor also found thin lines of fracture near about the base of the skull. From the medical evidence, it seems to me that though the blows were given on a vital part of the body, they were not given with any great violence and were given with small sticks, not *lathis* such as were used in the case which was before Shearer, J. The other injuries on the person of Ramdhani given with the same weapon were mere abrasions or bruises, which are again indicative of the fact that a small weapon was used with no great violence. Having regard to these facts, I am of the view that the proper section under which the appellant should be found guilty is the second part of section 304, Penal Code. He is guilty of the offence under the second part of section 304, Penal Code, by reason of the application of the principle of joint liability embodied in section 34 of the Penal Code. That section 34 can be read with the second part of section 304, Penal Code, seems now to have been accepted by a number of High Courts in India. The latest decision on the point to which our attention has been drawn is a Full Bench decision of the Allahabad High Court reported in *State* v. *Saidu Khan*(1). All the cases bearing on the question have been examined in that decision, and it is unnecessary for us to say anything more than this that we accept, with great respect the view expressed in the said Full Bench decision. There was in this case a common intention to assault Ramdhani, and in furtherance of that common intention, the two brothers assaulted Ramdhani in such a

(1) (1951) A. F. R. (All.) 21 F. B.

1953.

SOBRATI v. STATE. DAS, J.

manner as to lead to the inference that they knew that they were committing acts which might cause the death of Ramdhani. The appellant is, therefore, guilty of the offence under the second part of section 304 of the Penal Code. As to the sentence, in our view a sentence of seven years' rigorous imprisonment will amply meet the ends of justice.

The result, therefore, is that the appeal is allowed to this extent only, namely, the conviction of the appellant is altered to one under section 304, Part II, Penal Code, and the sentence is reduced to rigorous imprisonment for seven years only.

RAI, J.—I agree.

Order accordingly.

S. H.

1953.

July, 16, 17. *September*, 24.

APPELLATE CRIMINAL.

Before Das and Rai, JJ.

D. SOREN

v.

STATE.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 124A, 153A, *whether void—Constitution of India, Articles* 13(1), 19(1)(*a*), 19(2).

Sections 124A and 153A of the Penal Code, 1860, are not void by reason of Article 13(1) of the Constitution of India, on the ground that they are inconsistent with the fundamental right of freedom of speech and expression guaranteed to all citizens of India under Article 19(1)(*a*) of the Constitution; they are saved by clause (2) of Article 19 as it now stands after its amendment by the Constitution (First Amendment) Act, 1951, which is retrospective in operation;

Held, however, that none of the speeches came within the mischief of section 124A or section 153A, Penal Code, 1860.

* Criminal Appeals nos. 303, 306 and 312 of 1951, from a decision of Mr. D. P. Sinha, Subdivisional Magistrate, Dumka, dated the 31st May, 1951, and 21st July, 1951.

1953.

D. SOREN v. STATE.

State of Bihar v. *Shailabala*(1), *Bolloman*, In re-(2) and *State of Madras* v. *V. C. Row*(3), relied on.

Tara Singh Gopi Chand v. *The State*(4), *Romesh Thapper* v. *The State of Madras*(5), *Brij Bhusan* v. *State of Delhi*(6), *Tilak*, In re-(7), *Bhalarao*, In re-(8), *Niharendu Dutt* v. *Emperor*(9) and *Tilak*, In re-(10), explained and distinguished.

Appeal by the accused persons.

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

These cases in the first instance came before Imam, J., and he referred them to a Division Bench.

On this reference

B. C. Ghose, *S. Anwar Ahmad*, *G. P. Agarwala*, *Chandi Prasad* and *A. C. Mitra*, for the appellants.

S. C. Chakraverty, for the State.

DAS, J.—These are three appeals which have been heard together. The appellant in Criminal Appeal no. 303 of 1951 is one Debi Soren who has been found guilty under section 124A of the Penal Code and sentenced to pay a fine of Rs. 500 or in default to undergo simple imprisonment for six months by the learned Subdivisional Magistrate of Dumka. In Criminal Appeal no. 306 of 1951, the appellant is Mrs. Hanna Bodra, who has been convicted by the same Magistrate under sections 124A and 153A of the Penal Code and sentenced to pay a fine of Rs. 300

(1) (1952) 1. L. R. 31 Pat. 544, S. C.
(2) (1917) App. Cas. 406.
(3) (1952) S. C. Rep. 597.
(4) (1951) A. I. R. (Punj.) 27.
(5) (1950) A. I. R. (S. C.) 124.
(6) (1950) A. I. R. (S. C.) 129.
(7) (1897) I. L. R. 22 Bom. 528, P. C.
(8) (1947) A. I. R. (P. C.) 82.
(9) (1942) A. I. R. (F. C.) 22.
(10) (1897) I. L. R. 22 Bom. 112.

1953.

D. SOREN v. STATE.

DAS, J.

and Rs. 200 respectively, or in default to undergo rigorous imprisonment for a period of three months. In the third appeal (Criminal Appeal no. 312 of 1951) the appellant is Yunus Soren, who has been convicted by the same Magistrate for offences under sections 124A and 153A of the Penal Code and sentenced to pay a fine of Rs. 300 and Rs. 200 respectively, or in default to undergo rigorous imprisonment for a period of three months. The appeals have been preferred to this Court under clause (*c*) of the proviso to section 408 of the Code of Criminal Procedure.

The cases against the appellants were instituted on a complaint made by the Superintendent of Police, Santal Parganas, after the necessary sanction or authority had been obtained from the State Government in accordance with the provisions of section 196 of the Code of Criminal Procedure. Originally, the three appellants were on trial in one case. By an order dated the 12th of December, 1950, the trial was split up into three separate cases, one case against each of the appellants. The learned Subdivisional Magistrate delivered three separate judgments from which three appeals have been filed. The appeals have been heard together in this Court as common questions of law and fact arise in these appeals. We have heard Mr. S. Anwar Ahmad in two of the appeals and Mr. Basanta Chandra Ghose in Criminal Appeal no. 312 of 1951. Mr. S. C. Chakravarty has represented the State of Bihar in all the three appeals.

Very shortly put the case against these three appellants was the following. There was an annual conference of the Bhagalpur Adibasi Mahasava at a place called Lakhikundi in the district of the Santal Parganas, on the dates 24th, 25th and 26th of March, 1949. Debi Soren presided over the conference. He and the other two appellants, Mrs. Hanna Bodra and Yunus Soren, were the principal speakers. The prosecution case was that on two dates, 25th and 26th of

March, 1949, the appellants made speeches at the conference which brought or attempted to bring into hatred or contempt and excited or attempted to excite disaffection towards the Government established by law in India. Against two of the appellants, Mrs. Hanna Bodra and Yunus Soren, it was further alleged that by the speeches which they delivered they promoted or attempted to promote feelings of enmity or hatred between different classes of the citizens of India. In the charges framed against the appellants certain extracts from their speeches were quoted. It was alleged that Debi Soren made the following statements in his speeches:—

1953.

D. SOREN v. STATE.

DAS, J.

"Government want to suppress and oppress us. It is a matter of shame for the Bihar Government..... The Government do not want to see us developing in business. This clearly shows Zulum on us. Government have promulgated Bihar Maintenance of Public Order Act on us with a view to suppress us. Government have brought false allegations against our Secretary, Kamlu Kinkar, that they have been instigating Adibasis against non-Adibasis. Bihar Government has done many such things in the Damin tract to repress us..... We should not believe the Bihar Government."

Mrs. Hanna Bodra, it was alledged, made the following statements in her speeches:—

"The Britishers had not done so during their rule. I spit on such Government which did merciless firing on our females. We should not respect the Bihar Government. The Bihar Government is cowardly. They opened fire. We are ready to fight..... The Bihar Government has imposed taxes on dogs even and one day they will impose taxes on females also. They would drive us from this place."

It was alleged that she also said:

"Dikus are thieves and dacoits, Biharis entered first like needle but became ploughshares. Go back, Biharis, to your country and construct a hut by the side of the Ganges and sit like a crow and sell oil and salt."

Yunus Soren, it was alleged, had made the following statements:—

"The Bihar Government is placing bars on our way for achieving Jharkhand in various ways, by instituting false cases. Several Adibasis were killed due to Government firing at Kharsawan and other places and dead bodies were carried away in trucks like fuel. We are not afraid of such firing..... Bihar Government is taking undue

1953. advantage because we are all poor. The Bihar Government is oppressing us in various ways."

D. SOREN v. STATE.

He is also alleged to have said:

DAS, J. "Biharis are oppressing us. Biharis had moved Jharkhand. They were our ancestors but hate us now a days. Our chests are made of stone. We are not afraid of Bihari bullets."

I have quoted above extracts from the charges made against the appellants in order to show the nature of the case against them. I shall deal with the speeches in greater detail when I proceed to consider the points urged on behalf of the appellants.

On behalf of the appellants several points were urged before the learned Subdivisional Magistrate. Firstly, it was stated that the speeches which were recorded to have been made by the appellants were not actually made by them, and Debi Soren took the particular point that he did not say many of the things which were recorded as having been spoken by him; secondly, Mrs. Hanna Bodra and Yunus Soren alleged that they did not attend the conference; thirdly, it was urged on behalf of the appellants that the speeches, read as a whole and with reference to the context in which they were made, did not come within the mischief of either section 124A or section 153A of the Penal Code; and lastly, it was contended on behalf of the appellants that after the coming into force of the Constitution of India on the 26th of January, 1950, sections 124A and 153A of the Penal Code, the provisions of which are inconsistent with the fundamental right of freedom of speech and expression guaranteed under Article 19(1)(*a*) of the Constitution, are void by reason of Article 13(1) of the Constitution of India.

The learned Subdivisional Magistrate overruled these pleas, and held that the appellants had made the speeches complained of which in his opinion came

within the mischief of sections 124A and 153A of the Penal Code. On that finding the learned Subdivisional Magistrate convicted and sentenced the appellants.

1953.

D. SOREN v. STATE.

DAS, J.

The plea that two of the appellants did not attend the conference was not persisted in before us; but the other three pleas have been very seriously pressed before us.

I think that it is convenient to deal, first, with such of the questions as are common to the three appeals; thereafter, I shall take up the question whether the speeches delivered by the appellants come within the mischief of section 124A or section 153A of the Penal Code and while dealing with that question, I shall take the case of each appellant separately with reference to the speeches alleged to have been made by him or her.

I proceed now to consider those points which are common to the three appeals. One of the points strongly urged before us is that the speeches as recorded do not correctly represent what the appellants had said at the annual conference of the Bhagalpur Adibasi Mahasava. The evidence in the record shows that two Magistrates and two Sub-Inspectors of Police attended the conference on all the three days. The Magistrates were Messrs. G. Prasad and S. K. Sinha and the Sub-Inspectors of Police were S. Baski and J. Murmu. Both these officers were Santals and knew Santali in which the speeches were made. These officers said that they recorded the speeches *verbatim* and then made an English translation thereof which was signed by the two Magistrates. The Magistrates, it appears, also knew Santali. So far as Mrs. Hanna Bodra was concerned, the evidence was to the effect that she spoke in mixed Santali and

1953.

D. SOREN
v.
STATE.

DAS, J.

Mundari and also used some expressions in Hindi. Mr. Baski admitted in cross-examination as follows:—

"There were about 8 or 10 words of Mundari which the accused used in her speech and which I could not understand. Those words were omitted by me..... The accused's speech was a mixture of Santhali, Hindi and Mundari expressions."

Referring to Mrs. Hanna Bodra, Mr. Murmu said:—

"She made speeches at the conference in Santali but her knowledge of the language appeared to be poor as she was consulting persons near her for Santhali expressions.....

I do not know Mundari. The accused did not speak in Mundari, except one or two expressions. She used to ask for Santali expression when she did not know one. I omitted to record the Mundari expressions she used."

Mr. Murmu further gave evidence to the effect that the speeches which he recorded were recorded word by word. So far as Yunus Soren is concerned, Mr. Murmu said:

"This is accused Yunus Soren. He made speeches in Santali but he did not seem to know the language well and consulted the persons sitting around him for Santali expressions."

Mr. Baski said that in the speech of Yunus Soren also there were Mundari expressions which the witness could not understand.

It is against the background of the aforesaid evidence that the English translations of the speeches which have been exhibited in the cases against the appellants, have to be considered. Mr Basanta Chandra Ghose pointed out to us that the records of the speeches as prepared by the two officers, Messrs. Baski and Murmu, do not tally with each other and on the basis of the difference in the two records he has argued that the prosecution has failed to prove with reasonable certainty that the speeches, on the basis of which the charges against the appellants have been made, were actually made by them. I have examined and compared the speeches recorded by the two officers. Except in some particulars the records substantially agree. When two persons try to make

verbatim records of speeches delivered by word of mouth and then make translations, some differences in the two records are inevitable, however accurate the reporters may try to be; first of all, each reporter may not be able to take down each word as it is spoken and may miss a few words; secondly, the English translation will also result in some difference, because the same Santali word will not be translated by the same English word by the two reporters. Therefore, in the two records prepared there are some verbal differences; some particulars have been included in one whereas they have been omitted from the other record; with regard to some of the speeches one record is fuller than the other. I have made allowances for all these differences in favour of the appellants and consider that only that part of the record should be accepted where both the reporters agree as to a particular statement having been made by one or other of the appellants. I do not accept the contention of Mr. Basanta Chandra Ghosh that the reporters have falsely or incorrectly reported the speeches. There is substantial agreement between the two records, and that shows that the records are substantially correct. The first point urged on behalf of the appellants must, therefore, be overruled.

The next question is if sections 124A and 153A of the Penal Code are void by reason of Article 13(1) of the Constitution of India, on the ground that they are inconsistent with the fundamental right of freedom of speech and expression guaranteed to all citizens of India under Article 19(1)(*a*) of the Constitution of India. It is to be remembered that the speeches in this case were delivered on the 25th and 26th of March, 1949, that is on dates prior to the coming into force of the Constitution of India. Apart, however, from that consideration, I am unable to accept the contention that the provisions of sections 124A and 153A of the Penal Code were rendered void, on the ground

1953.

D. SOHAN v. STATE.

DAS, J.

alleged, after the 26th of January, 1950, the date on which the Constitution of India came into force except certain provisions of the Constitution with which we are not concerned in the present case. The two learned Counsel for the appellants have placed reliance on the decision in *Tara Singh Gopi Chand* v. *The State*(1). That was a case in which the speeches impugned were delivered after the coming into force of the Constitution of India, and the question arose whether sections 124A and 153A of the Penal Code were void as contravening the right of freedom of speech and expression guaranteed by Article 19 of the Constitution. Their Lordships held that those two sections were void. Since that decision there has been a change in the Constitution to which a reference must now be made. Article 19(1)(*a*) lays down that all citizens shall have the right to freedom of speech and expression. Article 19(2) as it originally stood in the Constitution of India said:

> "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

By the Constitution (First Amendment) Act, 1951, which was made on the 18th of June, 1951, with retrospective effect, clause (2) of Article 19 was altered to read as follows:

> "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

The point of difference is that clause (2) of Article 19 as it originally stood mentioned the security of the State or overthrow of the State; the amendment considerably widened its scope and referred to, *inter alia*,

(1) (1951) A. I. R. (Punj.) 27.

