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VOLUME V

1926

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HIGH COURT.

1926.

Chief Justice.

Hon'ble Sir Dawson Miller, Kt., K.C. (*On leave from 16th July* 1926 *to* 12*th August* 1926).

,, Sir Jwala Prasad, Kt. (*Acting from 16th July* 1926 *to* 12*th August* 1926).

Puisne Judges.

Hon'ble Sir B. K. Mullick, Kt., I.C.S. (*On leave from 13th March* 1926 *to* 12*th August* 1926).

,, P. R. Das, Barrister-at-Law. (*On leave from 16th July* 1926 *to* 12*th* August 1926).

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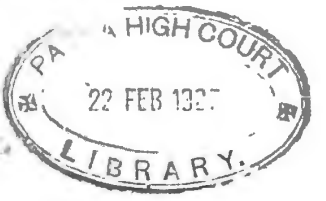


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PATNA HIGH COURT
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THE
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SPECIAL BENCH.

Before Dawson Miller, C.J., and Jwala Prasad and Das, J.J.

ADITYA PRASAD SINGH

v.

RAM NARAYAN DAS.*

1925.

March, 23.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22(a)—*Scope of—Proviso, meaning of—Subsequent application for execution more than a year after the last order in previous execution—whether notice necessary.*

Order XXI, rule 22(*a*), applies to every application for execution and not merely to the first application. It follows, therefore, subject to the proviso to that rule, that whenever an application, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the court is bound to issue the notice referred to in that rule to the person against whom execution is applied for.

Therefore, in every case where an application for execution is made more than a year after the last order made against the judgment-debtor in any previous application, a fresh notice must be served.

Mahadeo Singh v. *Dhobi Singh* (1), overruled.

* Appeal from Appellate Order no. 139 of 1924, from a decision of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 26th March, 1924, reversing a decision of B. Dwarka Prasad, Munsif of Begusarai, dated the 12th September, 1923.

(1) (1923) I. L. R. 2 Pat. 916.

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ADITYA PRASAD SINGH v. RAM NARAYAN DAS.

The facts of the case material to this report are stated in following Order.

ROSS AND KULWANT SAHAY, JJ.—The question is whether the present (the eighth) application for execution of a decree passed in 1913, which was made on the 11th of April, 1923, is barred by time. The Court of appeal below, reversing the decision of the Munsif, held that it was not barred. The question depends upon whether limitation was saved by the issue of notice under Order XXI, rule 22, in the seventh application for execution on the 9th of November, 1922.

The learned Vakil for the appellant concedes that if this notice was required to be issued by the Code of Civil Procedure of 1908, then the case is governed by Article 182, clause (*6*), of the schedule to the Limitation Act; and the present application is within time. He contends, however, that inasmuch as on the fifth application for execution notice under Order XXI, rule 22, was issued, it was no longer necessary to issue any further notice under that rule and, consequently, the issue of notice under Order XXI, rule 22, on the 9th of November, 1922, was not required by the Code of Civil Procedure and Article 182, clause (*6*), has no application. He relies in support of this contention on a decision of a Division Bench of this Court in *Mahadeo Singh* v. *Dhobi Singh* (1). In our opinion Order XXI, rule 22, is general and requires notice to issue in any case where the application for execution is made more than one year after the date of the decree, except as provided in the proviso. The proviso lays down that no such notice shall be necessary if the application is made within one year from the date of the last order against the party, against whom the execution is applied for, made on any previous application for execution. Now the seventh application for execution, in which the notice which is said to have been unnecessary was issued, was made on the 13th of May, 1922. The last order against the judgment-debtor made on a previous application for execution was passed on the 20th of February, 1920, when attachment and notice under Order XXI, rule 66, were issued; but, as that order was made more than one year before the seventh application for execution, it was, in our opinion, necessary that notice under Order XXI, rule 22, should have been given on the seventh application also. Consequently the issue of that notice was required by the Code of Civil Procedure and Article 186, clause (*6*), applies and the appeal should be dismissed. In *Mahadeo Singh* v. *Dhobi Singh* (1) the execution was against the legal representative of the judgment-debtor and notice had therefore been issued under Order XXI, rule 22(*1*)(*b*), and that notice did not need to be repeated; but the facts of the case show that if our reading of the proviso is correct and the last clause,

> "if upon a previous application for execution against the same person the Court has ordered execution to issue against him",

applies only to the clause immediately preceding, *i.e.*, to the case contemplated in clause (*b*) of the rule, then a fresh notice under clause (*a*) was necessary. Our opinion therefore differs from that decision and under the rules of the Court the case has to be referred to a Full Bench for a decision of the question whether when notice

(1) (1923) I. L. R. 2 Pat. 916.

under Order XXI, rule 22(*1*)(*a*), has once been issued it is or is not necessary to issue a fresh notice if the application for execution is made more than one year after the date of the last order against the party against whom execution is applied for, made on a previous application for execution.

Let the papers be placed before his Lordship the Chief Justice.

Shiv Narain Bose, for the appellant: No notice of subsequent applications for execution was necessary under Order XXI, rule 22, so as to save limitation under Article 182(*v*). When once a notice has been issued the rule exhausts itself and no fresh notice of any subsequent application is required by law. The only object of giving a notice under Order XXI, rule 22, is to protect the judgment-debtor or his representative from being lulled into a sense of a security [see *Mahadeo Singh* v. *Dhobi Singh* (1). *Mungal Prasad Dichit* v. *Girija Kant Lahiri*(2) was also referred to]. I rely on *Erava* v. *Sidram Appa Pasare*(3) in support of the proposition that the intention of the legislature in enacting the rule was to give the judgment-debtor an opportunity to pay up and when once a notice has been issued, the object is served.

Satyendra Nath Banerjee, for the respondent.

DAWSON MILLER, C. J.—This case has been referred to the Full Bench because the learned Judges before whom it came took a different view from that expressed in the earlier case of *Mahadeo Singh* v. *Dhobi Singh*(1).

The question for determination is whether a petition for execution filed on the 11th April 1923, is time-barred or not. The facts which it is necessary to refer to in order to appreciate the question in dispute are shortly as follows:

The decree which is the subject of the present application for execution was passed in favour of the

(1) (1923) I. L. R. 2 Pat. 916.

(2) (1882) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123.

(3) (1897) I. L. R. 21 Bom. 424 (432), F. B.

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respondents in the year 1913. After five applications for execution which left the decree unsatisfied a sixth execution petition was filed on the 1st December, 1919. An order for attachment of some of the judgement debtor's property was made in those proceedings on the 26th February, 1920, and in April the property was sold. The sale, however, was set aside on the 28th August following and that execution case then came to an end. It should be noted that the last order passed against the judgment-debtor in that execution case was the order for attachment of the 26th February, 1920. That is the only date which is of any importance in that execution case in considering the present question. A seventh application for execution was filed on the 13th May, 1922, and in that case a notice was issued under Order XXI, rule 22, on the 9th November, 1922. That notice appears to have been served on or before the 29th November of the same year. An objection was afterwards taken in that execution case by the judgment-debtor to the effect that the petition for execution was not in accordance with law. The objection was sustained and the case was dismissed on the 10th February, 1923. The present execution case which is the eighth was filed on the 11th April, 1923. That application was made within three years of the previous one but more than three years from the date of applying to take any step-in-aid of execution in the sixth execution case.

The learned Munsif decided that as the seventh application for execution was not according to law, it did not create a fresh starting point for limitation. He accordingly dismissed the present application.

The learned Subordinate Judge on appeal came to the conclusion that although the application itself in the seventh case may not have been according to law still an order had been passed in those proceedings on the 9th November, 1922, as required by Order XXI. rule 22, and, therefore, under clause (*6*) of article 182 of the Limitation Act a fresh period of limitation of three years began to run from that date. From that

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decision there was an appeal to this Court. The appeal was heard by a Bench of two judges who came to the conclusion that the order of the 9th November, 1922, passed in the seventh application for execution was an order required by the Code of Civil Procedure within the meaning of Article 182 of the Limitation Act, and, therefore, the present application, which was within three years, in fact within one year from that order, was in time. As, however, there was a previous decision of this Court to which I have referred, which too took a different view, the case was referred to this Bench.

The only question for determination in this appeal is whether in the circumstances which I have stated the order passed on the 9th November, 1922, ordering notice to issue under Order XXI, rule 22, was a notice required by the Code within the meaning of the sixth clause of Article 182. I perhaps ought to mention that it is no longer contended that that notice if required by the Code is bad merely on the ground that the seventh execution petition filed on the 13th May, 1922, was not in accordance with law.

Order XXI, rule 22, provides as follows:

"Where an application for execution is made—

(*a*) more than one year from the date of the decree, or

(*b*) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him."

There is a proviso to that rule which makes it unnecessary that a notice should be issued in certain cases but before dealing with that it is necessary to see what is included under the rule itself apart from the proviso.

The argument of the learned Vakil who appears on behalf of the appellant is that under the rule which I have just quoted it is necessary to issue notice in execution proceedings once, and once only, and when that has been done no further notice is required to be

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issued even if the subsequent execution proceedings should have been more than a year or even up to three years from the date when any order was passed against the judgment-debtor in any previous execution, and the issue of such a notice therefore did not come within clause (6) of Article 182 so as to save limitation. Now, so to interpret the rule is, in my opinion, to introduce words into it which do not exist. The rule applies to an application for execution and that to my mind must include, unless the contrary should appear, every application for execution and not merely the first application. It follows, therefore, in my opinion, that wherever an application for execution, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the Court is bound to issue the notice referred to, to the person against whom execution is applied for, unless the proviso makes it unnecessary. The present case therefore appears to come directly within the wording of the rule. It is not contended in this case that there is anything in the proviso which would make it unnecessary for the Court to issue the notice but we are asked to say that the intention of the Legislature must have been to require only one notice to be issued and no more. If that was in fact the intention of the Legislature, and I see no reason why it should be so, they have expressed that intention in every unhappy language, for there is nothing in the language of the rule to limit its operation to the first or any other application. But a reference to the proviso seems to me to make it clear that a fresh notice was contemplated as necessary even in subsequent applications except in so far as the proviso renders that course unnecessary. The proviso to the rule reads thus:

"Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for made on any previous application for execution or in consequence of the application being made against the

legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him."

But for that proviso it would be necessary to issue the notice in every case whether it be the first, second, or third or later application where it is made more than a year after the decree. The Legislature has considered, however, that if the party has had notice by some order being made against him in some previous execution case, then within a year of that order no further notice should be required. That seems to me to be the intention and object of the rule as a whole. Again, with regard to the legal representative, it is provided in his case that notice to him need not be given solely because he is the illegal representative, if upon a previous application for execution against him the Court has ordered execution to issue. But even although he is a legal representative he may still come under clause (*a*) of the rule subject to the proviso relating to that part of the rule.

The learned Judges in the previous case [*Mahadeo Singh* v. *Dhobi Singh* (1)] appear to me, with great respect, to have taken somewhat too narrow a view of the meaning of Order XXI, rule 22 They stated "The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree; but once the original decree has been put into execution and a notice has been served under rule 22 indicating his intention to proceed to execution it does not seem to me that it is contemplated by rule 22 that a fresh notice must be served for every execution application made more than one year after the last order against the judgment-debtor". With great respect to the learned Judges who decided that case I find myself unable to agree and I think that the proper interpretation of Order XXI, rule 22, is that which I have already indicated, namely, that in every case

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where an application is made more than a year after the last order made against the judgment-debtor in any previous execution, then a fresh notice must be served.

In my opinion this appeal should be dismissed with costs to the respondents to be paid by the appellant.

JWALA PRASAD, J.—I agree.

DAS, J.—I also agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

1925.

June, 2.

SUBEDAR RAI

v.

RAMBILAS RAI.*

Estates Partition Act, 1897 (*Ben. Act V of* 1897), *section* 119—*suit by a tenant contesting an order made under Chapter VI—whether section* 119 *a bar.*

In a partition proceeding the Deputy Collector recorded certain land as the plaintiffs' kasht land but on appeal the Collector ordered that the land should be recorded in the khasra as zerait, and the partition was made accordingly. The plaintiffs, therefore, brought the present suit on the allegation that the disputed land was their ancestral guzashta kasht land from before the time when their ancestor acquired a share in the proprietary interest in the village. The defence was *inter alia* that the suit was barred by the provisions of section 119, Estates Partition Act, 1897.

Held, that the suit was maintainable as section 119, Estates Partition Act, does not bar a suit contesting an order made under Chapter VI of the Act.

* Appeal from Appellate Decree no. 1062 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Shahabad, dated the 22nd May, 1922, reversing a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 21st July, 1921.

Janki Nath Chowdhury v. *Kali Narain Chowdhury*(1), *Lakhi Chaudhry* v. *Akloo Jha* (2) and *Baldeo Sahi* v. *Brajnandan Sahi*(3), followed.

Chaudhary Kesari Sahai Singh v. *Hitnarayan Singh*(4) and *Anil Kumar Biswas* v. *Rash Mohan Saha* (5), distinguished.

Appeal by the defendants.

The plaintiffs brought this suit on the allegation that 25 bighas of land was their ancestral guzashta kasht from before the time when in 1909 their ancestor acquired a half-anna share in the proprietary interest in the village. In certain partition proceedings the Deputy Collector recorded this land as the plaintiffs' kasht land; but on appeal the Collector ordered that the land should be recorded in the khasra as zerait and the partition was made accordingly. The plaintiffs claimed a declaration that the land was their kasht land and possession and mesne profits. The defence was that the land was zerait and that the suit was barred by the provisions of the Estates Partition Act.

The Subordinate Judge held that the plaintiffs had failed to prove their title; and, further, that section 119 of the Estates Partition Act barred the suit. The District Judge reversed both these findings. He held that the plaintiffs had proved that they had possessed this land as raiyats at least since 1899 and that they had acquired the status of occupancy raiyats in the land. With regard to section 119 he was of opinion that as the order in the partition case which was contested in this suit was made under Chapter VI of the Act, section 119 had no application, and that there was nothing in the Act that barred the suit which was instituted by the plaintiffs in their capacity of raiyats. The defendants appealed.

(1) (1910) I. L. R. 37 Cal. 662. (2) (1911-12) 16 Cal. W. N. 639.
(3) (1918) C. W. N. (Pat.) 164. (4) (1920) 1 Pat. L. T. 507.
(5) (1923-24) 28 Cal. W. N. 46.

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SUBEDAR RAI v. RAMBILAS RAI.

Sultan Ahmed (with him *Manohar Lall*), for the appellants.

S. M. Mullick and *P. K. Mukharji*, for the respondents.

Ross, J. (after stating the facts set out above, proceeded as follows): With regard to the first finding it was contended by the learned Counsel for the appellants that inasmuch as the land was under water up to 1908, it was impossible that the plaintiffs could have acquired occupancy rights in the same. Now there is only one piece of evidence which refers to the land being under water, as appears from the judgment of the Subordinate Judge, viz., Exhibit A, a written statement by the mortgagee in a suit for redemption. The learned District Judge has dealt with this evidence and has held that a recital of this kind is of no value as evidence of fact. He was entitled to hold that opinion and in that view no objection can be taken to this finding of fact as to the status of the plaintiffs.

The substantial question in the appeal is as to the effect of section 119 of the Estates Partition Act. Two cases were referred to by the learned Counsel for the appellants, *Chaudhary Kesari Sahai Singh* v. *Hitnarayan Singh*(1) and *Anil Kumar Biswas* v. *Rash Mohan Saha*(2). Neither of these cases deals with an order under Chapter VI. They were both cases between proprietors and the substance of the partition was directly in issue in both. Section 119 clearly barred the plaintiffs' suit in both cases and these authorities throw no light on the present case where the plaintiffs are not asserting any right as proprietors but are claiming a raiyati right acquired long before they became proprietors On the other hand in *Janki Nath Chowdhry* v. *Kali Narain Roy Chowdhry*(3), the question was as to a miras right held by one who was also a proprietor in the village. In that case also it was argued that there had been

(1) (1920) 1 Pat. L. T. 507. (2) (1923-24) 28 Cal. W. N. 46.
(3) (1910) I. L. R. 37 Cal. 662.

a decision of the revenue authorities against the plaintiff as to the reality and extent of his tenure and that it was not open to him to have the matter reagitated in the Civil Court. On this argument their Lordships observed as follows: "No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be over-ruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would in our opinion be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings." This language applies precisely to the present case. Similarly, in *Lakhi Chaudhry* v. *Akloo Jha*(1) the question was discussed with regard to an order passed under Chapter VI and their Lordships said, "In the second place section 119 of the Estates Partition Act specifies the orders of the revenue authorities which cannot be questioned by a suit in any Civil Court. An order under section 45 or 46 is not one of the orders mentioned in section 119. The reason for the exclusion is obvious. The determination by the revenue authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and a stranger to the proceedings." The same view has been taken in this Court in *Baldeo Sahi* v. *Brajnandan Sahi*(2). A partition deals with the rights of proprietors and so far as raiyati lands are concerned they

(1) (1911-12) 16 Cal. W. N. 639.
(2) (1918) Cal. W. N. (Pat.) 164.

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are only entitled to a distribution of the rents. It could not have been the intention of the Act that the rights of tenants should be conclusively determined by the record-of-rights prepared for the purpose of partition and that this is so is clear from the fact that Chapter VI and section 111 are not covered by section 119. There is in my opinion nothing in that section to bar the present suit. The learned Subordinate Judge was of opinion that section 119 must bar the suit because the effect of decreeing the plaintiffs' suit would be to upset the whole partition. In my opinion that is not so. Section 89 provides for the case of dispossession of the proprietor of a separate estate by a decree of a Court of competent jurisdiction and enacts that in such case the partition shall not be disturbed, but such proprietor shall be entitled to recover from the proprietors of the other separate estates formed by the partition such compensation as may be fair and equitable. That section does not apply in terms to the present case; and there is no reason why the principle should not be applicable. If the value of the defendants' estate is reduced by the declaration of the plaintiffs' raiyati right in this land, their remedy in my opinion would be to seek compensation from the other proprietors; but there is no ground in justice why the fact that a partition has been made on the basis that this land is proprietor's land should debar the raiyat from asserting his raiyati right.

I would therefore dismiss this appeal with costs. As it appears that during the pendency of the suit possession was delivered and the plaintiffs were dispossessed, the decree will entitle them to recover possession with mesne profits.

DAS, J.—I agree

Appeal dismissed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Dawson Miller, C.J., and Macpherson, J.

RAJA RAJENDRA NARAYAN BHANJA DEO

v.

COMMISSIONER OF INCOME-TAX, B. & O.*

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June, 8.

Income-tax Act, 1922 (Act XI of 1922), section 29—limitation—notice of demand, when can be issued—reasonable time—form of notice, significance of.

No period is prescribed within which a notice demanding income-tax under section 29, Income-tax Act, 1922, is to be issued, and the mere fact that the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, is not tantamount to an enactment that it cannot be issued afterwards.

But although no period of limitation is prescribed for such a demand, it must be made within a reasonable time.

A notice issued 14 months after the expiration of the year of assessment would not, therefore, necessarily be too late.

The facts of the case material to this report are stated in the following statement of the case by the Commissioner of Income-Tax.

The question for determination of the High Court is whether, when in the year 1922-23 the Income-tax Officer only made an adjustment in respect of the income of 1921-22, and made no demand for the assessment of 1922-23, the Income-tax Officer can, in the year 1923-24, make the omitted demand.

2. The facts are as follows: In 1922-23 the Collector, as Income-tax Officer, determined the income of 1921-22 of the assessee (Raja Rajendra Narayan Bhanj Deo of Kanika) to be Rs. 67,490 and passed an order, dated October 31, 1923,

" assess to Rs. 2,805 income-tax and Rs. 1,093-2-0 super-tax."

As the assessee had been provisionally assessed in 1922-23 on an income of Rs. 1,55,181 and had paid income-tax and super-tax amounting to Rs. 9,715-14-8 and Rs. 8,460-2-0, respectively, an adjustment was made under section 69 of the Indian Income-tax Act, 1922, which resulted in a refund of Rs. 14,277-14-8, but no demand notice under section 29 for the income-tax and super-tax due in the year 1922-23 was made.

* Miscellaneous Judicial Case no. 80 of 1925.

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On January 26, 1924, the Income-tax Officer ordered the issue of a notice under section 34 of the Act on the ground that the income of 1921-22 had escaped assessment under the Act of 1922 and ultimately issued a demand notice for Rs. 2,805 income-tax and Rs. 1,093-2-0 super-tax.

3. It is desirable to explain the assessment procedure under the Income-tax Act of 1918. Under that Act the income of (say) 1920-21 was provisionally assessed in 1920-21, but as the income could not be accurately known till after the close of the year the ascertained income of 1919-20 was made the basis of this provisional assessment. Then in 1921-22 an adjustment was made: if the actual income of 1920-21 was found to be more than that of 1919-20, a further demand was made, while if it was less, a refund was granted, and also in 1921-22 a provisional assessment of the income of 1921-22 on the basis of the known income of 1920-21 was made. In the present case the assessee was entitled under the second proviso to section 69 of the Act of 1922 to the adjustment which was made, but he was also liable to be assessed in 1922-23 on the actual income of 1921-22 under sections 2(*11*), 3 and 22, which together provide for the assessment in any year of the income of the previous year.

4. The assessee contends: (*i*) that the income of 1921-22 cannot be taxed twice in the absence of an express provision of law to that effect, and (*ii*) that there was no escape of income within the meaning of section 34 and that at most there was a mistake apparent from the record which under section 35 can only be corrected within one year from the date of the demand notice.

(*i*) As regards the first point, in my opinion there is the necessary express provision of law. As explained in paragraph 3, section 18, of the Income-tax Act of 1918, provides for the provisional assessment in 1921-22 of the income of the year 1921-22 while section 2(*11*), 3 and 22 of the Income-tax Act of 1922 provide for the assessment of the income of 1921-22 in the year 1922-23. That this is the effect of the law was recognized by the Legislature, as is shown by the enactment of section 25 of the Act of 1922, which provides for an adjustment when a business profession or vocation is discontinued to compensate the assessee for the double taxation of the income of 1921-22. It may be mentioned that this fact is also recognized by the commentators P. D. Aiyangar (The Law of Income-tax, pages 342-3 and 354), A. V. Visvanatha Sastri (The Law and Practice of Income-tax in British India, page 195, paragraph 349), and this procedure has been followed universally throughout India by the department and has never been contested. I may perhaps be allowed to add for your Lordships' information that the adjustment system was retained for one year under the 1922 Act at the request of representatives of the commercial community. The year 1921-22 was a bad year and consequently the nett result of its retention was a heavy loss for the revenue as the refunds due on adjustment exceeded the sum recovered on adjustment by 2¾ crores of rupees.

(*ii*) As regards the second contention, in my opinion neither section 34 nor section 35 has any application.

(*a*) Section 34 deals with the assessment of income which has escaped assessment, but in the present case the income of 1921-22 was computed by the Collector and the assessment completed as is

shown by his order of October 31, 1923, and the amount of income-tax and super-tax payable was determined. Nothing escaped assessment but the Collector omitted to issue a demand notice under section 29 for the income-tax and super-tax due. This he should have done, of course, allowing credit for the refund to which the assessee was entitled as explained above. As the Income-tax Act of 1922 lays down no period of limitation for the issue of a demand notice under section 29 after the sum payable has been determined, the Income-tax Officer has power even now to make the demand without invoking section 34.

(*b*) Section 35 deals with the rectification of mistakes apparent from the record. In the present case there was no mistake in the assessment, but only an omission to take the subsequent steps necessary for the recovery of the amount due. Moreover, the fact that the period of limitation within which section 35 must be applied is reckoned from the date of the demand being made, implies that the section can only operate after a demand has been made, while in the present case the demand was omitted.

5. It is submitted that this view of the law is supported by the decision of the Madras High Court, dated the 26th September, 1923, in Reference Case no. 4 of 1923, *Commissioner of Income-tax, Madras*, v. *M. S. S. Chidambaram Chettiar and Meyappa Chettiar* (1).

6. I may mention that if the High Court accepts this view, I propose in exercise of my powers of review to cancel the assessment under section 34 and to direct the Income-tax Officer to issue a demand notice for the income-tax and super-tax previously assessed, but not demanded.

K. P. Jayaswal, for the assessee: There was no proper notice of demand as contemplated by section 29 of the Act. Although the legislature has not prescribed any period of limitation for a notice under section 29, it has to be inferred from the prescribed form which contemplates the issue of a demand notice in the year of assessment. The Commissioner is wrong in saying that, in the absence of an express provision prescribing limitation, he can make a demand any time after the current year. The Act should be construed in favour of the assessee.

Sultan Ahmed, Government Advocate, for the Crown: There is no period of limitation prescribed for the making of a demand under section 29. Wherever any limitation is prescribed in the Act it is provided for in the proper sections. The omission

(1) (1924) M. W. N. 35; 79 Ind. Cas. 798.

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in the case of a notice under section 29 leads necessarily to the conclusion that the legislature did not intend to prescribe any limitation in such a case. The prescribed form cannot regulate the period of limitation. There must be some express provision in the statute to limit the period.

Jayaswal, in reply: The legislature has not provided for a situation arising from non-service of notice in the current year. That omission is deliberate and significant. The prescribed form is a part of the notice itself.

DAWSON MILLER, C. J.: The only question in this case is whether the assessee can escape payment of income-tax and super-tax assessed at Rs. 3,898 for the financial year 1922-23 on the ground that the demand notice issued to him claiming payment of the tax was not issued during the financial year for which the tax was payable. What happened was that for the previous year (1921-22) he had been assessed for income-tax and super-tax at a sum of over Rs. 18,000. That was under the Act of 1918. Under the provisions then in force the assessment was in all cases a provisional one based on the previous year's income but liable to adjustment when the actual income for the year in question came to be known. It so happened that the income for that year 1921-22 had been provisionally assessed at a sum very much larger than the actual income turned out. In fact the actual income for 1921-22 produced a tax and super tax amounting together to only Rs. 3,898. There was therefore a balance due to the assessee on adjustment of over Rs. 14,000. That balance was ascertained after taking into consideration the return made by the assessee of his actual income for the year 1921-22. The return was made for the purpose of ascertaining the income for the next succeeding year, that is to say the year which began in April 1922. That year came under the new Act of 1922 by which the provisional adjustments were abandoned and a different

method of adjustment was adopted, namely, the income for any financial year was based once and for all upon the actual income of the previous year Accordingly on the 1st November 1922, the assessee whose return was accepted was served with a notice intimating that in respect of the income of the previous year he was entitled to a refund of Rs 14,277. That sum was the surplus which he had paid for the previous year over and above that which, as it turned out, he was liable to pay upon the actual income earned. When that notice was issued it was perfectly clear from the form of it that the income for the year 1922-23 which was based upon exactly the same assessment would also be taxed and super-taxed to the extent of Rs. 3,898 but for some reason or other no actual demand for payment of that sum for 1922-23 was made at that time. This appears to have been discovered sometime before January 1924 and on the 26th of that month the income-tax officer, finding that no income-tax had been paid by the assessee in respect of the year 1922-23, treated the case as one under section 34 of the Income-tax Act, 1922, which provides for cases where no assessment has been made or where certain items of income have not been taken into account in making the previous assessment. The section provides in effect that in such a case where income has escaped assessment or has been assessed at too low a rate for any year the income-tax officer may, at any time within one year of the end of that year, serve on the person liable to pay tax notice containing the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income. If that were the real state of affairs and no assessment had in fact been made for the year 1922-23 then no doubt section 34 would apply and the notice which was issued under that section, on the 26th January 1924, would be a notice issued within the time prescribed for that purpose under that section. Here again it was obvious to the assessee that he had been assessed for a tax to the amount of Rs. 3,898 for the year in question so

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that although no demand in the prescribed form for the income-tax for that year was served, there was in fact an intimation to the assessee on two occasions, namely, on the 1st November 1922 and the 26th January, 1924, of what the amount of the income-tax payable by him was.

The Income-tax Commissioner before whom the case came eventually and who stated a case for the High Court considered that this was not a case to which section 34 applied, that is to say he did not think it was a case where no assessment had been made for the year in question or where any part of the income profits or gains had escaped assessment, for an assessment had actually been made. Therefore upon the case stated we must take it that the facts do not disclose a case coming within section 34. Then on the 9th June, 1924, the assessee having taken exception to the demand under section 34 a fresh notice was issued in the ordinary form prescribed under the Act demanding the income-tax for the year 1922-23. It will be seen that this notice was issued something more than a year after the expiration of the year of assessment and the assessee contends that that is too late to make any demand under the provisions of section 29 of the Act. Section 29 of the Act provides that

> "When the Income-tax Officer has determined a sum to be payable by an assessee under section 23, or when an order has been passed under sub-section (2) of section 25 or section 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable."

The first thing to be observed is that no period within which such a notice demanding income-tax is to be issued is prescribed in the Act and therefore prima facie a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late. The assessee, however, relies upon the form under which the demand referred to under section 29 is to be made. That form is headed

> "Notice of demand under section 29 of the Income-tax Act, 1922."

It begins thus:

"You have been assessed for the current year to income-tax amounting to Rs....."

and so on. The learned Counsel for the assessee contends that that form clearly indicates that the demand can only be made during the current year, that is to say the year in respect of which the income-tax is payable. No doubt in the ordinary course the form prescribed would be quite applicable because assessments are generally made as soon as possible after the commencement of the financial year and the demand notices are sent out in the ordinary course soon after the assessment is made. I cannot believe, however, that it was intended by prescribing a form of notice of this sort to create a limitation period within which such notice must be given. If it had been the intention of the legislature to prescribe a period of limitation for such notices I think that such an important provision would have found place in the body of the Act itself indicating that intention. In other sections of the Act we do find that where certain notices have to be given the period within which they have to be given is prescribed. But so far as section 29 is concerned no period at all is prescribed in the Act. Again it is quite possible that in certain cases no demand could be made within the actual year for which the tax is payable. Provision is made for disputes which may arise as to the acceptance or rejection of the assessee's return. If his return is not accepted then an enquiry takes place, evidence may be demanded of him and much time may be expended in carrying on the enquiry, and it is quite possible that such enquiry would not terminate until after the year of assessment and I do not think it can be suggested that because the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, it is tantamount to an enactment that it cannot be issued afterwards. If any part of the form should not be applicable to the particular facts of the case then I presume it can be altered in the ordinary course before the form is sent out, but the mere fact that forms are

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prescribed under the Act does not seem to me to carry with it the result that unless everything is done exactly as provided by the form it is of no force and effect. Although no time is prescribed for issuing the notice in question I suppose it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances. In the present case it was, as I have already said, about 14 months after the expiry of the year of assessment but from November of the year of assessment the assessee had in fact had notice, although no formal demand was made upon him, of the amount for which he had been assessed to income-tax for that year, and again he had notice in the following January showing that a demand was being made upon him for payment of the same sum on the ground that no previous assessment had been made. In these circumstances it seems to me that the notice was issued within a reasonable time. There is no period of limitation in the Act and I do not think in the circumstances the assessee should be allowed to escape payment of that which is justly due from him. I think that in this case the costs should be paid by the assessee who asked for a case to be stated. Having regard to the small amount in dispute we assess the hearing-fee at Rs. 150.

MACPHERSON J.—I agree.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1925.

June, 11.

Before Dawson Miller, C.J., and Macpherson, J.

AMBIKA PRASAD SINGH

v.

THE COMMISSIONER FOR INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 14(1)—*Scope of.*

The whole object of section 14 is to exempt from taxation in the hands of an individual that which has already been taxed

* Miscellaneous Judicial Case no. 147 of 1924.

in the hands of the joint family as such: If, however, the individual receives an income aliunde from property which has not been taxed as that of a Hindu joint family, the provisions of section 14 have no application whatever.

The facts of the case material to this report are stated in the following statement of the case by the Commissioner of Income-tax:

"The question for the determination of the High Court is whether, when a man receives an annual allowance from his son out of a property which the son inherited from his maternal grandfather, this sum is exempt under the provisions of sub-section (*1*) of section 14 of the Indian Income-tax Act, 1922.

2. The facts are as follows:—

3. The assessee, Babu Ambika Prasad Singh, is father of the Maharaja of Tikari, proprietor of the 9-annas Tikari Raj. The assessee has no share in the property which constitutes the Raj, though he has other property. The Maharaja has, for some years, made him an annual allowance in cash which according to the assessee has now been stopped; but the assessee admits payment of Rs. 23,528 during the year 1922-23 which was assessed to income-tax in the year 1923-24.

4. In my opinion this sum was not received by the assessee in his capacity as member of a Hindu undivided family. Section 14 appears to me to mean that where a member of a Hindu undivided family has a separate income of his own that income alone will be taxed and not also any further income which may be distributed to him from the joint property of the undivided family. Even admitting that the assessee and the Maharaja form a Hindu undivided family the payment made to the assessee out of property which is not joint between him and his son is not a sum which he receives as a member of a Hindu undivided family and it therefore appears to me that the sum is assessable.

K. P. Jayaswal (with him *N. P. Prasad*), for the assessee.

Sultan Ahmad, Government Advocate, for the Commissioner of Income-tax.

DAWSON MILLER, C. J.—This is a case stated for the opinion of the Court by the Income-tax Commissioner under section 66, sub-section (*1*), of the Income-tax Act, 1922.

The assessee Ambika Prashad Singh is the father of the present proprietor of the 9-annas Tikari Raj. The assessee has no interest in that property but his son the proprietor has been in the habit of making him an allowance yearly out of the proceeds of the property

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of the Tikari Raj. Upon that the assessee has been assessed to income-tax and the question which is submitted for our opinion in this case is formulated by the Income-tax Commissioner thus:

"The question for the determination of the High Court is whether, when a man receives an annual allowance from his son out of a property which the son inherited from his maternal grandfather, this sum is exempt under the provisions of sub-section (*1*) of section 14 of the Indian Income-tax Act, 1922."

DAWSON MILLER, C.J.

Section 14, sub-section (*1*), provides as follows:

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The learned Commissioner was of opinion that as the assessee received this sum as an allowance from his son and not by reason of any right to share in the proceeds of the Tikari Raj that property not being the property of an undivided Hindu family he did not come under the provisions of section 14, sub-section (*1*). His view of that section is that it only applies to cases where the assessee receives the income in the capacity of a member of a Hindu undivided family. If he receives it as a mere gratuitous allowance to which he is not in law entitled by reason of being a member of a joint family then he does not come under the provisions of section 14. That is the only question which has been submitted for our opinion.

It is contended by Mr. Jayaswal on behalf of the assessee that if he is joint with his son for any purpose, and he contends that in the present case he is joint for some purposes, then anything which he may receive from his son is received by him as a member of a Hindu undivided family. I cannot think that the section bears any such interpretation. The whole object of the section is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income aliunde from property which has not been taxed as that of a Hindu joint family then it would appear that the provisions of section 14 have no application whatever. In my opinion

the learned Commissioner took a correct view of the section and the question propounded for our opinion must on the facts stated be answered in the negative.