"public order" an expression which did not occur in the clause as it originally stood. The decision of the East Punjab High Court cited above proceeded on two main grounds: (1) the interpretation of section 124A as given by the Privy Council in *Sadashiv Narayan Bhalerao's case*(1) an interpretation to which I shall presently refer; and (2) the interpretation of clause (2) of Article 19 (as it originally stood) given by the Supreme Court of India in two decisions, *Romesh Thapper* v. *The State of Madras*(2) and *Brij Bhusan* v. *The State of Delhi*(3). Of the two reasons given above, the second, in my opinion, is no longer tenable by reason of the alteration made by the Constitution (First Amendment) Act, 1951. His Lordship, Weston, C. J. (as he then was) observed as follows with regard to clause (2) of Article 19:

1953.

D. SOREN v. STATE.

DAS, J.

"The limitation placed by clause (2) of Article 19 upon interference with the freedom of speech, however, is real and substantial. The unsuccessful attempt to excite bad feelings is an offence within the ambit of Section 124A. In some instances at least the unsuccessful attempt will not undermine or tend to overthrow the State. It is enough if one instance appears of the possible application of the section to curtailment of the freedom of speech and expression in a manner not permitted by the Constitution. The section then must be held to have become void."

In my view, this reason is no longer valid and on two grounds: firstly, the scope of clause (2) of Article 19 has now been widened, and the clause says in express terms that nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of, amongst other things, public order;

(1) (1947) A. I. R. (P. C.) 82.
(2) (1950) A. I. R. (S. C.) 124.
(3) (1950) A. I. R. (S. C.) 129.

1953.

D. SOREN v. STATE.

DAS, J.

the clause is no longer confined to the security or overthrow of the State but includes also public order. In other words, any reasonable restriction on the exercise of the right conferred by sub-clause (*a*) of clause (1) in the interests of public order is now permissible, and any such reasonable restriction imposed by any existing law will be valid and good. The two decisions of the Supreme Court on which his Lordship Weston, C. J. relied were explained in a subsequent decision of the Supreme Court, in an appeal from a decision of this Court, in the *State of Bihar* v. *Shailabala*(1). It was pointed out by his Lordship Mahajan, J. that the decisions of the Supreme Court in *Romesh Thapper's case*(2) and *Brij Bhusan's case*(3) were more than once misapplied and misunderstood. His Lordship further observed that the matter was now concluded by the language of the amended Article 19(2) made by the Constitution (First Amendment) Act which is retrospective in operation. I do not think that it can now be held on the strength of *Romesh Thapper's case*(2) or *Brij Bhusan's case*(3) that the provisions of sections 124A and 153A are void.

The question still remains if they are saved by clause (2) of Article 19 as it now stands. The contention of Mr. Basanta Chandra Ghose is that if the provisions of section 124A are interpreted in the way laid down by the Bombay High Court and approved by the Privy Council in *Tilak's case*(4) and *Bhalerao's case*(5) then those provisions are inconsistent with the guaranteed right of freedom of speech and expression and are not saved even by clause (2) of Article 19 as it now stands. Mr. Ghose has elaborated his argu-

(1) (1952) I. L. R. 31 Pat. 544, S. C.
(2) (1950) A. I. R. (S. C.) 124.
(3) (1950) A. I. R. (S. C.) 129.
(4) (1897) I. L. R. 22 Bom. 112; 528, P. C.
(5) (1947) A. I. R. (P. C.) 82.

ment in the following way. There has been a difference of opinion with regard to the true meaning and effect of section 124A of the Penal Code with its three explanations. In *Niharendu Dutt* v. *Emperor*(1) Gwyer, C. J. (as he then was) said:

1953.

D. SOREN v. STATE.

DAS, J.

" Public disorder, or the reasonable anticipation or the likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder, or must be such as to satisfy reasonable men that that is their intention or tendency."

He pointed out that the phrase " to bring Government into contempt " was not intended to minister to the wounded vanity of Governments; but the purpose was that where Government and the law ceased to be obeyed, there was no respect felt any longer for them and anarchy was likely to follow. In *Bhalerao's case*(2) referred to above the Privy Council did not accept the aforesaid interpretation. It was observed:

" Their Lordships are unable to find anything in the language of either section 124A or the Rule which could suggest that 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency'. The first explanation to section 124A provides: The expression 'disaffection' includes disloyalty and all feelings of enmity'. This is quite inconsistent with any suggestion that 'excites or attempts to excite disaffection' involves not only excitation of feelings of disaffection, but also exciting disorder."

Their Lordships reaffirmed the view expressed by Strachey, J. in *Tilak's case*(3) where Strachey, J. said:

" The offence consists in exciting or attempting to excite in others certain bad feelings towards the

(1) (1942) A. I. R. (F. C.) 22.
(2) (1947) A. I. R. (P. C.) 82.
(3) (1907) I. L. R. 22 Bom. 112.

1953.

D. SOREN v. STATE.

DAS, J

Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."

Their Lordships also reaffirmed their earlier decision in *Besant* v. *Advocate General of Madras*(1) and *Wallace Johnson* v. *The King*(2).

Mr. Basanta Chandra Ghose has contended before us that if the provisions of section 124A are given such a wide interpretation as was given by Strachey, J. and approved by the Privy Council, then those provisions cannot be said to be reasonable restrictions in the interest of public order; they go beyond public order and impose an unreasonable restriction on the freedom of speech and expression guaranteed by subclause (*a*) of clause (1) of Article 19 of the Constitution. I must say that the argument of Mr. Ghose is a very plausible argument. The decision of the Privy Council in *Bhalerao's case*(3) was referred to by the Supreme Court in *Romesh Thapper's case*(4) where his Lordship Patanjali Sastri, J. (as he then was) observed:

" Deletion of the word ' sedition ' from the draft article 13(2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it

(1) (1919) L. R. 46 Ind. App. 176.
(2) (1940) A. C. 231.
(3) (1947) A. I. R. (P. C.) 82.
(4) (1950) A. I. R. (S. C.) 124.

1953.

D. SOREN v. STATE.

DAS, J.

is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security of or tend to overthrow the State. It is also significant that the corresponding Irish formula of 'undermining the public order or the authority of the State' [article 40(6)(*i*) of the Constitution of Eire, 1937] did not apparently find favour with the framers of the Indian Constitution."

It is worthy of note, however, that his Lordship was considering clause (2) of Article 19 as it originally stood and his Lordship pointed out pertinently that the framers of the Indian Constitution did not accept the Irish formula of "undermining the public order or the authority of the State". That formula has now been accepted by the Constitution (First Amendment) Act, 1951. It may be relevant to refer to certain observations of Fazl Ali, J. (as he then was) in *Brij Bhusan's case*(1), though his Lordship's judgment was a dissenting judgment in that case. After referring to the decisions in *Niharendu Dutt Majumdar's case*(2) and *Bhalerao's case*(3), his Lordship observed:

"The framers of the Constitution must have therefore found themselves face to face with the dilemma as to whether the word 'sedition' should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way or other with public disorder; and, on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the

(1) (1950) A. I. R. (S. C.) 129.
(2) (1942) A. I. R. (F. C.) 22.
(3) (1947) A. I. R. (P. C.) 82.

1953.

D. SOREN v. STATE.

DAS, J.

Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word 'sedition' in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the State usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State."

It seems to me that in construing the provisions of sections 124A and 153A of the Penal Code, it should be the effort of the Court to give that interpretation of those provisions which would make them consistent with the Constitution of India, unless the language of the provisions precludes such an interpretation. Section 153A condemns, amongst other things, such speeches as promote feelings of enmity or hatred between different classes of the citizens of India. Acts which promote such feelings or attempt to promote such feelings undoubtedly affect public order in its wider meaning though there may be no immediate incitement to violence. Section 124A condemns, amongst other things, such speeches as bring or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards, the Government established by law in India. The first explanation to the section says that "disaffection" includes disloyalty and all feelings of enmity. The second explanation says that comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or

1953.

D. SOREN v. STATE.

DAS, J.

disaffection, do not constitute an offence under the section. The third explanation says that comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under the section. If the section is read as a whole together with the explanations, it seems clear that the mischief which it contemplates has a reference to public order in its widest sense, even though the section does not make it necessary that there should be a direct incitement to violence or disorder. My view is that even accepting the interpretation put upon the section by their Lordships of the Privy Council, the restrictions it imposes on freedom of speech and expression are reasonable restrictions in the interests of public order. It is worthy of note that the expression used in clause (2) of Article 19 is "in the interests of public order" and not "public order" simpliciter. The expression "in the interests of public order" has a wide connotation and should not be confined to only one aspect of public order, viz., incitement to violence or tendency to violence. Public order can be affected in other ways also; and creating disaffection, hatred or contempt towards the Government established by law (not merely comments which express disapprobation of Governmental measures or administrative and other action of Government) may seriously affect the interests of public order, even though there may be no tendency or incitement to violence. Incitement to violence no doubt directly affects the maintenance of public order; but the expression "in the interests of public order" is not confined merely to such incitement. It has a much wider content and embraces such action as undermines the authority of Government by bringing it into hatred or contempt or by creating disaffection towards it; one must however always keep in view the distinction which the section itself makes between

1953.

D. SOREN v. STATE.

disaffection and mere disapprobation of Governmental measures or action. From this point of view, clause (2) of Article 19, as it now stands, saves the provisions of sections 124A and 153A of the Penal Code.

DAS, J.

I am, however, prepared to go a little further and hold that if a somewhat narrower interpretation of the provisions of sections 124A and 153A will make these provisions consistent with the Constitution of India, that interpretation ought to be preferred unless the language coerces the Court to hold otherwise. In *Bowman's case*(1) Lord Sumner said:

"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because the times having changed, society is stronger than before."

The question whether a particular speech does or does not come within the mischief of sections 124A or 153A is a question of fact, and on a question of fact it is permissible to take note of the changing times and circumstances. As Lord Sumner said so well in *Bowman's case*(1):

"The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact."

It is true that if a maxim is expressed as a positive rule of law, "time cannot abolish it nor disfavour

(1) (1917) A. C. 406.

make it obsolete " [as per Lord Finlay in *Bowman's case*(1)]. I agree that a change in the spirit of the time cannot justify a change in a principle of law by judicial decision, though changes in public opinion may lead to legislative interference and substantive alteration of the law. But where two interpretations can be given to the words of an existing law, the Court should accept that interpretation which is in favour of constitutionality rather than an interpretation which will make the law unconstitutional. In *State of Madras* v. *V. C. Row*(1) his Lordship Patanjali Sastri, C. J. said:

1953.

D. SOREN v. STATE.

DAS, J.

" It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

(1) (1952) S. C. R. 597.

1953.

D. SOREN v. STATE.

DAS, J.

In my opinion, unless compelled by the words used in sections 124A and 153A, the Court should not hold that the provisions of those two sections impose unreasonable restrictions on the guaranteed right of freedom of speech and expression, or that the restrictions imposed are not in the interests of public order. I do not wish to pursue this question any further as my view is that even on the interpretation given by the Privy Council the provisions of sections 124A and 153A of the Penal Code impose reasonable restrictions in the interests of public order, giving that expression a fair and reasonably wide meaning. Speaking personally and with very great respect, it appears to me that the interpretation put by the Privy Council on the provisions of section 124A are unduly literal and verbal, it was given in the context of a state of affairs existing prior to the Constitution of India and, in my humble opinion, does not give full effect to the second and third explanations appended to the section in the context of freedom of speech and expression now guaranteed under the Constitution. The second point urged on behalf of the appellants must, therefore, be overruled.

I now propose to take up the case of each individual appellant and consider whether the speeches delivered by him or her come within the mischief of section 124A or section 153A of the Penal Code.

In considering the speeches on merits two points have to be kept in mind, and in fairness to the learned Subdivisional Magistrate, it must be said that he did mention these points in his judgment. The first point is that the speeches made must be considered as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong expression used here and there; in other words, an attempt should be made to gather the general effect of the speeches as a whole. The second point is that

the intention of the speaker in using the words complained of is relevant; but the intention must be gathered from the language used, as also from the whole of the circumstances in which the speeches were made including the audience to whom they were addressed.

1953.

D. SOREN v. STATE.

DAS, J.

On the 25th March, 1949, Debi Soren said (I am quoting the portion, Mr. S. C. Chakravarty referred to as objectionable):

"Ten years ago the Adibasi Mahasabha was laughed at and ridiculed as an agitation of a few job-hunters. To-day the All-India Adibasi Mahasabha can rightly boast of being the only organisation commanding the respect and allegiance of thousands of Adibasis. Now the Bihar Government is afraid of such organisation and wants to oppress us in various ways. I know how you people have come, you had to come here on foot as the buswalas did not let you come by the bus. I know even the Subdivisional Officer of Godda opposed you people and said to some people 'Debi Soren is in Jail there is no need of going to Dumka' (shouting by audience 'S. D. O. Godda Jhutha Hai'). I do not understand what for Government has kept such officers. For such propaganda many officers have been posted. It is said that wells, Band, Bandh have been constructed for the Adibasis. It is also said that at Hansdiha there is a welfare institution for the Adibasis. I have not seen such institution at Hansdiha and such Bandhs, Nahars, wells are only on paper but not in action. The Government money is being spent uselessly. If anybody points out such improper action he receives bullets. (Shouts 'Bihar Sarkar ko sharam hai'.) Social gatherings are also being banned. Damin Magistrates have been deputed for misrepresenting real state of affairs of Damin Area. Why the Government does not post any Magistrate towards Raneshwar side? It is therefore clear that Government attitude is not for the good of Adibasis. Hindi proverb 'Muh me Ram Ram begal me Chura' applies to them. Therefore we must have Jharkhand so that we may not be oppressed.

Authorities will not allow us to develop in the business also ....

The Bihar Maintenance of Public Order Act ought not to have been extended in this area. This Act is only for oppressing and to bind us down uselessly. We are prosecuted falsely. They arrested us only for harassment. This Act should be withdrawn forthwith.....

On the 26th, he said:

"We will not take rest until we achieve Jharkhand. Whatever you have heard here, keep it in your mind and act accordingly. If you do not do so, it is of no use. Time is fast changing and we must march

1953.

D. SOREN v. STATE.

with time. Bihar Government has done many works in Damin, but all these works are intended to suppress with our votes. Consequently no work should be done without our consent. There are several instances of injustice against us. Bihar Government claims to have spent much money for making Dand, Bandh, etc., but these are more in paper circulation than in actual work.

DAS, J.

The general effect of these two speeches, as one reads them, is that the Adibasi Mahasabha, of which Debi Soren was the President, wanted a separate State or region called Jharkhand, with a separate administration for the Adibasis; and in giving reasons for such a claim or demand criticisms were made of certain administrative and legislative measures of the Government of Bihar. I do not understand how such criticisms can be said to bring the Government of Bihar into hatred or contempt or create any disaffection towards it. Mr. Chakravarty has contended that a demand for a separate region for Adibasis will mean a dismemberment of the State of Bihar; that, however, is a political question on which this Court need express no opinion; nor is it necessary or desirable to make any judicial observation with regard to the merits of the controversy which has been recently raised for the formation of linguistic States—a controversy which may be political, economic or even cultural; but which has very little bearing on the questions at issue before us. It is sufficient to point out that our Constitution contains provisions for the formation of new States, alteration of the boundaries of existing States, etc.; and an agitation for the formation of a new State does not necessarily come within the mischief of section 124A. It may, if the agitation is based on an incitement to violence or brings or attempts to bring the existing Government into hatred or contempt, etc. This, in my opinion, Debi Soren's speech does not do, though some of the criticisms appear to be ill-informed and couched in crude and impolite language. The general effect of the speeches is that the Government of Bihar have not done much or enough for the Adibasis; therefore, the Adibasis must have a separate

Jharkhand. Whether this claim is right or wrong is not the question at issue before us; but it is clear that the expression of such a claim does not necessarily bring one within the mischief of section 124A or 153A of the Penal Code—whether we take the wider interpretation of *Tilak's case*(1) or the interpretation of *Niharendu Dutt Majumdar's case*(2).

1953.

D. SOREN v. STATE.

DAS, J.

I now proceed to the case of Mrs. Hanna Bodra. On the 25th March, 1949, she gave the following speech:—

"Brothers and sisters, for the last six thousand years we have been serving Dikus in various ways in order to have their sympathy and love. But instead they hate us. They are foreigners. They do not want to mix with us. They cannot understand us and hence they will not treat us kindly. Referring to Mrs. Kanhu Kishu she said that she (Mrs. Kanhu) was in District Board School but she was not paid for one year. Had there been a Diku teacher they would not have done so. They are oppressing us in various ways. In Mayurbhunj we have been shot and killed. Women have been killed. I spit upon such Government who can do *zulum* to the helpless. Britishers did not do like this but why Bihar Government did like this? But I say sisters do not be afraid and be bold.

We served the Biharis as our king but they have never protected us. They cannot help us to give us Jharkhand. Sisters, think over the matters. We must obtain Jharkhand. In Ranchi coloured water was poured on our girls by the Hindu boys. They do not care for our religion. So we must obtain Jharkhand."

(1) (1897) I. L. R. 22 Bom. 112.
(2) (1942) A. I. R. (F. C.) 22.

1953.

D. SOREN v. STATE.

DAS, J.

On the 26th, she said:—

"We Adibasis were very prosperous, but the Dikus (non-Santhals) who are dacoits, thieves and mischievous have taken away all our wealth. They made our people to take intoxicant and in drunken state they get promises of liberal transactions and they looted us. Our people fought at Rohtasgarh and females defeated the enemy. To commemorate that female hunting is observed and hunting is due in 1952. In Mayurbhanj Government opened fire on the Adibasis and took away their ornaments, etc., worth Rs. 1,200 but we should not be afraid of this. Suna Ram was also shot but he escaped. That time also they took away properties worth Rs. 3 lacs. We should be prepared to fight. The Government is coward. By resorting to firing Government prove its weakness. Orissa Government cannot continue its rule either by resorting to firing or using Atom Bomb who made this demon-like '(Bhut) Government. In Republican Government consent of the people should be taken. They have got no understanding capacity who made such 'nasamaih' Government. Bihar Government has imposed taxes on dog even and one day they will impose tax on the females. Brothers and sisters, raise funds for us by staging drama and we will also collect money by sewing, etc. Otherwise they will drive us from this place."

Mrs. Bodra no doubt used stronger and vituperative language; she talked of spitting on the Government and called the Government cowardly. In using such expressions she was abusing the privilege of a woman, and perhaps exceeding the bounds of decency. But the general effect of the speeches is the same as that of the speeches of Debi Soren. The avowed claim is the formation of Jharkhand, and in giving reasons in support of that claim strong criticisms of Governmental measures and administrative action

have been made. In a democratic country such criticisms are to some extent unavoidable; they are made for the purpose of enlisting popular support, and in considering the effect of such criticisms no serious notice ought to be taken of crude, blundering attempts or of rhetorical exaggerations by which nobody is likely to be impressed. The reference to Dikus (non-Santals) is not for the purpose of promoting hatred or ill-feeling amongst different classes of citizens, but rather in support of the claim for Jharkhand. As Lord Sumner pointed out, with the change of times, the effect of criticisms also changes; what was damaging contempt or hatred of a bureaucratic Government is not so of a popular Government—a Government which can neither afford to be hyper-sensitive, nor impervious, to criticism.

The effect of the speeches of Yunus Soren is the same. On the 25th he said:—

"Our ancestors have occupied this land from the very beginning and cleared the jungles of this land and so we have every claim over it. But these Dikus are driving us from the land and are oppressing us. This land is about 57,665 square miles in area and our population (Adibasis) is 13,187,754. According to Mahatma Gandhi's version the land which is populated by one big community should be administered by the same community so we should administer this land. But Bihar Government is a great opponent in this matter, and is oppressing us in various ways. We have established this Government by vote and if this Government will oppress and suppress us and instead of doing good it will harm us, we cannot support this Government. Many Adibasis were killed by firing at Tapkara, Mayurbhanj and some other places and they were loaded in truck like fuel and carried away to some unknown places for disposal. How can we side such a Government? The policy is divide and rule like that of Britishers. Nowadays Ministers can spend public money uselessly. At Palkot meeting in Ranchi District 3 bags of sugar and 3 bags of Ata were consumed by the Ministers. I say wherefrom they got these stuff when the public are not getting them. The present Ministry say that the Christian Adibasis and non-Christian Adibasis are different. I challenge the Ministers that it is not so. I say that they are the one and same. Let this be the bet.

If it is proved that these Christian and non-Christian Adibasis are separate then let Yunus Soren be hanged and his properties be distributed among the poor. But if it is proved contrary then let Mr. Srikrishna Sinha and Krishna Ballabh Sahai be hanged and their

1953.

D. SOREN
v.
STATE.

properties be distributed among the poor. But for proving this foreign experts from Germany, France, Russia, England and U. S. A. be called for blood culture."

On the 26th, he said:.

DAS. J.

"If we can withstand all the obstacles we must get Jharkhand. It is a universal belief that a country will gain its objective if theh females of that country join the struggle for its emancipation. So also if we try for Jharkhand we must achieve. The Bihar Congress Government is taking undue advantage because we are poor. If we can collect even even one lac as our fund the mouth of Bihar Congress Government will be sealed itself. We cannot live under the Bihar Congress Government. Fund is necessary for achieving our goal which is Jharkhand and is oppressing us in various ways. Bihar Government keep our men in jail. We must co-operate with Bengalee Brahmins, Rajput and other without money nothing can be done..... The Bihar Government castes who support our Jharkhand movement. We must subscribe for Jharkhand."

Shorn of all exaggerations, the speeches put forth a claim for Jharkhand, and in putting forth that claim, asked for the co-operation of all classes of people. I do not think that it is a fair construction of the speeches, read as a whole, to say that they created disaffection towards Government established by law or brought or attempted to bring that Government into hatred or contempt, or promoted feelings of class hatred.

In the result, I would hold that none of the speeches come within the mischief of section 124A or section 153A of the Penal Code—whether a narrow or wider interpretation of the provisions of those sections be taken. The appeals must, therefore, be allowed, the convictions and sentences are set aside, and the appellants are acquitted. The fines, if they have been paid, must be refunded to the appellants.

RAI, J.—I agree.

Appeals allowed.

S. H.

MISCELLANEOUS JUDICIAL.

1953.

Before Ramaswami and Sinha, JJ.

September, 4, 7, 11, 28.

RAMPHAL

v.

STATE.*

Bengal Ferries Act, 1885 (*Bengal Act I. of* 1885)—*Sub-divisional Magistrate, whether has authority to make private settlement of a public ferry—a bidder, whether can apply for a* writ *of* mandamus—*formal demand and refusal, whether essential—Constitution, Article* 226.

The Subdivisional Magistrate has no authority under the Bengal Ferries Act, 1885, to make a private settlement of the tolls of a public ferry. Any such settlement is void and *ultra vires*.

Ex parte Stephens(1), relied on.

Any bidder at the auction has the legal right to apply under Article 226, Constitution, for the issue of a *writ* of *mandamus*.

Rambharosa Singh v. *The Government of the State of Bihar and others*(2), *The Queen* v. *Bowman*(3), *The King* v. *Manchester Corporation*(4) and *The King* v. *Speyer*(5), referred to.

Held, that, in the circumstances, there was no question of formal demand by the petitioner and formal refusal by the Subdivisional Magistrate to enable the former to make an application for a *writ* of *mandamus*.

Surendra Nath Das and others v. *The State of West Bengal*(6), distinguished.

Commissioner of Police, Bombay v. *Gordhandas Bhanji*(7), relied on.

* Miscellaneous Judicial Case no. 269 of 1953, in the matter of an application under Article 226 of the Constitution of India.

(1) (1876) 3 Ch. D. 659, 660.
(2) (1953) I. L. R. 32 Pat. 592.
(3) (1898) 1 Q. B. 663.
(4) (1911) 1 K. B. 560.
(5) (1916) 1 K. B. 595.
(6) (1951) A. I. R. (Cal.) 396.
(7) (1952) S. C. Rep. 185.

8 I. L. R.

1953.

RAMPHAL v. STATE.

In the matter of an application under Article 226 of the Constitution.

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

Baldeva Sahay, Rash Bihari Lal and *Nakuleshwar Prasad*, for the petitioner.

Satyanand Kumar, Vinod Chandra, Sushil Kumar Jha and *Government Pleader*, for the opposite-party.

RAMASWAMI, J.—In this case, petitioner Ramphal Singh has moved this Court for a writ in the nature of mandamus under Article 226 of the Constitution of India commanding the respondents nos. 3 and 4 to lease the tolls of the Barh-Benarsi-Sultanpore Ferry by public auction and to cancel the private settlement made with the respondents nos. 5 and 6.

The Barh-Benarsi-Sultanpore Ferry has been declared by the State Government to be a public ferry under section 6 of the Bengal Ferries Act. The ferry was managed by the Patna District Board till the year 1944, but, on the 15th of January, 1945, the Government of Bihar notified that the ferry would be managed by the Barh Municipality in the district of Patna. In the year 1949, the Municipality was superseded under section 385 of the Bihar and Orissa Municipal Act. The Municipality was, in consequence, placed under the control and management of the Subdivisional Magistrate of Barh who was appointed as the Special Officer of the Municipality. The Special Officer issued a notification that on the 9th of January, 1953, the tolls of the Barh-Benarsi-Sultanpore Ferry would be settled by public auction. The date was postponed to the 31st of January, 1953, and again to the 5th of March, 1953, as the bids offered were not adequate. On the 5th of March, 1953, the Subdivisional Magistrate held the public auction and the petitioner Ramphal Singh offered

the highest bid of Rs. 8,200. On that date, the petitioner deposited a sum of Rs. 2,000 as earnest money. The balance was deposited by the petitioner on the 6th of March, 1953, into the Barh Treasury by means of a chalan. On the 13th of March, 1953, the petitioner executed a registered kabuliat and filed it in the Municipal office. The complaint of the petitioner is that on the 29th of March, 1953, the Subdivisional Magistrate rejected the petitioner's bid and ordered that the amount paid by the petitioner should be refunded. The Subdivisional Magistrate further ordered that the ferry would be retained by the Municipality in khas possession. On the 7th of April, 1953, however, the Subdivisional Magistrate made a private settlement with the respondent no. 5, Suraj Singh and the respondent no. 6, Ram Prasad Singh, for a sum of Rs. 12,000. The petitioner asserts that the private settlement made with the respondents nos. 5 and 6 is null and void and that the Subdivisional Magistrate has violated the statute in making the private settlement. The petitioner has therefore moved this Court for grant of a writ of mandamus directing the Subdivisional Magistrate to make a settlement by public auction and cancel the private settlement.

The first question which arises in this case is whether the Subdivisional Magistrate has committed any breach of statute in making private settlement of the Barh-Benarsi-Sultanpore Ferry with the respondents nos. 5 and 6. The question involves the interpretation of several sections of the Bengal Ferries Act. Section 6 states that

> " it shall be lawful for the Provincial Government from time to time to declare what ferries shall be deemed public ferries, and the respective districts in which, for the purposes of this Act, they shall be deemed to be situate ..... "

Section 7 declares that

> " the control of all public ferries shall be vested in the Magistrate of the district, subject to the direction of the Commissioner ".

1953.

RAMPHAL v. STATE.

RAMASWAMI, J.

Section 8 enacts that

" the immediate superintendence of every public ferry shall be vested in the Magistrate of the district in which such ferry is situated, or in such other officer as the Provincial Government may, from time to time, either by name or by official designation, appoint ".

Section 8 further requires that

" such Magistrate or officer shall, except when the tolls at such ferry are leased, make all necessary arrangements for the supply of boats for such ferry, and for the collection of the authorized tolls leviable thereat ".

Section 8 therefore imposes a duty on the Magistrate to make arrangements for the supply of boats and for collection of tolls, in case the tolls are not leased. The duty is imposed on the Magistrate unless he decides to lease the tolls of the ferry. Section 9 enacts in what manner the lease is to be made. Section 9 provides that " the tolls of any public ferry may, from time to time, be leased by public auction for such term as the Magistrate of the district in which such ferry is situated may, with the approval of the Commissioner, direct." Section 9 further states that " the Magistrate of the district or the officer authorized by him to conduct such auction may, for sufficient reason to be recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction ". If section 9 is read in the context of section 8, it is manifest that the Magistrate of the district has the power to manage the public ferry *khas* or to lease the tolls of the ferry by public auction. Section 9 imposes a duty on Magistrate to lease the tolls by public auction. It is open to the Magistrate to refuse to accept the offer of the highest bidder for sufficient reason to be recorded in writing. In such a case, the Magistrate may accept any other bid or may withdraw the tolls from auction but the Magistrate has no authority to make a settlement of the tolls by private treaty. The statute authorises the Magistrate to make a settlement of the tolls by public auction alone.

1953.

RAMPHAL v. STATE.

RAMASWAMI, J.

This view is supported by rule 2 of the Model Rules framed by the State Government under section 15 of the Bengal Ferries Act. Rule 2 states that

" every public ferry shall either be held in khas by the Magistrate, or be leased by public auction ".

Rules 5, 6, 7, 7-A and 7-B relate to the manner in which the public auction is to be held. In a case of this description, the principle to be applied is clear. The principle is that when a statute directs that a power is to be exercised in a certain manner, that power should be exercised in that particular manner and in no other manner. In other words, the powers of the Subdivisional Magistrate are limited to those expressly mentioned in sections 8 and 9 of the Bengal Ferries Act. The Magistrate is clothed only with those powers specially conferred by statute and with no other powers. To illustrate this principle reference may be made to *Ex parte Stephens*(1). The question in that case was whether a mere word or distinctive combination of letters was a trade mark within the meaning of the Trade Marks Registration Act, 1875. By section 10 of that Act, it was enacted that a Trade Mark might consist of (among other things) " any special or distinctive combination of letters used as a trade mark *before* the passing of this Act ". It was accordingly held that " a word which had not been used as a trade mark before the passing of the Act could not be used as a trade mark *after* the passing of the Act ". At page 660, Jessel, M. R., states:

" Here is a power to register a special and distinctive word, if used before the Act, shewing that it cannot be registered under the Act. Otherwise it would be contravening the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing

(1) (1876) 3 Ch. D. 659.