MACPHERSON, J.—I agree.

APPELLATE CIVIL.

Before Das and Ross, J.J.

KHUDI RAI

v.

LALO RAI.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII, rule 1—Application for permission to withdraw from suit with liberty to bring a fresh suit—Order permitting withdrawal, effect of.

Where an application is made by a plaintiff to withdraw a suit with liberty to bring a fresh suit on the same cause of action and an order is passed giving permission to withdraw the suit although nothing is said in the order as to the plaintiff's right to institute a fresh suit, the order should be read along with the petition and construed as granting permission to institute a fresh suit.

Golam Mahomed v. *Shibendra Pada Banerjee*(1) and *Keegangote Narayan Tantri* v. *Nagappa*(2), followed.

Appeal by the plaintiff.

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

S. K. Mitter, for the appellant.

G. S. Prasad, for the respondents.

* Appeal from Appellate Decree no. 1266 of 1922, from a decision of H. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 26th July, 1922, reversing a decision of B. Jogindra Nath Sarkar, Deputy Collector of Ranchi, dated the 28th June, 1921.

(1) (1908) I. L. R. 35 Cal. 990.

(2) (1918) 34 Mad. L. J. 515; 44 Ind. Cas. 889, F. B.

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DAS, J.—I am unable to agree with the view taken by the learned Judicial Commissioner. The plaintiff instituted a suit for arrears of rent and the defence which found favour with the learned Judicial Commissioner was that the suit was barred inasmuch as the plaintiffs instituted a previous suit in respect of the same cause of action but withdrew it. It appears that in the previous suit the plaintiffs presented a petition for liberty to withdraw from the suit with permission to bring a fresh suit. The Court, however, gave the plaintiffs permission to withdraw from the suit but did not in terms give them liberty to bring a fresh suit. The learned Judicial Commissioner takes the view that the order operated as a refusal of the permission. With this view I am unable to agree. There is a decision of the Calcutta High Court which is to the effect that where an application is made by a plaintiff to withdraw from a suit with liberty to bring a fresh suit on which an order is passed giving the permission to withdraw from the suit although nothing is said in the order as to the plaintiff's liberty to institute a fresh suit on the same cause of action that order ought to be read along with the petition and construed as granting permission to file a fresh suit. [See *Golam Mahamed* v. *Shibendra Pada Banerjee* (1).] This view was accepted by the Madras High Court in *Keegangote Narayana Tantri* v. *Nagappa* (2).

It appears that there were other points which were not dealt with by the learned Judge. It is true that the learned Judge says that this was the only point pressed before him but the learned Vakil for the respondent says that it was unnecessary to press other points because the learned Judicial Commissioner accepted the contention that the suit was barred.

(1) (1908) I. L. R. 35 Cal. 990.

(2) (1918) 34 Mad. L. J. 515; 44 Ind. Cas. 889, F. B.

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KHUDI RAI v. LALO RAI. DAS, J.

I would allow the appeal; set aside the judgment and the decree passed by the learned Judicial Commissioner and remand the case to him to be disposed of according to law. The appellant is entitled to the costs of this appeal. Costs incurred in the Court below will be costs of the appeal which will be determined by the learned Judicial Commissioner.

Ross, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mullick and Macpherson, J.J.

SIBAN RAI

v.

BHAGWAT DASS.*

1925.

June, 12.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 439—*Acquittal, power in revision to interfere with—locus standi of private prosecutor.*

Per *Mullick, J.*—(*i*) The power of interference in revision with acquittal should be most sparingly exercised and, only in exceptional cases where either there has been a denial of the right of fair trial or it is urgently demanded in the interests of public justice.

Faujdar Thakur v. *Kashi Chaudhuri*(1), *Gulli Bhagat* v. *Narain Singh*(2) and *A. T. Sankaralinga Mudaliar* v. *Narayana Mudaliar*(3), approved.

Shaikh Bagu v. *Raika Singh* (4), *Harai Chandra Nana* v. *Osman Ali*(5) and *Nabin Chandra Chakrabarty* v. *Rajendra Nath Banerjee*(6), referred to.

* Criminal Revision no. 104 of 1925, from an order of F. C. King, Esq., I.C.S., District Magistrate of Darbhanga, dated the 6th January, 1925, setting aside the order of B. Mahadeo Prasad Singh, Sub-Deputy Magistrate of Samastipur, dated the 17th November, 1924.

(1) (1915) I. L. R. 42 Cal. 612. (2) (1923) I. L. R. 2 Pat. 708.

(3) (1922) 68 Ind. Cas. 615, F. B. (4) (1913-14) 18 Cal. W. N. 1244.

(5) (1918) 27 Cal. L. J. 226. (6) (1917) 39 Ind. Cas. 487.

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This rule, however, does not apply where there has been no trial.

Domoo Sahu v. *Jitan Dusadh* (1), followed.

(ii) (Macpherson, J., dissentiente). In cognizable cases the private prosecutor has no position at all and if the crown which is the custodian of the public peace decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance.

Gulli Bhagat v. *Narain Singh* (2), *Queen-Empress* v. *Murarji Gokul Das*(3) and *Ganga Prasad* v. *Bhagat Singh* (4), referred to.

Per *Macpherson, J.*—The power to interfere in revision is not, either in law or under the practice of the Courts in India, definitely restricted to cases where there has been a denial of the right of fair trial. It is, however, neither necessary nor expedient to lay down or even suggest any limitation in this regard beyond the practice of the High Court in appeals under section 417, Code of Criminal Procedure, and the principles which guide the court in receiving and determining under section 439 applications for the exercise of their powers of revision in respect of convictions.

Ganga Singh v. *Rambhajan Singh* (5), followed.

Although the court will only interfere in revision with an acquittal in an exceptional case, the supreme consideration is that it should exercise its discretion untrammelled in each case as it arises.

In this case the second class Magistrate of Samastipur found that Mahanth Ganga Dass had title and possession in an asthal at Waini and that the accused Bhagwat Dass and Narain Dass had forcibly dispossessed him and committed criminal house trespass in a building appertaining to the asthal. He therefore convicted the accused under section 448 of the Indian Penal Code and sentenced them to a fine of Rs. 50 each.

(1) (1916) 1 Pat. L. J. 264. (2) (1923) I. L. R. 2 Pat. 708.
(3) (1889) I. L. R. 13 Bom. 389. (4) (1908) I. L. R. 30 All. 525.
(5) (1924) 82 Ind. Cas. 274.

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In appeal the District Magistrate of Darbhanga found that the story of forcible dispossession was false and that Bhagwat Dass and Narain Dass were in possession and that they had successfully resisted an attempt by Siban Rai, the servant of Ganga Das, forcibly to evict them from the asthal. He found that the accused had no right to stay in the asthal against the will of Ganga Dass; but at the same time the case of Ganga Dass being false in material particulars, he acquitted the accused. Ganga Dass made an application to the Local Government requesting it to lodge an appeal under section 417 of the Criminal Procedure Code, but the Local Government refused on the ground that the case was not one of sufficient public importance. The complainant then moved the High Court to set aside the order of acquittal passed by the lower courts.

Sir Ali Imam (with him *S. A. Sami*), for the petitioner.

Sultan Ahmed, Government Advocate, for the crown.

Ram Prasad, for the accused person.

MULLICK, J. (after stating the facts set out above proceeded as follows): In now asking us to interfere in revision the petitioner relies upon the following cases of the Calcutta High Court; *Shaikh Bagu* v. *Raika Singh*(1), *Harai Chandra Nana* v. *Osman Ali*(2), *Nabin Chandra Chakrabarty* v. *Rajendra Nath Banerjee*(3). In these cases a rehearing was ordered by the High Court on the ground that there had not been a sufficient trial in the court below; the decisions were based on the special facts of each case, but it was not till *Faujdar Thakur* v. *Kasi Chaudhuri*(4), that any attempt was made to define the

(1) (1913-14) 18 Cal. W. N. 1244.
(2) (1918) 27 Cal. L. J. 226.
(3) (1917) 39 Ind. Cas. 487.
(4) (1915) I. L. R. 42 Cal. 612,

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principles upon which the High Court will interfere in revision. That case was noticed with approval by this Court in *Gulli Bhagat* v. *Narain Singh*(1) and by a full bench of the Madras High Court in *A. T. Sankaralinga Mudaliar* v. *Narayana Mudaliar*(2) and I think it is now settled that the power of interference in revision should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice.

The rule of course does not apply to cases where there has been no trial. For instance, in *Domoo Sahu* v. *Jitan Dusadh*(3) this Court set aside an acquittal in revision because an acquittal had been entered without trial and under an error of law. In that case the complainant having died the Magistrate refused permission to complainant's son to proceed with the case and acquitted the accused and the District Magistrate moved the High Court in revision. On the other hand, in *Raj Kishore Dubey* v. *Ram Pratap*(4) a Division Bench (Mullick and Macpherson, J. J.) of this Court declined to interfere even though there was a clear error in the lower appellate Court's judgment. We have not been shown any case in which a High Court has interfered in revision on the ground that the inferences drawn from were erroneous.

In my opinion the legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the crown only. The High Court has the right to interfere but will only do so in very exceptional cases, which it may be stated generally are cases in which there has been a denial of the right of fair trial and which attract the operation of section 107 of the Government of India Act. Nor does it intend that the High Court will interfere in revision to correct an error when another remedy exists.

(1) (1923) I. L. R. 2 Pat. 708.
(2) (1922) 68 Ind. Cas. 615.
(3) (1916) 1 Pat. L. J. 264.
(4) Cr. Rev. no. 229, decided on the 19th April, 1923.

In England, where any member of the public may set the criminal law in motion, there is no procedure at all for setting aside an acquittal. In France, where the law permits in most criminal cases a private injured party to intervene as a *partie civile*, the right of appeal against an acquittal is accorded only to the Crown. Neither system permits a private prosecutor to control the proceedings if the Crown objects.

Nor is the private prosecutor's control any greater under the Indian law though he is entitled in certain cases to compound with the offender; see *Kamuna Kant Jha* v. *Rudra Kumar Jha*(1).

I am still therefore of the opinion which I expressed in *Gulli Bhagat* v. *Narain Singh*(2), that in cognizable cases the private prosecutor has no position at all and that if the Crown, which is the custodian of the public peace, decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance. These observations were made with reference to a private party's power to get an acquittal set aside in a cognizable case which had been conducted by a public prosecutor; but if it were necessary here I would be prepared to hold that they apply with equal force to acquittals in all cases. The Crown and not the complainant is always the party. [See *Queen Empress* v. *Muharji Gokul Das*(3) and *Ganga Prasad* v. *Bhagat Singh*(4).]

If that view is correct, then the circumstance that in the present case Mahanth Ganga Dass, in spite of delivery of possession by the Civil Court, is being deprived by the judgment-debtor of the enjoyment of his rights, is no ground for our interference in revision. There has been no denial of the right of fair trial. The District Magistrate has considered the evidence

(1) (1919) 4 Pat. L. J. 656.
(2) (1923) I. L. R. 2 Pat. 708.
(3) (1889) I. L. R. 13 Bom. 389.
(4) (1908) I. L. R. 30 All. 525.

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and if he has come to a wrong conclusion, it certainly cannot be said that there has been no fair trial. He has found that the complainant's story that the accused came with a mob and drove out Ganga Dass's servants was false and that Bhagwat Das was in possession and that it was the complainant who attempted to forcibly eject him. If the true facts had been put by the complainant before the Court, I have no doubt that he would have succeeded and if Bhagwat Dass persists in occupying the land and house which formed the subject matter of the Civil Court decree against him, the criminal courts are still open to him. The present application is misconceived and is dismissed.

MACPHERSON, J.—I agree to the order proposed.

In my opinion the application must fail on the simple ground that it is not even possible to say that the acquittal by the appellate Court (which rightly found that the case which petitioner set out to prove was false) was not in the circumstances warranted. If an appeal had been preferred by the local Government under section 417, it would have failed for the same reason.

The question whether a private person has any locus standi to move the High Court against an acquittal, and if so in what circumstances has, however, been argued at length and claims an expression of opinion.

I agree with the Government Advocate when he concedes that the High Court possesses the power to set aside an acquittal under section 439 on being moved by a private person. But I am unable to accept his contention that that power is either in law or under the practice of the Courts in India, definitely restricted to cases where as in *Damoo Sahu* v. *Itan Sahu*(1), there has been no trial, or where there has been a denial of the right of fair trial. All that can be said to be established is that in that class of cases at least the Courts will in a proper case set aside an acquittal

(1) (1916) 1 Pat. L. J. 264.

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at the instance of a private party. No doubt the High Court will in exercising its power of revision under section 439 observe the limitations which established practice has imposed upon appeals under section 417. But though in practice the broad rule of guidance that the Court will only interfere in revision with an acquittal, at least in a case where there has been a trial, sparingly and only where interference is urgently demanded in the interests of public justice [*Faujdar Thakur* v. *Kasi Chaudhuri*(1)] may be accepted, it appears dangerous to go further. I was a party to the decisions in *Rajkishore Dubey* v. *Rampartap*(2) and *Gulli Bhagat* v. *Narain Singh*(3), decided on successive days, but my considered opinion is to be found in the subsequent decision in *Ganga Singh* v. *Rambhanjan Singh*(4), where after referring to the cases above cited, I said " But it is not possible nor would it be expedient to lay down a general principle. The Court will interfere where the circumstances require it ".

In particular I am not prepared to subscribe to the view that in every case of a prosecution for a cognizable offence the private prosecutor in India has no position at all in the litigation. It might possibly be contended that at least where the prosecution has in fact been a public or as it is designated, a police prosecution, the private prosecutor has no position at any stage. I doubt whether even such a contention is tenable, though of course the Court acting in revision would in such a case enquire earnestly why the Crown has not appealed. But in any event the criterion cannot be whether the police could under the law of arrest without warrant for the offence under trial irrespective of whether they did so and initiated a public prosecution under the Code of Criminal Procedure; it is open to the private prosecutor to initiate criminal proceedings by

(1) (1915) I. L. R. 42 Cal. 612.
(2) Cr. Rev. no. 229, decided on the 10th April, 1923.
(3) (1923) I. L. R. 2 Pat. 708.
(4) (1924) 82 Ind. Cas. 274.

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complaint without the intervention of the police and where that has been done, and the prosecution has not been taken over by the Crown, a private prosecutor cannot in my judgment be said to be without position in the litigation even if the offence is cognizable. The majority of prosecutions for criminal trespass and house trespass which are cognizable offences are private. I cannot hold that either principle or authority supports the view that an application under section 439 against an acquittal is not maintainable in a private prosecution where the offence charged is cognizable.

Again too much stress may easily be laid upon the remedy available under section 417 even in police cases. An appeal against acquittal is a special weapon in its armoury which the Local Government judiciously reserves for exceptional occasions, and which is only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that Government will dull the edge of that salutary provision by utilizing it freely in cases which though of importance to individual subjects, are of no or of little general interest. Actually, therefore, a remedy under section 417 is practically non-existent in the less heinous cases whether they are private or public prosecutions. Yet where justice fails in this country, it undeniably does so at least as much by erroneous acquittal as by erroneous conviction.

In my judgment it is neither necessary nor expedient to lay down or even suggest any limitation in this regard beyond the practice of the High Court in appeals under section 417 and the principles which guide the Court in receiving and determining under section 439 applications for the exercise of their powers of revision in respect of convictions. I would adhere to the view expressed by Jenkins C. J. in *Faujdar Thakur* v. *Kasi Chaudhuri*(1) read in the light of the

(1) (1915) I. L. R. 42 Cal. 612.

observations of the same judge in *Emperor* v. *Bankatram Lachiram*(1) and *In re. Mahomed Ali*(2) as to the spirit which should guide the Courts in the exercise of their discretionary powers in revision. The result may in practice not differ greatly from that which would be obtained by laying down and following detailed rules. Doubtless the Court will only interfere in revision with an acquittal in an exceptional case. But the supreme consideration is that the Court should exercise its discretion untrammelled in each case as it arises.

REVISIONAL CRIMINAL.

Before Mullick and Jwala Prasad, J.J.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 195(b)—*Offence in relation to judicial proceeding, nature of*—*Indian Penal Code*, 1860 (*Act XLV of* 1860), *sections* 211 *and* 182.

If two offences are even remotely connected by the relationship of cause and effect, the first may be said to have been committed "in relation" to the second within the meaning of section 195.

Where, therefore, the petitioner laid a false charge before the police which caused the police to submit a report against the petitioner, which in its turn caused the petitioner to institute a judicial proceeding before the Magistrate by lodging a formal complaint and repeating the allegations made in his information to the police, and the Magistrate, on the

* Criminal Revision no. 143 of 1925, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, dated the 13th March, 1925, affirming an order of A. Haque, Esq., Subdivisional Magistrate of Patna, dated the 6th February, 1925.

(1) (1904) I. L. R. 28 Bom. 533. (2) (1914) I L. R. 41 Cal. 466.

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written complaint of the sub-inspector of police, summoned the petitioner under sections 211/182, Indian Penal Code. *Held*, that the laying of the false information before the police was an offence committed in relation to a judicial proceeding and the Magistrate had no jurisdiction to summon the petitioner under section 211, Indian Penal Code, without a complaint being made in writing by the Court under clause (*b*) of section 195, Criminal Procedure Code.

Emperor v. *Hardwar Pal*(1), *Brown* v. *Ananda Lal Mullick*(2), *K. Parameswaran Nambudri, In re.*(3) and *Shaikh Mohammad Yassin* v. *King-Emperor*(4), followed.

Jagat Chandra Mozumdar v. *Queen-Empress*(5), distinguished.

An offence under section 211 must always include an offence under section 182 and the court is competent to proceed and convict for the minor offence under section 182 even though the major offence under section 211 has been committed.

Bhoktaram v. *Heera Kolita*(6), followed.

Empress v. *Arjun* (7) and *Giridhari Naik* v. *Empress*(8), not followed.

Karim Buksh v. *The Queen Empress*(9), and *Raghavendra* v. *Kashinath Bhat*(10), referred to.

A false charge made to the police is not necessarily an offence under section 211, Penal Code: if the intention to injure the person charged is absent, the offence falls under section 182.

(1) (1912) I. L. R. 34 All. 522.
(2) (1917) I. L. R. 44 Cal. 650.
(3) (1916) I. L. R. 39 Mad. 677.
(4) (1925) I. L. R. 4 Pat. 323.
(5) (1899) I. L. R. 26 Cal. 786.
(6) (1880) I. L. R. 5 Cal. 184.
(7) (1883) I. L. R. 7 Bom. 184.
(8) (1900-01) 5 Cal. W. N. 727.
(9) (1890) I. L. R. 17 Cal. 574, F. B.
(10) (1895) I. L. R. 19 Bom. 717.

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On the 5th January, 1925, the petitioner, Daroga Gope, laid an information before the police complaining that his landlord Bajrangi Singh and others had forcibly carried off 9 maunds of paddy from his house because he had refused the landlord's request for the customary gift of milk and curds. Previous to this, on the same day, a counter information had been lodged before the police by the landlord against the petitioner charging him and his brothers with wrongfully seizing and confining the landlord's ploughman while the latter was passing the petitioner's house. It was alleged that previously there had been a quarrel between the petitioner's party and the zamindar's servants about the sowing of some paddy and that the zamindar's servant was seized in order to annoy the zamindar.

The police investigated both cases and reported that the zamindar's complaint was true and the petitioner's complaint was false. The zamindar's information, which was numbered by the police as case no. 1 of 1925, ended in the conviction of the petitioner and was under appeal at the time when the present application was disposed of.

On the 15th January the officer who investigated into the petitioner's information, submitted his final report declaring it to be false and on the 3rd February, under the orders of the Inspector, he submitted formal complaint to the Subdivisional Magistrate of Patna charging the petitioner with offences under sections 182 and 211, Penal Code. In the meantime, on the 23rd January, the petitioner, finding that the police had reported his case to be false, filed a formal complaint before the Subdivisional Magistrate repeating the allegations made in his information to the police, and on the 6th February, 1925, the Subdivisional Magistrate, after perusing the police report above referred to, dismissed the complaint under section 203, Code of Criminal Procedure. On the

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same day he passed the following order on the Sub-Inspector's written complaint of the 3rd February:

"Summon Daroga Gope under sections 211/182, I. P. C., for 24-2-25."

N. C. Ghosh, for the petitioner.

H. L. Nankeolyar, Assistant Government Advocate, for the Crown.

MULLICK, J.—We are asked in revision to set aside an order summoning the petitioner to stand his trial under sections 211 and 182, Penal Code, on the ground that the prosecution of the petitioner cannot proceed without the written complaint of the Magistrate who took cognizance of the petitioner's complaint of the 25th January.

Now clause (*b*) of section 195 of the Criminal Procedure Code directs that no Court shall take cognizance of any offence punishable under the following sections of the Code, namely, sections 193, 194, 195, 196, 200, 205, 206, 207, 208, 209, 210, 211, and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. In the present case the recording of the complaint of the 25th January was a judicial proceeding, and the first question is whether laying a false information before the police on the 5th January was an offence committed in, or in relation to, the complaint which was lodged by the petitioner before the Subdivisional Magistrate on the 25th January.

Admittedly the offence was not committed in the judicial proceeding. But was it committed "in relation" to it? This raises a point upon which there has been some diversity of opinion, but the tendency seems to be to give the words of section 195(*b*) as wide an application as possible. It is clear that some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may

be fabricated for a contemplated suit or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question.

With regard to a false information to the police, it may be argued that the offence is a contempt which cannot possibly be said to have been committed " in relation to " any subsequent contempt, each repetition being a separate independent and complete act On the other hand if two offences are even remotely connected by the relationship of cause and effect, then the first may be said to have been committed in relation to the second. It may be that the commission of the latter offence may never have been intended, but if it is in fact the consequence of the former offence then section 195 applies. Here it may be said that the laying of the false charge on the 5th January caused the police to submit a report against the petitioner which in its turn caused the petitioner to institute a judicial proceeding before the Subdivisional Magistrate by lodging the complaint of the 25th January and that therefore the offence of the 5th January was committed in relation to a judicial proceeding. This was the line of reasoning in *Emperor* v. *Hardwar Pal*(1). On the other hand, in *Jagat Chandra Mozumdar* v. *Queen Empress*(2), the offenec of fabrication of false evidence was said to have been committed by a police officer in the course of an investigation; but it does not appear that any judicial proceeding followed as a result of that investigation and therefore it was held that no sanction under the Criminal Procedure Code of 1898 was required. In *F. A. Brown* v. *Ananda Lal Mullick*(3), a charge of theft was laid before the police and was followed up by a complaint in Court upon which process was issued and a trial held. After his discharge in this trial the

(1) (1912) I. L. R. 34 All. 522. (2) (1899) I. L. R. 26 Cal. 786.
(3) (1917) I. L. R. 44 Cal. 650.

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accused sought to prosecute the complainant for laying a false charge before the police and it was held that this could not be done without a complaint under clause (*b*) of section 195 from the Court which discharged the accused. In *Re K. Parneswaran Nambudri*(1), the difference betwen clause (*c*) and clause (*b*) of section 195 was pointed out and it was held that clause (*b*) was applicable in a case where the offence of fabricating false evidence was committed in respect of a promissory note before the institution of a civil suit for its enforcement, and where the application to prosecute the offender under section 193, Penal Code, was made after the institution of such suit. In *Shaikh Muhammad Yassin* v. *King Emperor*(2), a complaint was lodged before the Magistrate after the police had reported the information lodged by him to be false. It was sought to prosecute the complainant for laying a false charge before the police without a complaint in writing by the Magistrate who took cognizance of the complaint. It was held that section 195 applied.

I think, therefore, that in the present case the order of the Subdivisional Magistrate of the 3rd February summoning the petitioner under section 211, Penal Code, was without jurisdiction on the ground that the offence was committed in relation to a judicial proceeding instituted before the Subdivisional Magistrate on the 25th January and that the complaint in writing of the Court was necessary under clause (*b*) of section 195.

The next question is whether, even if the proceedings in respect of section 211 are bad, a prosecution under section 182 can continue. On this point it is urged on behalf of the petitioner that if the offence of the 5th January was one falling under section 211, the Magistrate cannot split up the offence so as to give himself jurisdiction.

(1) (1916) I. L. R. 39 Mad, 677. (2) (1925) I. L. R. 4 Pat. 323.

It is true that the Bombay High Court has taken this view in *Empress* v. *Arjun*(1); but the Calcutta High Court, in *Bhokteram* v. *Heera Kolita*(2) has held that it is open to the Court to convict under the minor offence under section 182, even though the major offence under section 211 has been committed. It is clear that an offence under section 211 must always include an offence under section 182 and I do not see why the Court should not convict of the minor offence if it so chooses. Reliance is placed by the learned Vakil for the petitioner on *Giridhari Naik* v. *Empress*(3). In that case it was held that a false charge of theft having been laid before the police there should be a prosecution under section 211 and not under section 182. The decision purports to have been based on *Karim Buksh* v. *Queen Empress*(4), but with the greatest respect it does not appear that the Full Bench in that case laid down any such proposition. What the Full Bench decided was that a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of section 211 of the Penal Code. The difference between an offence under section 182, and an offence under section 211 was noticed in *Raghavendra* v. *Kashinath Bhat*(5). Every false charge made to the police is not necessarily an offence under section 211. If the intention to injure is absent, then the offence falls under section 182 and there is no reason why, if the prosecutor is unable or unwilling to prove intention, that is to say malice, he should not be permitted to take a conviction under section 182.

In the present case therefore although the Sub-divisional Magistrate will have no jurisdiction to take cognizance of the offence under section 211, he will be competent to investigate the complaint as regards

(1) (1883) I. L. R. 7 Bom. 184.
(2) (1880) I. L. R. 5 Cal. 184.
(3) (1900-01) 5 Cal. W. N. 727.
(4) (1890) I. L. R. 17 Cal. 574.
(5) (1895) I. L. R. 19 Bom. 717.

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section 182 which does not require the complaint in writing of the Magistrate who took cognizance of the complaint of the 25th January.

It appears, however, that the petitioner has already been convicted in the counter case and the necessity for prosecuting him for making a false charge is not clear. If the appeal Court maintains the sentence of imprisonment which we learn has been passed upon the petitioner, there is little object in punishing him again for giving false information to the police.

The application in revision is dismissed.

JWALA PRASAD, J.—I agree.

APPELLATE CIVIL.

Before Bucknill and Macpherson, J.J.

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June, 16.

SRIMATI PEARI DAI DEBITORS

v.

NAIMISH CHANDRA MITRA.*

Registration Act, 1908, (*Act XVI of* 1908), *section* 17 *and* 49—*Lease of immoveable property for five years*—parwana *not registered, admissibility of—induction of lessee—part-performance.*

A written application or proposal was made by the naib to the proprietors stating that he had the opportunity of effecting a lease on favourable terms with certain persons for five years. The proposal contained certain suggestions with regard to the proposed lease and the naib asked for orders. An order was passed by the proprietors on this application to the effect that, "Naib will do the needful". This was followed later by a formal letter from the proprietors to the naib definitely accepting the offer and telling him to issue a

* Appeal from Appellate Decree no. 1372 of 1922, from a decision of Pandit Ram Chandra Chaudhuri, Subordinate Judge of Bhagalpur, dated the 15th July, 1922, reversing a decision of B. Radha Krishna Prasad, Munsif of Bhagalpur, dated the 22nd April, 1921.

parwana to the new lessees. In pursuance of this order a parwana was issued by the naib and the lessees were put into possession.

The parwana, however, was not registered. In a suit by the plaintiff-proprietor for a declaration that the defendant-lessees had not acquired any right under the lease on the ground that the document on which the defendants based their title, viz., the parwana, had not been registered under section 17, Registration Act, and, therefore, was inadmissible in evidence under section 49, *held*, that the transaction had been completed by part-performance, viz., the induction of the lessees into actual possession and that therefore the plaintiff's suit must fail.

Sanjib Chandra Sanyal v. *Santosh Chandra Lahiri* (1), *Muhomed Musa* v. *Aghore Kumar Ganguli*(2) and *Nilkanth Bhimaji* v. *Hanmanti Eknath*(3), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report were as follows :—

The appellants were the plaintiffs in an action which they brought against a number of defendants for a declaration of their (the plaintiffs') right, title and interest to the extent of two-thirds share in a mahal called Aratghat; they also applied for recovery of khas possession to the extent of their share and they asked for an adjudication that the defendants first party were trespassers and had acquired no title as lessees to the ghat by virtue of any valid settlement made to them on behalf of the plaintiffs. The plaintiffs were the owners of two-thirds share in the mahal; the principal value of the mahal appeared to have laid in the fact that there was a ferry and that tolls were levied and collected at the ghat. It was the usual practice to let out the ghat to a lessee but it was said that sometimes the proprietors kept it in their own hands. The defendant second party was, until some time in 1918, the naib or manager of this

(1) (1921-22) 26 Cal. W. N. 329.
(2) (1915) I. L. R. 42 Cal. 801; L. R. 42 I. A. 1.
(3) (1920) I. L. R. 44 Bom. 881.

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property on behalf of the plaintiffs or some of them. In 1917, the defendant second party, whilst in the plaintiffs' employment, made a proposal to the plaintiffs with regard to the future letting out of the ghat; a written application or proposal appeared to have been made by the naib to the proprietors saying that he had the opportunity of effecting a lucrative lease with some persons whom he knew were anxious to acquire the rights in the ghat. The proposal contained the suggestion that these applicants would give Rs. 200 annually (which was considerably more than what up to that time had been paid) and the lease should be for five years. The naib asked for instructions and orders. This appeared to have taken place on the 15th July, 1917. On the 31st July of that year an order was passed by the proprietors in connection with this application; it was to the effect.

"Naib will do the needful."

This was followed later by a formal letter from the proprietors to the naib definitely accepting the offer and telling him to issue a parwana to the new lessees. On the 1st October, 1917, it seemed that the naib did give a hukumnama or parwana to the new lessees.

The Munsif found all these circumstances as facts. He found definitely that all these transactions had taken place. He found that the lessees had actually been put into possession; he found that a quarrel had arisen between the plaintiffs and their naib and that they had alleged that he had fraudulently granted this lease without their assent. This, however, he did not believe and it appeared that he would have given judgment for the defendants had it not been that he was led to form an opinion upon a point of law which was the only point seriously argued in this appeal. This point was that the defendants relied upon the parwana. It was urged before the Munsif that the lease or parwana must be registered as it purported to be a lease of immoveable property granted for five

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years and that, as it was not registered, it was impossible for it to be referred to or looked at by the Court and that in consequence the defendants were unable to prove that they had got any title. The Munsif remarking that he could not see his way to invoke any equity in favour of the defendants held that there could have been no valid settlement by lease and in consequence he decided in favour of the plaintiffs and ordered that their suit be decreed with costs.

This decision of the Munsif of Bhagalpur, which was dated the 22nd April, 1921, was the subject of an appeal to the Subordinate Judge of that place who by his judgment of the 15th July, 1922, affirmed in every respect save one, the decision to which the Munsif came. He, however, was of the opinion that it was not impossible to invoke equity in favour of the defendants and he came to the conclusion that it was necessary and proper to do so. In consequence, he reversed the judgment of the Munsif; he allowed the appeal and ordered that the plaintiff's suit be dismissed.

S. K. Milter, for the appellants.

C. M. Agarwala (for *S. N. Sahay*), for the respondents.

BUCKNILL, J. (after stating the facts as set out above, proceeded as follows): It has been argued very strenuously by the learned Counsel who has appeared for the appellants that it is impossible to invoke equity in favour of the defendant. He bases his argument upon section 49 of the Indian Registration Act. This section reads:

> "No document required by section 17 to be registered, shall
>
> (*a*) affect any immoveable property comprised therein, or
>
> (*b*) be received as evidence of any transaction affecting such property or conferring such power,
>
> unless it has been registered."

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Now, it is admitted here that this lease for five years ought to have been registered. The learned Counsel has suggested that as under the provisions of section 49, sub-section (*c*), a document required to be registered shall not, unless registered, be received as evidence of any transaction affecting such property or conferring such power, this hukumnama could not be looked at hat all by the Court nor could any equity be utilized as arising from it in favour of the defendant. He refers in this connection to *Sanjib Chandra Sanyal* v. *Santosh Chandra Lahiri*(1). The learned Judge (Rankin, J.), who decided that case held that he could not permit a document which was not registered but which ought to have been registered to be received in evidence as evidential of the title of a plaintiff who was seeking to enforce his rights under that unregistered document. On the other hand, however, a case of equal importance [*Mahomed Musa* v. *Aghore Kumar Ganguli*(2)] has been brought to our notice. That was a decision of their Lordships of the Privy Council and there it was laid down very specifically that "when the actings and conduct of the parties are founded upon, as in the performance or part-performance of an agreement, the locus penitentiæ which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon". Now, it is of course difficult to say definitely that equity will override completely the specific provisions of sections 17 and 49 of the Indian Registration Act and in the case of *Nilkanth Bhimaji* v. *Hanmanti Eknath*(3), Heaton J., in referring to the Privy Council case which I have just mentioned, draws attention to the necessity of guarding one self in stating definitely that the decision of their Lordships was intended to affect adversely the proper

(1) (1921-22) 26 Cal. W. N. 329.
(2) (1915) I. L. R. 42 Cal. 801; L. R. 42 I. A. 1.
(3) (1920) I. L. R. 44 Bom. 881.

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construction or maintenance of those sections of the Registration Act to which reference has been made. His Lordship says:

"I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa's* case(1) did not intend either to modify or to limit that part of the enactment of the Indian Legislature which appears as section 17 and 49 of the Indian Registration Act; nor do I believe that the Privy Council ever intended by their judgment to modify or limit that which has been enacted by the Legislature in India. So the effect of sections 17 and 49 of the Registration Act remains as totally unaffected by anything that is said in the case of *Mahomed Musa*(1).-

Now in this case before us it seems to me that it can be dealt with quite unhampered by any question of admissibility of this document. Personally I think that it is admissible and that equity can be invoked from it although it should have been registered and that we could draw an equity in favour of the defendant. But even if it was not admissible there was ample material upon which a Court may come to the same conclusion to which the Subordinate Judge has come, namely, that the equity here is clearly in favour of the defendant and must be given to him in relief. What have we here in coming to the same conclusion from another point of view? We have findings of fact which show clearly that the naib, that is to say, the manager of the plaintiffs asked for their consent to grant a lease for five years at Rs. 200 per annum to the lessees. He got this permission in a very definite form from the proprietors and he actually put the lessee into possession. The terms upon which the lease was to be granted appear clearly not only in what he offered in the application for instructions which the naib made to the proprietors but in the proprietors' letter authorizing him to grant the lease. How it can be seriously suggested after that that there was not

(1) (1915) I. L. R. 42 Cal. 801; L. R. 42 I. A. 1.