1953.

RAMPHAL v. STATE.

RAMASWAMI, J.

else can be done, so that the power to register a trade mark used before the passing of the Act clearly negatives the conclusion that a distinctive word can be used as a trade mark first used after the passing of the Act. A well-known illustration of that rule may be derived from the Act which gave power to railway companies to borrow on mortgage or bond. It was said that, irrespective of that Act, any corporation might borrow, by common law either on mortgage or otherwise. The answer was, that there being a definite power given, you must import the negative so that the company could only borrow on mortgage or bond. So here, there being power to register a distinctive word used before the Act, it is conclusive to my mind that it cannot be registered if first used after."

Adopting this principle in the present case, I hold that the Subdivisional Magistrate had no authority under the Bengal Ferries Act to make a private settlement of the tolls of the Barh-Benarsi-Sultanpore Ferry with respondents nos. 5 and 6 and the settlement so made by the Subdivisional Magistrate on the 7th of April, 1953, is *ultra vires* and void.

In the course of the argument, reference was made by Government pleader to the circular of the Provincial Government no. 40—44-L.S.-G., dated the 29th April, 1926, addressed to the Commissioners of the Divisions wherein it is stated:

> "Section 9 of the Bengal Ferries Act prescribes lease by auction as the normal method of settling public ferries, and I am directed by Government to emphasize this fact and to state definitely that lease by public auction is to be regarded as the ordinary method of settlement in future. If in any case recourse is had to private settlement the special circumstances justifying that course must be reported through the local officers for the information of Government ....."

The Government pleader based his argument on this Government Circular and contended that it was open to the Magistrate in exceptional cases to make a private settlement. In my opinion, there is no justification

for this argument. The Government Circular merely embodies the opinion of the Government as to the interpretation of section 9 of the Bengal Ferries Act. The opinion of the Government cannot control the legal interpretation of section 9 which is a matter for courts of law to decide. For the reasons which I have expressed, I am of opinion that the interpretation placed by Government as to the powers conferred in section 9 is not correct and that the Magistrate has no authority to make a settlement of the ferry by private contract.

The Government pleader next put forward the submission that the petitioner had no legal specific right which entitled him to enforce the performance of the duties imposed upon the Subdivisional Magistrate under the statute. It was pointed out that the offer of the petitioner on the 5th of March, 1953, was not accepted by the Subdivisional Magistrate and until the acceptance of the bid the petitioner had no contractual right. On this point, Mr. Baldeva Sahay conceded that the Subdivisional Magistrate had not accepted the bid of Rs. 8,200 which the petitioner had offered. But the argument of Mr. Baldeva Sahay is that even if the petitioner had no contractual right, the application for writ under Article 226 of the Constitution was competent. Counsel based his argument on the decision of this Court *Rambharosa Singh* v. *State*(1). In my opinion the objection raised by the Government pleader must be overruled. It is true enough to state as a general proposition that the advertisement of a sale by public auction does not amount in law to a contract with any one who might act upon the advertisement. The reason is that an advertisement of a sale by public auction is a mere declaration of an intention and does not constitute an offer to the persons who intend to

(1) (1958) I. L. R. 32 Pat. 592.

1953.

RAMPHAL v. STATE.

RAMASWAMI, J.

bid at the auction sale. The question at issue in the present case is, however, different. The question is not whether the petitioner has a legal right to enforce the contract. The claim of the petitioner is not founded on any contractual right. The petitioner, on the contrary, has based his claim on the breach of statutory obligation imposed upon the Subdivisional Magistrate. I think that upon the facts of this case the petitioner has a sufficient legal right—sufficient to prosecute an application for a writ under Article 226. It is not disputed in this case that the petitioner was a bidder at the auction held on the 5th of March, 1953. The petitioner had offered the highest bid of Rs. 8,200 and had also deposited a sum of Rs. 2,000 on the same date. Later on, the petitioner made the deposit of the balance of Rs. 6,200 and executed a registered Kabuliat in the prescribed form. In view of these facts I think that the petitioner was within the range of those persons to whom the Subdivisional Magistrate owed the statutory duty under the Bengal Ferries Act. It follows that the petitioner is competent to maintain this application for a writ. This view is consistent with the decisions reported in *The Queen* v. *Bowman*(1), *The King* v. *Manchester Corporation*(2) and *the King* v. *Speyer*(3).

I shall next deal with the argument addressed by the Government pleader that the petitioner has not made a formal demand for performance of duty on the part of the Subdivisional Magistrate. It was contended by Counsel that the demand for performance and the refusal must be established before any writ of mandamus or any writ in the nature of a mandamus could be granted. In support of the submission, Counsel relied on a passage at page 771 of Halsbury's Laws of England, 2nd Edn., Vol. 9—

(1) (1898) 1 Q. B. 663.
(2) (1911) 1 K. B. 560.
(3) (1916) 1 K. B. 595.

1953.

RAMPHAL v. STATE. RAMASWAMI, J.

"As a general rule the writ will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that such demand was met by a refusal."

The learned Counsel referred in this connection to the decision reported in *Surendra Nath Das* v. *The State of West Bengal*(1). In my opinion, there is no merit in this argument. It is true that there has been no formal demand by the petitioner and no formal refusal by the Subdivisional Magistrate. But in the special facts of this case the absence of such formal demand and refusal does not affect the competence of the application for a writ of mandamus. The Subdivisional Magistrate made the private settlement with respondents nos. 5 and 6 on the 7th of April, 1953. By this act, the Subdivisional Magistrate necessarily placed himself in a position in which he could not have complied with any demand of justice on the part of the petitioner. In view of this circumstance, any formal demand on the part of the petitioner and any formal refusal on the part of the Subdivisional Magistrate would be a mere idle ceremony. This view is supported by the decision of the Supreme Court in *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*(2), where it was held that "an evasion or shelving of a demand for justice is sufficient to operate as a denial within the meaning of section 46, Specific Relief Act". In English law, the refusal need not be in so many words. All that is necessary is to show that the party complained of has distinctly determined not to do what is demanded (Halsbury's Laws of England, 2nd edition, Vol.9,

(1) (1951) A. I. R. (Cal.) 396.
(2) (1952) S. C. R. 135.

1953.

RAMPHAL v. STATE.

RAMASWAMI, J.

page 772). In the United States also, a demand is not required "where it is manifest that it would be but an idle ceremoney" (*see* Ferris—Extraordinary Legal Remedies page 281.) The argument of the Government pleader on this point must therefore fail.

For the reasons which I have attempted to state, I think that the application must be allowed and that a *writ* should be issued cancelling the order of the Subdivisional Magistrate of Barh, dated the 7th of April, 1953 making private settlement with respondents nos. 5 and 6, Suraj Singh and Ram Prasad Singh. A *writ* in the nature of *mandamus* should also be issued to the Subdivisional Magistrate commanding him to hold a public auction after due notice and to lease out the tolls of the Barh-Benarsi Sultanpore Ferry according to law. There will be no order as to costs of hearing of the application.

SINHA, J.—I agree.

Rule made absolute.

K. D.

APPELLATE CIVIL.

1953.

September, 7, 8, 9, 10, 29.

Before Imam, C. J. and Narayan, J.,

RAMDHARI ....

v.

RAMBHAROSA.*

Code of Civil Procedure, 1908 (Act V of 1908), section 151 and Order XLI. rule 33. scope and applicability of—one of the appellants died—substitution petition dismissed—petition for adding the heirs as party to appeal—heirs, whether can be added—appeal, whether abates as a whole.

While the provisions of rule 33 of Order XLI of the Code of Civil Procedure, 1908, give wide powers to the Court as to

* Appeal from Original Decree no. 587 of 1946, from a decision of Mr. Gauri Shankar Prasad Sinha, Additional Subordinate Judge of Gaya, dated the 30th May, 1946.

the nature of the decree which it should pass, in terms, the provisions of rule 33 do not empower the Court to add parties where an appeal as a whole has abated.

The abatement of an appeal results in a valuable right accruing to the respondent, and if the Court readily added parties which could result in such a valuable right being destroyed it would be acting far beyond what was contemplated in rule 33 of Order XLI of the Code.

Where the petition for substitution in place of one of the deceased appellants was dismissed and a petition for adding the heirs of the deceased appellant party to the appeal was filed,

Held, that the heirs of the deceased appellant could not be added as parties to the appeal either under the provisions of Order XLI, rule 33 or under section 151 of the Code of Civil Procedure, 1908 and the appeal abated as a whole.

It is not permissible to allow the existence of conflicting decrees. One of the tests as to whether an appeal as a whole has abated is that if the appeal succeeds there will be in existence conflicting decrees.

Apurba Krishna Mitra v. *Ram Bahadur*(1), *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha*(2) and *Ramphal Sahu* v. *Babu Satdeo Jha*(3), relied on.

Ramphal Sahu v. *Babu Satdeo Jha*(4), referred to.

Appeal by defendants 6 and 7.

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

(1) (1936) A. I. R. (Pat.) 191.
(2) (1927) L. R. 55 Ind. App. 7.
(3) (1940) I. L. R. 19 Pat. 870. F. B.
(4) (1941) F. A. no. 232 of 1936, decided on 6th May, 1941, (unreported).

1953.

RAMDHARI v. RAMBHAROSA.

B. C. De, R. K. Sinha and *Kumar Bahadur*, for the appellants.

Lalnarain Sinha, Ambujakshya Ghose, Lakshmi Narain Sinha, L. M. Sharma and *A. K. Prasad*, for the respondents.

IMAM, C. J.—This is an appeal against the decision of the Additional Subordinate Judge of Gaya who decreed the suit of the plaintiffs on contest against defendants nos. 6 and 7 and *ex parte* against the rest. He also ordered a preliminary decree for partition to be drawn up having declared the plaintiffs' title to the properties in the suit. He further held that the plaintiffs were entitled to get mesne profits which would be ascertained in subsequent proceedings and that on plaintiffs' petition a commissioner would be appointed to carve out a separate *takhta* of 6 annas 8 pies kham which is equivalent to 2 annas 8 pies pokhta out of 16 annas kham which is equivalent to 6 annas 10 pies pokhta of the mukarrari interest in tauzi nos. 12443 and 12455. When the appeal was filed the appellants were Ramdhari Singh, appellant no. 1, who was defendant no. 6 in the court below, and Kishundeo Tiwari, appellant no. 2, who was defendant no. 7 in the court below.

A preliminary objection has been taken that the appeal has abated. Before I deal with the preliminary objection it is necessary to state briefly what the case of the plaintiffs is.

The plaintiffs filed the suit for a declaration of their title to 6 annas 10 pies pokhta mukarrari interest in villages Nima and Kormatho bearing tauzi nos. 12443 and 12455. These tauzis were carved out of the parent tauzi no. 4548. The plaintiffs, father and son, are members of a joint family of which plaintiff no. 1, Rambharosa Singh, is the *karta*. They had purchased 2 annas 8 pies mukarrari interest in villages Nima and Kormatho belonging to Durga

1953.

Singh in execution of a money decree in May, 1940, and delivery of possession was given by the Court. The case of the plaintiffs was that this 2 annas 8 pies pokhta mukarrari interest of Durga Singh in villages Nima and Kormatho was entirely separate and had nothing to do with the 2 annas 8 pies milkiat share of his son Gobardhan Singh, defendant no. 1. Defendants Ramdhari Singh, defendant no. 6, and Kishundeo Tiwari, defendant no. 7, were the real defendants who contested the suit of the plaintiffs. Their contention in the main was that the plaintiffs had acquired nothing by the execution sale in May, 1940, and that in any event the mukarrari interest of Durga Singh of 2 annas 8 pies after his death merged in the 2 annas 8 pies milkiat share of Gobardhan Singh, defendant no. 1.

RAMDHARI v. RAMBHAROSA. IMAM, C. J.

The Additional Subordinate Judge, after a very elaborate consideration of the evidence in the case, oral and documentary, held that the following facts were proved: (1) that the mukarrari tenure had been created before 1882 and, therefore, section 111 of the Transfer of Property Act did not apply in the case, but only the general law of merger would be applicable; (2) that there was only one tenure of 6 annas 10 pies mukarrari interest belonging to Gobardhan Singh in village Nima alone; (3) that Gobardhan Singh had 2 annas 8 pies undivided proprietary interest in villages Nima and Kormatho, while he had 6 annas 10 pies mukarrari interest in village Nima; therefore, there could not be any merger of these two interests; and (4) that Gobardhan Singh alone had 2 annas 8 pies proprietary interest in these two villages, while 6 annas 10 pies mukarrari interest was purchased by Durga Singh from the joint family fund and, therefore, the sons of Durga had some interest in this mukarrari share. In the circumstances, he thought it was clear that there was no merger of mukarrari and proprietary interest of

1953.

RAMDHARI v. RAMBHAROSA.

IMAM, C. J.

2 annas 8 pies as stated by the defendants up to the year 1919. He further held that the evidence of the defence witness no. 7 clearly shows that even after the Collectorate partition he or his father did not intend that 2 annas 8 pies mukarrari interest should merge in the 2 annas 8 pies proprietary interest. He was further satisfied that they were interested in keeping the two interests separate from each other. He accordingly, as I have already stated, declared the plaintiffs' title to 2 annas 8 pies mukarrari interest in villages Nima and Kormatho and passed a preliminary decree for partition.

The preliminary objection which has been taken that the appeal has abated arises in this way. Kishundeo Tiwari, appellant no. 2, died on the 10th of January, 1950. An application for substitution was filed on the 21st of March, 1950. On the 24th of April, 1950, talbana was filed, but it appears that notice had not been served on respondent no. 9. Time was given to the appellants to file fresh processes for notice on respondent no. 9, but this was not done. Ultimately the matter was placed before the Bench which while giving further time passed a peremptory order to the effect that if processes and talbana were not filed within the time allowed regarding fresh notice on respondent no. 9 the application for substitution in place of the deceased appellant no. 2 would be dismissed. On the 20th of November, 1952, an application for addition of parties was filed. No application for setting aside the abatement or for the restoration of the application for substitution had been filed.

Mr. De on behalf of the appellants has urged that under the provisions of Order 41, rule 33, and under the inherent power of the Court under section 151 of the Code of Civil Procedure this Court should allow addition of parties. Respondent no. 9 was not in the least interested in the appeal and had, it appears,

1953.

RANDHARI v. RAMDHARONA.

IMAM, C. J.

not contested the suit of the plaintiffs. The peremptory order made by the Bench should have been that the application for substitution as against respondent no. 9 only would stand dismissed if the processes and talbana concerning that respondent were not filed within the time allowed and not that the entire application for substitution would be dismissed. It seems to me, however, that at this stage we cannot sit in appeal over the order actually made by the Bench. It was the duty of the appellants to have pointed out to the Bench that the presence of respondent no. 9 was unnecessary and service of notice upon him may be dispensed with. The appellants, however, did not do so and as matters stood before the Bench the order could not, in my opinion, be in any other form than it was . Be that as it may, we have to take the order as it was made and that order is to the effect that the application for substitution in place of the deceased appellant no. 2 would stand dismissed if the processes and talbana for the service of notice on respondent no. 9 were not filed within the time allowed. Admittedly the processes and talbana were not filed within the time allowed and the application for substitution stood dismissed. The result has been that in place of the deceased appellant no. 2 no substitution has taken place. The consequence of no substitution of legal representatives in place of deceased appellant no. 2 having taken place has to be ascertained in order to determine as to whether the whole appeal has abated. It cannot be doubted that so far as the appeal of appellant no. 2 is concerned it has abated. The decree passed by the Additional Subordinate Judge as against the deceased appellant no. 2, therefore, stands, and according to that decree the plaintiffs' title to 2 annas 8 pies mukarrari share in villages Nima and Kormatho has been declared and a preliminary decree for its partition has been made and the plaintiffs have been declared to be entitled to mesne profits. If the appeal of appellant no. 1 is

1953.

RAMDHARI v. RAMBHAROSA.

IMAM, C. J.

allowed to be continued and the decree of a similar nature against this appellant is set aside, there would be in existence two conflicting decrees. The defence of appellant no. 1 and the deceased appellant no. 2 was substantially the same, namely, that the plaintiffs had acquired nothing by the sale in execution of their money decree and that in any event there was merger of the 2 annas 8 pies mukarrari share in the 2 annas 8 pies milkiat share of Gobardhan Singh, defendant no. 1, son of Durga Singh. It is not permissible to allow the existence of conflicting decrees. One of the tests as to whether an appeal as a whole has abated is as to whether if the appeal succeeds there will be in existence conflicting decrees. If such be the position, then the appeal as a whole abates and not partially. In my opinion, different considerations arise between the abatement of a suit and the abatement of an appeal because in a suit if there is an abatement it is before the passing of a decree and the question of conflicting decrees coming into existence does not arise. I may refer to the case of *Apurba Krishna Mitra* v. *Ram Bahadur*(1). It seems to me that no substitution of legal representatives in place of the deceased appellant no. 2 having taken place, in the circumstances of this case it must be held that the appeal as a whole has abated and not merely that the appeal of the deceased appellant no. 2 only has abated.

It was, however, urged that under Order 41, rule 33, it was permissible for this Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. In

(1) (1936) A. I. R. (Pat.) 191.

1953.

RAMDHARI v. RAMDHAROSA.

IMAM, C. J.

my opinion, while the provisions of rule 33 of Order 41 of the Code of Civil Procedure give wide powers to this Court as to the nature of the decree which it should pass, in terms, the provisions of rule 33 do not empower the Court to add parties where the appeal as a whole has abated. The abatement of an appeal results in a valuable right accruing to the respondents, and if the Court readily added parties which would result in such a valuable right being destroyed it would be acting far beyond what was contemplated in rule 33 of Order 41 of the Code of Civil Procedure. In the case of *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha*(1), their Lordships of the Privy Council were considering as to what is the meaning of the words " is interested in the result of the appeal " appearing in Order 41, rule 20, of the Code of Civil Procedure, and Sir John Wallis delivering the judgment of the Privy Council observed that giving these words their natural meaning it seems impossible to say that in that case the defendants against whom the suits had been dismissed, and as against whom the right of appeal had become barred, were interested in the result of the appeal. Sir John Wallis then observed as follows:—

" The Appellate Court was then asked to take action under Order XLI, rule 33. That rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree, and 'may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection'.

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against

(1) (1927) L. R. 55 Ind. App. 7.

1953.

RAMDHARI v. RAMBHAROSA.

IMAM, C. J.

the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this instance."

In the present case the respondents have certainly acquired a valuable right because the appeal having abated the decree in favour of the plaintiffs stands and an Appellate Court should not readily deprive the respondent-plaintiffs of the valuable right accruing to them as the result of the appeal having abated. Mr. De, however, was not unmindful of the decision of the Full Bench of this Court in the case of *Ramphal Sahu* v. *Babu Satdeo Jha*(1), where it was held that in the case of all the plaintiffs or defendants appealing from a decree, and the decree appealed from proceeds on a ground common to all the plaintiffs or defendants, and one of them dies and no substitution is effected within time and an application for setting aside the abatement, so far as the deceased appellant is concerned is refused, the Appellate Court has no power under Order 41, rule 4, of the Code of Civil Procedure, 1908, to reverse or vary the decree in favour of all the plaintiffs or defendants. He, however, pointed out that in spite of this decision, which was as the result of a reference made to the Full Bench in First Appeal no. 232 of 1936 (decided on the 6th May, 1941), their Lordships who heard that First Appeal held that the

(1) (1940) I. L. R. 19 Pat. 870, F. B.

1953.

RAMDHARI v. RAMBHAROSA.

IMAM, C. J.

High Court's power to move under Order 41, rule 33, or under its inherent power remained unfettered to be exercised in the peculiar circumstances of each case. The learned Judges who decided First Appeal no. 232 of 1936 were parties to the decision of the Full Bench in the case of *Ramphal Sahu* v. *Babu Satdeo Jha*(1). Manohar Lall, J., who delivered the judgment in the Firts Appeal, however, did make the following observation :—

"Having examined the authorities strongly relied upon by the learned Advocate for the respondent, I am inclined to the view that although it is true that the provisions of Order 41, rule 4, and Order 41, rule 20, cannot be applied to add the legal representative of a deceased appellant who has failed in getting an abatement of the appeal set aside, that these provisions cannot also be invoked to make the legal representative a party to the appeal when he was not a party to the suit in the Court below, but the jurisdiction of the High Court to move under Order 41, rule 33, or under its inherent powers remains unfettered to be exercised in the peculiar circumstances of each case always bearing in mind that the Court should be slow to exercise that discretion merely to aid one party against the other."

The application for substitution in the present appeal stood dismissed for non-compliance of a peremptory order and no substitution has taken place in the place of the deceased appellant no. 2. The Patna High Court has added a rule, rule 14A, to Order 41 of the Code of Civil Procedure which enables the Court in a proper case to exempt service of notice upon a particular party. The appellants did not ask this Court to exercise any such power. They also did not apply for setting aside of the abatement of the appeal of appellant no. 2 and they did not apply to this Court for the restoration of the application for

(1) (1940) I. L. R. 19 Pat. 870, F. B.

1953.

RAMDHARI v. RAMBHAROSA.

IMAM J.

substitution which had been dismissed for non-compliance of the peremptory order. In these circumstances it appears to me that to allow the addition of parties now would be to aid one party guilty of laches and thus deprive the respondents of a valuable right which has accrued to them. Certain decisions were cited, apart from what was done in First Appeal no. 232 of 1936, to show that the Court has inherent power to add parties even if the provisions of rule 33 of Order 41 did not apply. On behalf of the respondents, however, certain decisions were also cited to show that the inherent power was not exercised. Assuming for a moment that it is permissible for this Court at this stage to add parties, whether under Order 41, rule 33, or under its inherent power, I am of the opinion that this is not a fit case in which such a power should be exercised. To do so would be to deprive the respondents of a very valuable right which accrued to them entirely due to the laches of the other side. The application for adding parties is accordingly dismissed.

In my opinion, the preliminary objection must succeed and it must be held that the appeal as a whole has abated and it must be dismissed as such with costs.

NARAYAN, J.—I agree.

S. H.

Appeal dismissed.

MISCELLANEOUS JUDICIAL.

Before Ramaswami and Sinha, JJ.

1953.

July, 31. August, 3, 4, 5, 6, 7, 10. October, 5.

BIJAYANANDA

v.

STATE.*

Bihar Hindu Religious Trusts Act, 1951 (*Bihar Act I of* 1951), *whether constitutionally valid—Act, whether applied to*

* Miscellaneous Judicial Case nos. 415, 418 and 451 of 1952 and nos. 170, 56, 93, 88, 116, 120, 121, 133, 124, 153 and 167 of 1953. In the matter of applications under Article 226 of the Constitution of India.

1953.

BIJAYANANDA v. STATE.

kabirpanthis' *trusts also—Act, whether confined to private trust and whether capable of improvement—sections* 2, 28, 70—*Constitution, Articles* 14, 19(1)(*f*), 25, 26, 31. *whether violated—Article* 226, *whether proper remedy—Interpretation of Statutes*—intra vires *rule, whether to be adopted*—case-law, *referred to.*

The Bihar Hindu Religious Trusts Act, 1951, is constitutionally valid. It applies to trusts existing for the benefit of the *kabirpanthis* too.

In a matter of this description, the principle to be applied is that the Legislature must not be presumed to exceed its own jurisdiction and if two constructions of a statute are possible, one of which would make it *intra vires* and the other *ultra vires*, the Court must lean to that construction which would make the statute *intra vires*. To put it differently, the language used in section 2(1) of the Act must be read down in such a case so as not to apply to public or charitable trust of a private character.

The power granted to the Bihar State Board of Religious Trusts under the Act are very similar to the powers granted to the District Judge under section 92, Code of Civil Procedure, 1908. The only distinction is that the impugned Act provides a better and more speedy remedy.

The Act may be capable of improvement on certain points but if the provisions of the Act are examined as a whole the restrictions imposed upon the trustees are not unreasonable from procedural or substantive aspect. There is, therefore no violation of the guarantee provided under Article 19(1)(*f*) of the Constitution.

The right of superintendence of public trusts is entirely the right of the sovereign authority and this is all that the Board constituted under the Act does or can do as provided in section 28(1) of the Act. There is no acquisition or requisition of property within the meaning of Article 31 of the Constitution, and so there is no question of violating Article 31.

The impugned Act is not legislation directly interfering with the practice and propagation of religion. On the contrary, the object of the Act is to provide for the better administration of Hindu religious trusts and for the protection

1958.

BIJAYANANDA v. STATE.

and preservation of the properties appertaining to such trusts. There is, therefore, no violation of the guarantee under Article 25 of the Constitution.

The freedom guaranteed under Article 26 of the Constitution to a religious denomination includes the freedom of denomination to manage its own affairs in the matter of religion but does not include unqualified freedom to administer its property. The right of denomination to administer its property is subject to the right of the State to make law for the administration of such property. The impugned Act, does not, therefore, violate the freedom given under Article 26 of the Constitution.

All that is safeguarded is that so long as the religious denomination or a section thereof administers its property in accordance with such law as the State Legislature has passed, that right should not be interfered with.

The contribution made under section 70 of the Act is in the nature of a fee and not in the nature of a tax and the State Legislature was competent to enact this provision.

The guarantee of equal protection under Article 14 of the Constitution is not absolute. The Article does not prohibit legislative classification nor does it prevent the Legislature from enacting special laws to combat special evils. Hence, there was no question of violation of Article 14.

Whether the properties in question belonged to a public or private endowment involved consideration of complicated facts for which a proceeding under Article 226 was not the proper remedy.

Applications under Article 226 of the Constitution.

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

G. P. Das, B. C. Ghosh, Janeshwar Singh, Ashwini Kumar Ray, Gokulanandan Prasad, Shambhu Barmeshwar Prasad, G. C. Banerji and *Ram Naresh Upadhya*, for the petitioners.

Advocate-General, Lalnarain Sinha, Revati Raman Sinha and *A. B. N. Sinha*, for the opposite party.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

RAMASWAMI, J.—In these applications which have been heard together an important question of law arises for determination, viz., whether the Bihar Hindu Religious Trusts Act (Bihar Act I of 1951) is constitutionally valid.

In M. J. C. no. 418 the petitioner is Mahanth Moti Das whose Muth is situated at village Parbatta in the district of Monghyr. The Mahanth is a Bairagi and follower of the religion founded by Sri Kabir Sahib. The Mahanth states in the affidavit that the Muth was founded for the spiritual benefit of a particular sect called Kabirpanthis whose doctrines are contrary to the beliefs of the Hindus. The Mahanth alleges that the properties of the Muth have been treated as private properties and there is no trust imposed on these properties for any religious or charitable purpose. It is said that on 18th of August 1952 a notice was served upon the Mahanth by the opposite party no. 1 under section 59 of the impugned Act calling upon him to furnish a statement of the properties of the religious trust and threatening to prosecute him in case of default. It is contended for the petitioner that the Bihar Hindu Religious Trust Act is unconstitutional and void as its provisions violate Articles 14, 19(1)(*f*), 25, 26 and 27 of the Constitution of India. It is further contended that the religion founded by Kabir Sahib is not of Hindu origin and therefore the Act has no application to the petitioner or to the Asthal of which the petitioner is Mahanth. The petitioner prays that High Court should issue a writ in the nature of prohibition or mandamus against the opposite parties restraining them from interfering with the right of the petitioner to manage the properties of the Muth.

In M. J. C. no. 415 the petitioner is Mahanth Sri Bijayananda Giri of Manik Chawk Muth. The allegations of the petitioner are similar to those made in M. J. C. no. 418. The provisions of the Bihar Hindu Religious Trusts Act are challenged as unconstitutional

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

and void and there is a further assertion on behalf of the petitioner that the properties of the Muth are not trust properties at all and the Act has no application even if it is held that the Act does not violate any constitutional guarantee.

In the other Miscellaneous Judicial Cases the material facts alleged are of similar character.

It is necessary in the first place to set out the relevant provisions of the Bihar Hindu Religious Trusts Act (hereinafter referred to as ' the impugned Act ') for the purpose of reaching a conclusion as to its constitutional validity. The title of the Act is important. The Act is entitled as

> " an Act to provide for the better administration of Hindu religious trusts and for the protection and preservation of properties appertaining to such trusts."

The preamble states:

> " Whereas it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts."

The preamble is followed by definitions in section 2. Section 2(*e*) defines a ' Hindu ' to mean a person professing any religion of Hindu origin and to include a Jain and a Buddhist, but not a Sikh. Section 2(1) defines a ' religious trust ' to mean any express or constructive trust created or existing for any purpose recognised by Hindu Law to be religious, pious or charitable, but not to include a trust created according to the Sikh religion or purely for the benefit of the Sikh community or a private endowment created for the worship of a family idol in which the public are not interested. Section 2(*n*) defines a ' trustee ' to mean any person appointed to administer a religious trust either verbally or by or under any deed or instrument or in accordance with the usage of such trust or by the District Judge or any other competent authority. Section 5 provides for the constitution of the Bihar State Board of Religious Trusts. Section 5(3)

states that the Board shall be a body corporate and shall have perpetual succession and a common seal with power to acquire and hold property, both movable and immovable. Section 7 makes provision for the appointment of the President and the members of the first Board and their terms of office. Section 8 contains the terms of the constitution of the second and every subsequent Board. Chapter IV refers to the appointment and qualification of the Superintendent of the religious trusts. The chapter further provides for the appointment of officers and servants for the Board. Chapter V relates to the power and duties of the Board. Section 28(1) provides that the general superintendence of all religious trusts in the State shall be vested in the Board and the Board shall do all things reasonable and necessary to ensure that such trusts are properly supervised and administered and that the income thereof is duly appropriated and applied to the objects of such trusts and in accordance with the purposes for which such trusts were founded and for which they exist. Section 28(2) enumerates in great detail the powers and duties of the Board in regard to certain matters. Section 28(2)(*e*), for example, states that the duty of the Board shall be to cause inspection to be made of the property and the office of any religious trust including accounts and to authorise the Superintendent or any of its members, officers or servants for that purpose. Section 28(2)(*g*) empowers the Board to give directions for the proper administration of a religious trust in accordance with the law governing such trust and the wishes of the founder in so far as such wishes can be ascertained. Section 32 empowers the Board to settle a scheme for the proper administration of religious trusts. Chapter VI refers to the establishment of regional trust committees and the powers and duties imposed on such committees. Chapter VIII refers to transfer of immovable properties and borrowing of money by trustees. Section 44 of this chapter states that no transfer made by a trustee, of any immovable property

1953.