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a completed transaction not only on the face of the papers themselves but by a part performance, namely, the induction of the lessees into actual possession, I cannot understand. To allow the plaintiffs to succeed against their own nominees simply because the document which was given by the plaintiffs' agent to the new lessee did not comply with the provisions of section 49 of the Registration Act, would appear to me most inequitable. In these circumstances I think that in this case the Subordinate Judge has taken the proper course. He has come to the conclusion that there was no ground for allowing the plaintiff to eject the defendants who were their own lessees. They could not take advantage of some flaw in a document, which has been produced by the defendants, in order to show that their lease did not comply with the terms of the Registration Act nor could it be allowed that the lease which the defendants possessed against their own landlord should be defeated at his application.

I think therefore that this appeal should be dismissed with costs.

MACPHERSON, J.—I agree to the order proposed. This appeal should be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C.J., and Macpherson, J.

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June, 18.

MUSSAMMAT BIBI WAJIHUNNISSA BEGUM

v.

BABU LAL MAHTON.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 46 *and* 61—*liability of raiyat to pay enhanced rent under section* 46(7), *when accrues—Agreement, interpretation of—bona fide deposit of a part of rent due, whether valid.*

* Second Appeal no. 1070 of 1922, from a decision of Rai Bahadur Surendra Nath Mukherji, Subordinate Judge of Patna, dated the 12th June, 1922, modifying a decision of M. Amir Hamza, Munsif of Patna, dated the 31st January, 1922.

The words "the date of the agreement" in sub-section (7) of section 46, Bengal Tenancy Act, 1885, do not refer to the "agreement" tendered to the tenant under sub-section (1) but to the agreement contemplated by sub-section (7), namely, an agreement by the raiyat to pay the rent determined by the Court. The enhanced rent, therefore, becomes payable under the provisions of sub-section (7) from the date when the raiyat agrees to pay the rent found by the court under sub-section (6).

Where, under section 61 of the Bengal Tenancy Act, a tenant deposits what he bona fide believes to be the whole amount due at the date of the deposit and not merely a portion thereof, the deposit is validy made under the section, even though it should turn out that the whole amount due had not been deposited.

Sasibhusan Dey v. *Umakanta Dey*(1), followed.

Appeal by the plaintiff.

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

The following are the provisions of the Bengal Tenancy Act referred to in the judgment:

46. (*1*) A suit for ejectment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy raiyat unless the landlord has tendered to the raiyat an agreement to pay the enhanced rent, and the raiyat has within three months before the institution of the suit refused to execute the agreement.

(*2*) A landlord desiring to tender an agreement to a raiyat under this section may file it in the office of such Court or officer as the Local Government appoints in this behalf for service on the raiyat. The Court or officer shall forthwith cause it to be served on the raiyat in the prescribed manner, and when it has been so served it shall, for the purposes of this section, be deemed to have been tendered.

(*3*) If a raiyat on whom an agreement has been served under sub-section (*2*) executes it, and within one month from the date of service files it in the office from which it issued, it shall take effect from the commencement of the agricultural year next following.

(*4*) When an agreement has been executed and filed by a raiyat under sub-section (*3*), the Court or officer in whose office it is so filed shall forthwith cause a notice of its being so executed and filed to be served on the landlord in the prescribed manner.

(*5*) If the raiyat does not execute the agreement and file it under sub-section (*3*), he shall be deemed for the purposes of this section to have refused to execute it.

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(6) If a raiyat refuses to execute an agreement tendered to him under this section, and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding.

(7) If the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement, but on the expiration of that term shall be liable to ejectment under the conditions mentioned in the last foregoing section unless he has acquired a right of occupancy.

(8) If the raiyat does not agree to pay the rent so determined, the Court shall pass a decree for ejectment.

(9) In determining what rent is fair and equitable, the Court shall have regard to the rents generally paid by raiyats for land of a similar description and with like advantages in the same village.

(10) A decree for ejectment passed under this section shall take effect from the end of the agricultural year in which it is passed.

61. (1) In any the of following cases, namely:—

(a) when a tenant tenders money on account of rent and the landlord refuses to receive it or refuses to grant a receipt for it;

(b) * * * * * *

(c) * * * * * *

(d) * * * * * *

the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding an application in writing for permission to deposit in the Court the full amount of the money then due.

(2) * * * * * *

Sultan Ahmed, Government Advocate, (with him *G. Das*, *A. L. Das Gupta*, *A. H. Fakhruddin*, *K. Hussain* and *N. Hussain*), for the appellant.

Manuk, with him *A. N. Das*, for the respondents

DAWSON MILLER, C. J.—The suit out of which this appeal arises was instituted by the plaintiff on the 4th May, 1921, claiming rent from the defendants in respect of a holding of seven bighas five kattahs of land in Patna for the years 1325 to 1327-F., and for the Pous and Chait kists of 1328-F. together with damages at 25 per cent. per annum. The rent was claimed at the rate of Rs. 252-13-0 per annum.

The main defences to the action were (1) that the amount of rent recoverable was Rs. 102 per annum and that for the years 1325 to 1327-F the rent at that

rate had been deposited in Court under the provisions of section 61 of the Bengal Tenancy Act and a receipt obtained under the provisions of section 62, sub-section (2), and that the rent claimed for 1328-F. was not payable until Bhado in that year corresponding to September 1921, which date had not arrived when the suit was instituted, and, (2) that the suit was barred by limitation under the provisions of Schedule III (2) (a) of the Bengal Tenancy Act, having been brought more than six months after the date of service of notice of the deposit.

It appears that in 1917 the plaintiff attempted to eject the defendants as trespassers but it was decided by the High Court in April of that year that the status of the defendants was that of non-occupancy raiyats. The rent then payable was Rs. 102 per annum. On the 13th July, 1917, the plaintiff filed in Court an agreement under the provisions of section 46 of the Bengal Tenancy Act for the payment of an enhanced rent at the rate of Rs. 379 per annum and on the 18th July, 1917 (9th Sawan, 1324), the agreement was duly served on the defendants. The defendants refused to execute the agreement and on the 5th November, 1917, the plaintiff instituted a suit before the Munsif of Patna for ejectment of the defendants under section 46 (6) of the Act. Under the provisions of section 46, sub-sections (6) to (10), if the raiyat refuses to execute an agreement tendered to him under the earlier provisions of the section and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding. If the raiyat agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement but on the expiration of that term shall be liable to ejectment unless he has acquired a right of occupancy. But if the raiyat does not agree to pay the rent so determined, the Court shall pass a decree for ejectment and a decree for ejectment so passed shall take effect

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from the end of the agricultural year in which it is passed. The suit for ejectment was not decided by the Munsif until the 4th February, 1920, when he found that a fair and equitable rent for the holding was Rs. 252-13-0. On the 12th February, 1920, a notice was served on the defendants to accept and pay the rent found to be fair and equitable but they do not appear to have agreed to pay the rent at the rate found by the Munsif. The Munsif's judgment has not been produced before us but it may be assumed that he passed a decree for ejectment in accordance with the provisions of section 46 (*8*) of the Act. No steps however were taken to eject the tenants and they remained in possession without any agreement to pay the rent determined by the Court. I think the plaintiff was entitled to put them to their election but she failed to do so, and no agreement was come to by the tenants to accept the new rent determined by the Court until a year later as will presently appear.

The defendants appealed from the Munsif's decision to the Subordinate Judge. On the 19th September, 1920, the appeal was dismissed. The defendants then preferred a second appeal to the High Court and applied for a stay of execution of the decree for ejectment. They were in this difficulty that if they refused to agree to pay the rent found equitable, they would be liable to ejectment before the decision of the High Court on appeal. If they agreed to pay the rent found equitable they considered, rightly or wrongly, that their appeal to the High Court could not proceed. In the result they agreed to pay the rent found fair and equitable by the Court stipulating that it should be subject to the result of their appeal then pending in the High Court. Their agreement is dated the 10th February, 1921, corresponding to the 18th March, 1328-F. The appeal in the High Court was decided on the 3rd January, 1923, the decision of the lower Courts being affirmed and the appeal dismissed. Pending this litigation, the object of which

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was to fix a fair and equitable rent which the defendants could only refuse to pay under pain of being ejected, the defendants deposited in Court under the provisions of section 61 of the Act the rent due at the old rate, namely, Rs. 102 per annum, a short time after the expiration of each of the three years 1325 to 1327 and notices of the deposit were served upon the plaintiff on each occasion shortly after the deposit was made. The notices of the deposits for 1325, 1326 and 1327 were served upon the plaintiff on the 15th December, 1918, 15th December, 1919, and the 24th December, 1920, respectively.

The first question for determination is from what date is the enhanced rent payable. The plaintiff contends that under section 46, sub-section (7), the enhanced rent is payable from the 18th July, 1917, when the agreement mentioned in sub-section (1) was served upon the tenants. Sub-section (7) reads as follows:

> "If the raiyat agrees to pay the rent so determined" (that is, the fair and equitable rent determined by the Court in a suit for ejectment mentioned in sub-section 6), "he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement under the conditions mentioned in the last foregoing section, unless he has acquired a right of occupancy."

Her contention is that the date of the agreement there mentioned has reference to the agreement tendered to the tenant under sub-section (1). It is urged that it would be unjust where the rent is below the fair and equitable rate and the landlord claims enhancement under the earlier clauses of the section to allow the tenant by refusing to pay an enhanced rent, to continue in possession at the old rate until a suit has been brought and a fair rent determined which, as in this case, might take a long time, and that once the fair rent has been determined by the Court it should take effect from the date when the enhancement was first claimed and an agreement tendered under the earlier clauses of the section. The defendants, on the other

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hand, contend that the date of the agreement in sub-section (7) must refer to the earlier words of that sub-section which contemplate an agreement by the raiyat to pay the rent determined by the Court. They point out that the agreement mentioned in the earlier sub-sections (1) to (5) is merely a document tendered to the raiyat for execution which he may or may not execute at his option and that in fact, until executed, it is no agreement at all, and that if sub-section (7) intended to refer to the date when that agreement was tendered it would have said so. Moreover the document tendered would not bear any date until its actual execution. They further point out that under sub-section (3) if the agreement referred to in sub-sections (1) and (2) had been accepted and executed by the tenant it would not take effect until the commencement of the agricultural year next following, and there is no reason for supposing that where a raiyat agrees to accept the equitable rent found by the Court after a suit for ejectment, that agreement should take effect from an earlier date than would have been the case had he accepted the proposal put forward by the landlord before litigation took place. Moreover the agreement tendered under section 46, sub-section (1), was to pay rent at the rate of Rs. 379 and it would be unjust that having refused to pay that rent, but afterwards having accepted a smaller rate determined by the Court, he should have to pay the enhanced rent from the date when the larger rate was unjustifiably demanded. Much may be said on purely equitable grounds as to what the law ought to be but we must interpret the section according to the natural meaning of the words, unless such interpretation would lead to a manifest absurdity which it may be presumed the legislature did not intend.

It may be observed that section 46 refers to two separate and distinct matters. The first five sub-sections contemplate an amicable enhancement of the rent of a non-occupancy raiyat without litigation. The

landlord proposes an enhanced rent and tenders to the raiyat an agreement to pay that enhanced rent which he may or may not execute at his option. If he accepts the proposal then the enhanced rent takes effect from the beginning of the next agricultural year. If he does not accept it then the landlord may sue for ejectment. The sixth and subsequent sub-sections relate to the procedure to be adopted where a suit for ejectment has been brought. They provide that before ordering ejectment the Court shall determine what is a fair and equitable rent. If the raiyat refuses to pay the rent so found then he may be ejected, but it seems perfectly clear that he would not be liable for anything more than the original rent up to the date when he was ejected. If, on the other hand, he agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement. It seems to me clear that the date of the agreement there mentioned is the date when he agrees to pay the rent found by the Court. There would appear to be no more reason why he should pay that enhanced rent from an earlier date, if he accepts it, than there would be why he should pay an enhanced rent if he refuses to accept it and renders himself liable to ejectment. The agreement in this case was dated the 10th February, 1921, and, in my opinion, the enhanced rent became payable from that date. The result is that unless the suit is barred by limitation the rent payable by the tenants was at the rate of Rs. 102 up to the 10th February, 1921, which corresponds to the 18th March, 1328-F., and the rent payable after that date is at the rate of Rs. 252-13-0. The learned Subordinate Judge considered that the enhanced rent was not claimable until the 3rd January, 1923, when the High Court finally dismissed the appeal in the ejectment suit. But it seems clear that the enhanced rent is payable at the latest from the date when the raiyat agrees to pay the rent determined by the Court.

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Sub-section (7) does not in terms say from what date the enhanced rent should be payable. It merely states that the raiyat shall be entitled to remain in occupation of his holding at the enhanced rent for a term of five years from the date of the agreement. But, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems to me impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. The fact that the defendants did not in fact agree to pay the enhanced rent until a much later date than that on which they might have been put to their election appears to have been due to the failure of the plaintiff to insist upon her rights. She could have compelled the defendants to pay the new rent or submit to ejectment as soon as the Munsif's decision was given unless the Court ordered a stay which would only be granted on terms protecting the plaintiff's rights.

It remains to consider whether the claim is barred by the special limitation prescribed in Schedule III of the Act. If the limitation there prescribed applies to the facts of the present case then it is clear that the claim for rent for the years 1325 and 1326-F. is time-barred for the notices of deposit for those years were served on the 15th December, 1918, and the 15th December, 1919, respectively. The notice of deposit of the rent for the year 1327 was served on the 24th December, 1920, and the learned Subordinate Judge considered that the claim for rent for that year was also barred. It appears to have escaped his notice, however, that the present suit was instituted within six months of the 24th December, 1920, namely, on the 4th May, 1921, and it was conceded in argument before us that the rent for that year is not barred.

The appellant, however, contends that the claim for rent for the two previous years is not time-barred on the ground that the requirements of section 61 of the Bengal Tenancy Act were not complied with. The section provides that in certain cases, which are

applicable in the present instance, the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his holding an application in writing for permission to deposit in Court the full amount of the money then due. The application must state the grounds upon which it is made and shall contain certain particulars as to the name of the person to whose credit the deposit is to be entered and it shall be signed and verified in the manner prescribed by section 52 of the Code of Civil Procedure. Under section 62, if the Court accepts the deposit, it shall give a receipt for it under the seal of the Court and the receipt so given shall operate as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid in the same manner and to the same extent as if that amount of rent had been received by the person entitled to it. It is pointed out on behalf of the appellant that as the rent was not deposited until the end of the year interest became payable from the dates of the different kists in each year and the amount of interest was not deposited. It has been found that the rent was payable not at the end of each agricultural year but kist by kist and this is no longer disputed. It follows, therefore, that at the end of the year some interest would be due upon the unpaid instalments and as the interest was not deposited it is contended that the defendants cannot be taken to have made a valid deposit under section 61 of the full amount of the money then due. The limitation only applies to cases where the deposit was made under section 61 and if no deposit was made within the meaning of that section the limitation period cannot apply. The question for determination is whether the deposit made in the circumstances stated was a sufficient compliance with the section. The learned Subordinate Judge considered that even if the amount deposited fell short of the sum actually due to the landlord at the date of the deposit it was a sufficient compliance with the section. In support of his finding he relied upon the case of *Sasibhusan*

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Dey v. *Umakanta Dey*(1). In that case the previous decisions of the same Court were reviewed and the meaning and effect of the section was considered at length. The Court consisting of Mookerjee and Beachcroft, J.J., held that where there has been a bonâ fide deposit in respect of the whole amount due at the date of the deposit, and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. In my opinion that case was rightly decided. The section appears to me to provide for the case of a bonâ fide deposit of what the tenant considers to be the full amount of the rent due at the time of deposit. The deposit, however, must be in respect of the whole rent due and not in respect of a portion only. It may well happen that there is some difference between the landlord and the tenant as to the amount of rent payable. In such a case the landlord might refuse to accept a sum which he considers falls short of the rent payable. One of the cases to which the section applies is where the rent has been tendered to the landlord and he has refused to accept it or grant a receipt. That might well happen where there was a bonâ fide dispute between the parties as to the actual amount payable. In the present case the tenants were contending that the rent was due at the end of the agricultural year and not kist by kist. If they were right in that contention no interest would be payable upon the earlier kists. The bonâ fides of the tenants in this case has not been impugned although the Court has decided that the rent was payable quarterly and not annually. It seems to me that the intention of the legislature was that where a bonâ fide deposit has been made in respect of the whole rent due then the matter must be decided by suit at the instance of the landlord within six months of the receipt of the notice. Under section 62 a receipt given for the sum deposited acts as an acquittance to the extent of the amount

(1) (1914-15) 19 Cal. W. N. 1143.

deposited and the landlord can take the deposit out of Court and sue for the balance if he contends that the total amount due has not been deposited, and I think that the intention was that in such a case the dispute between the parties should be promptly decided otherwise the landlord cannot question the sufficiency of the amount paid into Court. If the appellant's contention be accepted it would follow that section 62 could not operate if the amount paid in were less by a few annas than the amount actually due and no valid acquittance could be given to the tenant. Again if the appellant's contention be accepted it is difficult to see in what case the period of limitation prescribed would be effective for if the whole amount actually due must be paid in, so as to create a valid deposit under section 61, it follows that any suit by the landlord, whether brought within six months or at a later period to recover the rent, must prove infructuous and there is no necessity for prescribing a period of limitation. If, on the other hand, the deposit of a smaller sum than that actually due is not a valid deposit within the meaning of the section again the limitation prescribed is of no effect. In my opinion the case of *Sasibhusan Dey* v. *Umakanta Dey*(1) was rightly decided and applies to the facts of this case. I think the claim for rent for the years 1325 and 1326 is barred by limitation and for the year 1327, the plaintiff is entitled to recover kist by kist at the old rate of Rs. 102 with interest at 12½ per cent. credit being given for the amount deposited. With regard to the rent for the two kists of 1328 this is also recoverable at the old rate up to the 10th February, 1921, and after that date at the rate of Rs. 252-13-0, together with interest at 12½ per cent. The defendants are willing that the amount paid into Court for the years 1325 and 1326, and which we are told is still in deposit, should be paid out to the plaintiff in satisfaction of the rent for those years notwithstanding the bar. There will therefore be an order that the

(1) (1914-15) 19 Cal. W. N. 1143.

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sums deposited for the years 1325 and 1326 be paid out to the plaintiff. She will also be entitled to take out of Court the deposit made for 1327 in part satisfaction of her claim for rent for that year. The decree of the lower appellate Court will be varied in accordance with the decision above arrived at. The appellant has failed upon each of the main points argued before us but has succeeded in so far as the rent for 1327 is concerned and has succeeded in part as to the date from which the enhanced rent shall be payable. She has gained little advantage in so far as the rent for 1327 is concerned as this has been found to be payable at the old rate and the sum deposited could have been taken out of Court by her at any time. In the circumstances I think that the parties should each bear their own costs of this appeal.

MACPHERSON, J.—I agree.

Decree varied.

PRIVY COUNCIL.

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June, 23.

HIRA BIBI
v.
RAM HARI LALL.*

Mortgage—Attestation—Pardanishin Executant—Admission of Execution—Absence of due Attestation—Indian Evidence Act, 1872 (*I of* 1872), *section* 70—*Transfer of Property Act*, 1882 (*IV of* 1882), *section* 59.

In a suit to enforce a mortgage, it appeared that one of the executants was a pardanashin woman, who had signed the deed behind the parda; and that the persons who signed as attesting witnesses were outside the parda and did not see her affix her signature. At the trial she admitted having signed the deed.

By section 70 of the Indian Evidence Act, 1872, "The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested." The Transfer of Property Act, 1882, section 59, requires that the execution of a mortgage must be attested by at least two witnesses.

*PRESENT: Lord Atkinson, Lord Shaw and Lord Darling.

Held, that section 70 of the Indian Evidence Act, 1872, applies only to a document which is duly attested, and that as the mortgage deed was not attested within the meaning of section 59 of the Transfer of Property Act, 1882, it was invalid as against her in spite of her admission.

Shamu Patter v. *Abdul Kadir Ravuthan*(1) and *Ganga Pershad Singh* v. *Ishri Pershad Singh*(2), followed.

Padarath v. *Ram Nain Upadhia*(3), distinguished.

Judgment of the High Court(4), reversed.

Appeal (no. 6 of 1924) from a decree of the High Court (June 10, 1921) varying a decree of the District Judge of Patna (September 26, 1917).

The respondents sued the appellants to enforce by sale a mortgage, dated August 17, 1906, for Rs. 29,000.

Though other questions arose at the trial the sole question upon the appeal was whether the mortgage was binding upon the first appellant, a pardanishin woman. She had filed a separate written statement in which she pleaded that she was a pardanishin woman, and did not admit the validity of the deed; at the trial she admitted in her evidence that she had executed it.

The facts as to the attestation of her signature appear from the judgment of the Judicial Committee.

The suit was tried by the District Judge who made a decree for sale against the first appellant, but dismissed the suit as against the other defendants upon grounds not material to this report.

Upon an appeal and cross-objection the High Court set aside the decree, and made a mortgage decree against all the defendants. The learned Judges were of opinion that the execution of the deed by the first appellant was not duly attested, but they considered

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 218.
(2) (1918) I. L. R. 45 Cal. 748; L. R. 45 I. A. 94.
(3) (1915) I. L. R. 37 All. 474; L. R. 42 I. A. 163.
(4) (1921) 6 Pat. L. J. 465.

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themselves bound by Indian decisions to hold that the first appellant having in the course of the trial admitted execution section 70 of the Indian Evidence Act, 1872, rendered the document valid against her. After referring to *Satish Chandra Mitra* v. *Jogendra Nath Maharlanabis*(1), *Nibaran Chandra Sen* v. *Ram Chandra Sen*(2), followed by the Patna High Court in *Nageshwar Prasad* v. *Bachu Singh*(3), Das, J., by his judgment, with which Adami, J., agreed, said as appears from the judgment of the Judicial Committee.

1925, May 22, 26.—*DeGruyther*, *K. C.*, and *Wallach*, for the appellants.

Sir George Lowndes, *K. C.*, and *E. B. Raikes*, for the respondents nos. 1 to 5 and no. 8.

Reference was made to the decisions of the Board referred to in the present judgment.

June 23.—The judgment of their Lordships was delivered by:

LORD DARLING.—This is an appeal from a judgment and decree, dated 10th June, 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage, dated 17th August, 1906. It was pleaded by the defendants (appellants) that the mortgage bond is void by reason of its not being attested in accordance with the provisions of the Transfer of Property Act, IV of 1882, section 59.

The only important question upon this appeal is in regard to the appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

(1) (1916) I. L. R. 44 Cal. 345. (2) (1917) 22 Cal. W. N. 444.
(3) (1919) 4 Pat. L. J. 511.

Hira Bibi is a pardanashin lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign it. She was behind the purdah. Anant Prasad, her son, took this deed, and others, inside the purdah. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

DAS, J., with whose judgment ADAMI, J., agreed put the case thus:

"If the matter were res integra I should doubt whether the admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in section 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that section 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by section 59 of the Transfer of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by section 59 of the Transfer of Property Act."

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the appellant, Hira Bibi, had they not felt bound to follow earlier decisions

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of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lorship that this case is already concluded by authority. It is nedless to do more than to call attention to them very briefly:

Shamu Patter v. *Abdul Kadir Ravuthan*(1) decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, section 59, the persons signing as witnesses must be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington [in *Bryan* v. *White*(2)]: "'Attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." And they followed the decision of the House of Lords in *Burdett* v. *Spilsbury*(3), to the same effect.

The case of *Padarath* v. *Ram Nain Upadhia*(4) is in its material facts totally different from this one, and has, therefore, no bearing on the question here to be decided. But another case—*Ganga Pershad Singh* v. *Ishri Pershad Singh*(5)—is in almost all particulars identical with this present one, and in that instance the mortgage deed was declared to be void as not being duly executed and attested.

These cases sufficiently confute the argument founded upon the words of section 70 of the Indian Evidence Act, 1872, that:

"The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

Those words apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense, attested; for it was merely signed

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 218.
(2) (1850) 2 Rob. Ecc. 315, 317.
(3) (1843) 10 Cl. & F. 340.
(4) (1915) I. L. R. 37 All. 471; L. R. 42 I. A. 163.
(5) (1918) I. L. R. 45 Cal. 748; L. R. 45 I. A. 94.

by persons who professed to be witnesses to its execution, although in truth and in fact they were not so.

Their Lordships are, therefore, of opinion that, as against the appellant Musammat Hira Bibi, the mortgage decrees of both the Courts below should be set aside with costs, and the suit dismissed as against her. With regard to the other appellants the decrees should stand.

The costs of Musammat Hira Bibi should be paid by the contesting respondents, but the other, and unsuccessful appellants, should pay the costs of such of the respondents who appeared. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *W. W. Box & Co.*

Solicitor for respondents: *Watkins and Hunter.*

APPELLATE CRIMINAL.

Before Mullick, A.C.J. and Jwala Prasad, J.

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Code of Criminal Procedure, 1898 (Act V of 1898), sections 161, 162 and 360—Statement made by accused before the police, admissibility of—Indian Evidence Act, 1872 (Act I of 1872), sections 27, 28 and 54, effect of—Evidence of bad character to prove motive, admissibility of—Approver, nature of corroboration required—Deposition read over by deponent himself, admissibility of.

Although the amendment of section 162, Code of Criminal Procedure, 1898, has altered the previous law so as to exclude completely statements made by witnesses during the course of an investigation (except for certain limited purposes), the statements of accused persons are still admissible in law provided they do not amount to confessions.

* Death Reference no. 7 of 1925 with Criminal Appeal no. 101 of 1925, from a decision of H. R. Meredith, Esq., I C.S., Sessions Judge of Monghyr, dated the 4th June, 1925.

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The main object of the amendment of the section is to prevent the use of the statement of prosecution witnesses as corroboration under section 157 of the Evidence Act.

Sections 161 and 162 of the Code of Criminal Procedure do not override the general provisions of the law with regard to the admissibility of statements made by accused persons as laid down in sections 27 and 28 of the Indian Evidence Act, 1872.

Although, in a criminal case, evidence of the bad character of the accused is inadmissible for the purpose of showing that the accused was of such a disposition that he was likely to commit the offence charged, that prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant.

It is not sufficient that the evidence of an approver should be corroborated with regard to the actual commission of the crime itself, for such corroboration merely proves that the approver himself took part in the offence. Experience requires that approvers should also be corroborated in material points as to the part played by their accomplices. The amount of corroboration required depends upon the view taken by the court of the approver's character and of his demeanour in the witness-box.

Where a magistrate who had recorded the confession of an accused person was examined in the Session Court to prove the confession and the certificate appended at the end of the magistrate's deposition showed that the deposition had been read out by the witness and not read over to him as required by section 360, Criminal Procedure Code, *held*, that the deposition was nevertheless legal evidence.

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

MULLICK, A. C. J.—The appellant Bhaghambar Rout alias Bhagwa is the father of the appellant Jagwa Dhanuk. It is alleged that these two appellants with the third appellant Rama Rout murdered a shop-keeper and money-lender named Ramdhani on the night of Thursday, the 12th February, 1925. Ramdhani's home was in mauza Dariapur but he had a shop at Gangto which is about three miles off by road.

About 3 A.M. on the morning of Friday, the 13th February, Ramdhani left his shop telling his brother Gobind aged 16 that he would be back about 10 A.M. He was not seen again but his body was found in course of the day at a cremation ground at which there is a temple of Mahadeo and which lies in a jungle on a hill about four miles from Gangta. It was obvious that he had been murdered and information was given about 6 P.M. by Nasir Khan, chowkidar, to the Sub-Inspector of the Kharagpur police-station. The Sub-Inspector arrived at the place of occurrence on the morning of the 14th. In consequence of certain information obtained from a zamindar named Babu Sailendra Nath Kar, who was spoken of in the trial as Sailu Babu, suspicion fell upon one Dallo Kumhar.

On the 16th February, Dallo was placed before the Superintendent of Police who had come to direct the investigation. It is said that he then made a statement the contents of which are not in evidence. On the 18th Dallo made a full statement in the nature of a confession to the investigating Sub-Inspector Satya Kinkar Mukherji. He took the Sub-Inspector immediately afterwards to the cremation ground and showed him the way by which the deceased went with the three appellants and himself from the house of Ramu at Lauriya to the cremation ground. Dallo pointed out the marks made by the iron shod heels of the deceased's shoes in a wet barley field belonging to one Bansi Raut. Accordng to Dallo, the appellants were habitual thieves who disposed of their stolen property through the deceased and on the night in question Ramdhani had been decoyed by the appellants from his shop on a promise by the appellants that they would give him a considerable quantity of gold and silver. Dallo pointed out to the Sub-Inspector two hollows in the ground where the stolen property was said to have been concealed. He states that at the first place which is near a place marked on the Sub-Inspector's map as the Surdun Bandh, no property

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was found and that therefore one of the appellants said that it had probably been removed by the other members of the gang and that it would be necessary to go to the Mohadeo temple and to search the tank on the hill. The deceased was then taken to the tank and there he was attacked by Jagwa with a sindh katti (a piece of iron used by Indian burglars) by Bhagwa with a knife and by Ramu with a Santoli pharsa. Ramdhani was killed instantly and a sum of Rs. 84, which was found on his person, was taken by Bhagwa. Thereafter Ramu took the handle off the head of the pharsa by knocking it against a stone and threw it away. Dallo pointed out the jungle into which the handle had been thrown and the evidence is that there the handle was found. Dallo also pointed out the place on the hill where Bhagwa gave Rs. 25 out of the Rs. 84 to Ramu. He himself was offered Rs. 5 which he refused on the ground that it was insufficient. Then a quarrel arose and the appellants prepared to assault him. He then ran away and he pointed out to the Sub-Inspector the route along which he returned.

After the discovery of the above facts from the confession of Dallo, the Sub-Inspector arrested Dallo and the appellants. On the same day he searched the houses of the appellants and found hidden away in an earthen pitcher in the house occupied by Bhagwa and Jagwa and by Naku, the brother of Bhagwa, a knife which was identified by Dallo as the weapon with which Bhagwa had inflicted the wound on the left side of Ramdhani's head. In the Committing Magistrate's Court Bhagwa admitted the ownership of this knife but in the Session Court he denied it. I do not think there can be any doubt that the knife was found in his house and that it belongs to him. A short iron weapon which might be ordinarily used for making holes in mud walls was also found in the same house; but Dallo says that this was not the sindh katti with which Bhagwa was armed. The pharsa, which Ramu is alleged to have used, has not been

found nor has the sindh katti alleged to have been used by Jagwa.

The postmortem examination on the body of Ramdhani was made on the 15th February and it was then discovered that there were two wounds on the head which had been caused by a sharp instrument: (1) an incised wound $2\frac{1}{2}$ inches long by $\frac{1}{3}$ inch down to the bone behind the right ear and (2) a punctured wound $\frac{3}{4}$ inch by $\frac{1}{2}$ inch by 1 inch deep in the left temporal region above the left ear. The police had apparently assumed that the wound on the right side of the head had gone right through to the other side, but the postmortem report shows that there were two separate wounds and that they were probably made by different kinds of weapons, the first a sharp cutting weapon and the second by a sharp pointed weapon. The skull at the back of the head was extensively fractured and it was obvious that the head had been severely battered with a heavy blunt weapon.

The postmortem report is sought by the prosecution to be used as corroboration of Dallo's statement. It is urged that after his arrest on the 18th February Dallo was taken to Monghyr where he was kept in prison and that on the 26th he repeated his confession before Rai Krishna Bahadur, Deputy Magistrate, which was recorded under the provisions of section 164 of the Criminal Procedure Code.

It is suggested that Dallo had no knowledge of the postmortem report and that the striking agreement between his account and the postmortem report in contrast with the original police view is strong corroboration of the truth of his statement.

When placed upon their trial the appellants pleaded not guilty and alleged that a false case had been instituted against them by Sailu Babu who was the master of Dallo and had enmity with the zamindar of the appellants.

The four assessors at the trial were unanimously of opinion that the appellants were guilty and the Sessions Judge of Monghyr agreeing with them has

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found the appellants guilty of an offence under section 302 of the Indian Penal Code and sentenced them to death.

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The case turns upon the evidence of the approver Dallo. He was offered a pardon on the 19th March and he was examined as a witness for the prosecution in the Court of the Committing Magistrate. There is no inconsistency between his confession of the 26th February, his deposition before the Committing Magistrate on the 19th March and his deposition in the Session Court. He states in his deposition in the Committing Magistrate's Court that he was produced before a hakim who asked him if he had committed the murder with his own hands and as he denied it and began to relate the story which he is now telling the hakim declined to write and sent him away. This obviously refers to the Superintendent of Police before whom Dallo appeared on the 16th February. The Sub-Inspector tells us that on that date he made short notes of what Dallo stated but the notes have not been proved.

According to Dallo's evidence his association with the appellants commenced sometime about the middle of the year 1924. He had been borrowing money from a thief named Shyamlal Kahar who, in June 1924, advised him to associate with Jagwa if he wanted money. He states that in consequence of this he went with Jagwa and three others to the house of a Kunjra in mauza Karikle and that Bhagwa burgled the house and brought out three bundles while he and the remainder of the party stood outside. Evidence has been given by Titu Kunjra that on the 1st November 1924, he reported a burglary at his house.

A point has been sought to be made by the learned Counsel for the appellants as to the discrepancy regarding the time of the burglary. Dallo says that it was about mid-night, but the first information report shows that it was about 4 A.M. The information recorded is not very clear and it would seem that the

intention of the informant was to say that the burglary was discovered at 4 A.M. when the women of the house woke up.

According to Dallo, Jagwa would give him nothing out of the proceeds of this burglary. He also deposes to hearing about another burglary commited by Bhagwa and his gang in the district of Bhagalpur out of which he got nothing. He states that he was constantly asking Jagwa for his share but without success; and about January 1925, Jagwa informed him that he would be paid out of a burglary which it was contemplated to commit at the house of one Basdeo. Basdeo, however, had previously helped Dallo with small sums of money. Dallo partly through pique and partly out of gratitude gave warning to Basdeo and Basdeo removed his valuables from the house. This is corroborated by Basdeo's evidence.