VIJAYANANDA v. STATE.

RAMASWAMI, J.

of a religious trust by way of sale, mortgage, or lease for a term exceeding three years shall be valid unless made with the previous sanction of the Board. Section 45 prohibits a trustee from borrowing money for the purpose of any religious trust without the previous sanction of the Board. Chapter X relates to trustees and their duties. Section 59 of this chapter imposes a duty on the trustee to furnish particulars of the religious trust. Section 60 relates to the budget of religious trusts and submission of such budgets to the Board who may alter or modify the budget in such manner and to such extent as it thinks fit. Chapter XI relates to audit of accounts and recovery of irregular expenses from the trustees in default. Chapter XIII provides for the creation of a trust fund which is to be vested in the Board. Section 70 states that for the purpose of defraying the expenses incurred in the administration of this Act, the trustee of every religious trust shall pay to the Board such fee, not exceeding five per centum of its net income as the Board may from time to time with the previous sanction of the State Government, determine. Chapter XVI provides for the dissolution or supersession of the Board. Section 80 states that if, in the opinion of the State Government, the Board makes default in the performance of the duties imposed on it or exceeds or abuses its powers, the State Government may declare the Board to be in default and direct that the Board shall be superseded. Section 81 provides that where an order of supersession has been passed, all the members of the Board shall vacate their offices as such members and all the powers and duties to be performed by the Board shall be performed by such person as the State Government may direct.

The first question debated in these cases is whether the impugned Act violates the guarantee under Article 19(1)(*f*) of the Constitution. It was pointed out by Mr. G. P. Das that Article 19(1)(*f*)

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

declared that all citizens shall have the right to acquire, hold and dispose of property and that the impugned Act imposed unreasonable restrictions on the right of a Mahanth, both from the substantive and procedural point of view. Relying upon the authority of the Supreme Court decision in the case of *Angur Bala*(1) Mr. G. P. Das argued that the right of a Mahanth was not that of a bare trustee but that the right of the Mahanth carried with it the element of beneficial or personal interest in the properties. The complaint of the learned counsel is that the impugned legislation made a drastic restriction on the proprietary powers of the Mahanth and the effect was to reduce the position of the Mahanth to a mere servant of the Board, mechanically obeying its directions. Learned counsel based his argument upon several important sections of the Act. For example, section 28(2)(*g*) empowered the Board to give directions to the trustees for the proper administration of religious trusts. Reference was made to section 58 of the Act which cast a duty upon the trustees to carry out the directions to be issued by the Board under any provisions of the Act. It was pointed out that section 28(2)(*c*) of the Act empowered the Superintendent or any of the members, officers or servants of the trust to inspect the property of the Muth and the office of the religious trust including accounts. Counsel also referred to section 28(2)(*h*)(*iii*) which enabled the Board to remove a trustee from his office when he refuses to act according to the directions of the Board. Counsel also referred to section 28(2)(*j*) which enabled the Board to sanction the conversion of any property of religious trust into any other property if the Board was satisfied that such conversion was beneficial for the trust. Reference was also made to section 32 which empowered the Board to settle schemes for proper administration of religious trusts. Learned counsel also read sections 44 and 45 of the Act which

(1) (1951) S. C. J. 394.

1969.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

imposed restrictions on the power of the trustee to borrow money or transfer immovable property of religious trusts by way of sale, mortgage or gift or by way of lease for a term exceeding three years without the previous sanction of the Board. Learned counsel then read section 59 of the Act which imposed a duty upon the trustee to furnish full particulars of religious trusts in a statement in the prescribed form. Learned counsel pointed out that section 60 of the Act imposed a duty upon the trustee to prepare a budget of income and expenditure of the religious trusts and that under section 60(2) the Board had authority to alter or modify the budget in such manner and to such extent as it thinks fit. The complaint of the learned counsel was that section 60 imposed unreasonable fetters on the discretion of a Mahanth or Shebait to spend the surplus portion of the income in any manner he thought fit. Reference was lastly made to section 30 of the Act which empowered the Board to determine the object to which the trust funds should be applied when the original object of the endowment had ceased to exist or had become impossible of achievement. Learned counsel also referred to section 49 of the Act and submitted that the doctrine of *cypres* has been carried too far.

In examining the argument with respect to violation of Article 19(1)(*f*), it is, I think, desirable to bear in mind the exact legal position of the Shebait or Mahanth of the religious institution at the time when the impugned Act was passed. It is necessary to examine what was the legal right of the Mahanth, what were the legal limitations on that right, and what further limitations to that right have been imposed by the Act. That is the true approach to the problem presented in these cases. It was contended by Mr. G. P. Das that the right of a Mahanth was not a mere right of office but that the Mahanth had a beneficial interest in the properties endowed in the name of the Muth. This argument is correct. It is now

established that in the position of a Mahanth the elements of office and proprietary right, of duty and personal interest are mixed up and blended. The matter was elaborately discussed by a Full Bench of the Calcutta High Court in the case of *Manohar Mukerji*(1) and the decision of the Full Bench was approved by the Judicial Committee in *Ganesh Chunder*(2) and *Bhabatarini*(3) and by the Supreme Court in *Angur Bala's*(4) case. These authorities emphasise that the position of a Mahanth or Shebait is a combination of office and proprietary right and though the position is anomalous, it is an anomaly which has been recognised and accepted in Hindu law from a very early date. But it is important to remember that though a Mahanth has a beneficial interest and though he has large administrative powers, his control is always subject to certain obligations and duties governed by the customs and usage of the particular Muth. A Mahanth is not a trustee in English sense of the term but a Mahanth is nevertheless in view of the obligations and duties resting upon him answerable as a trustee in the general sense for proper administration. The Mahanth in fact occupies a fiduciary position in respect of the endowment and he has duties and obligations of certain kinds to discharge. In *Ram Parkash Das's case*(5), the Judicial Committee described the status of a Mahanth as follows: " The Mahanth is the head of the institution. He sits upon the Gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon the death or abdication he is succeeded

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

(1) (1932) I. L. R. 60 Cal. 452, F. B.
(2) (1936) L. R. 63 Ind. App. 448.
(3) (1943) L. R. 70 Ind. App. 57.
(4) (1951) S. C. J. 394.
(5) (1916) I. L. R. 43 Cal. 707, P. C.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

by one of the Bairagi Chelas. These Bairagi Chelas are, as stated, celibates; or if they have ever been married they must prior to their initiation as Bairagi Chelas, have renounced their wives and families and have conformed to the practice of the Muth. This practice is ascetic; it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the Asthal.....this property is held by the Mahanth as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the Muth or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning Mahanth, this trust does exist, and that it must be respected. " The law stated in this case as regards the juristic position of the Mahanth is substantially correct. The implication of this case was later explained by the Judicial Committee in *Vidya Varuthi's case*(1). It was pointed out that in *Ramprakash Anand's case*(2) the term ' trustee ' had been used by Lord Shaw not in the technical English sense but in the general sense—to convey a general conception of the obligations imposed on the Mahanth. It was held by the Judicial Committee in *Vidya Varuthi's case*(1) that a Mahanth was neither a corporation sole nor a life tenant in respect of the Muth properties nor was he a trustee in the sense in which the term was understood in English law. But the Judicial Committee was emphatic that though a Mahanth was not a trustee in the technical sense of English law he was nevertheless in view of the obligations and duties resting upon him answerable as a trustee in the general sense for proper administration of the properties of the institution. At page 311 the Judicial Committee states: " Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every

(1) (1922) L. R. 48 Ind. App. 302.
(2) (1916) L. R. 43 Ind. App. 78.

1953.

BIJAYANANDA v. STATE. RAMASWAMI, J.

kind, and for all purposes considered meritorious in the Hindu social and religious system, to Brahmans, Goswamis, Sanyasis, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations..... In many cases in Southern India especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Muth were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage". It is clear therefore that though a Mahanth is not a trustee in the strict sense of English law, he is a trustee in the general sense occupying a fiduciary position in respect to the endowment and having obligations of certain kinds to discharge. He holds the Muth property for certain religious and charitable purposes which are laid down by the founder in the original grant or sanctioned by custom and usages of the Muth. A Mahanth has no authority to alienate trust properties except for benefit or legal necessity of the Muth. A Mahanth has authority to borrow money but he may do so only for the purposes connected with the Muth. A Mahanth is not entitled to grant lease in perpetuity and fix an unalterable rate of rent. A Mahanth has a large discretion in spending the surplus over the objects connected with the institution. But it is not permissible for the Mahanth to spend the surplus for his personal use. He is not bound to save the surplus but if he spends it at all he must spend it only for the purpose connected with the objects of the institution. That he is not the owner of the surplus income is clear from the fact that after his death the savings are not regarded as his personal property and cannot be proceeded against for satisfaction of his personal debts [*see Appa Rao's case*(1)].

(1) (1937) A. I. R. (Mad.) 118.

1953.

BIJAYANANDA v. STATE.

KAMASWAMI, J.

A Mahanth is therefore accountable if he uses the surplus fund for purposes alien to those for which the institution was founded. Even before the passing of the impugned Act there was statutory machinery for enforcing the obligations and duties imposed upon a Mahanth. Section 92 of the Code of Civil Procedure provides that—

> in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Provincial Government, to obtain a decree—(*a*) removing any trustee; (*b*) appointing a new trustee; (*c*) vesting any property in a trustee; (*d*) directing accounts and inquiries; (*e*) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust; (*f*) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged; (*g*) settling a scheme; or (*h*) granting such further or other relief as the nature of the case may require.

The section therefore provides an important machinery for enforcing the obligations and duties imposed on trustees. The section can be invoked when there is a case of any alleged breach of any express or constructive trust or when the directions of the Court are deemed necessary for the administration of any such trust. The jurisdiction granted to the Court is of very wide extent. The Court may remove a trustee and appoint a new trustee, the Court may direct account and inquiries into the trust properties, the Court may declare what proportion of the trust property shall be allocated to any particular object of the trust. The Court may also authorise the whole or any part of the trust property to be let, sold, mortgaged or exchanged. The Court is also empowered to settle a scheme for the trust properties or grant such other relief as the nature of the case may require.

In the light of these facts the constitutional objection under Article 19(1)(*f*) has to be tested. The powers granted to the Board under the impugned Act

1953.

BIJAYANANDA v. STATE. RAMASWAMI, J.

are very similar to the powers granted to a District Judge under section 92 of the Civil Procedure Code. Section 28(2)(*e*) grants authority to the Board to inspect the property and office of every religious trust including accounts. Section 28(2)(*g*) empowers the Board to give directions for the proper administration of religious trusts in accordance with law governing such trusts. Section 28(2)(*h*) empowers the Board to remove a trustee from his office for certain reasons. Section 28(2)(*j*) authorises the Board to sanction conversion of any property of the trust into any other property if the Board is satisfied that such conversion is beneficial for the said trust. Section 32 empowers the Board to settle a scheme for the proper administration of religious trusts. Sections 44 and 45 impose restriction on the power of the trustee to borrow money or to transfer immovable property of the trust. Section 60(2) authorises the Board to alter or modify the budget of the religious trusts in such manner and to such extent as it thinks fit. Section 30 enables the Board to determine the object to which the funds of religious trusts should be applied if the original object has ceased to exist or has become impossible of achievement. All these powers conferred on the Board of religious trusts correspond to the powers of the District Judge in a suit instituted under section 92, Civil Procedure Code. The only distinction is that the impugned Act provides a better and more speedy remedy for the enforcement of the obligations and duties imposed on the trustees instead of the lengthy and cumbrous procedure of a suit. The Board is vested with summary powers on various matters but the control of the Board is always subject to the important condition that the control is exercised for the better and more efficient administration of the trusts, and for the protection and preservation of the trust properties. That is the key-note which runs through the whole Act. The preamble of the Act states that:

> "it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts".

1959.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

Section 28(1) states that:

" the Board shall do all things reasonable and necessary to ensure that the religious trusts are properly supervised and administered and that the income thereof is duly appropriated and applied to the objects of such trusts and in accordance with the purposes for which such trusts were founded ".

Section 60(2) empowers the Board to alter or modify the budget in such manner and to such extent as it thinks fit.

But section 60(6) states that:

" nothing contained in the section shall be deemed to authorise the Board to alter or modify any budget in a manner or to an extent inconsistent with the wishes of the founder, so far as such wishes can be ascertained ".

The argument was presented on behalf of the petitioners that large powers have been conferred on the Board and that there is a possibility that the Board may abuse its powers and harass the trustees. But it is not proper to test the constitutional validity of an Act by the possibility that the powers conferred may be abused. In any case, important restrictions have been imposed on the Board in various matters. For example, section 28(2)(*h*) enables the Board to remove a trustee for the reasons stated therein but the trustee has right of appeal to District Judge under section 28(3). That section states that the order should be communicated to the trustee concerned and such trustee may within ninety days of the communication of the order appeal to the District Judge for varying, modifying or setting aside the order. Again section 28(2)(*j*) empowers the Board to sanction conversion of the property of religious trusts into other property if the Board is satisfied that such conversion is beneficial for the trust. But there is a proviso that no such conversion shall be sanctioned unless the Board so resolves by a majority of three-fourths of its members and the resolution of the Board must be approved by the District Judge. Again section 32 empowers the Board to settle a scheme for proper administration of religious trusts. But section 32(3) gives right to the trustee or any other person interested

1958.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

in the trust to appeal to the District Judge for varying, modifying or setting aside the scheme. On certain points however the Act may be capable of improvement from the procedural aspect. If the trustee of a particular endowment objects that the Board has no jurisdiction on the ground that the trust is private and the properties are not trust properties, there is no provision made in the Act for proper determination of this question. Presumably the Board may hear and determine the objection and the aggrieved party has the right to institute a suit in the civil court to challenge the decision of the Board. It is perhaps desirable that the Act should contain a provision that the question should be determined by the District Judge in a summary manner and the aggrieved party should also have a right to file a suit in the civil court if the decision of the District Judge is challenged. The Act contains a duplication of procedure for the removal of a trustee. Section 28(2)(*h*) provides that the Board may remove a trustee from his office if such trustee (*i*) is convicted of any such offence as implies moral turpitude, (*ii*) is convicted more than once of the same or different offences under this Act, (*iii*) refuses to obey the directions of the Board. Section 48 states that the Board may apply to District Judge for removing a trustee if such trustee (*i*) acts in a manner prejudicial to the interest of the said trust, (*ii*) defaults on three or more occasions in the payment of any amount payable under any law for the time being in force in respect of the property or income of the said trust or any other statutory charge on such property or income, (*iii*) defaults on three or more occasions in the payment of any sum payable to any beneficiary under the said trust, or in discharging any other duty imposed upon him under it or (*iv*) is guilty of a breach of trust. There appears to be no good reason why the Board should be empowered to remove the trustee for certain cases of default and the District Judge should be given authority to remove trustee in other cases of default. It is perhaps desirable that provision should

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

be made for the removal of a trustee only by the order of the District Judge on application made by the Board. Again section 60 authorises the Board to alter the budget in any manner it thinks fit and the aggrieved trustee has no remedy against the action of the Board. It is desirable in my opinion that an appeal to the District Judge should be provided against the order of the Board modifying or altering the budget.