With regard to Ramdhani, Dallo's statement is that the first dealings which he saw between him and any of the appellants was two days after the burglary at Titu's house when Ramdhani came to Jagwa and paid him a sum of Rs. 50; he also says that four or five days later he again came to Jagwa's house and paid him Rs. 25. Dallo states that after this in order to silence his importunities Jagwa told him that Ramdhani owed him Rs. 5,000 or Rs. 6,000 on account of gold and silver made over to him and that when Ramdhani paid up, Dallo also would be duly paid; that he, Jagwa Bhagwa and Ramu in the month of Kartick became exasperated at Ramdhani's delay in settling and that they conspired together to kill him and that he spent the whole of one night in Ramu's house with the three appellants because Ramdhani was coming there with money; but Ramdhani never came.

Next, in Falgun, that is, in February, Dallo was again told by Bhagwa that Ramdhani was coming to Ramu's house on the following Thursday. It was agreed that advantage should be taken of that visit to kill Ramdhani and accordingly Dallo again went to Ramu's house.

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Now Titu reported his burglary on the 1st November, 1924, and so the conspiracy to which Dallo deposes must have been formed shortly afterwards. His suggestion is that the appellants were so dissatisfied at Ramdhani's prevarications that they determined to make an end of him and so intended to get him to come to Ramu's house and then to decoy him to a lonely place for the commission of the murder. The plan succeeded and Ramdhani came on the 13th February and the three appellants and Dallo started off with him telling him that the stolen property for which he had come was near the Mahadeo temple.

With regard to the various places pointed out by Dallo along the route, the corroboration is not of much value because Dallo was a resident of the locality and the places were familiar enough to him; but there is one place of evidence to which some reference should be made. Dallo pointed out to the Sub-Inspector the marks of the heels of Ramdhani's shoes in Bansi Rout's field about two miles from Ramu's house. Now undoubtedly two heel-marks were found and the Sub-Inspector states that they fitted Ramdhani's shoes exactly. Unfortunately the casts which he dug up were damaged while in the custody of the Committing Magistrate and the Sessions Judge and the Assessors were not able to satisfy themselves as to the correctness of the Sub-Inspector's conclusion. It is curious that no heel-marks were found in the bed of the rivulet which the party crossed and which is immediately to the east of the barley field; but that may be because it is sometimes the practice of people in this country to take off their shoes when they come to a river.

The learned Government Advocate, however, before us has declined to place any reliance upon the identity of the foot-prints, because the evidence shows that the route taken by Ramdhani is ordinarily taken by people who go from Lauriya to the cremation ground and that the precise number of foot-prints were not noted down by the investigating Sub-Inspector. But the finding of the handle of the pharsa is undoubtedly

good corroboration of Dallo's story; and if it is believed that he had no hand in himself putting the handle there, it cannot be doubted that he was one of those who took part in the murder of Ramdhani.

The next piece of corroboration of Dallo's story with regard to his association with Shyamlal and Jagwa and Bhagwa is provided by an information given by a chowkidar to the police on the 26th September, 1924. An entry appears in the station diary to the effect that Jagwa, Bhagwa and Shyamlal, who were notorious bad characters, were associating together. This corroborates Dallo's statement that he was told by Shyamlal to take the help of Jagwa if he wanted to make money.

Next there is the statement of Ramdhani's brother Gobind and of Khem Lal Lohar who prove that Ramdhani left his home at 3 A.M. on the morning of the 13th February. There is no reason whatsoever for distrusting this evidence. It is to be noted, however, that Khema states that Ramdhani was travelling from west to east. His direction would be from east to west; but the evidence does not make it clear whether the road at the place where it passes Khema's house, does not make a curve and does not run from west to east.

There is also the evidence of Sheo Narain, the cousin of Ramdhani and Gobind, that the appellants used to deal with Ramdhani and used to go to his shop and that Ramdhani also used to go to them.

The learned Judge was very favourably impressed with Dallo's behaviour in the witness-box and he was satisfied that he was a witness of truth. He appears, however, to have admitted the evidence relating to Dallo's association with the appellants for the purpose of committing thefts and burglaries and of Ramdhani's association with the appellants as a receiver of stolen property with considerable reluctance on the ground that it was evidence of bad character which was not admissible under any circumstances. The

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position appears to have been misconceived. Evidence of bad character cannot be given for the purpose of showing that the accused were of such a disposition that they were likely to commit the crime charged. But that prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant. Learned Counsel for the appellants has taken the same objection before us and has relied upon *Emperor* v. *Panchu Das*(1) and *King Emperor* v. *Haji Sher Mahomed*(2). But these cases are not relevant to the point before us which is whether it was open to the prosecution to prove that Dallo and the appellants and Ramdhani had been engaged in offences against property and that the quarrel which arose out of their association was a motive for the murder of Ramdhani.

It may be asked why should the appellants have taken Dallo with them on the night of the murder. It is in evidence that the appellants knew that Dallo had played them false with regard to the projected burglary in Basdeo's house and Dallo himself admits that he had been beaten several times by the appellants on this account and that when the dispute took place about the division of the money found upon Ramdhani immediately after the murder his previous treachery was brought up against him. In these circumstnces, argues the learned Counsel, it is impossible that Dallo should have been taken. The reply, however, is that either Dallo knew too much of the appellants to be left out or it was considered necessary to involve him still further in order that his mouth might be shut for good. We can only speculate but it is possible that the appellants thought that if Dallo joined in the murder it would not be possible for him to make any disclosure without endangering his own life. However that may be the fact remains that the assessors were satisfied that Dallo's story upon this point was correct.

(1) (1920) I. L. R. 47 Cal. 671. (2) (1922) I. L. R. 46 Bom. 958.

Then it may be asked why should Dallo confess at all. Unfortunately we have no information as to what steps were taken on the 14th and 15th to induce him to appear before the Superintendent of Police, nor do we know what statement he made to him, nor do we know what happened on the 17th. But there is evidence that Sailu Babu was taking a very active part in assisting the police and it is possible that it was on information supplied by him that the suspicions of the police were attracted towards Dallo and the appellants. Dallo is evidently a person of weak character and upon his own admission he was treated by his accomplices with contempt. It sometimes happens that a criminal's courage fails him in the end and that he without any pressure or inducement gives out the whole truth.

There is also corroborative evidence given by Aklu that Dallo was seen coming along the Dariapur road about sunrise on the morning of the 13th from the east and that he carried Aklu's bundle for him as far as his house. This is also corroborated by a party of musicians namely Digo, Rohan and Balo who were going along the road from west to east.

Finally there is corroborative evidence that Ramdhani was in need of money and that on the 13th he borrowed Rs. 19 from witness Muralidhar. He also borrowed Rs. 50 from one Saggam Singh, but there is some doubt as to whether this loan was made on the 12th or a day or two before. In the Committing Magistrate's Court Saggam Singh said that he had made the payment on the 12th but in the Session Court he said that it was one or two days earlier. These payments corroborate Dallo's statement that the appellants were pressing Ramdhani for money and also his allegation that a sum of Rs. 84 was found in Ramdhani's purse immediately after the murder.

Finally there is one other item of corroboration to which reference should be made. Four small note books and 12 sheets of loose accounts were found in

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Ramdhani's pocket. There are numerous entries, says the Sessions Judge, in these account books and papers showing petty transactions between the appellants and Ramdhani and in the note book, Exhibit IV, there is an entry showing against the name of Ramu Rs. 95-13-9 as "chupka" and Rs. 32-11-8 as "sagri". Now sagri means open account and chupka means secret account. It is suggested that this latter entry relates to money paid to Ramu for stolen property. With regard to Dallo there are no entries but Sheonarain states that Ramdhani told him that Dallo owed 21 maunds of paddy. Against Naku, brother of Bhagwa, the entries amount to a total of Rs. 48.

I am satisfied that the entry against Ramu showing Rs. 95 odd due on account of "chupka" corroborates Dallo's story that Ramdhani was the receiver of stolen property from the hands of Ramu.

Having therefore given the evidence my most careful consideration, I agree with the learned Sessions Judge and the Assessors that Dallo was a witness to the murder. He himself does not admit that he struck any blow but simply states that he kept watch. Now self-exculpation is always a reason for suspecting an approver's evidence but here the corroboration in other respects was such and the general demeanour of the witness was so satisfactory that the Assessors and the learned Judge had no difficulty in accepting Dallo's testimony and I agree with them.

But the authorities show that it is not sufficient that the approver should be corroborated with regard to the actual commission of the crime itself for such corroboration merely shows that he himself took part in the offence. Experience requires that the approver should also be corroborated in material points as to the part played by his accomplices. Therefore it is necessary to see what corroboration there is to show that the appellants before us took part in the offence in the manner alleged by the approver.

The amount of corroboration under this head as in deed in respect of all corroboration of an approver's evidence must depend upon the view which the Court takes of the approver's character and of his general demeanour in the witness-box. Here the Court and the assessors have found that in regard to the time, place and manner in which the crime was committed the approver has told the truth. That finding must naturally affect the quantum of corroboration required as to the remainder of his story. One must also enquire what motive the approver had for concocting a false story. On behalf of the appellants it is urged that Dallo was the creature of Sailu Babu. Of this there is no evidence. Then it is urged that Sailu Babu is at enmity with the zamindar of the appellants. Of this also there is no evidence, and the defence that Dallo was a ready tool in the hands of Sailu Babu has, in my opinion, been rightly rejected by the lower Court.

Coming next to the actual items of corroboration upon which the prosecution rely we have first of all the evidence as to the movements of Ramdhani on the Wednesday and Thursday preceding the murder. The evidence is that about sunset on the Wednesday Gobind was coming back from the family house at Dariapur to the shop at Ganta and met Ramdhani at Lauriya. Ramdhani was then on his way home. About 9 P.M., Gobind set out on the return journey to his house and met Ramdhani near Ramu's house and saw him talking to Ramu. Ramdhani told him to go on and that he would be coming later. That night Ramdhani never came home at all and Gobind on going to the shop in the early morning of the 12th (Thursday) found Ramdhani there. At midday the appellant Bhagwa came to the shop and had some conversation with Ramdhani. Gobind was not permitted to hear the conversation because Ramdhani told him not to listen and sent him off to Dariapur to purchase some articles for the shop. About half a pahar before evening (which would be about 4 P.M.),

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Gobind returned to the shop and he and his brother took their evening meal together. At 5 A.M. on the morning of the 13th Ramdhani got up and said he was going out. Gobind asked him where he was going and Ramdhani merely said he would be back at 10 A.M. Neither Ramu nor Bhagwa gives any explanation of the conversation with Ramdhani. Of course having regard to the fact that both Bhagwa and Ramu were old customers this evidence is not conclusive of guilt, but so far as it goes it is corroboration of the approver's story that the intention of the appellants was to decoy Ramdhani somehow or other to the house of Ramu on the night of Thursday.

Next there is the finding of the knife. There is, however, this to be said that knives of this description are common. Dallo, however, does swear that this was the knife with which Bhagwa was armed and there is the fact that Bhagwa attempted to deny his ownership of the knife in the Session Court. Then Counsel has argued that it is strange that when the sindh katti which was used by Jagwa seems to have been thrown away or concealed, Jagwa's father should have been so careless as to keep the knife. That of course is an argument which has weight, but I think that upon the evidence, the identification is sufficient. The knife is one which could be used for domestic purposes and possibly Bhagwa either did not wish to part with it or thought that even if found it would not raise any inference of guilt against him.

The third item of corroboration against the appellants is the finding of the note books and the account papers in Ramdhani's pocket. This indicates that Ramdhani set out that night in order to settle accounts with Ramu, Bhagwa and Jagwa. On the other hand it is argued that there are other entries in the account books and it is quite possible that Ramdhani may have gone out to visit some of his other debtors. The cumulative effect of the whole of the evidence is such that the hypothesis must be rejected. Taken by itself no item may be conclusive,

but when the whole evidence in the case is considered I think the corroboration is sufficient.

Having regard to the time when the journey was made and the precautions which, according to the evidence of Dallo, were observed by the appellants much direct evidence of the association of Ramdhani with the appellants on that night could not be expected. The question is whether the above evidence connecting the appellants with him is sufficient to satisfy us that it would be safe to act upon Dallo's account. I think after consideration of all the circumstances that the answer is in the affirmative.

It may be said that Ramdhani was killed by footpads but that would not account for the finding of his body at the Mohadeo temple unless it was carried to that place from some other place where the murder was committed. The finding of the earring and the armlet are also inconsistent with such a theory. It was suggested in the lower Court, that Ramdhani was killed in the course of an intrigue. The answer is that there is nothing to suggest that he was a man of loose character. Further the simple answer to all these theories is, if Dallo is believed there is no place for any of them.

Finally the learned Counsel for the appellants who has evidently devoted much care to the preparation of the case and has argued it with fairness and ability has raised two points of law which require some discussion.

The first was as to the admission of Dallo's statement to the police on the 18th February.

Now only such portions of that statement have been admitted as led to the discovery of any fact. Section 27 of the Indian Evidence Act permits confessions to be admitted for this limited purpose. I think it must be admitted that section 162 of the Criminal Procedure Code of 1923 has altered the previous law so as to completely exclude statements made by witnesses during the course of an investigation, except for certain limited purposes not here

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material. The learned Counsel, however, argues that the prohibition also extends to the statements of accused persons. Now comparing the corresponding provisions of the Code of 1882 and the relevant amendment made therein by the Codes of 1898 and 1923, I think it is clear that the statements of accused persons provided they do not amount to a confession are still admissible in law. To what extent the provisions of a special enactment such as the Criminal Procedure Code override the provisions of a general enactment such as the Indian Evidence Act must depend upon the language of the special Act, but reading the present sections 161 and 162 of the Code, I think it is clear that the main object of the legislature was to prohibit the use of the statements of prosecution witnesses as corroboration under section 157 of the Indian Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem, in my opinion, to be affected. If it were otherwise, sections 27 and 28 of the Evidence Act must be considered repealed. It surely cannot have been the intention of the legislature to effect such a repeal by implication. It is important for the Court to know what was the defence made by the accused at the earliest moment. If section 162 is given the meaning which the learned Counsel now seeks to give to it accused persons would be most seriously prejudiced and the only object of section 163 of the Criminal Procedure Code would be to enable police officers to get clues for the purpose of investigating the charge. If that were the case the Court would be deprived of much valuable material for testing the truth of the case for the defence. To shut out corroborative evidence comprising statements made by defence witnesses during the investigation is prejudicial enough, but unless compelled to do so I do not think we ought to add to the prejudice by shutting out exculpatory statements by the accused; and if the amendment of 1923 does not operate to exclude such statements then section 27 of the Indian Evidence Act remains unrepealed.

The other point of law is that the confession recorded by the Deputy Magistrate on the 26th February is not legal evidence because the Deputy Magistrate who proved it read over his deposition himself and did not have it read over to him in the hearing of the accused. It is urged that the provisions of section 360 of the Criminal Procedure Code have been violated and that as the accused could not hear what the witness was reading there was no compliance with the law. Although it has been held elsewhere that section 360 requires that the deposition of a witness shall be read over in the presence of the accused and that it is not sufficient to allow the witness to read it himself I do not think there is any authority in this Court to that effect. In the absence of any such authority I think that the deposition was legal evidence.

The result therefore is that upon a consideration of the whole of the evidence in the case we are not satisfied that there is any ground for interfering with the finding of the learned Sessions Judge. The case was tried with great care by the learned Judge and the assessors who are all residents of the locality and well acquianted with the conditions of life amongst the class to which the approver and the accused belong have come to the unanimous conclusion that the approver should be believed. In these circumstances the convictions must be upheld and the sentence of death which has been passed upon the appellants is affirmed.

JWALA PRASAD, J.—I agree.

Convictions and sentences affirmed.

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APPELLATE CIVIL.

Before Das and Adami, J.J.

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March, 20, 23, 24, 25; June, 10.

MIDNAPUR ZAMINDARI Co. LTD.

v.

RAM KANAI SINGH DEO DARPA SAHA.*

Mineral rights—Lease of, in perpetuity—want of delivery of possession—Validity of—trust, by construction of law, scope of—Administrator, whether a legal representative in respect of properties held in trust—Succession Act, 1865 (Act X of 1865), section 179, scope of—constructive possession, whether sufficient foundation for action in trespass—tenant having interesse termini, remedy of—non-user, whether amounts to abandonment.

A perpetual mukarrari lease of mining rights was executed by the proprietor in the name of *K*, who took it not for himself only but also on behalf of eleven other persons. Later on *K* executed a " deed of declaration of trust " by which he declared himself to be the lessee of his share of the estate and a trustee on behalf of his co-sharers. Thereafter an agreement was entered into between the so-called beneficiaries and *B* by which the former agreed to transfer their interest to the latter. Meanwhile *K* died before the legal estate was conveyed to *B*, leaving a will not touching the demised property, of which probate was taken. *F*, acting under instructions of the executors of the will and as their constituted attorney, obtained letters of administration to the estate of *K*, and, as administrator of the estate and effects of *K*, transferred the legal estate to *B* in pursuance of the agreement arrived at. *B's* interest subsequently devolved on the plaintiff by successive transfers. In a suit by the plaintiff for a declaration of his title to the mineral rights, for damages and for a permanent injunction, held, (*i*) that by the deed of trust *K* did not constitute himself a trustee on behalf of his co-sharers, but that he was, by construction of law, a trustee bound to convey the legal title to his co-sharers whenever called upon to do so; (*ii*) that all the property of

* Appeal from Original Decree no. 30 of 1922, from a decision of B. Kamla Prasad, Subordinate Judge of Manbhum, dated the 17th December, 1921.

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K, whether held by him for his own benefit or for the benefit of others, including the property in respect whereof he died intestate, vested in the administrator as the legal representative of *K* under section 179, Indian Succession Act, and that the plaintiff derived a valid title from the transferee of the administrator irrespective of the agreement with the beneficiaries.

De Souza v. Secretary of State for India in Council(1), referred to.

Delivery of possession is not necessary for the completion of a permanent lease made under the Transfer of Property Act, 1882, which requires a permanent lease to be made by a registered instrument. It is, therefore, unsafe, in such a case, to import the English Common Law, where delivery of possession is necessary to complete a lease.

For many purposes the law regards the right to possession as equivalent to possession, especially when the property is not in the actual possession of anyone; and the mere omission on the part of a grantee of mineral rights to do anything with the subject-matter of the grant does not amount to disseisin or dispossession of him in favour of the surface-owner.

Constructive possession is a sufficient foundation for an action in trespass.

A plaintiff having a mere interesse termini is not necessarily debarred from maintaining an action for injunction.

Wallis v. *Hands* (2), referred to.

In the case of a mining lease mere non-user of the mines on the part of the lessee does not amount to abandonment; likewise, a mere refusal on the part of the lessor to recognise the lease does not amount to dispossession of the lessee. Limitation begins to run against the lessee when there is a positive act of dispossession; but when a trespasser abandons possession, the rightful owner is in the same position in all respects as he was before the intrusion took place.

Agency Co. v. *Short* (3), referred to.

(1) (1874) 12 Ben. L. R. 423.

(2) (1893) 2 Ch. D. 75.

(3) (1888) 13 A. C. 793.

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Appeal by the plaintiffs.

The plaintiff company claimed the mineral rights in Pargana Barabhum under a permanent mukarrari lease granted by Raja Braja Kishore Singh Deo, the then proprietor of the Pargana, to one Kenny, on the 12th November, 1881; and the suit out of which this appeal arose was for a declaration of its title to those rights, for damages, and for a permanent injunction restraining the defendants from carrying on mining operations in the Pargana. The present proprietor (whose estate was under attachment under the provision of the Encumbered Estates Act) was cited as defendant no. 1 in the action. Defendant no. 2 was the manager of the estate appointed under the Act. On the 5th September, 1911, the present proprietor granted a mining lease of the pargana for 999 years to Herambo Nath Banarji, cited as defendant no. 3 in the action. Herambo in his turn granted a prospecting license to Guzder, the 5th defendant, on the 11th February, 1920. It was admitted that Guzder was actually carrying on underground operations through his agent, Chandan Singh, named as defendant no. 4. The suit was originally instituted against defendants 1-4, the plaintiff not being aware that Chandan Singh was the agent of Guzder. The plaint was subsequently amended and Guzder was added as a party to the suit on the 23rd November 1920.

The defendants contested the suit on grounds which were common to them. The Subordinate Judge gave effect to most of these objections and dismissed the plaintiff's suit on the following grounds; first, on the ground that the plaintiff company had not established its title to the minerals; secondly, on the ground that the plaintiff company, not being in possession of the thing demised, was incompetent to maintain an action for trespass, and, therefore, for injunction; thirdly, on the ground that there was, by operation of law, an abandonment by Kenny of his interest under the lease of 1881 entitling the

proprietor to enter into a fresh arrangement with Herambo; fourthly, on the ground that the suit was barred by limitation; and, lastly, on the ground that the plaintiff company was estopped from disputing the title of Herambo under the lease of the 5th September 1911.

Manuk (with him *A. Sen* and *S. N. Palit*), for the appellant.

Sultan Ahmed (with him *C. C. Das*, *S. M. Mullick*, *L. N. Sinha* and *N. N. Sen*, for the respondents.

DAS, J.—I think this appeal must fail. [After stating the facts set out above, his Lordship proceeded as follows:] I will first consider the question of title. On the 12th November, 1881, the then proprieor of Barabhum executed a permanent mukarrari lease in favour of Kenny. The validity of the lease was unsuccessfully challenged by the defendants in the Court below, and it was not in controversy before us. We start then with this, that Kenny acquired a permanent, transferable and heritable interest in the minerals in Pargana Barabhum under the lease of the 12th November, 1881. Now it appears that though the lease was taken by Kenny in his own name he was in fact acting on behalf of himself and eleven other persons. On the 24th February, 1882, Kenny executed what is called a deed of declaration of trust in which he declared that

> "he, his heirs, executors, administrators, representatives, shall, and will, henceforth stand and be possessed of the said mines and minerals and all mining rights granted by the said patta * * * in trust for the said several persons whose names are set forth in the first column of the second schedule hereto according to the shares and interests set opposite to their respective names in the second column of the second schedule hereto."

It is not necessary to give the names of the persons interested in the patta of the 25th November, 1881; it is sufficient to say that Kenny had three shares out of 32 and that eleven other persons whose names

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appear in the second schedule had the remaining shares. On the 28th January, 1891, a company was formed called the Barabhum Co., Ltd., with a view

"to acquire lands for the mining purposes and mining rights of all kinds in Manbhum, Singhbhum and Chota Nagpur and elsewhere in British India, and, in particular the mining rights in Pargana Barabhum acquired by one Nathenial Kenny under a perpetual lease from Maharaja Braja Kishore Singh, dated the 12th November, 1881, and now vested in the said Nathenial Kenny as trustee in terms of an indenture, dated the 24th February, 1882."

On the 5th February, 1891, an agreement for sale of the property which was the subject-matter of the mukarrari patta of the 25th November, 1881, was entered into between Barabhum Co., Ltd., and a number of persons called the vendors including all the persons who according to the deed of declaration of trust were interested in the patta of the 25th November, 1881. By this agreement the vendors agreed to sell to the Barabhum Co., Ltd., the underground rights of Pargana Barabhum for the sum of Rs. 32,000 which was agreed to be paid and satisfied by the allotment to them of 320 shares in the capital of the Company. It appears that these shares were allotted to the vendors in the proportion in which they were interested in the lease of the 25th November 1881. It will be niticed that various persons are mentioned as vendors whose names did not appear in the deed of declaration of trust as being interested in the demised property; but the explanation is that these persons came to acquire an interest by subsequent transfers. Meanwhile Kenny died in England before the legal estate could be conveyed. He left a will of which probate was taken in England. Mr. Foley, acting under instructions from the English executors and as their constituted attorney, obtained letters of administration to the estate of Kenny from the Calcutta High Court on the 21st November, 1905,

"with effect within the province of Bengal."

On the 29th January, 1908, Foley, as the administrator of the estate and effects of Kenny, conveyed the property to the company. On the 14th July,

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1916, the compnay transferred its interest to Billinghurst, and on the 14th July, 1917, Billinghurst conveyed it to the plaintiff-company.

Now there is no dispute as to the validity or sufficiency of the transactions by which the Barabhum Co., Ltd., conveyed the property to Billinghurst and Billinghurst conveyed it to the plaintiff-company. The only question is as to the conveyance of the property to the Barabhum Co., Ltd. Now Kenny's interest in the thing demised being admitted, what infirmity is there in the title of the plaintiff-company? The learned Subordinate Judge attacks both the declaration of trust of the 24th February, 1882, and the conveyance by Foley to the Barabhum Co., Ltd., on the 29th January, 1908. He attacks the declaration of trust on the ground that Kenny had no authority to declare himself a trustee for his co-sharers. The view of the learned Subordinate Judge on this point may be stated in his own words:—

> "Under this deed Mr. Kenny constituted himself to be the trustee of the eleven other co-sharers. I do not think that he could constitute himself to be a trustee on behalf of the eleven. He could create a trust and make himself a trustee only in respect of his own property and not in respect of the property of others. He was, therefore, in my opinion, not a trustee, but only a farzidar of those eleven persons in respect of the shares in the leasehold property."

It is not necessary for me to say anything more than this that the view of the learned Subordinate Judge cannot be supported for a single moment. The legal title was in Kenny; but as between him and his co-sharers he was entitled to a small share in the demised property. The deed itself states that the eleven persons who had a beneficial interest in the demised property had requested Kenny to execute a declaration of trust in respect of the property. It was but right and proper that Kenny should make an open declaration to the effect that though the legal title was in him, he was holding the property on behalf of himself and eleven other persons. The learned Subordinate Judge has entirely misunderstood the position. It is not that Kenny constituted

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himself a trustee on behalf of his co-sharers, but that he was, by construction of law, a trustee bound to convey the legal title to his co-sharers whenever called upon to do so. This is all that the declaration of Kenny amounts to.

The learned Subordinate Judge next turned his attention to the agreement of the 5th February, 1891, and found that it was not proved in accordance with law. The learned Subordinate Judge is entirely right when he says that it was for the plaintiff to prove that the twelve persons who were interested in the demised property or their representatives in interest actually executed this agreement. Now it appears that eight of these persons representing 11 annas share in the subject matter of the lease executed this document through their constituted attorneys and it is quite true that there is no evidence in this case that these attorneys had any authority to execute the agreement on behalf of the 11 annas share-holders. The objection as to the sufficiency of proof was taken in the Court below and the learned Subordinate Judge decided, in my opinion, rightly, that no presumption arises under section 90 of the Evidence Act as to an agent's authority which must be proved in the usual way. I agree that the plaintiff-company has not established that this agreement was executed by all the persons interested in the subject-matter of the lease of the 25th November 1881; but in my opinion, the question as to the proof of this particular document does not fall to be considered. The learned Subordinate Judge made unnecessary difficulty for himself We know that the legal title in the thing demised was in Kenny although there were various other persons beneficially entitled to specific shares in it. We may put out of our mind the agreement of the 5th February, 1891. Kenny died; and on his death probate was obtained of his will in England. As I have said, Foley obtained letters of administration to the estate of Kenny " with effect within the province of Bengal ". Now what is the position?

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Upon the grant of letters of administration to Foley, the demised land (which was then within the province of Bengal) vested in Foley as such administrator; and Foley was competent to deal with the property in due course of administration. As will be remembered, Foley conveyed the demised property to the Barabhum Co., Ltd., on the 29th January, 1908. The learned Subordinate Judge objects to this transaction. He remembered that the declaration of trust showed that Kenny was a beneficial owner of only a small share in the property and that in regard to the remaining shares he was a trustee of eleven other persons; and he thought that as Kenny's will did not purport to deal with the legal title in the demised property, that title did not vest in Foley so as to enable him to convey it to the Barabhum Co., Ltd

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Now it is quite true that Kenny did not deal with the demised property in his will and the learned Subordinate Judge is right in saying that

> " so far as this property is concerned, he died intestate."

But even the estate of an intestate has to be administered in due course of law; and section 179 of the Indian Succession Act says that the

> " executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such."

Now what is the meaning of the words " all the property of the deceased "? There is high authority for the view that the words " all the property of the deceased " must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others [See *De Souza* v. *Secretary of State for India in Council*(1)]. There is no reason to doubt therefore that the demised property vested in Foley as such administrator under section 179 of the Indian Succession Act.

(1) (1874) 12 Ben. L. R. 423.

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The next question is whether Foley was entitled to convey the property to the Barabhum Co., Ltd. Now, before dealing with this question, let me examine what Foley purported to do. The deed of conveyance of the 29th January, 1908, recites the following transaction :—

First, the mukarrari patta of the 12th November, 1881, granted by Raja Braja Kishore Singh to Kenny;

Second, the deed of declaration of trust by Kenny by which he declared that he, his heirs, executors and administrators and representatives should and would stand and be possessed of the subject-matter of the lease of 1881 in trust for the several persons whose names appeared in the second schedule of the deed;

Third, the agreement of the 5th February, 1891, by which the persons then entitled to the subject-matter of the lease of the 25th November, 1881, agreed to sell the mining rights conferred by that lease to the Barabhum Co., Ltd., for Rs. 32,000 which sum should be paid and satisfied by the allotment to the vendors of 320 shares in the capital of the company.

It then recites that the said shares have long since been allotted to the said parties and that ever since the completion of the agreement of the 5th February, 1891, the company has been in possession of the mining rights conferred by the said patta, but that the legal estate was still outstanding in Kenny. In these circumstances Foley, as the administrator of the estate of Kenny, transferred the mining rights conferred by the patta of the 25th November, 1881, to Barabhum Co., Ltd.

Now what is there to object to in the transaction? In point of form, the property stood in the name of Kenny and Foley as the administrator of the estate of Kenny was competent to convey the property to the Barabhum Co., Ltd., in due course of administration. If substance is to be regarded, then, there is no doubt that though the legal title was in Kenny the persons who were beneficially entitled to the property had already conveyed their interests to the Barabhum Co., Ltd., for valuable consideration, and were entitled to call upon Kenny or on the administrator after his death to convey the legal estate to

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Barabhum Co., Ltd. Now it may be said that Foley had no business to convey the property to the Barabhum Co., Ltd., without the permission of the Court. The general rule established under section 269 of the Indian Succession Act is that ordinarily an administrator ought to obtain the previous permission of the Court before conveying the property to a third party. But then that section provides that a disposal of the property by the administrator in contravention of the rule stated in paragraph (3) of section 269 is voidable at the instance of any other person interested in the property. In other words, if any objection was to be made to the conveyance of the 29th January, 1908, that objection could proceed either from the heirs of Kenny or the heirs of the beneficiaries recognized as such in the deed of declaration of trust. The objection could neither proceed from the landlord nor from any other party claiming through the landlord. In my opinion the conveyance in favour of Barabhum Co., Ltd., is not open to attack. That being so, the plaintiff-company has clearly established its title to the demised property, for it is not disputed that the Barabhum Co., Ltd., validly transferred the property to Billinghurst on the 14th July, 1916, and that Billinghurst validly transferred it to the plaintiff-company on the 14th January, 1917.

The next point is whether the present suit by the plaintiff-company is maintainable. The learned Subordinate Judge has shown some research into the intricacies of the English Common Law. He says that neither the plaintiff-company nor its predecessors ever got possession of the demised property; and that, that being so, the demise only gave the lessee a right of entry in the property or, which is the same thing, an interesse termini which is not sufficient as a foundation for an action for trespass or a suit for injunction and damages. Now, so far as I know, this doctrine has been applied in England only to leases for years; it has, for instance, never been

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applied to what are known as freehold leases. Now the lease with which we are concerned is a perpetual lease, a lease creating a permanent, transferable and heritable interest in the thing demised, in which the landlord has no right of reversion [*Sonet Kooer* v. *Himmut Bahadoor*(1)]. A lease of this nature is, so far as I am aware, unknown to the English Common Law and I do not think that it is quite necessary to apply a doctrine applicable to English leases to a lease which is unknown to English law. In the next place it is as well to look to the definition of a lease in the Transfer of Property Act, a statute with which we should be acquainted. At common law, possession under the instrument is necessary to complete a lease, so that after a lease has been granted, and before actual entry has been made by the lessee, he is for many purposes not a tenant. Under the Transfer of Property Act a lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. It will be noticed that delivery of possession is essential to the completion of a lease under the Transfer of Property Act only where it has been made by oral agreement; and a lease by oral agreement cannot be made where it is from year to year or for any term exceeding one year or reserving a yearly rent. Now if, as I hold, delivery of possession is not necessary for the completion of a permanent lease under the Transfer of Property Act, I do not see why we should import into our system the complications of English law where delivery of possession is necessary to complete a lease. In the third place, what foundation is there for the suggestion that the plaintiff-company is not in possession? By possession is, and must be meant, possession of that character of which the thing is capable. We are concerned

(1) (1875) I. L. R. 1 Cal. 391.

in this litigation with underground rights which are not capable of possession as a house, a watch or a ring is. For many purposes the law regards the right to possession as equivalent to possession; specially when the property is not in the actual possession of any one. It is quite true that the plaintiff-company has not yet worked the mines; but,

" the mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a disseisin or dispossession of him in favour of the surface-owner " [*see* Pollock and Wright on Possession, page 87].

Now obviously there is no question of a " disseisin " unless, to start with, there is a seisin; and, in my opinion, the omission of the mineral owner to work the mines does not show that he is not in possession of the mines. I hold that the plaintiff-company was in constructive possession of the thing demised and that constructive possession is a sufficient foundation for an action in trespass [Clerk and Lindsell on Torts, 6th edition, 380]. In the fourth place, it is not necessary to embarrass ourselves with a discussion as to forms of action known to English Common Law. If it were necessary to do so, one might say that though a person, not in possession, is not entitled to maintain trespass, he is entitled to maintain trover and to recover the value of personal chattels wrongfully converted by another to his own use. It is necessary to see what is the substance of the plaintiff-company's claim in this case. There is an injury to the plaintiff-company's right both actual and threatened. It has proved its title. It shows that the defendants or some of them have carried away coal which belong to it, and are threatening to carry away more coal or convert that coal to their personal use. Is it to be supposed that the plaintiff-company has no remedy because it is not in actual possession of the thing demised? Now even at Common Law, a tenant having a mere interesse termini could maintain an action for damages for recovering the value of coal wrongfully converted by another to his own use and he could also maintain

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an action for injury to his rights [*Gillard* v. *Cheshire Lines Committee*(1)]; and these are the remedies which the plaintiff-company is seeking in this case. In regard to the question of injunction the case upon which the learned Subordinate Judge relies does not in my opinion establish that a plaintiff, not in possession, is not entitled under any circumstances to injunction, even if he satisfies the Court that the injury which is apprehended will be either continuous or frequently repeated or very serious The case of *Wallis* v. *Hands*(2) was decided on its own facts and is not an authority for the proposition that "a man having only interesse termini cannot bring a case for injunction". In my opinion the plaintiff-company is entitled to maintain this action.

The next question is whether there was by operation of law an abandonment or surrender of the lease by Kenny. There is no doubt that the plaintiff-company has not worked the mines; but there is ample authority for the view that mere non-user does not amount to an abandonment. The passage which I have already cited from Pollock and Wright may be again referred to in this connection. It is not necessary to cite authorities, for the principle is well recognized. The learned Subordinate Judge relies upon the following circumstances in support of his theory as to abandonment. He says that in 1901 the proprietor treated the lease as having been surrendered or abandoned. In 1904 the manager of the proprietor granted a prospecting license to Messrs. Mackinon Mackenzie and Co., whose agent Robinson worked a particular kind of mineral called galena in one of the mauzas called Beldi; and the learned Subordinate Judge says that—

> "the inference is that when the zamindar found that for a period of twenty years the lessee had not worked but had left the country, he inferred that the lessee had surrendered the lease and entered upon possession";

(1) (1884) 32 W. R. 943.

(2) (1893) 2 Ch. 75.

and he says that, since the zamindar entered upon possession, the lease was extinguished. There is, in my opinion, neither principle nor authority in favour of the startling proposition laid down by the learned Subordinate Judge. A contention very much like the one which found favour with the learned Subordinate Judge was advanced before the Privy Council in *Agency Co.* v. *Short* (1). Lord Macnaghten, in dealing with the contention, said that in the case of mines, the doctrines contended for might lead to startling results and produce great injustice. It is quite true that the proprietor treated the lease as having been surrendered in 1901; but what he understood is of no consequence unless he actually took possession of the demised land and retained possession for the statutory period. It is quite true that in 1904 he granted a lease to Messrs Mackinon Mackenzie and Co., and that Mackinon Mackenzie and Co. worked the galena in one of the mauzas comprised within the Pargana. It is not suggested that any of the subsequent lessees has been in possession for the statutory period. That being so, there was no abandonment of his interest by Kenny.

I will now deal with the question of limitation. The defendants rely upon the following facts as establishing that the plaintiff's suit is barred by limitation. On the 9th November, 1909, a letter was written by Mathewson as patnidar of the Pargana contending that the mining rights in the Pargana belonged either to the Government or to him as representing the zamindar. This letter throws no light on the question of possession. On the 21st October, 1905, the proprietor gave a mining lease to Sullivan. Admittedly Sullivan has never worked the mines and he surrendered the lease by a registered document. No question of dispossession, therefore, arises. Between August, 1904 and September 1905 Messrs. Mackinon Mackenzie and Co. worked a

(1) (1888) A. C. 793.

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particular kind of mineral called galena in village Beldi under a license from the manager of the encumbered estate. The extent of that working is shown by the local inspection note of the learned Subordinate Judge and the amount of the working is to be found in Ex. R. It appears that they took Rs. 17,415 worth of galena and that they paid the Raja Rs 162 as balance of the royalty due. It may be admitted that there was an ouster of the plaintiff-company or its predecessors in title by Messrs. Mackinon Mackenzie and Co., of village Beldi comprised within the Pargana between August 1904 and September 1905; but Messrs. Mackinon Mackenzie and Co. entered upon possession without title, for the proprietor had no power to grant a lease to Messrs. Mackinon Mackenzie and Co. They ceased to work in September 1905; and the rightful owner, that is to say, the plaintiff-company, or its predecessors in title, on Messrs. Mackinon Mackenzie and Co., abandoning possession of the mauza, was in the same position in all respects as it was before the intrusion took place. As Lord Macnaghten in *Agency Co.* v. *Short* (1) says, "there is no one against whom he can bring an action. He cannot make an entry upon himself." Time undoubtedly began to run as against the plaintiff-company in August 1904 in regard to mauza Beldi; but in my opinion it ceased to run in September 1905 when Messrs. Mackinon Mackenzie and Co. abandoned possession of the mauza. On the 15th June, 1906, the manager of the Encumbered Estate wrote a letter to Messrs. Hoare Miller and Co., the managing agents of the Barabhum Co., Ltd., informing them that the Raj ignored Kenny's lease. The manager in his letter said

"the mining rights have remained latent from the date and year the lease was granted."

Messrs. Hoare Miller and Co. replied to this letter which has not been put in by the defendants. On the 24th June, 1906, there was another letter from the

(1) (1888) A. C. 793.

manager in which he repeated that the proprietor refused to recognize Kenny's lease. In my opinion the refusal to recognize Kenny's lease did not amount to dispossession. What was wanted on the part of the proprietor was a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. As I have said, the rightful owner may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession the rightful owner, to quote the words of Lord Macnaghten, " is in the same position in all respects as he was before the intrusion took place ". The letters Exhibits G1 and G2 throw no light whatever on this point. On the 9th April, 1907, the Raj gave a lease to Gobind Bose. It is not suggested that Gobind Bose took possession by virtue of this lease or carried on any underground operations One may therefore ignore Gobind Bose's lease. On the 5th September, 1911, the Raj gave a lease to Herambo who in his turn granted a prospecting license to Guzder on the 5th June, 1919, and again on the 11th February, 1920. It is not suggested that Herambo, defendant no. 3, took possession by virtue of his lease or that he carried on any underground operations. The plaintiff's cause of action arose for the first time when Guzder through Chandan Singh began to act under the prospecting lease. The suit having been instituted on the 14th June 1920 is amply within time.

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The last question is as to estoppel. It is difficult to understand the view of the learned Subordinate Judge on this point. It is contended that

> " as the predecessors in interest of the plaintiff-company by not working the minerals in the Pargana made the defendant believe that the zamindar had the right to settle the minerals and as in that belief he paid Rs. 25,000 as salami to him for the lease of the minerals, the plaintiff-company is estopped from claiming a leasehold interest in the minerals as against him."

In my opinion it is only necessary to state the proposition to reject it. I hold that there is no question of estoppel to be tried.

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I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below. The plaintiff-company is entitled to a declaration of title in its favour and to a permanent injunction restraining the defendants and their agents and servants from working and appropriating the minerals in Pargana Barabhum. The plaintiff-company is also entitled to its costs in this Court and in the Court below.

ADAMI, J.—I entirely agree.

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Macpherson, J.

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June, 18, 19, 23.

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v.

RAM RACHHYA SINGH.*

Pre-emption, suit for—joinder of co-plaintiffs not entitled to pre-empt, effect of—shafi-i-khalit, meaning of—talab-i-ish-had, performance of, after ascertaining amount of purchase-money—reasonable delay—finding of fact.

If a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed as against both; but the mere joining by a person having a right of pre-emption of persons who have an actual right of pre-emption, but who have not qualified themselves according to the Muhammadan law to enforce it and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself is concerned.

Chotu v. *Husain Baksh*(1), followed.

* Second Appeal no. 1500 of 1922, from a decision of G. J. Monahan, Esq., I.C.S., District Judge of Monghyr, dated the 8th September, 1923, reversing a decision of M. Saiyid Nasiruddin Ahmad, Subordinate Judge of Monghyr, dated the 15th April, 1920.

(1) (1893) 13 A. W. N. 25.

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Where an ahar adjoining certain vended property was within the plaintiffs' patti and the title to it belonged to them alone, but the proprietors of the vended property had a right of easement over the ahar, *held*, that the plaintiffs came within the second class of pre-emptors, namely shafi-i-khalit.

Keshub Singh v. *Bansi Singh*(1), distinguished.

Where, after performing the talab-i-mowasibat, the pre-emptor waited until he had ascertained the amount of the purchase money and then performed the second ceremony of talab-i-ish-had, *held*, that the delay was excusable and did not operate as a forfeiture of the right of pre-emption.

Held, further, that the due and sufficient observance of the formality as to time, is a question to be decided in each case by the Court which has to deal with the facts and the High Court should not interfere with a finding of fact on such question in second appeal.

Abadi Begam v. *Inam Begum*(2), *Musammat Jumeelun* v. *Lateef Hossein*(3) and *Baijnath Goenka* v. *Ramdhari Chowdhury*(4), referred to.

Appeal by the defendant.

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

P. Dayal and *T. N. Sahay*, for the appellant.

Sultan Ahmed (with him *S. N. Ray*), for the respondents.

DAWSON MILLER, C. J.—This is an appeal from a decision of the District Judge of Monghyr, dated the 8th September, 1922. The appellant, Mahanth Tokh Narayan Puri, is the defendant first party in a pre-emption suit instituted by some of the respondents as plaintiffs against the appellant as purchaser of the defendants second party, also respondents as vendors of an estate in mauza Beiman bearing Tauzi no. 7094 on the rolls of the Collector of Monghyr. Some years ago by a Collectorate batwara mauza Beiman was partitioned amongst the co-sharers and divided into several separate revenue-paying estates bearing separate tauzi

(1) (1919) 4 Pat. L. J. 420.
(2) (1876-78) I. L. R. 1 All. 525.
(3) (1871) 16 W. R. 13, F. B.
(4) (1908) I. L. R. 35 Cal. 402; L. R. 35 I. A. 60.

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numbers. Tauzi no. 7094 which constitutes the property in dispute in this case fell to the patti of certain co-sharers now represented by Jagdip Narain Singh and others, the second party defendants in the suit. Tauzi no. 3814 and Tauzi no. 7093 fell to the patti of those who are now represented by the plaintiffs. These two estates are contiguous with the estate in suit lying immediately to the south and east thereof respectively. The appellant (defendant first party) is the proprietor of mauza Bindaban which lies immediately to the west of the estate in suit. On the 13th December, 1918, the defendants second party, who may be conveniently referred to as the vendors, sold their interest in Tauzi no. 7094 to the appellant, who may be referred to as the purchaser, for Rs. 3,775 and a further sum of Rs. 125 to cover the arrears of rent then due. The plaintiffs as proprietors of Tauzi nos. 3814 and 7093 claim the right of pre-emption on payment of the price agreed between the vendors and purchaser and instituted the present suit to enforce their claim.

The Muhammadan Law relating to pre-emption applies also to Hindus in Bihar. The right of pre-emption applies in the case of three classes of persons. The first class are the co-sharers in the vended property known as shafi-i-sharik. The second class are sharers in the appendages or appurtenances of the vended property, shafi-i-khalit. The third class derive their right from vicinage and the right applies in favour of neighbouring proprietors holding contiguous property. They are known as shafi-i-jar. The plaintiffs claimed originally as the owners of the adjoining property but by an amendment of their plaint they alleged that the pattis of the plaintiffs and the vendors had all along been irrigated from water of the same ahar and pynes and they also claim as sharers in the appurtenances common to both properties (shafi-i-khalit).

The purchaser resisted the suit on various grounds. He contended that the plaintiffs were not

entitled to pre-emption on the ground of vicinage as he also was a neighbouring proprietor; that the plaintiffs were not entitled to the right of shafi-i-khalit as they were not in fact sharers in appurtenances common to the two estates, and, further, that such a right had not been properly claimed in the plaint; that the ceremonies necessary to be performed in order to found a right of pre-emption had not been properly performed, and that such ceremonies, if performed, had been performed by the plaintiff no. 4 alone, and by adding other plaintiffs in the suit who were strangers having no claim to pre-emption he had forfeited his right.

The learned Subordinate Judge before whom the case came for trial appears to have found all the facts in favour of the plaintiffs but considered that although the plaintiffs were entitled to pre-emption as shafi-i-jar and shafi-i-khalit they could not enforce their right as they were not actual co-sharers in the vended property.

On appeal the learned District Judge of Monghyr, without considering the questions of fact which had been determined by the trial Court, upheld the decision of the Subordinate Judge.

An appeal was preferred to the High Court, but as the facts had not been found by the lower appellate Court the same was remanded to that Court for rehearing and for decision after coming to a finding as to what the facts were.

The learned District Judge on remand has found that the ceremonies were properly performed by the plaintiff no. 4; that the plaintiffs other than the plaintiff no. 4 were not strangers and were entitled to be added; that they could not succeed merely as shafi-i-jar because the purchaser was also a neighbouring proprietor but that they had established their right as shafi-i-khalit, sharers in appendages, a right which the purchaser did not enjoy, and he passed a decree for pre-emption in favour of the plaintiffs.

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The purchaser has appealed from that decision which he challenges upon three grounds, (*1*) that the plaintiff no. 4 who performed the ceremonies has lost his right to claim pre-emption by joining as plaintiffs other persons who had not joined in the ceremonies and who were strangers as that expression is understood in Muhammadan Law, (*2*) that the plaintiffs having claimed on the ground of vicinage only should not have been given a decree as sharers in the appendages and, (*3*) that delay in performing the talab-i-ish-had was fatal to the validity of that ceremony without which the right could not be asserted.

As to the first point it is well settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right he forfeits his own pre-emptive right and the suit must be dismissed as against both. [*See* Wilson's Anglo-Muhammadan Law, 5th Ed. 388.] The basis of this rule appears to be that as the right of pre-emption only exists in favour of those who are co-sharers either in the vended property or in the appurtenances, or who are proprietors of adjoining property, as against persons who are not so qualified it would be manifestly unjust as against the vendee to allow persons who do not possess the necessary qualifications to assert a right of pre-emption. In the present case the plaintiffs are all members of the same family and are all proprietors in tauzi nos. 3814 and 7903. They do not therefore come under the category of strangers as understood for this purpose in Muhammadan Law. It was contended, however, on behalf of the appellant that nobody could be joined as a plaintiff who, although otherwise qualified, had not himself performed the preliminary ceremonies of talab-mowasibat and talab-i-ish-had, but no authority was produced in support of this proposition. As pointed out by Banerji, J., in *Wajid Ali* v. *Shaban*(1), in almost all the cases in

(1) (1909) I. L. R. 31 All. 623.

which it has been held that a person possessing the right of pre-emption forfeits it by joining a stranger, the person joined was a stranger to the co-parcenership body and a total outsider, and reference is made to the case of *Chotu* v. *Hussain Boksh* (1) in which it was held that the mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption, but have not qualified themselves according to the Muhammadan Law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself was concerned. In that case pre-emption was claimed by several persons one of whom, Chotu, only had performed the preliminary demands and it was held that Chotu had not forfeited his right of pre-emption by joining with him the other plaintiffs in bringing the suit. The point appears to have been settled by that decision. Moreover, the learned Judge whose judgment is under appeal states that this point was not pressed before him by the purchaser and I do not think we should in the circumstances allow the appellant to raise the point afresh. In any case were it necessary to do so I should hold that the suit is not bad for misjoinder of parties.

With regard to the second point it is true that in the relief portion of the claim the plaintiffs ask for a declaration that they have the right of pre-emption as they are proprietors of the adjoining pattis. But by the amendment of paragraph 15 in the body of their plaint they do allege that the pattis of themselves and the vendors have all along been irrigated from water of the same ahar and pynes and at the trial as well as in the lower appellate Court, the question whether the plaintiffs were entitled to come in under the second class of pre-emptors was raised and decided. The facts with regard to this part of the case are found by the learned District Judge on remand. There

(1) (1893) 13 A. W. N. 25.

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is an ahar of considerable extent in the plaintiffs' patti, tauzi no. 3814, and the vendors as proprietors of tauzi no. 7094 have rights of taking water for the irrigation of their own land from this ahar. The learned Judge finds that the proprietors of the two pattis have joint rights over this ahar and that in fact the owners of the vended patti have a right of easement over the ahars and water-courses situated in the plaintiffs' patti. The result is that the plaintiff's patti is a servient tenement. Such a case has always, so far as I am aware, been treated as bringing the owner of the servient tenement within the right of shafi-i-khalit. It was contended, however, that the ahar in question had been left ijmal at the time of the batwara and that it was not an appendage or appurtenance to either of the two pattis over which the parties had common rights and the case of *Keshub Singh* v. *Bansi Singh*(1) was referred to. In that case an estate had been partitioned into several mahals but certain roads and a well and a tank and other properties had been left undivided and remained the joint property of the proprietors of the different estates. It was found that the fact that this joint property remained enjoyable by the proprietors of each of the separate mahals was not sufficient to give any of them a right of pre-emption in the second degree or khalit, as the joint property was not an appurtenance of any of the estates but a separate property owned by the proprietors jointly. In the present case the facts appear to be different. The ahar in question is within the plaintiffs' patti and the title to it belongs to the plaintiffs alone. It is not shewn to be joint property and it is found by the learned District Judge that the right which the proprietors of the vended property have was merely a right of easement in the ahar. This being so I think the plaintiffs come within the second class of pre-emptors, namely, shafi-i-khalit.

(1) (1919) 4 Pat. L. J. 420.

With regard to the third point it may be stated that the Muhammadan Law requires that the pre-emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses are present or not. The ceremony is known as talab-i-mowasibat. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as talab-i-ish-had. It is not disputed that the first demand was properly made by the plaintiff no. 4. It is contended, however, that there was a delay of four days in performing the second demand and that this delay is fatal to the plaintiffs' right. The facts found are that the property was sold on the 13th December, 1918. The plaintiff no. 4 came to hear of it on the 16th December and immediately declared his intention of exercising his right of pre-emption in the presence of several witnesses. He was not aware, however, of the amount of the purchase price paid for the property and in order to ascertain this he sent his servant Munshi Gajadhar Lal by train on the evening of the same day to Shaikhpura to obtain a copy of the sale deed. There was some delay in obtaining the copy of the sale deed owing to the registration office being closed. Eventually Gajadhar Lal obtained a copy of the sale deed on the 19th December and took it to his master at Mauza Parhi who, as soon as he received it on the 20th, proceeded to the house of the vendors who lived in the same village and there performed the second ceremony of talab-i-ish-had in the presence of some of the vendors and other witnesses. The same ceremony was performed by him on the vended property on the following day and in the presence of the purchaser on the 22nd, but these last two ceremonies were not necessary in order to complete his right. The question is whether by waiting until he

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had ascertained the amount of the purchase money the plaintiff no. 4 forfeited his right. The learned District Judge considered that the delay was satisfactorily explained and that the plaintiff was justified in waiting until he ascertained the purchase price before performing the second ceremony. It seems to me on general principles that unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. The price when ascertained may be higher than that which he is inclined to pay. There can be no doubt, however, that he would be bound to take immediate steps to ascertain the price and any unreasonable delay in doing so would, in my opinion, operate as a forfeiture of his claim. In the case of *Abadi Begam* v. *Inam Begam*(1), the opinion was expressed that a claim relinquished upon misinformation of the amount of the sale consideration, or of the property sold, may be resumed when the real facts became apparent. This opinion, however, upon the facts of that case, would appear to be merely obiter. It is referred to apparently with approval by Sir Roland Wilson who states

> " but a person who refrains from pre-empting when he first hears of the sale, owing to being misinformed of the price, is not estopped from reviving his right on becoming subsequently aware of the true price." (*See* Anglo-Muhammadan Law, 5th Ed. 401.)

The rule laid down by Sir William Macnaghten and referred to with approval in the case of *Musammat Jumeelun* v. *Luteef Hossein*(2) is that the talab-i-ishhad should be made with the least practicable delay and it was further laid down in that case by a full bench of the Calcutta High Court that the due and sufficient observance of that formality, as to time, is a question to be decided in each case by the Court which has to deal with the facts and I do not think that in second appeal we should interfere with the

(1) (1876) I. L. R. 1 All. 521.

(2) (1871) 16 W. R. 13, F. B.

finding of fact on a question of this sort unless the ascertained facts clearly shew that there was no evidence to support the finding. In the case of *Baijnath Gaonka* v. *Ramdhari Chowdhry*(1) there was a considerable delay between the date (the 20th December, 1897), when the pre-emptor first heard of the sale and the 7th January following when he performed the second ceremony of talab-i-ish-had. The delay between the 20th December and the 7th January was due to the fact that the pre-emptor was during that time endeavouring to procure from the registration office a copy of the sale deed, the office being closed for the Christmas vacation. Their Lordships of the Judicial Committee appear to have assumed that the circumstances were adequate to excuse that delay. The trial Court had held that the delay was not fatal to the claim. The High Court on appeal had reversed that decision. Their Lordships observed, " There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such a delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court on a pure question of fact were insufficient ". In my opinion the delay in the present case has been amply explained and I do not think that any sufficient reason has been made out why we should differ from the learned District Judge on a pure question of fact. Indeed had the case come before us in the first instance I should have taken the same view. In my opinion the third objection also fails and this appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

(1) (1908) I. L. R. 35 Cal. 402; I. L. R. 35 I. A. 60.

APPELLATE CIVIL.

Consd. 28 Pat. 552.

Before Mullick and Kulwant Sahay, J. J.

AGENT OF THE BENGAL-NAGPUR RAILWAY COMPANY, LIMITED

1925.

July, 1.

v.

HAMIR MULL CHAGAN MULL.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 31 *and* 115—*Suit by consignee for compensation for non-delivery—proper article applicable—Notice, whether necessary—Indian Railways Act*, (*Act IX of* 1890), *section* 77.

A suit for compensation for breach of contract on account of non-delivery of goods entrusted to a carrier must be brought within one year from the date when the goods ought to have been delivered, under Article 31, Limitation Act.

The residuary Article 115 has no application to such a suit.

Indian General Navigation and Railway Company, Ltd. v. *Nanda Lal Banik*,(1) *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Company of Calcutta* (2), *Mutsaddi Lal* v. *Bombay Baroda and Central India Railway Company*(3), *Vally Md. Haji Gunny* v. *Nederland Steam Navigation Company*(4), *Gobind Ram Marwari* v. *East Indian Railway Company*(5), and *East Indian Railway Company* v. *Sagar Mill*(6), approved.

Radha Shyam Basak v *Secretary of State for India*(7), not followed.

Non-delivery constitutes "loss" within the meaning of section 77, Indian Railways Act, 1890, and, therefore, the

* Second Appeal no. 287 of 1923, from a decision of W. N. Boyce, Esq., District Judge of Manbhum, dated the 2nd January, 1923, setting aside a decision of M. Nazabat Hussain, Subordinate Judge of Purulia, dated the 6th June, 1922.

(1) (1908-09) 13 Cal. W. N. 851.

(2) (1916) I. L. R. 39 Mad. 1, F. B.

(3) (1920) I. L. R. 42 All. 390.

(4) (1922-23) 27 C. W. N. 806.

(5) S. A. no. 985 of 1921.

(6) S. A. no. 495 of 1922.

(7) (1917) I. L. R. 44 Cal. 16.

service of notice under the provisions of that section is essential in a suit for compensation for non-delivery of goods.

Great Indian Peninsular Railway Company v. *Jitan Ram*(1), *East Indian Railway Company, Ltd.* v. *Netram Ganesh Lal*(2), *Assam Bengal Railway Company, Ltd.* v. *Radhica Mohan Nath*,(3), and *East Indian Railway Company* v. *Sheo Prasad* and *Ram Prasad*(4), followed.

East Indian Railway Company v. *Messrs. Kali Charan Ram Prasad*(5), dissented from.

Appeal by the defendant.

The plaintiffs consigned 25 bales of cloth to themselves by the Bengal Nagpur Railway Company to be carried from Assansol to Barabhum. The goods were entrusted to the Railway on the 25th August, 1918. On the 10th September, 1918, only 24 bales were delivered and one bale was missing. On the 21st August, 1921, the plaintiffs brought a suit before the Subordinate Judge of Manbhum claiming compensation for non-delivery. The Subordinate Judge dismissed the suit.

An appeal was taken by the plaintiff to the Court of the District Judge and he, on the 2nd January, 1913, reversed the decision of the Subordinate Judge and gave the plaintiffs a decree for Rs. 950 as compensation with costs.

The present second appeal was preferred by the Agent of the Bengal Nagpur Railway Company.

A. B. Mukharji, for the appellant.

P. Dayal, for the respondents.

MULLICK, A. C. J.—A preliminary point which was not taken in the memorandum of appeal to this Court has first to be noticed.

It appears that in the Court of the Subordinate Judge the plaintiffs correctly impleaded the Railway

(1) (1923) I. L. R. 2 Pat. 442.
(2) (1923) 75 Ind. Cas. 26.
(3) (1923-24) 28 Cal. W. N. 438.
(4) C. R. no. 118 of 1924.
(5) (1922) 3 Pat. L. T. 215.

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MULLICK, A. C.J.

Company as the defendant but in the Court of the District Judge the respondent named was the Agent of the Bengal Nagpur Railway. This was clearly an error; for having regard to the fact that it was the Company that was sued in the trial Court there can be no doubt that in the District Judge's Court the plaintiffs intended to implead the same party and that they misdescribed him as the Agent of the Railway. The present appeal is preferred by the Agent and in any view of the matter he cannot now be heard to say that the appeal cannot proceed merely because he was impleaded in his personal capacity in the lower appellate Court.

The next two points are more substantial. The first of these is whether Article 31 of the Indian Limitation Act or Article 115 governs the suit. The learned District Judge, relying on the case of *Radha Shyam Basak* v. *Secretary of State for India*(1), held that where the consignee is the plaintiff Article 31 applies but if the consignor is the plaintiff then Article 115 operates. Upon the authorities this view cannot be supported. The following decisions shew that whether the suit is laid in tort or contract if compensation is claimed for non-delivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Article 31 and that the residuary Article has no application: [*Indian General Navigation and Railway Company, Limited*, v. *Nanda Lal Banik*(2), *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Company*(3), *Mutsaddi Lal* v. *Bombay Baroda and Central India Railway Company*(4), *Vali Muhammad Haji Gunny* v. *Naderland S. Navigation Company* (5), *Gobind Ram Marwari* v. *East Indian Railway Company*(6), (decided by Dawson Miller, C. J., and Kulwant Sahay, J., on the 22nd

(1) (1917) I. L. R. 44 Cal. 16.
(2) (1908-09) 13 Cal. W. N. 851.
(3) (1916) I. L. R. 39 Mad. 1, F. B.
(4) (1920) I. L. R. 42 All. 390.
(5) (1922-23) 29 C. W. N. 806.
(6) S. A. no. 985 of 1921.

June, 1913); and *East Indian Railway Company, Limited* v. *Sagar Mull*(1) (decided by Ross and Kulwant Sahay, J.J., on the 23rd January, 1925.] Here the claim is for compensation for breach of contract on account of non-delivery and should have been made within one year from the date when the goods ought to have been delivered. The suit has therefore been brought long after the due date.

MULLICK, A. C. J.

The other point is whether a notice under section 77 of the Indian Railways Act was necessary in this case. It is found as a fact by the learned District Judge that no notice was served but the learned Judge holds that as the suit is brought for non-delivery and not for loss, section 77 of the Indian Railways Act has no application. For this view he relies upon the case of *East Indian Railway Company* v. *Messrs. Kali Charan Ram Prasad*(2). That judgment, however, has been dissented from in later cases in this Court and also in the Calcutta High Court [see *Great Indian Peninsular Railway Company* v. *Jitan Ram*(3), *East Indian Railway Company Limited* v. *Notram Ganesh Lal*(4), *Assam Bengal Railway Company Limited* v. *Radhica Mohan Nath*(5) and *East Indian Railway Company* v. *Sheo Prasad and Ram Prasad*(6) (decided on the 28th May, 1924]. These authorities shew that non-delivery constitutes "loss" within the meaning of section 77 and therefore the service of notice under the provisions of that section is essential.

On both these grounds therefore the plaintiffs must fail. The appeal is accordingly decreed with costs throughout, and the suit is dismissed.

KULWANT SAHAY, J.—I agree.

(1) S. A. no. 495 of 1922.
(2) (1922) 3 Pat. L. T. 215.
(3) (1923) I. L. R. 2 Pat. 442.
(4) (1923) 75 Ind. Cas. 26.
(5) (1923-24) 28 Cal. W. N. 438.
(6) C. R. no. 118 of 1924.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, J.J.

1925.

July, 8.

RAMCHANDRA MODAK

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898, (*Act V of* 1898), *sections* 256 *and* 539—*cross-examination before charge—right of accused to have the witnesses recalled—cost of recalling prosecution witnesses not to be imposed as a condition—affidavit, sworn before a magistrate, whether can be used in the High Court—Penal Code*, 1860 (*Act XLV of* 1860), *section* 19.

Section 256, Code of Criminal Procedure, 1898, does not come into operation until the charge is framed. Therefore, a statement of the pleader for the defence made after he had cross-examined the prosecution witness before the charge that he no longer required their attendance, does not deprive the accused of his right to further cross-examine the witnesses after the framing of the charge.

A Magistrate has no power, when passing an order under section 256 to impose a condition that the expenses of recalling the prosecution witnesses should be deposited before they are recalled.

A Magistrate is a "judge" within the meaning of section 19, Penal Code, read with section 4(2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before a magistrate cannot be used in the High Court.

Dinobundhu Nundy v. *Sm. Hurrymutty Dassee*(1), distinguished.

Iswarchunder Guho, in the matter of(2), referred to.

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

S. N. Basu for *A. K. Gupta*, for the petitioner.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

* Criminal Revision no. 255 of 1925, from an order of G. Rowland, Esq., I.C.S., Judicial Commissioner of Ranchi, dated the 14th April, 1925, affirming an order of H. J. B. LePatourel, Esq., Subdivisional Magistrate of Khunti, dated the 13th March, 1925.

(1) (1903-04) 8 Cal. W. N. xl.

(2) (1887) I. L. R. 14 Cal. 653.

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JWALA PRASAD, J.

JWALA PRASAD, J.—The trial in this case seems to have been vitiated by the omission on the part of the Magistrate to comply with the provisions of section 256 of the Code of Criminal Procedure.

The witnesses for the prosecution were examined on the 23rd of February, 1925, and were cross-examined and then discharged as the pleader for the defence no longer required their attendance. This happened before the charge was framed. The charge was framed the following day, namely, on the 24th February. The accused pleaded not guilty and cited defence witnesses. Later on Mr. Ghatak, pleader from Ranchi, appeared on behalf of the accused for the first time and stated that he wished to cross-examine the prosecution witnesses after the charge was framed. This request was evidently made under section 256 of the Code of Criminal Procedure.

As a matter of fact, the section requires that after the charge is framed and the accused pleads not guilty or claims to be tried,

> "he shall be required to state, *at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith*, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged."

The procedure indicated herein was not observed, and the accused was not required to state whether he wished to cross-examine any of the prosecution witnesses. The words italicised have now been inserted in the section by the amending Act XVIII of 1923 and indicate the intention of the Legislature that sufficient time should be given to an accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes. The pleader for the petitioner, however, expressed a desire that the witnesses should be recalled for the purpose of cross-examination.

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Therefore, the irregularity committed by the Magistrate in not asking the accused to state if he wished to cross-examine seems to have been practically condoned, and the accused expressly stated that he wanted to avail himself of the provisions of section 256 and to exercise his right to cross-examine the prosecution witnesses after the charge.

The Magistrate as well as the learned Sessions Judge refers to the statement of the pleader for the defence made on the 23rd of February before the charge was framed, stating that he did not any longer require the attendance of the prosecution witnesses, as showing that opportunity was given to the accused to cross-examine the witnesses under section 256. This apparently is a misconception, for on the 23rd of February the stage for applying section 256 had not been reached. No charge was framed, and the cross-examination of the prosecution witnesses before the charge was under the previous sections 252 and 253. Therefore, the statement of the pleader of the defence made on the 23rd of February would not deprive the accused of his right to further cross-examine the prosecution witnesses after the framing of the charge under section 256 of the Code.

The Magistrate did, as a matter of fact, direct the prosecution witnesses to be present on the 25th of February at Bundu for the purpose of being further cross-examined. This, no doubt, was an order passed under section 256 of the Code of Criminal Procedure, but the accused could not avail himself of it inasmuch as his pleader did not go to Bundu and an application was then made to the Magistrate stating that the accused could not bring his pleader to an out-of-way place such as Bundu.

The Magistrate then passed an order directing the witnesses to be produced upon the accused depositing the cost of their attendance, and fixed the 7th of March for this purpose. This order the Magistrate states to be under section 257, clause (*2*), of the Code; but that stage had not yet arrived inasmuch as the further

cross-examination of the witnesses after the charge was to be under section 256 of the Code and full and proper opportunity was not given to the accused for that purpose. There was no application on behalf of the accused under clause (*1*) of section 257 applying to the Magistrate to issue any process for compelling the attendance of the prosecution witnesses for the purpose of cross-examination, and consequently clause (*2*) of that section did not apply. The application of the accused made on the 24th of February and renewed on the 25th was an application under section 256 of the Code, and the Magistrate so treated it.

Therefore, the Magistrate's order under clause (*2*) of section 257 of the Code imposing a condition upon the accused to deposit costs for the purpose of summoning, that is for the purpose of recalling the prosecution witnesses, is wrong and without jurisdiction.

If the order be taken to come under section 256 as is contended for by the learned Assistant Government Advocate, then the condition, imposed by the Magistrate, of depositing the expenses for recalling the prosecution witnesses is ultra vires. That section does not lay down any condition, nor does it vest the Magistrate with any such power.

It is then urged that such a power must be deemed to exist in the Magistrate as being inherent in him. There is no room for such a suggestion. The Code has expressly laid down the procedure for trial under Chapter XXI, and section 257 expressly vests the Magistrate with discretion to require expenses to be paid by an accused. There being no such discretion vested under section 256, the power cannot be invoked upon the ground of its being inherent in the Court. The Magistrate had no power to alter in any way the procedure laid down in those sections for the conduct of the case.

The result is that the conviction of the accused is set aside and the case is sent back to the Magistrate to try it from the stage it had reached on the 24th of

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February after the framing of the charge and to dispose of it after compliance with the provisions of section 256 of the Code of Criminal Procedure.

The learned Counsel on behalf of the petitioner urged that the case should be transferred to the file of some other Magistrate. We do not see any reason to accede to this request, for we find nothing on the record to indicate that the Subdivisional Officer, who tried the case, has any bias against the accused.

Another question has arisen in this case, which has nothing to do with the present case. The application in revision filed in this Court by the accused was not sworn to before the Commissioner appointed by this Court; in lieu thereof an affidavit sworn to before the Subdivisional Magistrate of Ranchi was filed in this case. The question is whether this affidavit can be legally used in this Court.

Section 539 of the Code of Criminal Procedure deals with affidavits and affirmations to be used before any High Court or any officer of such Court. It requires that such affidavits and affirmations should be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, etc. It is said that the Subdivisional Magistrate of Ranchi is a Judge within the meaning of section 539 and consequently the affidavit in question could be sworn before him. Reliance is placed upon section 19 of the Indian Penal Code which defines the word "Judge" as denoting

> "every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment."

The Code of Criminal Procedure does not define the word "Judge", but section 4, clause (*2*), adopts the definition of words given in the Indian

Penal Code which are not expressly defined in the Code. Therefore the definition of the word " Judge " given in section 19, Indian Penal Code, would apply to the word " Judge " used in section 539 of the Code of Criminal Procedure.

It is, therefore, said that the learned Subdivisional Magistrate of Ranchi is empowered to give a definite judgment and so he must be deemed to be a " Judge " within the meaning of the word in section 539.