Two other points were taken by the learned counsel on behalf of the petitioners. It was argued that section 60(2) empowered the Board to alter and modify the allocation of expenditure to the various objects for which the endowment was made. But section 60(6) enacts that the power of the Board is subject to the directions of the founder. If there is any direction as regards allocation of the income to be spent on the various objects of the grant, the Board is not empowered by the Act to make any change in the allocation. But if there is no such direction contained in the original grant, the Board has authority to allocate the income to the various objects in such manner as it thinks fit. This power is not new. It is exactly similar to the power granted under section 92 of the Civil Procedure Code to a District Judge:

> "to declare what proportion of the trust property or the interest therein shall be allocated to any particular object of the trust".

It was argued on behalf of the petitioners that if the Mahanth is taken ill and money has to be spent for medical treatment the Board may unreasonably disallow this item of expenditure of the budget. The argument proceeds on a misconception. If the expenditure for medical treatment is permissible according to the wishes of the founder or according to the custom and usage of a particular Muth, the Board has obviously no power under the Act to disallow that item of expenditure. If the expense of medical treatment is not justified by the custom or usage of the Muth or there is no provision made by the founder in

the original grant, the matter will be left to the discretion of the Board of Trust who are presumed to exercise the discretion in a reasonable manner. An other argument was advanced that the Mahanth would be required to show in the budget the personal offerings made by his disciples and such a provision was unreasonable. The question again depends upon the intention of the disciples who make the offerings. If the intention of the disciples was to make offering to the institution and not to the Mahanth personally, the offerings must be accounted for in the budget prepared by the Mahanth. But if the offerings are made to the Mahanth personally and not to the institution, it is not necessary that the offering should be shown in the budget, for section 60 only requires the trustee to prepare a budget " of the estimated income and expenditure of such trusts ".

1958.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

The Act may be capable of improvement on certain points but if the provisions of the Act are examined as a whole I am of opinion that the restrictions imposed upon the trustees are not unreasonable from procedural or substantive aspect. There is no violation of the guarantee provided under Article 19(1)(*f*) of the Constitution and the argument of Mr. G. P. Das on this part of the case must fail.

I next turn to the question whether the impugned Act violates Article 31 of the Constitution. It was argued that there was compulsory acquisition of the property within the meaning of Article 31 that there was no compensation provided in the statute nor was there any public purpose involved. It was contended that there was violation of Article 31 of the Constitution and the whole of the Act must be held to be invalid. In support of his proposition learned counsel referred to *Maharaja Bahadur Sir Kameshwar Singh's case*(1), in which it was held by a special Bench that the Bihar State Management Act of 1949 (Bihar Act XXI of 1949) was unconstitutional and invalid. In my opinion the argument proceeds on a

(1) (1950) I. L. R. 29 Pat. 799, S. B.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

misconception. The ratio of the special Bench decision referred to above has no application to the present case. The majority opinion of Shearer and Sinha, JJ. proceeded upon the view that the Bihar Legislature had no competence to enact the legislation, since the subject matter was not covered by item 21 of the Provincial List. The third learned Judge, Das, J. held that there was legislative competence, but the Act was invalid as there was no public purpose and there was no provision for payment of compensation. The Bihar State Management Act is in any event different in material respects from the Bihar Hindu Religious Trusts Act which is the subject-matter of the present cases. Under the Bihar State Management Act the management of the proprietor or tenure-holder was taken away and the management of the estate was vested in the manager to be appointed by the Government. Section 4 of the Act empowered the manager to take possession of the estate of the proprietor or tenure-holder together with buildings, papers and other properties appertaining to the estate or tenure. Section 4(*c*) declared that the proprietor or tenure-holder shall be incompetent to mortgage or lease the estate or to grant valid receipts for the rents and profits arising therefrom. The position is different with respect to the Bihar Hindu Religious Trusts Act. The Board does not take possession of the endowed properties, the Board does not perform any act of management with reference to the endowed properties. The Board merely exercises the power of superintendence as provided in section 28(1) of the Act. There is no acquisition or requisition of property right within the meaning of Article 31. In other words, the impugned Act is legislation made in exercise of the Police Power and not in exercise of the right of Eminent Domain, to use the language of American lawyers.

The right of superintendence of public trusts is essentially the right of a sovereign authority. This

will be manifest if the question is examined from the historical standpoint. In *Raju Muttu Ramlinga's case*(1) it was observed by the Judicial Committee that the superintending authority over temples and religious endowments had been exercised by the old rules. After the establishment of the British Government it was discovered that the income of many endowments, both Hindu and Mohammadan, was misspent and misappropriated by the persons who were in charge of the same. The British Government therefore asserted its right of supervision over the endowed properties which was exercised by previous rulers and in 1810 a regulation was passed in respect of the province of Bengal under which the general superintendence of all religious and charitable endowment was vested in the Board of Revenue. Similar regulations for Madras and Bombay were passed in the years 1810 and 1817. Later on it was thought that the connection of the British Government with religious establishment of Hindus and Mohammadans was inexpedient and a report was therefore called for by the Government of India in the year 1841 from the Collectors of all districts with a view to divest itself of the management of religious endowments and transfer the management to properly qualified individuals. As a result, Act XX of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to religious endowments were repealed, and provision was made for the transfer of all such endowments, in certain cases to trustees, and in others to committees. But the duty of superintending charitable endowments imposed on the Board of Revenue by the old Regulations was still retained. In the Civil Procedure Code of 1877 a definite section was introduced, viz., section 539, under which a suit could be instituted in case of any alleged breach of any express or constructive trust created for public, religious or charitable purposes, by the Advocate-General or with his consent, by two or more persons, having an interest in the Trust, in

(1) (1874) L. R. 1 Ind. App. 209.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

the principal Civil Court of the district, for removal of trustees, for appointment of new trustees, for settlement of a scheme and for various other reliefs specified in the section. The section was later on amended and in this amended form it stands as section 92 of the present Civil Procedure Code. In 1890 another statute, the Charitable Endowments Act (Act VI of 1890) was passed and this statute provided for the vesting and administration of property held in trust for charitable purposes not of a religious nature. The other important Act is Act XIV of 1920. The object of this enactment was to provide facilities for the obtaining of information regarding trusts for public purposes of a charitable or religious nature and to enable the trustee to obtain directions of the court on certain matters and also to make special provisions for the payment of expenditure incurred in certain suits against the trustees.

The argument was put forward on behalf of the petitioners that the definition of a ' religious trust ' in section 2(1) was too wide and that the Act would apply not merely to public endowments but also to endowments of private character with the exception of endowments created for worship of family idol in which the public were not interested. The contention of the petitioners was that there was no warrant or justification why the State should exercise any superintendence over private endowments in which the public were not interested. It was submitted that the superintendence over private endowments was not in the interest of general public and there was a clear violation of the guarantee provided in Article 19(1)(*f*) of the Constitution. The argument is based upon the definition of ' religious trust ' in section 2(1) of the Act which defines ' religious trust ' to mean any express or constructive trust created or existing for any purpose recognised by Hindu law to be religious, pious or charitable, but shall not include a trust created according to the Sikh religion or purely for

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

the benefit of the Sikh community and a private endowment created for the worship of a family idol in which the public are not interested. The argument involves consideration of two questions—(1) whether section 2(1) of the Act upon a true construction applies to private religious endowment; (2) whether the Act is unconstitutional as a whole if the first question is answered in the affirmative. I think that for the purposes of this case it is not necessary to express a concluded opinion on either of these two questions. I shall assume that section 2(1) upon a right interpretation includes religious endowments of private character and that the provisions of the impugned Act apply to such endowments. On this assumption it was contended for the petitioners that the Act would be wholly unconstitutional and void since the restriction imposed was beyond the permissible constitutional limit. Mr. G. P. Das referred in this connection to Madras and Bombay Acts which applied only to endowments of public character. Mr. G. P. Das referred to section 6(14) of Madras Act XIX of 1951 which defines 'religious endowment' to mean all property endowed for the support of Muths or temples, or given for the performance of any service or charity of a public nature. Counsel also referred to Bombay Act XXIX of 1950, the preamble of which states that it was enacted "to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay". The Advocate-General, however, put forward the opposite view. It was contended that the legislation fell under item 28 of List III—

"Charities and charitable institutions, charitable and religious endowments and religious institutions".

The argument was that item 28 was comprehensive enough to include both public and private religious and charitable endowments and that the legislation would be competent even though it embraced within its ambit charitable endowments of private

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

character. It was also contended that Article 19(5) would not be a bar because it might be necessary and reasonable in exceptional cases for the legislature to legislate for better management of private endowments. It is not necessary for the purpose of this case to express any final opinion on this point. I shall assume in favour of the petitioners that the State Legislature cannot validly legislate for private charitable or religious endowments. But the petitioners are not right in submitting that the Act would be unconstitutional and void even so far as it applied to public religious and charitable endowments. In a matter of this description, the principle to be applied is well-settled. The principle is that Legislature must not be presumed to exceed its own jurisdiction and if two constructions of a statute are possible, one of which would make it *intra vires* and the other *ultra vires*, the Court must lean to that construction which would make the statute *intra vires*. To put it differently, the language used in section 2(1) of the Act must be read down in such a case so as not to apply to public or charitable trust of a private character. In support of this principle reference should be made to *Macleod* v. *Attorney-General for New South Wales*(1), in which the Legislature of New South Wales had enacted a law providing that:

> "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years".

The appellant who had during the life time of his wife married another woman in the United States of America, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act

(1) (1891) A. C. 455.

1953.

BIJAYANANDA v. STATE. RAMASWAMI, J.

would be *ultra vires*. The Judicial Committee observed that if the statute was construed as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. At page 457 Lord Halsbury states: " That seems to their Lordships to be an impossible construction of the statute, the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It, therefore, becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words ' Whosoever being married ' mean ' Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales ' ". And again at page 459: " It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the Statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony ". The principle applies to all law-making bodies with limited powers. In

1953.

BIJAYANANDA v. STATE.

RAMASWAMI J.

D'Emden v. *Pedder*(1), the High Court of Australia held that there was no justification for assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth: "It is, in our opinion, a sound principle of construction that Act of a sovereign Legislature, and indeed of subordinate legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative.....It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or in the more restricted sense according to the general scope and object of the enactment". The principle is also enunciated in the decision of the Federal Court in *Re The Hindu Women's Rights to Property Act*(2), in which it was held that the word 'property' in the Hindu Women's Rights to Property Act must be construed as referring to property other than agricultural land. It was observed that when a Legislature with limited and restricted powers makes use in an Act of a word of such wide and general import as 'property', the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other.

Adopting the principle in the present case it follows that the Act would not be unconstitutional even on the assumption that the State Legislature cannot validly enact a law with respect to private religious endowments. In such a case, section 2(1) would be read in a restricted sense so as to include only Hindu religious or charitable trusts of public character and the provisions of the Act would apply only to Hindu religious or charitable trusts of public character.

(1) (1904) 1 C. L. R. 91.

(2) (1941) A. I. R. (F. C.) 72.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

I must next examine the question whether the impugned Act violates Articles 25 and 26 of the Constitution. The argument of Mr. G. P. Das is that the freedom of the Mahanths in dealing with the endowed properties is greatly hampered by the drastic provisions embodied in the impugned Act. For example, learned counsel referred to section 28(2)(*g*) which empowered the Board to give directions to the trustees for the proper administration of a religious trust, and to section 28(2)(*h*)(*iii*) which empowered the Board to remove a trustee from his office if such trustee wilfully disobeys the directions and orders of the Board. Learned counsel also referred to sections 44, 45, 51, 58 and 59 of the Act. Learned counsel complained that section 58 imposed a duty upon the trustee to carry out all directions which may be issued by the Board. It was argued that the Mahanth would be reduced to the status of a mere servant, carrying out the orders of the Board, and no discretion would be left to the Mahanth in the matter of administration. Learned counsel also referred to section 60 which provided that the trustee should prepare a budget for the estimated income and expenditure and submit a copy thereof to the Board. Section 60(2) empowered the Board to alter or modify the budget in such manner and to such extent as it thinks fit. On the basis of these provisions it was argued that the right of free practice and propagation of religion guaranteed under Article 25 has been interfered with. It was also contended that the guarantee under Article 25 has been violated.

In my opinion the argument is not correct. The freedom of religion guaranteed by Article 25 is not an uncontrolled freedom. The religious freedom which has been safeguarded by this article is religious freedom in the background of a secular State. The freedom which Article 25 guarantees is freedom in a

1953.

VIJAYANANDA v. STATE. RAMASWAMI, J.

social organisation which requires the protection of law against the evils masquerading in name of religion, against evils which menace the welfare and the morals of the people. It should be noticed that the right guaranteed under Article 25 is " subject to public order, morality and health ". The article also is subject to other provisions of part III of the Constitution, for instance, the right is subject to Article 17 which abolishes untouchability and forbids its practice in any form. Article 17 provides that the enforcement of any disability arising out of ' untouchability ' shall be an offence punishable in accordance with law. There are other restrictions imposed on the right guaranteed by Article 25(1). For instance, Article 25(2) permits the State to make any law regulating or restricting any economic, political or other secular activity which may be associated with religious practice. The State has also the right under this article to legislate for social welfare and social reform though it may interfere with the profession, practice and propagation of religion by any particular individual. The State may also legislate for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus though such legislation may interfere with religious practice.