The illustrations to section 19 of the Indian Penal Code would, however, show that a person other than one who is officially designated as a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of " judge " when it is empowered by law to give a judgment, such as arbitrators, but arbitrators can come within the term " judge " only when dealing with a case on reference to their arbitration. I need not quote the Illustrations which seem to support the aforesaid view. It would be sufficient to refer specifically to clause (*d*) which says :

> " A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a judge."

No doubt, such a Magistrate is empowered to give a definitive judgment in other cases which he is trying; still as he is not empowered to give a definitive judgment in the case in which he is only empowered to commit he is not a judge for the purpose of that case.

The Subdivisional Magistrate of Ranchi had not the seisin of the criminal case before us and he could not pronounce any judgment in respect of that case.

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Therefore, he is not a judge within the meaning of the term in section 539 of the Code.

A reference to section 539-A, clause (2), will show that a Magistrate would not come within the meaning of the word " judge " in section 539. That clause says:

" An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate."

The " Magistrate " here is differentiated from the officers mentioned in section 539 and therefore he cannot come under section 539 and is not empowered to have an affidavit sworn before him.

No doubt, under section 139 of the Code of Civil Procedure a Magistrate is expressly empowered to receive an affidavit. That has no application to the present case, inasmuch as we are dealing with a criminal case tried by the Magistrate.

There is no authority on all fours with the present case and there seems to be a dearth of cases upon the point. There are only two cases [*Iswarchunder Guho*(1) and *Dinobundhu Nundy* v. *Sm. Hurrymutty Dasee*(2)]. The latter case related to an affidavit in connection with a civil case and it was held that the affidavit was valid as coming under section 139 which empowered a Magistrate to receive an affidavit and to administer an oath. This has no application to the present case. The other case did not relate to an affidavit to be used in the High Court and even then it was held that a Deputy Magistrate had no power to administer an oath to a person making an affidavit.

Therefore, the affidavit in this case is not a valid one and cannot be used in this Court.

The rule of the Court is as laid down in Chapter III of the Patna High Court Rules, viz.,

" The facts stated in every petition shall be verified either by the solemn affirmation of the petitioner or by an affidavit to be annexed to the petition."

(1) (1887) I. L. R. 14 Cal. 653.

(2) (1903-04) 8 Cal. W. N. xl.

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The application in the present case has not been properly sworn or affirmed, and the facts stated therein cannot, therefore, be used by the petitioner. Therefore, we cannot act upon the application in the present case as regards the facts stated therein.

JWALA PRASAD, J.

We have, however, dealt with the case upon the order sheet and the law on the subject, and consequently the irregularity in the affidavit does not affect the decision given by us.

MACPHERSON, J.—I agree. The order proposed is a necessity in the circumstances. The mistaken application of section 257(2) by the Subdivisional Magistrate of Khunti practically amounted to non-compliance with the provisions of section 256 which is of fundamental importance in the trial of an accused person.

The Crown has, however, suggested that we should not interfere with the conviction because the affidavit by which the application in revision is supported is not one contemplated by section 539 of the Code of Criminal Procedure which sets out the Courts and persons before whom affidavits to be used before a High Court may be sworn. The Subdivisional Magistrate of Ranchi before whom the affidavit supporting the petitioner's application was sworn is not one of the Courts or persons named in section 539. He has not been appointed by the High Court either personally or ex officio for the purpose of the section. Obviously therefore an affidavit to be used in the High Court can only be sworn before him if he is a Judge within the contemplation of the section. But it is manifest from section 19 of the Penal Code read with the illustrations thereto and section 4(2) of the Code of Criminal Procedure that a magistrate is not a Judge within the meaning of these Codes except in relation to a case on his own file and these also only in certain circumstances. The new section 539A of the Code of Criminal Procedure also gives countenance to this view. The affidavit filed on behalf of petitioner is accordingly not one which can be used in the High

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Court and also is not one such as is required under rule 3, Chapter III of the Rules of the Patna High Court. But though the objection is made out it is technical only and should not prevail at this stage even though it might have constituted good ground for refusal to issue a rule when the defective application was lodged. The rule has been heard out on the merits, also in the course of the hearing it has appeared that the facts stated in the petition, which is faultily verified, are matters of record and indeed they are not disputed on behalf of the Crown. Moreover, regard being had to the nature of the illegality in the trial and to the fact that the Magistrate had some ground for believing the petitioner to be eccentric, I should, if necessary, be disposed to treat the case as one which has come to the knowledge of the High Court otherwise than on application wherein the Court should of its own motion exercise its powers under section 439 of the Code of Criminal Procedure.

APPELLATE CIVIL.

Before Adami and Bucknill, J.J.

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June, 29, 30; July, 10.

GREAT INDIAN PENINSULA RAILWAY

v.

DATTI RAM.*

Non-delivery, suit against Railway company for—onus of proving liability—Risk Note B, nature of contract arising out of—admission of theft in a running train—failure to prove allegation, effect of—Evidence Act, 1872 (*Act I of* 1872), *section* 106.

In order to be successful in an action against the Railway Company, for damages for the loss of goods consigned, based

* Second Appeal no. 126 of 1923, from a decision of A. E. Scroope, Esq., I.C.S., District Judge of Saran, dated the 24th November, 1922, modifying a decision of B. Atal Behari Saran, Munsif of Chapra, dated the 16th March, 1922.

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on a contract under Risk Note B, the onus of proving that the loss is due to one of the exceptions under which the defendant is responsible lies on the plaintiff.

Smith v. *Great Western Railway Company*(1) and *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2), followed.

Gillabhai Punsi v. *The East Indian Railway Company*(3) and *Jamnadas Baldevadas* v. *The Burma Railway Company, Limited*(4), not followed.

The contract under Risk Note B forms a complete special contract between the consignor and the Railway company. The plaintiff, therefore, cannot go behind his special contract with the defendant company and sue the company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act, 1872, and upon Railways as carriers under the Indian Railways Act, 1890.

Where the Railway Company admitted " theft in a running train " but failed to prove the allegation, *held*, (i) that the admission was not of theft at large but of a specific form of theft; and (ii) that in any case the onus still lay on the plaintiff to prove neglect or theft by the servants of the Company.

Madras and Southern Mahratta Railway Company, Limited v. *B. Krishnaswami Chetty*(5), referred to.

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

Muhammad Hasan Jan, for the appellant.

B. N. Mitter, for the respondent.

BUCKNILL, J.—This was a second appeal from a decision of the District Judge of Saran, dated November 24th, 1922, by which he modified a decision of the Munsif of Chapra, dated March, 16th of the same year. The appellant was the Great Indian Peninsula

(1) (1922) L. R. 1 A. C. 178.
(2) (1923) I. L. R. 2 Pat. 442.
(3) (1921) I. L. R. 45 Bom. 1201.
(4) (1921) 64 Ind. Cas. 395.
(5) (1924) 79 Ind. Cas. 137.

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Railway through its agent in India; this Company was the defendant in a suit brought by the plaintiffs (the respondents here) who are merchants of Chapra town. The plaintiffs' suit was of familiar type; their firm ordered a bale of cloth from a Bombay merchant; it is admitted it was duly sent under Risk Note B and was duly placed in the appellant Company's custody; it is also common ground that it was never delivered.

The plaintiffs sued the appellant Company for the value of the goods lost (Rs. 869-14-9), the freight (Rs. 5-15-0) and loss of profit (Rs. 75) or Rs. 948-13-0 in all. They averred that they believed that the bale had been lost through the negligence of the appellant Company's servants.

The appellant Company pleaded various defences; they admitted the loss but alleged that it was due to a "running train theft" and that therefore they were absolved by Risk Note B from liability. The appellant Company, however, called no evidence whatever in support of their allegation of "running train theft". Whether the plaintiffs' evidence proved any negligence on the part of the appellant Company or not was a matter of difference of opinion between the Munsif and the District Judge.

The case, however, proceeded on the usual lines: the plaintiffs tried to prove negligence on the part of the defendant Company but all that their sole witness could aver was that he supposed that the Company's servants must have been negligent because the plaintiffs had never received their bale of cloth. I need hardly say that such an assertion by itself is of no value as proof of negligence. The Munsif, therefore, holding that the plaintiffs had failed to prove any negligence, dismissed their suit with costs.

The District Judge, when the appeal came before him, thought that negligence should be inferred "from all the circumstances": he, therefore, reversed the Munsif's decision and gave judgment for the plaintiffs

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for the price of the cloth with costs but not for the alleged loss of profit which he did not consider had been proved.

It is important to ascertain on what grounds the District Judge arrived at this conclusion. In the first place he points out how impossible it was for the plaintiffs to prove what happened to the cloth when in the Railway's custody; but this, though I may say at once that it is a constant difficulty in almost every case of this type, does not relieve a plaintiff from proving negligence on the part of the Railway's servants. The District Judge next remarks that the Company alone can know what happened to the bale whilst in its custody and that, therefore, under section 106 of the Evidence Act the onus is on the Company of proving what happened to the goods: but this kindly view is contrary to all the Indian and English case law authority [vide, e.g., *Smith* v. *Great Western Railway Company*(1)]; the onus of proving negligence in these cases lies on the plaintiff; the Railway Company is not bound in law to assist the plaintiff to fasten liability on itself. The District Judge further observes that the whole consignment was lost and that, although the Railway pleaded theft on a running train, it had made no attempt to prove any such theft; and that therefore the onus of avoidance of liability lay, by this plea in defence, upon the Company: it is possible that, more closely examined, there may be some force in this reasoning but I propose to deal with this point at a later stage.

The District Judge then states that the plaintiffs could get no information from the Company as to what had happened to the cloth; but this does not, according to the authorities, relieve the plaintiffs from proving negligence. The District Judge next remarks that, from the plaintiffs' evidence and the admitted facts in the case, the only reasonable conclusion was that the loss was due to the negligence of the Company's

(1) (1922) 1 A. C. 178.

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servants: but I have already pointed out that the plaintiffs' testimony was of no evidential value; whilst the only material admissions in the case were that the bale was duly given to the Company's custody and was lost in a running train theft; neither of which circumstances threw any liability on the Company.

Lastly, the District Judge seems to think that a plaintiff can in some manner go behind his special contract (i.e., Risk Note B) with the Company and sue the Company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act and upon Railways as carriers under the Indian Railways Act; but this view again is, I fear, contrary to the best authority. There have been so many decisions on cases of this type reported in Indian law reports that I think it is as well to try and express very simply a few of the more important features which emerge from them.

What is known as Risk Note B is, we are informed, the ordinary and most usual contract for the carriage of goods entered into between merchants and the railway companies in India. It is very simple in its language: it forms a complete special written contract between the consignor and Railway Company. The railway takes the goods at a rate of freight lower than the ordinary rate; in consideration for so doing, the consignor undertakes to absolve the Company from all responsibility for any loss, destruction, deterioration of or damage to the goods whilst in transit from any cause whatever subject to certain exceptions. These exceptions provide that if a whole consignment (or one or more complete packages forming part of a whole consignment) is lost, then the Company will be responsible if the loss is due—

(*a*) to the wilful neglect of the railway administration, or

(*b*) to theft by its servants or agents, or

(*c*) to wilful neglect of its servants or agents,

Then there is a proviso that wilful neglect cannot be held under the contract to include—

(*a*) fire,

(*b*) robbery from a running train,

(*c*) any other unforeseen event or accident.

A, then, a merchant, consigns goods by *B*, a Railway Company to *C*, another merchant, under a contract contained in Risk Note B: the goods are never delivered to *C*; *A* (or *C* acting really on *A's* behalf or as *A's* principal for there is no direct contract between *B* and *C*) sues *B* for damages for the loss of his (*A's*) goods or, if one so likes to phrase it, for damages for breach of contract in that *B* has not delivered the goods to *C* as *B* undertook so to do. What is *A's* cause of action?; it is solely on account of a breach by *B* of the contract between *A* and *B*. What is that contract?; it is an agreement between *A* and *B* reduced into writing in the form of Risk Note B. What contract must *A* sue on? on the only contract existing betweent *A* and *B*, i.e., the Risk Note B. Can *A* ignore the Risk Note and sue *B* for damages for non-delivery basing his claim on statutory liabilities imposed generally upon those who make contracts or particularly upon a railway company under the provisions of the Indian Contract Act and the Indian Railways Act respectively? the answer is in the negative; *A* cannot do so; he has to base his claim on his existing and actual contract with *B*, i.e., the Risk Note B. *A* then sues *B* upon and for damages for breach of the contract, i.e., the Risk Note B made between them. *B*, to take the simplest case, admits the loss in the Company's statement or defence. By the express terms of the contract *B* is not liable for loss save under certain specified circumstances. Who has to prove those circumstances under which *B* is liable? clearly not *B*, for it can hardly be contemplated seriously that *B* is bound to assist *A* in fastening responsibility upon B. So it is *A* upon whom the onus falls of showing that *B* is responsible for the loss,

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There have, it is true, been cases—even of quite recent date—in which it has been held that it is not sufficient for *B* to admit the loss in his statement of defence but that *B* must adduce evidence to prove such loss [e.g., *Ghelabhai Punsi* v. *East Indian Railway Company*(1), and *Jamnadas Baldevdas* v. *Burma Railway Company, Limited*(2)] , but these were decisions given prior to the case of *Smith* v. *Great Western Railway Company*(3); and it is difficult to understand why *B* should be called upon to prove what he expressly admits: the point also has been fully discussed and dealt with in this Court in the decision of Mullick, J., and myself in *G. I. P. Railway Company* v. *Jitan Ram Nirmal Ram*(4) in which we held that the contention was incapable of support. *A*, who may know nothing, and indeed is not likely in most instances to know anything, as to how or where his goods vanished or why they were not delivered, can aver in his statement of claim what he pleases; he can state if he wishes that the loss was due to any or all of the exceptions under which alone *B* is liable; but, assuming that *B* admits the loss, *A*, if he is to be successful in his claim, must prove that the loss was in fact due to one of the exceptions under which *B* is responsible. It is often asked how he can do so; it is obviously not an easy task as it may well frequently be that *B*, at the mercy of any unscrupulous member of its staff or the victim of clandestine theft by outsiders, knows no more as to the disappearance of the goods than *A* himself: *A's* only chance would appear to lie in the administration of searching interrogatories and the calling of servants of *B* as his (*A's*) witnesses. If he proves nothing his claim must fail: *B* need not say or do anything beyond admitting the loss.

All the above points have been dealt with at length in the recent decision of Mullick, J., and myself to which I have referred above. But it is frequently

(1) (1921) I. L. R. 45 Bom. 1201.
(2) (1921) 64 Ind. Cas. 395.
(3) (1922) 1 A. C. 178.
(4) (1923) I. L. R. 2 Pat. 442.

observed that if the law is as above stated it seems very hard as the position of *A* is almost hopeless. The answer to this comment is very simple; it is that the contract is itself a hard one but that *A* has a complete remedy in his own hands, namely, not to seek to have his goods carried at a reduced rate and under the terms of such a hard contract as Risk Note B but pay a higher freight and have his goods carried under another form of contract under the terms of which *B* has to assume a far fuller responsibility.

I mentioned at an early stage of my judgment that one of the reasons why the District Judge thought that the appellant should be held responsible was that the railway company had pleaded in its defence that the loss was due to a running train theft but that it made no attempt to prove that allegation. There seemed at one stage to be some force in the argument which was thus put forward in support of this part of the District Judge's decision. It was contended for the respondent that this admission by the appellant Company was an admission that there had been a theft and that as the Company failed to prove that it was a theft on a running train (satisfactory evidence of which would clearly have permitted the Company to escape any liability) it might be inferred that the theft was committed by the appellant's agents or servants; or, at any rate, that, as they had admitted a theft it was incumbent upon the appellant Company to show that it was not theft by their own agents or servants but theft either as pleaded on a running train or at any rate by some outsiders not in their service or not their agents. It is, however, impossible upon further consideration to come to the conclusion that this argument is a sound one. In the first place the admission or plea is not of theft at large but of a specific form of theft, i. e. on a running train. In the second place, even if the defendant Company failed to prove or to adduce any evidence in support of such an allegation, it cannot be held that a necessary inference must be drawn that the theft was committed by the

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Company's servants or agents; for, although there might have been a theft, it might have been by persons who were or were not the servants or agents of the Company; whilst, in order to prove that the Company was liable to the plaintiffs for the loss, it was primarily necessary (the onus being upon the plaintiffs) for the plaintiffs to show that the theft (whether or not committed on a running train) was effected by the Company's servants or agents; and this of course the plaintiffs made, and no doubt could make, no attempt to do. Lastly, it was quite unnecessary, according to the authorities, for the railway company to do anything more than to prove or admit the loss; and, having done that, the onus of proving that that loss was occasioned under one of those exceptions contained in the contract under which alone the Company could be held responsible lies upon the plaintiffs. As a matter of fact this very point appears to have been dealt with by Odgers, J., in the Madras High Court in the case of the *Madras and Southern Mahratta Railway Company, Limited* v. *B. Krishnaswami Chetty*(1). That case was one in which there appeared, superficially, to exist considerably greater reasons for drawing an inference that the theft had been committed by the Railway Company's servants than would be justifiable in the present case now before this Court. In the case decided by Odgers, J., the Railway Company pleaded in defence robbery from a running train and actually produced evidence in order to try and prove that allegation. The Company, however, failed to prove that the theft was one committed on a running train although they did show that when the train carrying the goods arrived at a certain station the guard found the doors of one of the covered vans open and the plaintiffs' bale of goods missing from it. The learned Judge in his decision remarks, "One is very much tempted to think that where the Railway Company has 5 or 6 of its servants travelling in the train it is not necessary to look to any outside agency to found a case of theft.

(1) (1923) 79 Ind. Cas. 137.

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But I cannot say that that has been established by evidence. In a similar case [*B. B. & C. I Railway Company* v. *Ranchodlal Chotalal and Company*(1), which also arose on this Risk Note B the learned Judges point out that though the defendants have failed to prove theft from the running train, the onus is, of course, still on the plaintiff to prove neglect or theft by railway servants. This, they point out, should have been done before any question is reached of robbery from a running train as that, namely, robbery from a running train, is an exception to wilful neglect. It has also been established in *Narayana Aiyar* v. *The South Indian Railway Company, Limited*(2), that the onus is upon the plaintiff to establish how the loss or deterioration was caused though there the Risk Note was Form H. The case of *Madras and Southern Mahratta Railway Company, Limited* v. *Mattai Subha Rao*(3), cited by the learned Counsel for the defendant does not seem to me to touch the case. I am, therefore, with great reluctance constrained to come to the conclusion that the plaintiff has no remedy on this Risk Note B on the evidence as it stands. The suit must, therefore, be dismissed. The question is whether I should inflict costs on the plaintiff. The defendant, as stated, attempted to prove loss by robbery from a running train and assumed that onus at the trial and failed. This is, as I pointed out, wrong. I do not think that the plaintiff suffered any prejudice from that procedure, but, on the whole, I am inclined to dismiss the suit without costs."

The first judgment referred to by Odgers, J., [*B. B. & C. I. Railway Company* v. *Ranchodlal Chotalal and Company* (4)] is precisely to the same effect as that of the learned Judge.

Under these circumstances I fear that this appeal must be allowed and the decree of the District Judge

(1) (1919) I. L. R. 43 Bom. 769.
(2) (1923) M. W. N. 731; 75 I. C. 260.
(3) (1920) I. L. R. 43 M. 617.
(4) (1921) I. L. R. 43 Bom. 769.

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of Saran set aside and that of the Munsif of Chapra restored.

One can only observe once again that, although it may seem that the decision in these cases bear hardly upon those whose goods are carried by Railway Companies in this country under Risk Note B, the contract is one which involves those who thus confide their goods for carriage to a Railway Company in the greatest difficulty in recovering compensation in the case of their loss; the substantial remedy against such a state of affairs lies, however, in the hands of the individual, who is in no way bound to enter into a contract of such a type which in effect places him at the mercy of the Railway Company with which he enters into such an agreement.

ADAMI, J.—I agree.

LETTERS PATENT.

Before Mullick, A.C.J. and Kulwant Sahay, J.

1925.

July, 14, 16.

RADHE LAL

v.

EAST INDIAN RAILWAY COMPANY, LIMITED.*

Railway Company, suit against—Agent impleaded as defendant—Suit whether maintainable—bona fide mistake, whether cures the defect—plaint, construction of.

In the case of a Railway Company, the proper name under which the Company should be sued is the name and style under which it carries on its business; and if a plaintiff deliberately chooses to sue, not the Company, but the Agent, he cannot by any decree which he obtains in the suit bind the Company. Where, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant, then the suit may proceed against the Company.

* Letters Patent Appeal no. 16 of 1925.

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Where the plaint bore the name of the Agent of a Railway Company as the defendant, but plaintiff, the Company and the Court all treated the suit as one against the Company and the Company in fact appeared and conducted the case up to a certain stage of the proceedings on the footing that they were the defendants in the suit, *held*, that this was a case of mere misdescription and the suit was one against the Company.

East Indian Railway Company v. *Ram Lakhan Ram*(1), distinguished.

Sinehi Ram Behari Lal v. *The Agent, East Indian Railway Company*(2), *Agent, Bengal-Nagpur Railway* v. *Behari Lal Dutt*(3), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report, were as follows:

On the 14th January, 1922, the firm of Kalu Ram Brijmohan of Bombay consigned three bales of cloth by railway to the firm of Ramlal Lachman Ram of Shaikhpura in the district of Monghyr. While the goods were in transit the latter firm assigned them to the present plaintiffs Radhe Lal and Ganga Prasad. It was admitted that delivery was to be made at Shaikhpura by the East Indian Railway Company. On the 9th February, 1922, the Company in question delivered only one bale and on the 24th October, 1922, the plaintiffs lodged a suit before the Munsif of Jamui claiming compensation from the "Agent of the East Indian Railway" for the loss of the two bales. The firm of Ramlal Lachman Ram were sued as pro forma defendants.

The plaint, which was filed on the 24th October, was not properly stamped and was returned to the plaintiffs. On the 28th October the plaint was re-filed with a proper court-fee and was accepted.

On the 21st November, 1922, the East Indian Railway appeared and asked for time to file a written

(1) (1924) I. L. R. 3 Pat. 230. (2) (1921) 2 Pat. L. T. 679.
(3) (1924-25) 29 Cal. W. N. 614.

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statement. Time was granted and the written statement was filed on the 3rd January, 1923.

After various adjournments the case was taken up on the 13th December, 1923. The defendant railway then took a new ground and urged that the suit was incompetent against the agent and that if it was sought to substitute or add the Company the time for doing so had expired. The Munsif accepted this argument and held that the frame of the suit was bad and made a decree in favour of the defendants.

The plaintiffs then went on appeal to the Subordinate Judge of Monghyr who, on the 21st July, 1924, set aside the Munsif's order and remanded the suit for trial on the merits.

A second appeal was then preferred to the High Court, and on the 18th December, 1924, Das, J., disagreeing with the Subordinate Judge, restored the order of the Munsif and dismissed the suit.

Murari Prasad, for the appellants.

Noresh Chandra Sinha, for the respondent.

MULLICK, A. C. J. (after stating the facts set out above, proceeded as follows): The present Letters Patent appeal is against an order of Das, J.

The learned Judge, relying on the decision in *Sinehi Ram Behari Lal* v. *The Agent, East Indian Railway Company*(1) and *East Indian Railway Company* v. *Ram Lakhan Ram*(2) held that this was a case brought against the Agent of the Railway and not the Railway Company and that the plaintiffs were not entitled to any relief against the Company, and the learned Judge laid down his view of the law in the following words: " In my opinion when there were two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant

(1) (1921) 2 Pat. L. T. 679.

(2) (1924) I. L. R. 3 Pat. 230.

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on the ground that he all along intended to sue the other and that in substance he sued the other and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription." There is no reason for dissenting from this statement of the law. It has been accepted in other cases and also recently in *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt*(1). The question now before us depends not upon the correctness of the proposition as stated above but upon its application to the facts of this case. Was the suit against the Railway in substance or not? If it was a suit against the Agent then obviously no relief can be given against the Railway Company but the point is whether upon a consideration of the plaint and the circumstances of the case it is possible to hold that in truth and substance the plaintiff sued not the Agent as a designated person but the Railway Company as a corporate body. That is a question of fact and must be decided upon the evidence in the case. The decision in other cases cannot therefore be any guide. Now the view that the learned Subordinate Judge took in appeal was that the suit was in substance one against the Railway and that it was competent to proceed. This is a finding of fact which is conclusive in second appeal but it is urged on behalf of the respondent before us that there is no evidence to support it. It is necessary therefore for us to see whether there was any evidence upon which the learned Judge was competent to come to the conclusion that this was really a case of misdescription.

In order to come to a finding upon this point it is necessary to see what the plaintiffs did. In their plaint they describe the first party defendants as the

"Agent of the East Indian Railway."

In paragraph 5 they state that the two bales were lost when in the custody of the defendant first party.

(1) (1924-25) 29 Cal. W. N. 614.

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In paragraph 6 they state that they made the demand to the Agent. In the relief portion they pray for judgment against the defendant first party,

"as Agent of the East Indian Railway Company."

In their application of the 24th October, 1922, asking for issue of process they describe the defendant not as Agent but as the East Indian Railway Company. In filing the deficit court-fee with their plaint on the 28th October they again repeat this description.

Let us now see what the defendant did. The defendant who appeared on the 21st November, 1922, was not the Agent but the Company. The defendant who filed the written statement on the 3rd January was again not the Agent but the Company and no objection was taken to the competency of the suit until the 12th December, 1923. It is pointed out by the appellant that if that ground had been taken at the earliest moment the error could easily have been remedied within the period of limitation which appears to have not expired till about February 1923. In reply it is urged on behalf of the respondent that paragraph 1 of the written statement does take the objection. That paragraph runs as follows:

"That the suit as framed is not maintainable."

It is clear, however, from the fact that the Railway Company appeared on the 21st November and also filed a written statement that this objection had reference not to the designation of the defendant but to other grounds upon which the suit of the plaintiffs was liable to fail.

Let us next see what the Court did. In the order sheet it describes the suit as one between Radhe Lal, plaintiffs, and the East Indian Railway Company and others defendants. On the 21st November, 1922, the Court accepts a petition from the Railway Company for time and on the 3rd January, 1923, it accepts the written statement not from the Agent but from the

Company. It is true that process was issued upon the Agent but that was clearly in consequence of the provisions of section 140 of the Indian Railway, Act.

It is clear therefore that the plaintiffs. the Company, and the Court, till the 13th December, 1923, all thought that the suit was not against the Agent but against the Railway Company.

Is this therefore a case in which the plaintiffs have deliberately chosen to proceed not against the principal. but his servant?. Clearly the plaint differs from that in *East Indian Railway Company* v. *Ram Lakhan Ram*(1) for here in the prayer portion the plaintiffs claim against the defendant first party as Agent and they make it clear that they desire to proceed against the corporation and not against the Agent in his personal capacity.

In my opinion the facts of this case are such that the decision in *East Indian Railway Company* v. *Ram Lakhan Ram*(1) has no application.

There was evidence on which the Subordinate Judge could find that this was a case of misdescription and his finding is conclusive.

The appellant also urges that the Munsif's orders of the 21st November, 1922, and of the 3rd January, 1923, are really orders substituting the Railway Company as a defendant in the suit. Order 1, rule 10, of the Civil Procedure Code would therefore apply and no question of limitation would arise. It is true that no formal amendment of the plaint was made. This should have been done but the omission was an irregularity and I do not think it vitiates the order of the Subordinate Judge.

With regard to the general question as to what is the correct way of designating the defendant in a claim against a Railway Company the point has been argued but it is unnecessary to deal with it in detail.

(1) (1924) I. L. R. 3 Pat. 230.

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The Civil Procedure Code of 1882 and the present Code both contemplate that a registered corporation should be described by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals must be given or the ordinary name by which the company is known and under which it carries on its business. There are companies constituted by Statute which are permitted to sue or be sued in the name of an officer or trustee. As to this class provision was made in section 435 of the Code of 1882 but Order XXIX of the present Code of 1908 is silent. The omission, however, is remedied in the appendix to the Code which makes it clear that this class of Company may be sued through the designated officer. Therefore in the case of the East Indian Railway the proper name under which the Company should be sued is the name and style under which it carries on its business. A suit against the Agent would be incompetent and would fix no liability upon the Company. The Company has no registered office in India but the Indian Railways Act provides that an officer named the Agent may be appointed in India upon whom service may be made of all notices and processes adressed to the Company. The appointment of such an officer, however, does not in any way relieve the plaintiff of the duty of suing the proper person and of correctly describing him.

If a plaintiff deliberately choses to sue not the Company but the Agent he cannot by any decree which he obtains in the suit bind the Company. If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the Company.

Here the Railway did in fact appear and conducted the case till the 12th December, 1923, on the footing that they were the real defendants in the suit.

In these circumstances the judgment of the learned Judge of this Court must be set aside and the

appeal must be decreed with costs. The order of the Subordinate Judge will be restored and the case will proceed to trial as directed by him.

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KULWANT SAHAY, J.—I agree.

Ref. 28 Pat. 1008

PRIVY COUNCIL.

SOURENDRA MOHAN SINHA

v.

HARI PRASAD.*

1925.

July, 21.

Santal Parganas—Mortgage of land in Santal Parganas—Jurisdiction of Civil Courts—Statutory restriction on interest recoverable—Interest after bringing of suit—Discretion of High Court—Santal Parganas Settlement Regulation, 1872, (III of 1872), section 6—Santal Parganas Settlement (Amendment) Regulation, 1908, (III of 1908), section 5.

The effect of section 5 of the Santal Parganas Settlement (Amendment) Regulation, 1908, which replaced section 6 of Regulation III of 1872, was to exclude the jurisdiction of the Civil Courts to try cases relating to land in the Santal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed.

Maha Prasad v. *Ramani Mohan Singh*(1), applied.

A Civil Court exercising jurisdiction under section 5 of the Regulation of 1908 is a "Court having jurisdiction in the Santal Parganas", within the meaning of section 6 of the Regulation of 1872, and is bound by the rules relating to usury enacted by that section.

Those rules preclude compound interest from being decreed, and limit the amount which can be decreed for interest under a mortgage bond or other loan to a sum equal to the amount actually advanced less any sum which already has been paid by way of interest.

* PRESENT: Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

(1) (1924) I. L. R. 42 Cal. 116; L. R. 41 I. A. 197.

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Where the High Court has refused to exercise its discretionary power under section 34 of the Civil Procedure Code, 1908, to decree interest from the date of the institution of a suit, the Judicial Committee as a rule will not interfere.

Quaere whether section 6 of the Regulation of 1872 applies to and limits the discretionary power under section 34 of the Code.

Decision of the High Court [*Hari Prasad Sing* v. *Sourendra Mohan Sinha* (1)], affirmed.

Consolidated Appeals (no. 136 of 1924) from a decree of the High Court (April 12, 1922) varying a decree of the Subordinate Judge of Bhagalpur (June 17, 1918).

The suit was brought by the abovenamed appellants to enforce a mortgage, dated December 21, 1898, to secure Rs. 3,50,000 of which Rs. 1,36,142 were advanced in cash, the balance being the amount due under a previous bond. The greater part of the mortgaged properties was situate in the Santal Parganas where the mortgagors resided, the remainder in the district of Bhagalpur; the mortgage was registered in Bhagalpur.

The appeal raised questions as to the jurisdiction of the Subordinate Judge at Bhagalpur having regard to the Santal Parganas Settlement (Amendment) Regulation, 1908, and (if there was jurisdiction) as to the effect of section 6 of the Santal Parganas Settlement Regulation, 1872, upon the amount of interest recoverable.

The facts and the relevant provisions of the legislature appear from the judgment of the Judicial Committee.

The Subordinate Judge made a preliminary decree for sale for Rs. 15,27,997, and a personal decree for Rs. 44,164 on account of principal and interest.

(1) (1922) I. L. R. 1 Pat. 506.

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Both parties appealed to the High Court. The learned Judges who hear the appeal (Dawson Miller, C. J. and Bucknill, J.) varied the above decree by passing a decree for sale for Rs. 3,88,673 and making a personal decree for Rs. 23,181.

1925, June 15, 16, 18. DeGruyther, K. C., and *Dube*, for the plaintiffs appellants.

Sir George Lowndes, K. C., and *E. B. Raikes*, for the defendants respondents.

July 21.—The judgment of their Lordships was delivered by—

SIR JOHN EDGE.—These are two consolidated appeals from a decree of April 12, 1922, of the High Court at Patna, which varied a decree of June 17th, 1918, of the Subordinate Judge of Bhagalpur.

The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on February 5, 1915. The plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage bond of December 21, 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of October 3, 1883, and for moneys advanced at various times, and for interest at various rates. The bond in suit provided that the principal sum of Rs 3,50,000 was to carry 7½ per centum compound interest with yearly rests. The principal was repayable in the month of Phagon, 1310 Fasli, the last day of which month was March 14, A.D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Santal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the defendants, except as later in this paragraph is mentioned, are members of the joint family. The joint

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family is governed by the school of Hindu law of the Mithila. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the district of Bhagalpur, by profession a pleader, who had occasionally acted for the joint family, and knew its financial position; he died long before this suit was brought, and the plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

A previous suit on the same mortgage bond of December 21, 1896, had been brought in the Court of the Subordinate Judge of Bhagalpur on June 20, 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council and was dismissed by His Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on May 19, 1914, by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to His Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of May 19, 1914. See *Mata Prasad* v. *Ramani Mohan Singh*(1).

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the

(1) (1914) I. L. R. 42 Cal. 116; L. R. 41 I. A. 197.

mortgagors of the amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage bond of the persons who might be the mortgagors. The property mortgaged was the joint property of the joint family, the greater part of which was situate within the Santal Parganas. That joint property extended from the Santal Parganas into the district of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage bond has been translated, and to that translation their Lordships will refer. By their bond the mortgagors declared that they would repay to the mortgagee the said sum of Rs. 3,50,000 in the month of Phagon, 1310 Fasli, and further declared that they should pay interest on the Rs. 3,50,000 at the rate of 7½ per centum per annum on the 1st Phagon, 1304 Fasli, and thereafter every year on the 1st Phagon, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at 7½ per centum per annum and converted into principal after the 1st of Phagon, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (1st Phagon, 1310 Fasli) they should pay such compound interest, and that

"the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

The mortgage bond also contained, amongst others, the following agreements by the mortgagors:

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in Court or privately, by the said Rai Bahadur, for realization of the debt.

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"7. For payment of the principal, interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Schedule no. 2 of this deed to the said Rai Bahadur subject to the mortgage lien created under the bond, dated the 11th Assin, 1299 F. This is the first mortgage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realize his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with cost be realized from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realize the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. The mortgaged properties which will be sold for realization of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Clause 16 of the bond is as follows :—

"16. This loan has been taken at Bhagalpur. The said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realize his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the mauzas, *i.e.*, the mortgaged properties no. 1, mentioned in Schedule no. 2, lie in the district of Bhagalpur, and some in the district of Santal Parganas."

The Santal Parganas were in 1872, and are still a backward district, and the Government of India considered that the inhabitants and their properties in the Santal Parganas required some protection from the operations of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted the Santal Parganas Regulation no. III of 1872 (known as the Santal Parganas

Settlement Regulation), which came into force on May 1, 1872, and so far as it was material was in force until Regulation no. V of 1893, and the Santal Parganas Settlement (Amendment) Regulation, 1908 (III of 1908), were, as later is mentioned, enacted.

Section 5 of Regulation no. III of 1872 was as follows:—

"5. Till such time as a settlement of the whole or any part of the Santal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act 6 of 1871 in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-head-ship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under section 2 of the said Act 37 of 1885, or by the Settlement Officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Section 6 of Regulations III, of 1872, as amended by Regulation V of 1893, was and is as follows:—

"All Courts having jurisdiction in the Santal Parganas shall observe the following rules relating to usury, namely:—

(*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than 2 per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed;

(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

Explanation.—The expression 'intermediate adjustment of account' in clause (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

Illustration.—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on June 20, 1904, and he tried

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the suit and made his decree therein on February 12, 1906. No notification that the settlement mentioned in section 5 of Regulation III of 1872, had been completed and concluded was ever made in the "Calcutta Gazette". In the suit of 1904, the two material issues to be determined were: (*a*) whether the Bhagalpur Court had jurisdiction in the suit, and (*b*) whether the mortgagees were precluded by section 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on February 12, 1906, found all the issues in favour of the mortgagees, and made a decree under section 86 of the Transfer of Property Act, 1882 (Act IV of 1882), for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (*b*).

That appeal was heard by Harrington and Mukharji, J. J., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in section 6 of Regulation III of 1872—

"The Court having jurisdiction in the Santal Parganas"

meant a Court situate in that district and constituted under the Regulation, and did not include a Court situated outside, but exercising jurisdiction to order the sale of mortgaged property situated within that district. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1924.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Santal Parganas, and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was obiter, as the High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a judge of the Courts established under the Bengal, United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to " suits of which the value exceeds Rs. 1,000, and which are not excluded from his cognizance by the Santal Parganas Setllement Regulation, or by any other law for the time being in force ", said that: " they were clearly of opinion that these words of exclusion refer to section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary

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for the purposes of this Appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said: "The informations supplied to their Lordships by the parties as to the notifications appearing in the 'Calcutta Gazette' show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suits, other portions were not settled. It is clear, therefore, that the suit came within the provisions of section 5 of the Santal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the 'Calcutta Gazette' to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed.

"Reliance was placed by counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. The Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Santal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of section 5 of the Santal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Santal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the

Board in one of the other appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that: "Apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Santal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The plaintiffs, in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on June 20, 1904.

By Bengal Regulation III of 1908, sections 5 and 5-A were substituted for section 5 of Bengal Regulation III of 1872. Section 5 which was substituted for section 5 of the Regulation of 1872 is as follows:—

"5. (1) From the date on which, under section 9, the Lieutenant-Governor declares, by a notification in the 'Calcutta Gazette', that a settlement shall be made of the whole or any part of the Santal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court, established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to:—

(a) any land or any interest in, or arising out of, land, or

(b) the rents or profits of any land, or

(c) any village headship or other office connected with any land,

in the area covered by such first-mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

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"(2) Between the dates referred to in sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Santal Parganas Act, 1855, or section 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Section 5-A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of section 5 of Regulation III of 1908, which replaced section 5 of the Regulation of 1872, has been to exclude for the future after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Santal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed.

The mortgagors were the appellants in the appeal before the High Court, and the High Court found in their evidence that they had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on February 5, 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Santal Parganas within the meaning of section 6 of the Regulation III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case,

which were accepted by the High Court as proved, not excluded by the substituted section 5 of the Regulation of 1872, their Lordships, accepting the findings on that question of the High Court as correct, hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on February 5, 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Santal Parganas within the meaning of section 6 of Regulation III of 1872, as amended by Regulation V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. Issue 11, as amended by the Subordinate Judge, was:

"Are the plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent)?".

The Subordinate Judge in this suit made a decree for the plaintiffs which included interest, both simple and compound, and such interest exceeded the amount of the original debt or loan. His decree in favour of the plaintiffs was for Rs. 15,27,997-8-3 in respect of the mortgage debt and interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs. 12,968-11-3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by the Chief Justice, Sir Dawson Miller and Bucknill, J. These learned judges carefully considered the facts of the case and applied section 6 of Regulation III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164 to Rs. 23,181. Assuming

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that section 6 of Regulation III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion section 6 of Regulation III of 1872, as amended, applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,963-11-3, as a debt was not advanced for a necessity of the joint family and was not an antecedent debt for which the joint family property was liable under the mortgage bond. As to that Rs. 12,968-11-3, the High Court agreed with the Subordinate that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court, by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan, as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October, 1922, and if paid on or before the 11th October, 1922, the plaintiffs should deliver up to the defendants or to such persons as they should appoint all documents in their possession, or power, relating to the mortgaged properties, and should, if so required, retransfer the same to the defendant free from the mortgage and from all incumbrances created by the plaintiffs or any person claiming under them. And further ordered and decreed that the plaintiffs should realise from the persons and properties of the defendants 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the plaintiffs, respondents in the appeal to the High Court, should pay to the defendants the sum of Rs. 6,012 being the proportionate costs incurred by the defendants in the High Court.

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From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the plaintiffs in their case are, so far as it is necessary to refer to them, that section 6 of the Regulation III of 1872, as amended in 1893, does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs 6 per centum from the date of the institution of the suit. The reasons alleged by the defendants in their case are, so far as it is necessary to refer to them, that the claim for a personal decree is barred; that the mortgage bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of Law the joint family could not be bound by any debt which was not originally contracted by a common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the plaintiffs that section 6 of the Regulation III of 1872, as amended in 1893, does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court " having jurisdiction in the Santal Parganas, " and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of section 6 of Regulation III of 1872, amended in 1893.

Section 6 of Regulation III of 1872 as amended by Regulation I of 1908 was very carefully considered in the High Court at Calcutta in 1905 in *Ram Chandra Marwari* v. *Rani Keshobati Kumari*(1), in which case Maclean, C. J., and Pargiter J., held that

(1) (1905) 1 Cal. L. J. 182.

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section 6, Bengal Regulation III of 1872 as amended by Bengal Regulation V of 1908, does not authorise any court to decree as interest a larger sum of money than would, together with prior payments if any, equal the original loan or debt. In that case Ghose, J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the plaintiffs that the High Court should have allowed interest from the date of the institution of the suit. Under the circumstances of this case, as will presently appear, that contention must be limited to the sum of Rs. 3,88,673. That Rs. 3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge who tried the suit by his decree of June 17, 1918, decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur, who had not tried the suit, but in making the final order as to the account which he made on May 14, 1919, he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage debt, which would complete the decree of June 17, 1918, of the trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage debt. That as appears to their Lordships was not within the scope of his powers. He was was not a Judge sitting in review or in appeal. He had to take the decree of June 17, 1918, as it had been drawn up. He had not power to alter

it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable, and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suit is by section 34 of the Code of Civil Procedure, 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court.

That the High Court carefully considered whether interest should or should not be allowed by the High Court from the date of the institution of this suit is apparent from the following passage in the judgment of the Chief Justice. He said: "It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgage decree, but there is no cross-appeal on this question. I think there is much to be said for the argument that the Santal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a court under section 34 of the Civil Procedure Code to award interest on the decretal amount until realization. But it has been held in this Court in *Rani Keshobati Kumari* against *Kumar Satya Niranjan Chakraverty*(1), that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself, as to do so would contravene the provisions of the Regulation relating to compound interest. The principal underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at, and I think we should follow that decision."

(1) (1918) Cal. W. N. (Pat.) 305.

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Their Lordships have not before them a report of the decision of the Patna High Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of interest from the date of the institution of the suit was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the defendants that the claim for a personal decree is barred it is necessary to consider whether the plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage bond. In the suit of 1904, as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under section 90 of the Transfer of Property Act, 1882 (Article IV of 1882), was also claimed as a relief, and "such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted" the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is

"that such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the plaintiffs."

It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made, and the High Court in Appeal could have made, a personal decree, and the Board could have advised His Majesty that the plaintiffs were entitled to a personal decree, the plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under section 11 of the Code of Civil Procedure, 1908 (Act V of 1908), by which it is enacted that:—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under

whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.....

* * * * * * *

"*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by section 11 of Act V of 1908, and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from the judgment of Bucknill, J., a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact that it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

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These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and extending down to 1896, and were made to one or other of the pricipal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Bucknill, J., in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum Bucknill, J., said: "(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed; and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions, very often small and very often numerous, of what is a large aggregate sum of money one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and, indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof, that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

From an examination of such of the evidence as has been brought to their Lordships' attention, their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the defendants based on what is said to be the law of the Mithila School that no member of a Hindu joint family subject to the law of the Mithila School is bound to pay the debt of an anscestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty to pay the debt of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his father or his grandfather. That is a startling proposition. The law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson to pay, it is difficult to understand on what principle of the law of the Mithila School it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila School of Hindu law, the passages which have been cited as from it to their Lordships as appearing in the Tagore translation at pages 34 and 35 seem to relate only to debts contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the Vivada Chintamani was a debt which

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was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under these circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with commonsense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred *Bhagput Pershad Singh* v. *Girja Koer*(1), which may have come from the Mithila Country.

Their Lordships will therefore humbly advise His Majesty—(1) that the appeal of the plaintiffs ought to be dismissed and the appeal of the defendants allowed in part and the decree of the High Court of Judicature at Patna, dated April 12, 1922, set aside so far as it was a personal decree against the defendants and in other respects except as to costs affirmed; (2) that the decree of the Court of the Subordinate Judge at Bhagalpur, dated June 17, 1918, for the sale of the mortgaged property and for costs ought to stand except that so far as it was a personal decree against the defendants it should be set aside; (3) that neither side ought to be allowed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned; (5) that the time within which the defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein; and (5) that there ought to be paid by the plaintiffs to the defendants their costs of these appeals.

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

Solicitors for defendants respondents; *Wathins and Hunter.*

(1) (1888) I. L. R. 15 Cal. 717.

APPELLATE CIVIL:

Before Mullick, A.C.J. and Kulwant Sahay, J.

SIB SAHAI LAL

v.

SIR BIJAI CHAND MAHTAB.*

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July, 6, 7, 8, 22.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 52, *scope of—area of land demised, when is essence of the contract—landlord's papers, whether admissible for ascertaining area and rental.*

Where a tenancy is created, not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental, the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent.

Section 52, Bengal Tenancy Act, 1885, comes into operation where, in determining the area, the parties either resort to measurement or agree to accept an assumed figure; and for the purposes of the section it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid.

Statements of area in the landlord's papers, whether after measurement or not, are evidence for the purpose of ascertaining what the area is for which the rent shown in the jamabandi is being paid.

Maharaja Kesho Prasad Singh v. *Tribhuan* (1), *Durga Priya Choudhuri* v. *Nazra Gain* (2) and *Lal Sheo Kumar Lal* v. *Ramphal Das*(3), followed.

Manindra Chandra Nandi v. *Kulat Sheikh*(4), dissented.

* Appeal from Appellate Decrees nos. 915, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 1454, 1455, 1456, 1457, 1458, 1459, 1460 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470 and 1471 of 1924, from a decision of B. Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 26th April, 1924, affirming the decision of B. Charu Chandra Coari, Munsif of Madhipura, dated the 4th June, 1923.

(1) (1917) 2 Pat. L. J. 276.
(2) (1920-21) 25 Cal. W. N. 204.
(3) (1920) 58 Ind. Cas. 959.
(4) (1923-24) 28 Cal. W. N. 264.

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The material facts were as follows:—

The plaintiff brought 47 suits against different tenants for arrears of rent for the years 1327, 1328 and 1329 FS. He also at the same time claimed additional rent for excess area under section 52 of the Bengal Tenancy Act alleging that by a measurement made in the course of partition proceedings in 1910 and 1911 it was found that the area in the possession of the tenants was in excess of the area for which rent had been previously paid. He also claimed an enhancement under 30(*b*) on the ground that there had been a rise in the average local prices of staple food crops. He also claimed enhancement under section 30(*d*) on the ground that the lands had been improved by the fluvial action of the river Kosi.

Three suits were comprised and one was decreed ex parte. In the remaining 43 cases the Munsif diallowed the pray for enhancement under section 30(*d*) but he allowed in a modified form the prayer for enhancement under section 30(*b*). He also allowed the claim under section 52. He made decrees against the tenants in accordance with these findings.

Thereupon the tenants in 35 cases appealed to the District Judge. The appeals were heard by the Subordinate Judge whose decision was as follows:

(*a*) The Subordinate Judge affirmed the Munsif's decree for enhancement on the ground of a rise in the price of food grains.

(*b*) He affirmed the Munsif's finding that the quality of the land had not been shown to have improved and his decree dismissing the claim under section 30(*d*), Bengal Tenancy Act.

(*c*) He affirmed the Munsif's finding that the standard of measurement was a lagga of $6\frac{1}{2}$ cubits.

(*d*) Disagreeing with the Munsif he found that the tenancies which, according to the evidence, had existed for a period of 700 years, were not created

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after measurement, and he modified the Munsif's decree and allowed an enhancement under section 52 only in some of the cases.

In some of the cases the plaintiff appealed to the High Court and in the remainder the appellants were the defendants.

The following is section 52 of the Bengal Tenancy Act, referred to in the judgment:—

52. (*1*) Every tenant shall—

(*a*) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made; and

(*b*) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

(*2*) In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

(*a*) the origin and conditions of the tenancy, for instance whether the rent was a consolidated rent for the entire tenure or holding;

(*b*) whether the tenant has been allowed to hold additional land in consideration of an addition to his total rent or otherwise with the knowledge and consent of the landlord;

(*c*) the length of time during which the tenancy has lasted without dispute as to rent or area; and

(*d*) the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit.

(*3*) In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description and with similar advantages in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure, and shall not in any case fix any rent which, under the circumstances of the case, is unfair or inequitable.

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(4) The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding.

(5) When in a suit under this section the landlord or tenant is unable to indicate any particular land as held in excess the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area.

(6) When in a suit under this section the landlord or tenant proves that, at the time the measurement on which the claim is based was made, there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situate, a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any patta or kabuliyat, or (where there is an entry of area in a counterfoil receipt corresponding to the entry in the rent roll) in any rent roll relating to it has been entered to such patta kabuliyat or rent roll after measurement.

S. M. Mullick and *S. N. Palit*, for the tenants.

Sultan Ahmed, with him *S. C. Mazumdar*, for the landlord.

MULLICK, A. C. J. (after stating the facts as set out above, proceeded as follows): As the learned Subordinate Judge's judgment seems somewhat obscure at first sight it is necessary to examine it with reference to the pleadings and the judgment of the trial court. Now in the plaint the plaintiff distinctly makes the case that the mauzas from time immemorial have been settled with tenants after proper measurement with a lagga of $6\frac{1}{2}$ cubits and that the measurements were entered in the rent roll kept by the zamindar and in the receipts granted to the raiyats and that in accordance with the said practice the defendants used to take settlement of specified areas at specified rates per bigha. The plaintiff then alleges that from about 1305 to 1313 the lands were inundated by the river Kosi and that in 1314 the defendants encroached upon the khas lands of the plaintiff and that in 1316 a Cadastral Survey was made and it was found that the defendants were holding lands in excess of the

area originally settled with them. At the trial the plaintiff produced the jamabandis for the years 1314 F.S., 1315 and 1316, also some karchas and counterfoil rent receipts. From the Munsif's judgment it would appear that the jamabandis show the area, the rate per bigha and the total rental. The karchas show the area and the rental. The counterfoil rent receipts contain the same particulars and on the back of them appear the thumb impressions of the raiyats.

At the trial one of the issues (no. 14) was

"Is there any system of measurement prevalent in the village where the plaint lands are situate?"

This was answered by the Munsif in the affirmative. The Munsif appears to have held not only that the standard of measurement was $6\frac{1}{2}$ cubits but also that there was a practice of measurement in the mauza such as is referred to in clause (6) of section 52 of Bengal Tenancy Act. That clause provides that if such a practice is established then the Court may presume that the area specified in a patta, kabuliyat or rent roll has been entered in such patta, kabuliyat or rent roll after measurement and the Munsif gave effect to this presumption and found that the areas shown in the jamabandis and the other papers were entered after measurement.

The Subordinate Judge accepts the Munsif's finding as to the length of the standard of measurement but does not find that there was any measurement before entering the areas in the papers.

But in the course of the trial the plaintiff appears to have made an alternative case. He contended that even if his allegation of measurement was not accepted and it was held that the jamabandi and other papers referred to an assumed area, still he was entitled to additional rent upon the difference between the present area and such assumed area.

The learned Munsif accepted this alternative contention although it did not arise upon his findings.

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The Subordinate Judge took a middle course and he held that the areas entered in the papers were in fact assumed areas and where the differences between the present area and the assumed area was small he declined to decree enhancement. He thought that it was quite possible that in these cases the area was under-estimated and that the area of the holding at the time of its origin was the same as that fixed by the partition proceedings. He appears to have founded his decision upon the principle of mutual mistake.

But where the difference was large the Subordinate Judge held that the raiyat must have encroached upon the zamindar's land. The learned Judge found that the encroachment took place not upon the zamindar's khas lands of which he had none in the neighbourhood but upon the lands of other raiyats paying rent to him. But as the law is that encroachments, whether upon the landlord's khas lands or upon those of third parties must always enure to the benefit of the landlord, the learned Subordinate Judge held that in these cases the difference between the present area and that shown in the landlord's papers constituted an excess upon which the raiyat was liable to pay additional rent.

The Subordinate Judge accordingly dismissed 17 of the appeals.

In the remaining 18 appeals he disallowed the prayer for enhancement under section 52 while maintaining the enhancement under section 30(*b*).

We have now before us 33 second appeals.

In 18 the landlord appeals against the Subordinate Judge's decrees disallowing enhancement under section 52.

In 15 appeals the tenants appeal against the Subordinate Judge's decrees allowing enhancement under section 52.

It is urged that the Subordinate Judge's finding is that as the plaintiff has failed to show what was

the area of the holdings at the time of their origin he is not entitled now to claim rent on any excess area and that the operative part of the judgment is inconsistent with the findings.

In my opinion the findings, when properly understood, justify the decree and it is desirable first to consider the scope of section 52. Now excess area may be acquired by a tenant (*a*) by encroachment on waste or unoccupied land of the same estate belonging to his landlord; (*b*) by alluvion, or (*c*) by encroachment on the lands of a third person. The tenancy may be created by reference to boundaries. In such a case the operative part of the contract lies in the enumeration of the boundaries and any reference to area is merely descriptive and does not affect the identity of the subject-matter of the grant.

Next, a tenancy may be created by the grant of a block of land described otherwise than by reference to boundaries. Here again any incorrect assertion as to the area will be merely false description and will not affect the liability for the rent reserved. In either of these two cases the rental may be either a lump sum without reference to rates or a lump sum based upon a rate or rates per unit of measurement.

The third case arises when a tenant squats upon the land of the zamindar and there is an implied contract of tenancy to pay fair and equitable rent upon all the land in his possession at any time. Strictly speaking section 52 is not necessary to fix liability for excess area under such a contract. The liability for excess area arises upon the contract itself.

The fourth case arises when the contract is made, not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental. In such a case the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent. In determining the area demised the parties may either resort to measurement or they

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may agree to accept an assumed figure. In either case section 52 operates. In the cases before us there is no finding that the original grant was for land within any specified boundaries or comprised in a specified block. The Subordinate Judge finds that there was no measurement before the grant and I think he intends to find that the settlement was for an assumed area. He does find that there was no rate per bigha; but that question is not material. The sole question is whether the rent reserved in 1314 was for an area less than the present area.

For the purposes of section 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid The onus is then shifted on to the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. In other words, the tenant has to show that the area last in his possession was less than the true area for which he was then paying rent. As I read the learned Subordinate Judge's findings I think he holds that the landlord's papers show that in 1314 and the subsequent years the tenants were paying the rents noted against their names for areas assumed by both parties to be correct and that they would be liable to pay additional rent: (*1*) if the jamabandis of 1314 recorded a new contract, or (*2*) if the assumed areas were in accord with the state of affairs at the origin of the tenancies.

As the case of neither party was that there was a new contract of tenancy the only question for decision that remained was what was the area at the origin? For this purpose the learned Judge accepted the jamabandi papers as evidence but he declined to give that weight to them that the Munsif gave and he held that in some of the cases they were inaccurate. The Munsif held that as there was a practice of measurement in the mauza the jamabandis must be taken to be accurate and conclusive as to the area of the

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holdings at their origin. The Subordinate Judge declined to accept the oral evidence upon this point and he drew attention to the fact that the papers previous to 1314 had not been produced and he thought that the areas shown in the jamabandi of 1314 might well be the area of the holdings at the time of their origin in those cases where the excess discovered in 1316 was only slight. On this point the learned Government Advocate on behalf of the landlord attacks the learned judge's finding on the ground that he did not consider the whole evidence in the case. It is pointed out that no reference is made to the fact that the tenants placed their thumb impressions upon the counterfoil rent receipts and that there is no discussion of the evidence of some of the witnesses who prove the measurements. As the Subordinate Judge had the whole evidence before him his finding in favour of the tenants with reference to these cases is ,I think, conclusive.

MULLICK, A C. J.

Therefore the Second Appeals nos. 1454 to 1471 of 1924 preferred by the landlord must be dismissed with costs. I do not think there is any ground for the suggestion that the learned Judge was labouring under the impression that the landlord must prove measurement in 1314. It is clear that he did not consider that necessary. And as to the onus which rested upon the tenants to show that the present area is not in excess of the original area, though it is not quite clear whether the Subordinate Judge has correctly placed the burden, the learned Judge has come to a finding on the evidence on both sides and the question of the burden of proof becomes academical.

In regard to the cases in which the difference is large, the learned Subordinate Judge takes the view that the jamabandi of 1914 is approximately correct and the large difference shows that the excess is real. The position taken by the learned Subordinate Judge is perhaps not very logical but he was entitled to find in which cases the jamabandi area was not the original area and his finding is conclusive.

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Therefore the Second Appeals nos. 915 and 963 to 976 which have been preferred by the tenants are dismissed with costs.

Before concluding it is necessary to refer to *Manindra Chandra Nandi* v. *Kaulat Sheikh*(1). In this case the landlord produced jamabandis and rent receipts showing the area in certain years and he claimed additional rent on excess area found in the possession of the raiyat in a subsequent year. Their Lordship of the Calcutta High Court held that the claim could not be allowed, but in affirming the decision of the lower appellate Court, which was conclusive as a finding of fact, their Lordships reviewed the previous law on the subject in Bengal and made certain observations upon which, though obiter, considerable stress has been laid by the learned Vakil for the tenant appellants before us. The material passage of the leading judgment runs as follows:—

"I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has prima facie to show that the rent was a consolidated rent for all the land within specific boundaries, but that in the absence of such proof the mere production of such dakhilas as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving, if he can, a contract of the nature indicated in *Dhrupad Chandra's case*(2) but entries of area and rate in dakhilas or jamabandis do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence".

(1) (1923-24) 28 Cal. W. N. 264.

(2) (1917-18) 22 Cal. W. N. 827.

The learned Judges appear to have been disinclined to accept the view taken in this Court in *Maharaja Keshav Prashad Singh* v. *Tribhuan* (1) where it was held that statements of area in the landlord's papers whether after measurement or not were evidence for the purpose of ascertaining what the area was for which the rent shown in the jamabandi was being paid. It would seem that the learned Judges were of the opinion that unless the jamabandis were prepared after measurement no claim for enhancement could be founded upon them. In their view the settled rule of the Calcutta High Court was that an assumed area could never be a foundation for such a claim. It does not appear however that the case of *Durga Priya Choudhuri v. Nazra Gain* (2) was considered by the learned Judges. There Mookerjee, A. C. J., observed that a jamabandi prepared by the landlord though not binding upon the tenant was admissible as evidence that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area; and in remanding the case the learned Chief Justice gave the following directions: " The District Judge will first consider whether since the date of the last assessment of rent, land has been added to the holding by encroachment, accretion or in like manner. If this is answered in the negative, he will consider whether the rent was assessed at a consolidated sum for the entire tract in the possession of the tenant whatever its area might turn out to be, or whether the rent was assessed on an area fixed by estimate or determined by measurement. If the rent was not fixed as a consolidated sum the plaintiff is entitled to additional rent." This view of the law is in accord with that which had been taken in this Court in 1917 in *Maharaja Keshav Prasad Singh's case*(3). It was subsequently affirmed in *Lalla Sheo Kumar Lal* v. *Ramphal Das*(4) and in our opinion the learned

(1) (1917) 2 Pat. L. J. 276.
(2) (1920-21) 25 Cal. W. N. 204.
(3) (1917) 2 Pat. L. J. 276.
(4) (1920) 58 Ind. Cas. 959.

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Subordinate Judge was right in taking the landlord's papers into consideration in ascertaining whether the excess in the cases before him was real or fictitious.

The result is that all the appeals before us are dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Macpherson, J.

1925.

May, 27.

SITA RAM SINGH

v.

KHUB LAL SINGH.*

Evidence Act, 1872 (*Act I of* 1872), *section* 32(3)—*admission, whether can be split up.*

In a suit by the reversioners of the last male holder to recover property which had been mortgaged by the latter's widow and subsequently purchased by the mortgagees in execution of a decree on the mortgage, the trial Court admitted in evidence, under section 32(3) of the Evidence Act, a statement made by the widow in a previous suit (the widow being dead when the present suit was instituted) to the effect that she had contracted the loan from the mortgagees for the performance of her husband's saradh and other necessary expenses. It was contended on behalf of the plaintiffs that the only part of the admission which was contrary to her pecuniary interest was the fact that she took the loan and not the remaining part that she took it for a particular purpose, and that, consequently, the latter part of the statement was inadmissible. *Held*, that the admission could not be split up into two parts and that the whole statement was admissible for the purpose of ascertaining exactly what the nature of the loan was.

Higham v. *Ridgway* (1), referred to.

* Second Appeal no. 814 of 1922, from a decision of B. Lala Damodar Prasad, Subordinate Judge of Patna, dated the 20th July, 1922, confirming a decision of M. Amir Hamza, Munsif of Patna, dated the 16th March, 1921.

(1) (1823) 2 Sm. L. C. 348.

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Appeal by the plaintiff.

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

Manuk (with him *S. Dayal*), for the appellant.

Sultan Ahmad (with him *S. N. Rai*), for the respondents.

DAWSON MILLER, C. J.—In my opinion the matters in dispute in this case are concluded by the findings of fact of the lower appellate Court. The suit was brought by the reversioners of Ramautar Singh against the mortgagees under a mortgage granted by his widow Dhanwanti Kuer after his death to secure payment of a sum of Rs. 400. The mortgage hypothecated certain property which formed part of the estate of her husband. That was in the year 1905. A suit was brought during the widow's lifetime by the mortgagees on the mortgage. They succeeded in that suit and put up the property for sale in execution of the decree and themselves purchased it. The widow died in 1920 and the present suit was brought by the reversioners claiming to recover the property.

The question for determination in the suit is whether the mortgagees were entitled to a charge upon the whole estate or only upon the life-interest of the widow and that again depends upon whether the sum borrowed was borrowed by the widow for purposes of legal necessity. The allegation of the defendants is that of the Rs. 400, Rs. 226 had been borrowed in order to pay for Dhanwanti's husband's saradh. Rs. 174, the balance, was for the cost of litigation and maintenance. The evidence shews that although the income of the estate was about Rs. 2,000 still after her husband's death Dhanwanti Kuer, the widow, was unable to get the estate into her possession. Therefore it seems highly probable that she was in a position in which it might be necessary to borrow the money for her expenses.

Both the trial Court and the Subordinate Judge on appeal found that the money was borrowed by

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Dhanwanti Kuer for purposes of legal necessity and that she was in need of money at the time. That decision, however, has been challenged on the ground that the learned Subordinate Judge admitted in evidence a statement of Dhanwanti Kuer, who, as I have intimated, was dead at the time when the present suit was brought, made in a previous suit in the year 1908 in which she stated that she took a loan from Faujdar Singh and Sheoraj Singh to defray the expenses of the funeral rites of her husband. The learned Judge accepted that statement as admissible under section 32, clause (*3*), of the Indian Evidence Act. It has been contended that the only part of that admission which is an admission contrary to her pecuniary interest is the fact that she took the loan and not the remaining part that she took the loan for a particular purpose. I am not able to agree to this proposition. I think the whole statement must be taken in order to ascertain exactly what the nature of this loan was. There might be a difference in her pecuniary liability, certainly in the liability of the estate she at that time represented if the loan was borrowed for necessary expenses or if the loan was borrowed for purposes which were not to be regarded as necessary expenses, and I do not see very well how you can split up the admission into two parts. The whole thing works together and each part is necessary to explain the other. This I think is the view which has been taken in dealing with cases of this sort ever since the old case of *Higham* v. *Ridgway* (1) which was decided in the year 1823. The learned Judge accepted that statement which was not necessarily conclusive and not necessarily binding upon the reversioners but which I think he was entitled to accept as a corroboration of the defendants' story that in fact the money had been borrowed by Dhanwanti Kuer for purposes of legal necessity, and the further statement of one of the defendants himself that he had made enquiries at the date when the money was

(1) (1823) 2 Sm. L. C. 348.

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borrowed and he found that it was required by Dhanwanti Kuer in order to pay for her husband's saradh.. The learned Judge said:

"Having regard to the statement of Mussammat Dhanwanti Kuer above alluded to I see no reason to doubt the evidence of these witnesses that Rs. 200 was borrowed by Dhanwanti for her husband's sradh. It is clear from her deposition also that litigation commenced soon after her husband's death."

That is really the only criticism which has been made of this judgment and it does not seem to me that the criticism is a sound one. The matter is concluded by the findings of fact and I do not think that the learned Judge took into consideration any evidence which he was not legally entitled to consider. The appeal will be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Adami and Bucknill, J.J.

NIL MADHAB CHOWDHRY

v.

KING-EMPEROR.*

1925.

July, 10, 13, 14, 15, 23.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 164 *and* 337—*approver, allowed to depose to a series of crimes not relevant to the enquiry—subsequent prosecution for offences not expressly covered by the pardon—section* 164, *applicability of, to confessions recorded by a Presidency Magistrate.*

In connection with a case of forgery of currency notes the Calcutta police arrested *N*, *H* and *S*, together with others. All the three persons made full confessions before the Magistrate and in their confessions each of them started by

* Criminal Appeals nos. 80, 81 and 86 of 1925, from a decision of Promotho Nath Bhattacharji, Esq., Assistant Sessions Judge, Saran, dated the 28th March, 1925.

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giving details of a bogus telegraphic money-order conspiracy and went on to tell how subsequently a plan had been devised for tapping telegraphic wires and obtaining money through bogus telegrams, and, lastly, *N* and *H* related how they with others had joined together and forged Government currency notes. Investigation was made into the statements in these confessions and an enquiry began before the Magistrate. Subsequently the public prosecutor applied to the Magistrate for tender of pardon to *N* under section 337, Code of Criminal Procedure, and asked the Court's permission to examine him as an approver in the case. The Magistrate accordingly tendered a pardon as prayed for and *N* accepting the pardon gave evidence before the committing Magistrate. In his deposition he made a full statement of the previous activities of the conspirators right up to the present conspiracy under enquiry. Thereafter the accused persons were committed to the Criminal Sessions of the Calcutta High Court where *N's* evidence related only to the note-forgery case. The result of the trial, however, was an acquittal. Subsequently, on the strength of the previous investigation and the confessions of the conspirators *N*, *H* and *S*, they were put on trial and convicted for offences committed in connection with the bogus telegraphic money-order conspiracy. On behalf of *N* the pardon tendered to him in the note-forgery case was pleaded as a bar to his prosecution. The trial Court overruled the objection.

Held, on appeal, that if the intention of the Magistrate was to confine the pardon to the forgery case only, the approver should have been warned against making any incriminating statements in his evidence which were not relevant to the note-forgery case; but the fact that the Magistrate allowed the approver to give evidence of the previous activities of the conspirators showed that he considered that such activities fell within the scope of the enquiry, and, having regard to the spirit of section 337, *N* was entitled to the benefit of any doubt there may have existed as the extent of the pardon.

Queen-Empress v. *Ganga Charan* (1), referred to.

Section 1, Code of Criminal Procedure, bars the application of the Code to the police in presidency towns and not to a Magistrate, and, since the amendment of section 164 in 1923, a Presidency Magistrate is empowered to record

(1) (1889) I. L. R. 11 All. 79.

a confession in Calcutta in the course of a police investigation.

Per BUCKNILL, J.—Even though the police in Calcutta may not conduct their investigations in precise accordance with the provisions of Chapter XIV, a construction of section 164, which would exclude its utilization in Calcutta during a police investigation, or at any time afterwards before the commencement of the enquiry or trial, is to read it in a strained and unnatural sense.

Emperor v. *Panchkori Dutt* (1) and *Queen-Empress* v. *Nilmadhab Mitter* (2), disapproved.

The three appellants, Nil Madhab Chowdhry, Haripado Mukerji and Sudhir Kumar Banerji, were found guilty of the offence of criminal conspiracy and were sentenced to three years' rigorous imprisonment and a fine of Rs. 50 each under section 120B of the Indian Penal Code; the appellant Nil Madhab was sentenced to six years' rigorous imprisonment and a fine of Rs. 100 under section 467 and to three years and a fine of Rs. 50 under section 420; the other two appellants received like sentences under sections 467 and 420 read with section 34 of the Indian Penal Code. Nil Madhab Chowdhry was also sentenced to one year's rigorous imprisonment under section 419.

The facts were as follows:

The appellants Nil Madhab Chowdhry, Haripado Mukerji and Sudhir Kumar Banerji in 1921 were residing in Calcutta. The first-named kept a baker's shop, the third-named a tobacconist shop, and Haripado Mukerji was employed as a telegraphist at the Central Telegraph office. Haripado and Sudhir used to meet at Sudhir's shop and talk over their straitened circumstances. Haripado was a relation of Sudhir and one day told him that he had hit on a plan for getting money. He said that it would be easy to obtain money by means of bogus telegraphic money-orders; it would only be necessary to forge telegraphic money-order forms and place them in the clip in the

(1) (1925) I. L. R. 52 Cal. 67. (2) (1888) I. L. R. 15 Cal. 595, F.B.