In the present case I am of opinion that the impugned Act does not violate the guarantee under Article 25(1). Unless the legislation *directly* attempts to control the practice and propagation of religion there is, in my opinion, no violation of the guarantee under Article 25 of the Constitution. The question must always be asked" Does the impugned law prohibit the propagation or practice of religion in its character as such?" The true approach is to consider the directness of the legislation. It was argued on behalf of the petitioners that section 60 of the Act grants wide discretion on the Board to alter the budget in such manner as it thinks fit. It was contended that the

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

right of the Mahanth to propagate religion may be affected by the orders given by the Board and the guarantee under Article 25 of the Constitution was therefore violated by the impugned Act. I am unable to accept the argument. The impugned Act may indirectly affect the propagation of religion but Article 25 is not attracted unless the legislation directly relates to the exercise or propagation of religion. For example, a Mahanth who is a reputed religious leader may be detained under the provisions of the Preventive Detention Act for reasons of the security of the State. Would it be open to the Mahanth to complain that his right under Article 25 has been violated though the legislation fulfils all the requirements of Article 21? It is manifest that Article 25 has no application to such a case. Again, take the case of a millionaire who is piously disposed and who devotes all his income for printing and publishing leaflets to propagate a particular religious tenet. If there is a legislation providing for increased rate of income-tax and sur-tax, is it open to the millionaire to complain that his right under Article 25 has been abridged? It is manifest that such a plea cannot be entertained. This view is supported by the decision of the Supreme Court in *Gopalan's case*(1). It was held by the Supreme Court in that case that Article 19 of the Constitution has no application to a law which relates directly to preventive detention even though as a result of the order of detention the rights referred to in sub-clauses (*a*) to (*e*) and (*g*) of clause 1 of Article 19 may be restricted or abridged; and that the constitutional validity of a law relating to such detention cannot therefore be judged in the light of the test prescribed in clause 5 of the said article. At page 101 Kania, C.J., states: "If there is a legislation directly attempting to control a citizen's

(1) (1950) S. C. R. 88.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in Article 19(1) generally must fail. Any other construction put on the article, it seems to me, will be unreasonable ". Applying this test in the present case it is obvious that there is no violation of the guarantee under Article 25 of the Constitution. The impugned Act is not legislation directly interfering with the practice and propagation of religion. On the contrary, the object of the Act is to provide for the better administration of Hindu religious trusts and for the protection and preservation of the properties appertaining to such trusts. The preamble of the Act makes an express statement to this effect. Section 28 of the Act imposes a duty on the Board to do all things reasonable and necessary to ensure that trusts are properly supervised and administered and that the income thereof is duly appropriated and applied to the objects of such trusts and in accordance with the purposes for which such trusts were founded. Section 60 authorises the Board to alter or modify the budget of a trust in such manner as it thinks fit; but section 60(6) sets an important limitation on the power. Section 60(6) provides that the Board is not authorised to alter or modify the budget in a manner inconsistent with the wishes of the founder. Upon a consideration of these provisions it is clear that the impugned Act deals only with administration of the

properties of religious trust and that the impugned Act does not directly relate to practice and propagation of religion. There is no violation of the guarantee under Article 25 of the Constitution and the argument of the learned counsel for the petitioners on this point must fail.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

That the freedom of religion guaranteed does not prohibit legislation dealing with administration of property is also clear from a consideration of the provisions of Article 26. Article 26 states: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(*a*) to establish and maintain institutions for religious and charitable purposes; (*b*) to manage its own affairs in matters of religion; (*c*) to own and acquire movable and immovable property; and (*d*) to administer such property in accordance with law. The article makes clear distinction between right of a religious denomination to manage its own affairs in the matter of religion and the right of such religious denomination to own and acquire movable and immovable property and to administer such property. Article 26(*d*) expressly states that the right of a religious denomination to administer property is not an unqualified right. The right to administer the property is subject, in the first place, to the condition that public order, morality and health are safeguarded. The right is also qualified by the expression that the " administration should be in accordance with law ". Article 26(*d*) therefore contemplates the right of the State to make a law with respect to administration of property owned and acquired by religious denominations or by any section thereof. All that is safeguarded is that so long as the religious denomination or a section thereof administers its property in accordance with such law as the State Legislature has passed, that right should not be interfered with. It was not disputed in the course of argument that the

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

expression ' law ' in Article 26(*d*) should be construed to mean enacted law or State made law and not to mean the principles of natural justice outside the realm of positive law. That was the interpretation given to the word ' law ' in Article 21 by the Supreme Court in *Gopalan's case*(1). It was held in that case that the word ' law ' in Article 21 was used in the sense of State made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. In my opinion the word ' law ' in Article 26(*d*) must be interpreted in the same manner as in Article 21 to mean—State made law. If this view is correct it follows that the freedom guaranteed under Article 26 to a religious denomination includes the freedom of denomination to manage its own affairs in the matter of religion but does not include unqualified freedom to administer its property. The right of the denomination to administer its property is subject to the right of the State to make law for the administration of such property. In my opinion the impugned Act does not therefore violate the freedom given under Article 26 of the Constitution of India.

There are decisions of the Supreme Court of United States which deal with the constitutional protection of religious freedom. These cases clearly lay down that such protection is not absolute and that it does not involve dispensation from obedience to general laws of the land which are not expressly directed against religion. Speaking of the guarantee, Justice Frankfurter declared in a recent case: " But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To

(1) (1950) A. I. R. (S. C.) 27.

1958.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

state the problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration..... In the judicial enforcement of religious freedom we are concerned with a historic concept. *See* Mr. Justice Cardozo in *Hamilton* v. *University of California*(1). The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognised " [*Gobitis's case*(2).]

I turn next to the question whether the fee payable by religious trust under section 70 of the impugned Act is in the nature of a tax and whether the statutory provision is constitutionally valid. The argument presented on behalf of the petitioners is that the fee imposed under section 70 was a compulsory fee, that the fee was not proportionate to the services rendered and there was no relationship between what was paid by the trustee and the services

(1) (1934) 293 U. S. 245, 265.
(2) (1940) 310 U. S. 586.

1958.

BIJAYANANDA v. STATE

RAMASWAMI J.

rendered by the Board. It was therefore contended that the fee mentioned under section 70 is a contribution in the nature of a tax and the State Legislature was incompetent to enact such provision. It was conceded that the impugned legislation falls under items 28, 10 and 47 of list III and if the fee imposed by section 70 was not a tax but a fee. the legislation could be sustained under the power of the State Legislature mentioned in item 47 of the Concurrent List. It was however contended that the fee was in the nature of a tax and the power to tax was vested in the Parliament and not in the State Legislature by reason of Article 248(1) and entry 97 in list I of the Constitution. The question to be determined is therefore whether the fee imposed under section 70 is a payment in the nature of a fee. In my opinion the contribution made under section 70 is in the nature of a fee and not in the nature of a tax. It is true that there is the element of compulsion in the payment of the fee and it is also true that the fee is not uniform and there is no relationship between the amount of the fee and the services rendered. But the main consideration in such a case is whether the contribution goes to swell the public revenue. In this connection the definition of Bastable is important: "A tax is a compulsory contribution of the wealth of a person or body of persons for the services of the public powers" (Public Finance 3rd edition, page 263). Seligman also defines the nature of a tax in similar terms—"A tax is a compulsory contribution from the person to the Government to defray the expenses incurred in the common interest of all without reference to the special benefits conferred (E. R. A. Seligman—Essays on Taxation, 10th edition, page 432). In the present case the contribution imposed under section 70 does not go to the consolidated fund of the State of Bihar. A separate fund is constituted under section 69 which is ear-marked for a separate purpose. Section 71 states that the trust fund should be applied to certain objects including all the expenses for carrying out the

object of the statute. The fund created under section 69 is not a part of the consolidated fund of State and there is hence no justification for holding that the contribution imposed under section 70 on the trustee of every religious trust is in the nature of a tax. In his book on American Constitutional Law, Willis states: "Taxation is the legal capacity of a Government to impose charges upon persons or their property to raise revenue for governmental purposes". Under the present Act, the authorities may be raising revenue from the trustees of religious endowments under section 70 but the levy is not made for any governmental purpose but for the limited specified purpose laid down in section 70, viz., for defraying the expenses incurred in the administration of the Act. For these reasons I hold that the contribution made under section 70 of the Act is in the nature of a fee and not in the nature of a tax and the State Legislature was competent to enact this provision.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

On this question learned counsel for the petitioners placed much reliance upon the decision of the Madras High Court in *Sri Shirur Mutt* v. *Commissioner, Hindu Religious Endowments Board*(1). The question at issue in that case was whether the levy of 5 per cent on the income of the Muth under the Hindu Religious Endowment Act was constitutionally valid. It was held by a Bench of the Madras High Court that the levy was a tax and not a fee and the Madras State Legislature was not competent to enact the provision with regard to the imposition of the tax. But the authority of that case is of no assistance to the petitioners for the material facts are different. The main distinguishing feature of the Madras Act was that no separate fund was constituted of the levy imposed by the Government on the religious institutions. The contributions were not allocated to any specific fund but the contributions went to the consolidated fund of the State. The expenses provided in the Act had

(1) (1952) A. I. R. (Mad.) 613.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

therefore to be met by a proper Appropriation Act and not out of any specific fund created by the statute. The decision of the Madras High Court proceeds mainly on the footing that the contribution made by religious institutions were not ear-marked for any specific fund but the contributions went to the general revenue of the State. The material provisions of the impugned Act in the present case are manifestly different. The present case bears resemblance to *Ratilal's case*(1) in which it was held that the levy imposed by the Bombay Public Trust Act was in the nature of a fee and not in the nature of a tax. It was held by Chagla, C.J. in that case that the real test to be applied was to consider whether the levy was made for the purpose of raising public revenue for the State. With great respect, I think, that the test laid down by the learned Chief Justice is correct.

Lastly the argument was put forward by Mr. G. P. Das that the statute violated Article 14 of the Constitution. The argument was based on section 2(*e*) of the Act which defines a ' Hindu ' to mean a person professing any religion of Hindu origin and includes a Jain and a Buddhist, but does not include a Sikh. Reference was also made to sections 5, 7 and 8 of the Act which relate to the constitution of the Board of Religious Trusts. It was pointed out that section 8 made a distinction in the constitution of the Board for the Jains and the Board for the Hindus. In the case of Hindus the constitution of the Board is as follows: (*a*) four persons appointed by the State Government, (*b*) two persons elected in the prescribed manner by the trustees of religious trusts other than Jain Religious Trusts; (*c*) eleven persons elected in the prescribed manner by the Hindu members of the State Legislature, the Parliament, the Municipalities and the District Boards. As regards Jains, two Boards are constituted, one for Swetambar Jains and the other for Digambar Jains. The constitution of these

(1) (1953) A. I. R. (Bom.) 242.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

two Boards is identical. The constitution is (*a*) two persons appointed by the State Government, (*b*) four persons elected in the prescribed manner by the trustees of the Jain Religious Trusts, (*c*) five persons elected in the prescribed manner by Shree Sangh or by the Digambar Samaj. The argument of the learned counsel was that there was no apparent reason why a distinction should be made in the constitution of the three Boards. Learned counsel complained that the Board of Jain Religious Trusts had a greater proportion of members elected by the trustees. It was further argued that there was no reason why the Sikh endowments were excluded from the purview of the Act. In my opinion the argument of the learned counsel cannot be accepted as valid. The guarantee of equal protection under Article 14 is not absolute. The article does not prohibit legislative classification nor does it prevent the Legislature from enacting special laws to combat special evils. In this context it is important to remember the principle that the Court ought to make every possible presumption in favour of the constitutionality of the enactment. "It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds" [*Middleton's case*(1)]. The onus is therefore on the petitioners to establish that the classification adopted by the Legislature is arbitrary and unreasonable. That is the principle laid down by the Supreme Court in *Charanjit Lal's case*(2). In the present case there is no material produced on behalf of the petitioners to discharge the onus. It is true that in the affidavit the petitioners state that Article 14 has been violated and that the classification is unreasonable; but the petitioners have not alleged that Sikh and Jain endowments are in the same situation as Hindu trusts or that they are mismanaged to the

(1) (1919) 249 U. S. 152, 157.
(2) (1951) A. I. R. (S. C.) 41.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

same extent. No facts are stated in the affidavit to indicate that the classification adopted by the legislature is unreasonable. On behalf of the respondents it was argued that Sikhs, Jains and Hindus are different in the matter of profession of faith. It was pointed out that Sikhs have no caste or priest, that they do not believe in the Vedas, Puranas or Shastaras and that the ceremony of initiation was different. It was pointed out that the Jains also do not recognise the divine authority of Vedas and do not practise Saradhs or ceremonies of the dead, nor do they recognise spiritual superiority of the Brahmins. The Government Advocate referred in support of his contention to page 82 of Maine's Hindu Law, eleventh edition. The contention of the Government Advocate was that Sikhs, Jains and Hindus differ in the matter of numerical strength. It is also conceivable that there is difference as regards the number of religious institutions, the amount of the properties held, the measure and extent of mismanagement and the consequent need for control. The contention of the Government Advocate was that the onus was on the petitioners to show that the Hindus, Jains and Sikhs were similarly situated in respect of these matters and that the classification adopted in the Act was unreasonable. The argument of the Government Advocate was that the question depends on investigation of facts, that evidence has to be given *aliunde* and that the petitioners have not shown either by swearing affidavit or otherwise that the classification made under the Act was unreasonable. In this connection counsel pointed out that there was indication in the Act that the Jains possessed an organisation different from that of the Hindus. Section 8 of the Act referred to Shree Sangh which was an assembly of Swetambar Jains and Digambar Samaj which was an assembly of Digambar Jains and made provision that five persons shall be elected to the Board in the prescribed manner by these two assemblies. The Government Advocate said that

the religious institutions of Jains were organised on an all-India basis.

The argument of the Government Advocate is well-founded. The petitioners have not established their claim that the classification is unreasonable or that the guarantee of equal protection of laws under Article 14 is violated. To adopt the words of Justice Stone. " It is a salutary principle of judicial decision long emphasised and followed by this Court that the burden of establishing the unconstitutionality of a statute rests on him who assails it and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of the equal protection of the laws if any state of facts reasonably may be conceived to justify it " [*Metropolitan Casuality Insurance Company* v. *Brownell*(1)].

The next point urged on behalf of the petitioners is that even if the Act is constitutionally valid, the Board has no jurisdiction to issue a notice under section 59 of the Act for the reason that the endowments are not public endowments and that they do not come within the ambit or operation of the Act. In M. J. C. No. 415 it was asserted by the petitioner that the property was not trust property at all and that the Act had no application. There is a counter affidavit on behalf of the State of Bihar to the effect that Manik Chawk Asthal is a public religious trust. In M. J. C. no. 418 there is an affidavit on behalf of Mahanth Moti Das that the trust exists for the benefit of the Kabirpanthis who are not of Hindu origin and the Act has no application to the petitioner or to the Asthal. There is also an assertion that the properties

(1) (1935) 294 U. S. 580.

1953.

BIJAYANANDA v. STATE.

RAMASWAMI, J.

are not trust properties and there is no endowment made for any public, charitable or religious purpose. There is a counter affidavit also on behalf of the State that the Parbatta Asthal is a public Asthal and the properties in question are trust properties. In M. J. C. 131 of 1953 we have examined the question whether Kabirpanthis are of Hindu origin. We have reached the conclusion that Kabirpanthis are of Hindu origin and that the impugned Act applies to trusts existing for the benefit of Kabirpanthis. The judgment in M. J. C. 131 of 1953 will be pronounced today. The other question at issue, viz., whether the properties belong to a public or private endowment, is a question which involves investigation of complicated facts and involves recording of evidence. It is manifest that a proceeding under Article 226 is not a proper machinery for investigating such complicated questions of fact. If the petitioners contend that the properties are not trust properties they are at liberty to institute a properly framed suit claiming the reliefs they seek in a court of competent jurisdiction.

For the reasons which I have expressed I think that the Bihar Hindu Religious Trust Act (Bihar Act I of 1951) is a valid piece of legislation and that all these applications for a *writ* under Article 226 of the Constitution of India must be dismissed with costs. Hearing fee five gold mohars in each case.

SINHA, J.—I entirely agree.

Applications dismissed.

K. D.