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Telegraph office and then arrange for some one to be at the office of receipt to take over the money covered by the telegraphic money-order. Sudhir told Nil Madhab of this plan and they asked Haripado to come and see them. He, however, did not come at first for he had gone away, so a telegram was sent to a man in Chittagong to find out what his address was. Haripado saw this telegram in the telegraph office, and came to see Sudhir and Nil Madhab, and plans were then made. It was arranged that telegraphic money-orders should be forged and that one or two of the conspirators should go to Bombay, Allahabad, Benares, Chapra and other places to make plans for the receipt of the money when telegraphic money-orders arrived. Haripado at first was unwilling to take any steps, but it was represented to him that money had been spent and that his two companions would be losers if he resiled from the plan. Accordingly Haripado supplied Nil Madhab with telegraphic money-order forms and showed him how to fill them in with bogus names. After attempts at some other places, Sudhir and Nil Madhab came to Chapra in March 1921. They went to the firm of one Sahebjan Suray Hussain, and there Nil Madhab stated that his name was Bhabani Charan Rai; he came from Rangoon to buy ghee and to ascertain the market rates. After finding out the rates Nil Madhab said he was going to Patna and other places to find out the local rates there for ghee, and that he would come back to Chapra later on. He came back on the 5th June, 1921, and took quotations for ghee, then left stating that he was going to Hathras and Cawnpur. He asked that, if any telegraphic money-orders came during his absence, the firm of Sahebjan would keep them until he came back again. On the 10th of June he telegraphed to Sahebjan that he had sent for the money and would be coming soon to Chapra. On the 14th June the Chapra post office received 11 money-orders amounting altogether to Rs. 6,500, purporting to have been sent by one Nalini Mohan Ghosh from Rangoon, the payee being

described as Bhabani Charan Rai care of Sahebjan Suray Hussain. The Postmaster sent the money through his three postal overseers to Sahebjan's shop but they found that Bhabani Charan had not yet arrived. On the 17th June, 1921, Nil Madhab, posing as Bhabani Charan, arrived at Chapra, and on the 18th the postal overseers took the Rs. 6,500 to Sahebjan's shop with the 11 money-orders and enquired where Bhabani Charan Rai was. Nil Madhab said he was Bhabani Charan Rai. Thereupon the money was handed to Nil Madhab who signed the money-order receipts, and Sahebjan also signed them. Nil Madhab deposited the money with Sahebjan, who entered it in his books in the name of Bhabani Charan Rai. Then Nil Madhab said he had to go to Darbhanga to buy ghee and required Rs. 6,000 to pay for it, but Sahebjan paid only Rs. 5,011 to him because he had already paid certain sums to ghee mercants on behalf of Nil Madhab. Nil Madhab did not come back to Chapra so Sahebjan sent a wire to him in the name of Bhabani Charan Rai to the shop of Ram Rameswar in Darbhanga, whither Nil Madhab had said he was going. That was on the 22nd June. No reply came, nor was a second telegram answered. On the 27th June and on the 4th July Sahebjan wrote two letters to Rameswar asking were Bhabani Charan Rai had gone to. Eventually Rameswar replied that Bhabani Charan Rai had never been to his shop and was not known to him.

On the 6th June, 1921, the appellant Sudhir Kumar Banerji went to the shop of this Rameswar at Darbhanga and represented that his master was a ghee merchant of Rangoon and had come to buy ghee and he himself was going to Cawnpur to get ghee and would come back if he found the Darbhanga rates less.

On the 10th June Rameswar received a wire from Sudhir to the effect that he had wired to Rangoon for money and his master, Nandlal Das, was going to visit Rameswar.

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On the 13th June 11 money-orders to the amount altogether of Rs. 6,500 arrived at Darbhanga purporting to have been sent by one Ramesh Chander Sen from Rangoon to Nandlal Das, care of Kalu Ram Rameswar at Darbhanga. Nil Madhab came to Rameswar at Darbhanga and represented that he was Nandlal Das about whom Sudhir had spoken. He went with Rameswar's gomasta to the post office and was paid Rs 6,500 on the money-orders, giving out his name to be Nandlal Das. He handed the money to Rameswar to be kept in deposit, and then afterwards asked Rameswar to give him the money back, but Rameswar refused to do so saying he was going to use it for buying ghee for Nil Madhab; he only gave Nil Madhab Rs. 25.

As no confirmation of the telegraphic money-order came from Rangoon to the Postmaster of Darbhanga, the latter began to make inquiries and found from the Rangoon office that no such telegraphic money-orders had been sent from there. He made inquiries, and then Rameswar told the Postmaster of the telegrams he had received from Sahebjan. So the Postmaster made inquiry from the Postmaster at Chapra and the latter, too, found out that no telegraphic money-orders had been sent from Rangoon to Chapra. Then information was given to the Magistrate and a police investigation followed, but it failed to disclose the culprits. A final police report was drawn up on the 1st September, 1921.

More than two years later, on the 1st December, 1923, while the inspector of police in Calcutta was investigating a case of forgery of currency notes he raided certain places in Calcutta and arrested four men. Nil Madhab was arrested on the 3rd December, one Lalit on the 4th December and also Haripado and a man called Jiban; Sudhir was arrested on the 12th December. All these arrests were in connection with the note-forgery case.

On the 13th of December Nil Madhab was produced before an Honorary Presidency Magistrate in

Calcutta and made a confession, and Haripado and Sudhir also made confessions. The confessions were so long in each case that they covered more than one day. Each of the three appellants made his confession to a different Presidency Magistrate.

In those confessions each of the three appellants started by giving details of the bogus telegraphic money-order conspiracy and their operations; they then went on to tell how later on a plan had been devised for tapping the telegraph wires and obtaining money through bogus telegrams, and lastly Haripado and Nil Madhab told how they, with others, had joined together and forged Government currency notes.

Investigation was made into the statements in these confessions and an inquiry began before the Magistrate.

On the 10th of March, 1924, a petition was put before the additional Chief Presidency Magistrate to the following effect:—

"In the above case which is now under enquiry before your Worship, it is necessary to examine some of the accused person or persons directly concerned in the conspiracy with a view to obtaining his or their evidence in the case and in order that the whole plot may be brought to light, and that the material facts disclosed by such person or persons may be corroborated by other independent evidence in support of the disclosures made by such person or persons. The facts disclosed by such person or persons would appear from the statement or statements voluntarily made by such person or persons to the Magistrate before whom he or they were placed after arrest. As it will appear that Nil Madhab Chowdhury has made a full disclosure of the whole conspiracy fully implicating himself and the other accused persons concerned in the conspiracy I pray that the said Nil Madhab Chowdhury be tendered pardon under section 337, Code of Criminal Procedure, and examined as an approver in the case."

The order passed on this application was to the following effect:—

"Perused the application of the Public Prosecutor and heard him. It is a case of a big and widespread conspiracy to forge and utter Government currency notes and all the facts of the conspiracy cannot be obtained unless pardon is tendered to some of the accused. So under section 337, Code of Criminal Procedure, I tender pardon to Nil Madhab Chowdhury, one of the accused, on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, and order that he be examined as a witness in the case."

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Nil Madhab accepted the pardon and gave evidence before the Committing Magistrate, and in his deposition made a full statement of what had happened in 1921 in connection with the telegraphic money-orders to Chapra as also of the tapping of the telegraph wires and of the forgery of the Government currency notes in 1923. Haripado and others were committed to the Criminal Sessions of the Calcutta High Court and there again Nil Madhab gave evidence, but at the Sessions his evidence related only to the note-forgery case and he was not allowed to make statements as to the previous events. The result of the trial was that Haripado and his fellow accused were acquitted by Mukerji, J., and the jury.

Thereafter, on the strength of the previous investigation in 1921 and the confessions of the three appellants, they were put on trial before the Assistant Sessions Judge of Saran and were convicted as stated above.

Each of the appellants lodged a separate appeal but the three were heard together.

Sir Ali Imam (with him *B. N. Mitter*), for Nil Madhab Chowdhry.

H. M. Bose, for Haripado Mukherji.

K. N. Mittra, for Sudhir Kumar Banerji.

Sultan Ahmed (Government Advocate), for the Crown.

Cur. adv. vult.

ADAMI, J. (after stating the facts set out above, proceeded as follows): Before the Committing Magistrate and also before the Assistant Sessions Judge the appellant Nil Madhab claimed that the pardon tendered to him in Calcutta in the note-forgery case absolved him from prosecution with regard to the present case in Chapra; but the Courts have overruled the objection. On his behalf Sir Ali Imam now claims before us, that having been tendered the pardon in the note-forgery case, which is known as the

Masjidbari case, the prosecution of Nil Madhab is unwarranted, and that he ought to be granted the protection of the Crown

From the order on the application for tender of pardon it is clear that the pardon related to the case of a big and widespread conspiracy to forge and utter Government currency notes and Nil Madhab was required to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. It can be argued, as it has been argued, that the order shows clearly that the pardon was intended to extend only to the case then on enquiry, and also it is reasonable to argue that the conspiracy for the forging of the Government currency-notes was an absolutely distinct conspiracy from that which had as its object the obtaining of money by bogus telegraphic money-orders; two years elapsed between the two conspiracies. Strictly speaking I think there would be good ground for holding that the conspiracies were different and the cases also were separate. But there are several considerations which lead one to think that Nil Madhab, at the time he accepted the pardon and undertook to make a full discovery of all the circumstances, conceived that the pardon covered all the events which were disclosed by him in his confession and his statement before the Committing Magistrate. Nil Madhab had made a confession which showed the connection of the appellants with one another right from March 1921 and he gave a connected narrative of events since then, leading up to the forgery of the currency-notes. The inquiring Magistrate allowed him to make a statement in his deposition of all those occurrences, and in fact two witnesses were called from the Telegraph Department to give evidence as to the telegraphic money-order fraud, which had really nothing to do with the Masjidbari case. Had it been the intention to confine the pardon only to the forgery case it would have been the duty of the Magistrate to warn Nil Madhab against making any incriminating statements in his evidence which were not relevant to the forgery case, but no

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such warning was given. Nil Madhab had made a full confession and it is likely that he considered it incumbent upon him, under his promise to make " a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence ", to include in his evidence a narration of the part he and his associates had played in the fraud at Chapra. The fact that the inquiring Magistrate allowed him to give evidence of these previous activities shows I think that he considered that his inquiry covered them, and the prosecution also called witnesses who had nothing to do with the note forgery case, but deposed with regard to the bogus telegraphic money orders.

Sir Ali Imam has relied on the case of *Queen-Empress* v. *Ganga Charan* (1). There a person was charged before a Magistrate at Benares with offences punishable under sections 471, 472 and 474 of the Penal Code, having made a confession to a Magistrate in respect of those offences. In that confession he mentioned that part of the forgery had been committed in Calcutta and he was sent down to Calcutta and there charged before a Magistrate with offences punishable under sections 467, 473 and 475. The Magistrate at Calcutta tendered him a pardon and it was accepted, and the approver gave evidence for the prosecution. The prosecution failed but the pardon was not withdrawn. Subsequently the Magistrate at Benares continued the trial there under sections 471, 472 and 474. Ganga Charan pleaded not guilty; but he did not specifically plead his pardon as a bar. It was held in that case by Straight, J., that the terms of the pardon granted to the accused by the Calcutta Magistrate protected the accused from trial at Benares. That case was somewhat different to the present one, because there the offence at Calcutta was mixed up with the offence at Benares and they were cognate cases. In the present case the offence with which Nil Madhab is now charged cannot be said to be

(1) (1889) I. L. R. 11 All. 79.

an offence cognate with his offence in the Masjidbari case; a long interval of time separated the two; still the remarks made by Straight, J., in his judgment have application to the present case. He said:

"Though approvers may be infamous persons they are nevertheless entitled to have faith kept with them by the Courts, and in dealing with the question as to what a pardon is to cover, and how far it is to extend, I should not be inclined to apply too technical tests and should rather look to substance than mere matters of form."

He referred to the wording of section 339, Criminal Procedure Code, as to the consequences that follow on a non-compliance by an approver with the conditions of his pardon and its withdrawal; and said, "He may be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connection with the same matter.....It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver, on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence, or offences, as to which he gives evidence, and when he has given his evidence, I do not think that the question of how far it is to protect him, and what portion of it should not protect him, ought to be treated in a narrow spirit. In a note by Mr. Greaves to the 4th edition of Russell on Crimes, Vol. III, page 597, it is said:—

"If however, the prisoner, having been admitted as an accomplice to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property which was the subject-matter of a different robbery by the same parties under the impression that by the information he had given previously as to the robbery of other property he had delivered himself from the consequences of having the property he so disclosed in his possession, Coolridge, J., recommended the Counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property."

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Then again the learned Judge says " I need not point out the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence, which may be capable of corroboration, and this is what I understand the Criminal Procedure Code to mean when it speaks of a ' full and true disclosure of the whole of the circumstances within his knowledge ' ".

I agree with the learned Government Advocate that this case I have cited is not altogether on all fours with the present case, but I do think that the appellant Nil Madhab understood that in order to carry out his promise he had to make a full disclosure of everything he knew and therefore told about the proceedings at Chapra in 1921.

Sir Ali Imam has pointed out, too, that it would be most unsafe that any impression should be allowed to gain ground that a promise of pardon once tendered can be broken by the Crown. There are indications throughout the inquiry before the Magistrate in Calcutta that the Chapra case was held to be in some way connected with the Masjidbari case. Had it been the intention to confine the pardon only to the Masjidbari case, the appellant should not have been allowed to make any statements in his deposition with regard to the earlier occurrences.

Though technically the contention of the Crown is correct, I think that in this case it is right to give Nil Madhab the benefit of any doubt there may be as to his understanding of the pardon and to hold that the pardon granted in Calcutta should excuse him from prosecution in the present case. On those grounds I would acquit the appellant Nil Madhab.

On behalf of the appellant Haripado, his Counsel, Mr. Bose, contends in the first place that the confession made by Haripado was not a confession covered by sections 164 and 364 of the Code of Criminal Procedure; and, even assuming that the confession could be recorded under those sections, there were such grave

irregularities and such disregard of the provisions of the Code with regard to the manner in which the confession should be recorded that Haripado's confession should be held to be inadmissible. He urges that the evidence to prove that the confession was made there is little or no evidence to prove the charges against Haripado.

Mr. Bose has relied chiefly on the judgment of Mukerjee, J., in the Masjidbari case (1), and I may say that Mr. Bose has adopted all the arguments used by the learned Judge in that case.

The point taken is that, under section 1 of the Code of Criminal Procedure, the Code does not apply to the police in the towns of Calcutta and Bombay, and as section 164 lies within Chapter XIV of the Code which is headed

> " Information to the police and their powers of investigation ",

an investigation by the police in Calcutta is not made under the Code. It is argued that the confessions were made in the course of an investigation by the police and therefore the Code does not apply. The learned Judge, as also the learned Counsel, rely on the case of *Queen-Empress* v. *Nilmadhab Mitter* (2). It was there held that section 164 does not apply to a confession made before a Presidency Magistrate. That decision was come to before the amendment of the section in 1923. Before the amendment the section began

> " Every Magistrate not being a police officer may ",

but in 1923 before those words, the words

> " Any Presidency Magistrate, any Magistrate of the 1st class and any Magistrate of the 2nd class especially empowered in this behalf by the Local Government may if he is not a police officer ",

were substituted. It is quite obvious that the change was made to allow a Presidency Magistrate to record a confession in Calcutta in the course of a police

(1) (1925) I. L. R. 52 Cal. 67. (2) (1888) I. L. R. 15 Cal. 595.

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investigation otherwise the amendment seems altogether meaningless. Section 1 bars the application of the Code to the police; it does not bar an application of the Code to a Magistrate or any Magistrate not being a police officer. We cannot believe that the amendment was made without the intention of giving a Presidency Magistrate power to record a confession. It is sought to be explained that the addition of the words "Any Presidency Magistrate" has been made in order to allow such a Magistrate to record confessions where the police have conducted an investigation outside Calcutta. The Assistant Sessions Judge has decided the point, which he fully considered, by finding that as a matter of fact the investigation into the present case was made in Chapra and had concluded in September 1921.

Section 164 allows the recording of a confession by a Presidency Magistrate to be made at any time after a police investigation has closed so long as it is before the commencement of the inquiry or trial. In the present case the investigation at Chapra had closed and the confession was recorded before the commencement of the trial. If the confession was not made under the Code of Criminal Procedure then the rest of the arguments by Mr. Bose regarding irregularities and contraventions of the provisions of the Code of Criminal Procedure will have little or no force.

Mukerjee, J., in his judgment, having found that the confession was not recorded under the Code, comes to the conclusion that section 80 of the Evidence Act will not apply to the confession which came before the Court without any presumptive force of its own, and its admissibility must be judged as that of any other evidence; and, after citing the rules drawn up by the Government of Bengal for the recording of confessions and noticing that some of those rules had not been observed by the Presidency Magistrate who recorded Haripado's confession, states—"The position would

have been quite different if the confession did not stand before me divested of the presumption under section 80 of the Evidence Act, and had been duly recorded under some provisions of the law, or at any rate if I was able to hold that all proper precautions had been taken in recording them."

The learned Counsel, following Mukerjee, J.'s judgment, contends that the confession is bad because Haripado was arrested on the 4th December and was kept in custody of the police until he made his confession before the Magistrate on the 13th.

Elsewhere in his judgment Mukerjee, J., stated that he absolutely disbelieved the allegations made by Haripado that he had been tortured or ill-treated or induced by the police to make his confession, but yet he thinks that the custody of the accused by the police was against the rules and had an effect on his decision as to the voluntary character of the confession. As a matter of fact the rules of the Calcutta police are not the same as the provisions of the Code as to the detention of the accused persons. It appears that, according to the custom of the Calcutta police, the accused are kept in custody by the police during an investigation but are produced every day before the Deputy Commissioner who sees them and questions them as to whether they have been ill-treated by the police or whether any inducement has been held out to them; and in this case we have evidence that this custom was observed and no complaints were made to the Deputy Commissioner by Haripado or Sudhir.

The next contention is that under the rules the confession should have been recorded in open Court, whereas the evidence shows that the Presidency Magistrate on subsequent days had Haripado brought to his house where a statement of his confession was continued. The Code itself contains no provision as to the confession being made in open Court. On the first date the Magistrate recorded the confession in Court, after taking every precaution to see that no police were present. It is complained that the

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confessions were recorded piecemeal, but it was unavoidable owing to their length. It would have been better perhaps if during the period of the confession the accused had not been returned to the custody of the police at night; but there is nothing to show in this case that Haripado was in any way tampered with.

The next objection is that the Presidency Magistrate did not properly warn Haripado and did not tell him that he was a Magistrate. The Magistrate was called as a witness and stated that, to the best of his memory, he did warn Haripado that he was a Magistrate, and he has also given full evidence that he was quite satisfied that the confessions were made voluntarily.

I have read through the confession and the warnings given by the Magistrate to Haripado, and in my opinion they fully meet the requirements of the law. The Magistrate states that before he recorded the confession he took the precaution that he was satisfied that there was no police officer in Court and that he questioned Haripado as to the time during which, and the places where, he had been under the control of the police. Haripado told him that he was arrested at 4 a.m. on the 4th December and was taken to the Bartola Thana on a Saturday, and was sent from Lal Bazar Police office at 2 p.m. on the 13th December to have his confession recorded. It may be that the Magistrate might have obtained more details as to the police custody but I think there was sufficient compliance with the law. Haripado was asked whether he wished to make a statement voluntarily and he replied that he did, and then he was warned that any statement he might make would be used as evidence against him, but Haripado replied that he was willing to make a statement.

It was next contended that the confession is bad because it is recorded in English. Haripado is a Bengali and so was the Magistrate but it appears that he made his confession partly in English and partly

in Bengali, a mixture of both. Under the circumstances I hold that in recording the confession in English the provisions of section 364 were complied with. Haripado knows English well and he read through his statement and corrected it, showing that he fully understood it.

It is hinted that Haripado made his confession under the impression that, if he confessed, he would be made an approver, and therefore the confession is bad. It may be that he did hope to be made an approver but unless this inducement was held out to him by some person in authority, the thought in his own mind will not affect the admissibility of the confession. There is no sign of this inducement having been held out to him. He made a very full and convincing confession which bears every sign of being voluntary and has no traces in it of being tutored or invented. As a matter of fact Haripado was kept in custody with Nil Madhab and Lalit, who had also confessed, and when it was proposed to segregate the men they expressed their desire to remain together.

Haripado retracted his confession by a petition, dated the 23rd December, which was filed in Court on the 27th. It is stated that the retraction was made because Haripado saw that he was not going to be made an approver. The hope of being made an approver does not show that the confession was not voluntary.

It was lastly urged that as the confession was retracted it can only be acted upon if there is strong corroboration, and it is contended that in the present case corroboration is wanting; for instance the evidence that Haripado had consorted with Sudhir and Nil Madhab is scanty and the Assistant Sessions Judge has relied on certain evidence to prove association which really carries no proof. It was pointed out that the fact that Haripado and Nil Madhab both dealt with the same Kabulis in borrowing money can have little effect in the present case, since the evidence shows that the borrowing was in 1923, whereas the

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present offence was committed in 1921. But the confessions show that these men joined in borrowing money from Kabulis from the start, and the evidence that afterwards in 1923 they were still borrowing together is corroborative. Prosecution witness no. 26 says that he never heard Haripado and Nil Madhab talking together in the baker's shop, but he saw them together.

Then Mr. Bose dealt with the point that the learned Assistant Sessions Judge had drawn inferences against Haripado from the evidence that he had taken leave from the Telegraph office on several occasions. He was present on the two days when telegraphic money-orders in this case were despatched from Calcutta. He contends that no inference should be drawn from this. But it is striking that Haripado was present on those days and had been absent both before and afterwards. The confession of Haripado, though retracted, is strongly corroborated by the confessions of Nil Madhab and Sudhir and those two confessions are strongly corroborated by the mass of evidence which has been recorded in this case. Haripado is an intelligent man and was a telegraphist and would be able to act, as he is said to have done by Nil Madhab and Sudhir, showing the other two how to prepare bogus money-orders while he himself would have the opportunity to place them in the clip.

In my opinion the confession of Haripado was made voluntarily and is corroborated, and I have no doubt in my mind that his conviction was correct.

With regard to Sudhir, the learned Vakil who appears for him has stated that his arguments are the same as those of Mr. Bose on behalf of Haripado. But the case against Sudhir is supported also by the evidence of witnesses who saw him at Chapra as well as by the other confessions. In each of these confessions the accused implicates himself to the same degree as he implicates the other accused. Even were there no confession by Sudhir, the oral evidence on the

record is fully sufficient to prove his guilt for he has been fully identified by Sahebjan and the witnesses from Darbhanga. I have no doubt about his guilt.

It has been contended that the sentences passed on these appellants are too severe. But considering the seriousness of the offence and the amount of which they have cheated the Government and the public, I do not think that the sentence of six years' imprisonment which they are called upon to undergo is by any means too severe. I am not inclined to reduce it.

The learned Assistant Sessions Judge has written an exceedingly good and careful judgment which meets every one of the arguments put forward on appeal before us fully and completely. He has shown the greatest care in dealing with the documentary evidence and in explaining the methods which are followed in despatching telegraphic money-orders through the Calcutta Telegraph office. He has taken the greatest pains over the case and shown that he has fully understood and considered every point in it.

The result of the appeal is that the appellant Nil Madhab Chowdhury will be acquitted and set at liberty, and the appeals of Sudhir and Haripado are dismissed.

BUCKNILL, J.—The learned Counsel, Sir Ali Imam, who has appeared for the appellant Nil Madhab Chowdhury has only raised before us one point upon his client's behalf. It is simply that he was granted a pardon in a criminal case the circumstances in which were relative to the offence of which he has been convicted in the present proceedings which are now before this Court; and that in view of this pardon he cannot properly be convicted of the offence of which he has actually been convicted. In order to appreciate this plea, it is necessary to ascertain exactly what took place. Some time ago it was discovered in Calcutta that extensive forgeries of Government notes were taking place. Certain persons

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were detained by the police in connection therewith and amongst them was the appellant. On the 13th December, 1923, the appellant made a long confession (which occupied more than one day) before a Magistrate of the 1st class. This confession disclosed the association of the appellant with a number of other persons including the two other appellants in the present case in a series of crimes. Those included the swindling of the Post Office over money-orders which is the subject-matter of the present case, the forgery of notes and the tapping of the Government telegraph wires so as to be able to send bogus telegrams. In connection with these offences the appellant Haripado Mukerji was throughout one of the associates but not so the appellant Sudhir Kumar Banerji who was principally only concerned with the money-order fraud. In his confession the appellant spoke first of the money-order swindle, then of the telegraph tapping and lastly of the note-forgery. Besides the other two appellants, other persons were also implicated by the appellant in his confession. At this date there had apparently been no suggestion made that the services of the appellant might be utilized as an approver and no inducement of any kind had been held out to the appellant of a nature which would have persuaded him to make this confession. At that time indeed it was only the note-forgery matter which was being investigated and it certainly seems somewhat strange that the Magistrate should, without any specific warning to the appellant that by his confession he was involving himself in responsibility for crimes other than that in connection with which he had been under detention, have permitted him to confess to the commission of those other offences; unless indeed the Magistrate thought that the history which was being unfolded by the appellant constituted a connected series of organized malpractices carried out by a body of conspirators; the personnel, however, of which may not always have been constant or identical. On the other hand the Magistrate may have thought that what the appellant

detailed with regard to the money-order frauds was introduced to indicate the way in which that offence led up through the telegraph tapping operations to the association of the appellant with those with whom the note-forgery was undertaken. It may at once be said that, as a result of the appellant's remarkable disclosures, enquiries were put on foot with reference to these other crimes as to the commission of which he had given details. The primary upshot however was that the appellant and others were charged in connection with the note-forgery offence which is usually referred to as the Masjidbari Note-Forgery Case. It would seem, however, that it was difficult to obtain evidence of a convincing character against the accused; for, on the 10th March, 1924, it is found that the Public Prosecutor in the Presidency Police Court at Calcutta writes to the Additional Chief Presidency Magistrate to the following effect [the letter is set out at p. 177, *ante*].

The material portions of section 337 are that a competent tribunal may at any state of the investigation or enquiry into, or the trial of, any of the offences specified in the section, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person, on condition of his making a full and true disclosure of *the whole of the circumstances relative* to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

The Additional Chief Presidency Magistrate, on receiving the application of the Public Prosecutor, made the following order on the same day [the order is set out at p. 177, *ante*].

The Magisterial enquiry then proceeded; the appellant was called as a witness for the prosecution and he was allowed substantially to give in his evidence testimony to the same effect as were the statements contained in his confession to which I have already referred. He disclosed, as he had done in

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his confession, the methods employed in connection with the money-order frauds which are the subject-matter of his present conviction. It is difficult to understand how such matter could have been allowed either by the Court or by the Public Prosecutor to have been introduced into his evidence unless it was at that time thought that the incidents connected with the money-order frauds were associated with and relevant (or to use the word of section 337 *relative*) to the offence which was then the subject-matter of the enquiry, that is to say, to the Masjidbari Note-Forgery. Further than that we are informed that certain witnesses were called by the Public Prosecutor who corroborated portions of the appellant's evidence with regard to the money-order frauds; and, although it may be that their evidence may have been primarily intended to be directed towards fixing the guilt upon the accused in the note-forgery case, there is no doubt that their evidence was relevant to the money-order frauds as well. Now the learned Government Advocate, who has appeared here in support of the present conviction of the appellant, suggests that the admission at the Magisterial enquiry of all this evidence to which I have just referred, was a blunder; and he points to the fact, in support of his suggestion, that at the trial it was all dropped; no questions being then asked by the Standing Counsel for the Crown of the appellant and of other witnesses relating to the money-order frauds. It may here be mentioned that the prosecution failed and that the accused in the note-forgery case were all acquitted. There can be no question but that the appellant fulfilled all the conditions under which his pardon was granted.

But the appellant was then proceeded against in connection with the money-order frauds; he was tried before the Assistant Sessions Judge at Saran; he at once raised the plea that in view of the pardon which had been granted to him in the Masjidbari Note-Forgery Case he could not be put on his trial in connection with the money-order frauds. This defence having been raised as a plea in bar was heard by the

Additional Sessions Judge, who decided the point against the appellant; against this order the appellant appealed to this Court; the matter came before Mr. Justice Mullick and myself and we ordered that he should be allowed definitely to take this plea at the trial. The point was heard before the Additional Sessions Judge at the trial and was argued at considerable length. The learned Additional Sessions Judge came to the conclusion that the note-forgery case was in no way associated with the money-order frauds and that consequently the pardon granted to the appellant did not extend so far as to protect him against a prosecution for his participation in the latter crime. The matter, however, is not quite so simple as it might at first sight appear. One of the most important considerations is as to why the appellant should have been allowed to implicate himself in offences other than the note-forgery if it was not thought by those who represent the Crown directly or indirectly that such other offences were associated with or relative to the note-forgery case. Another important consideration is as to from what consequences the appellant was under the reasonable impression that he had delivered himself when he received a pardon in consideration of his turning approver. It is true that when he made his confession it had not apparently been then mooted to him that he might obtain a pardon and be called as a prosecution witness; but he was allowed without any warning to implicate himself in most serious crimes which were not then the subject-matter even of enquiry, far less of any threatened charge against himself. Although it can be argued that the three branches of crime in which the appellant admitted that he had taken part were not in point of time or partly in point of character directly connected with each other, it is idle to contend that they did not form a part of the doings of a criminal association of persons, the membership of whose band varied to some extent but remained constant, so far as the appellant and his co-accused Haripado were concerned. Then, again, with full

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knowledge that the appellant had hopelessly involved himself in a series of offences, the Public Prosecutor, when suggesting that the appellant should be allowed to become an approver, puts forward as a reason the suggestion that the *whole plot* must be brought to light and selected the appellant as the most suitable of the accused for utilization by the Crown as a prosecution witness because of the fact that the appellant had already made a *full disclosure* of the *whole conspiracy*. Undoubtedly the language of the pardon itself is restricted because it merely speaks of the case being one of a big and widespread conspiracy to forge and utter Government Currency Notes; but, on the other hand, the pardon is offered if the appellant makes *a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence*. How then can one infer what were at that time thought to be *the whole of the circumstances relative to the offence*? What did the appellant think they were and what did the Public Prosecutor and the Additional Presidency Magistrate also think they were? To my mind the fact that the whole of the incidents relating to the money-order frauds and the tapping of the telegraphs was given in evidence at the Magisterial enquiry indicates that the impression of the appellant, the Public Prosecutor and the Additional Chief Presidency Magistrate was that those incidents *were* relative to the note-forgery case. Had that impression not existed, it would indeed be difficult to contemplate either that the appellant should have given evidence relating thereto or that the Public Prosecutor or the Magistrate could possibly have allowed so much testimony—in no way relevant or relative to the note-forgery case—to have been given.

The fact that later on at the trial itself, the Standing Counsel thought fit not to allow a repetition of this evidence to be adduced, does not seem to me to affect the position. I have no doubt that, had he been asked the necessary questions, the appellant would have reiterated what he had said before; but

he was simply not called upon to do so. That fact cannot in the least affect the position as it existed when he was offered and accepted the pardon nor the attitude of mind of the appellant, the Public Prosecutor and the Magistrate when the pardon was tendered, agreed to and granted.

The case known as *Garside's* case (1) (of which report the library of this Court does not unfortunately contain a copy but which is quoted in Russell on Crimes, 4th Ed., Vol. 3, p. 597) supports my view that, where an accomplice has been allowed to turn King's Evidence (i.e. has been, as it is termed in India permitted to become an approver) and in his confession discloses offences (in that case another robbery by the same parties but quite distinct from the robbery the subject-matter of the charge) other than that which was the subject of the charge against him and from liability to answer for the consequences of which he was (even wrongly) under the impression that he had freed himself by his confession and pardon, the Crown should not proceed against him in connection with such other offences. No question can of course arise where the offence clearly pardoned and that or those further disclosed by the approver are obviously closely linked together; such as for instance occurred in the case of *Queen-Empress* v. *Ganga Charan* (2) but a remark of Straight, J., in his judgment in that case is well worthy of note; it is this, "It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver; on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence; and when he has given his evidence, I do not think that the question of how far it is to protect him and what portion of it should not protect him, ought to be treated in a narrow spirit".

(1) (1834) 2 Lew. 88.

(2) (1889) I. L. R. 11 All. 79.

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I myself cannot but think that the course of events in this case, namely:—the confession, the knowledge of the Public Prosecutor of the full reference in it to the money-order frauds, the wide language used in the Public Prosecutor's application and in part of the Magistrate's offer of pardon, the connections (such as they were and small though they might be) between the offences disclosed, and the admission at the Magisterial enquiry of evidence as to the money-order frauds—show that, at the time of the pardon, it was undoubtedly thought by all concerned that the disclosures as to the money-order frauds *were* really relative to the note-forgery case.

In this view therefore the appellant's appeal must succeed.

It is suggested by the learned Government Advocate that the Magistrate had no power to grant such a pardon of so wide a character: this must of course depend upon whether the disclosures relating to the money-order frauds were really relative to the note-forgery case; but even if the Magistrate was wrong in thinking that they were both relevant or even relative it would not be, I think, in the contemplation of the Crown that if its Court purported to grant such a pardon such Court's action should be jettisoned to the grave jeopardy of the subject.

For the above reasons I think that the appeal of the appellant Nil Madhab Chowdhury must be allowed, that his conviction and sentence must be quashed and that he must forthwith be set at liberty.

With regard to the appeals of the other two appellants Haripado and Sudhir, I have had the advantage and opportunity of reading the judgment of my learned brother with which I may say at once that I entirely agree and to which I desire only to add a few words. With regard to the intention of the legislature in amending section 164 by the introduction of the words "Any Presidency Magistrate", an examination of what took place in the Legislative Assembly leaves no doubt. On the 31st January,

1923 (see Legislative Assembly Debates, Vol. III, Part II, 1923, page 1747), it will be found that Sir Henry Moncrieff Smith in moving the amendment said,

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" Sir, before we leave sub-clause (*j*) of clause 34 I should like to invite the attention of the House to what is obviously a somewhat serious omission in the clause as drafted by the Joint Committee. It has till just this moment escaped the notice of the House. In the way it is drafted no Presidency Magistrate can record a statement or a confession. I think this is a most serious defect and I should like to ask the indulgence of the House to enable me to move an amendment which will remedy that defect. The amendment will run as follows:— ' That in sub-clause (*i*) of clause 34, before the words *Any Magistrate*, the words *Any Presidency Magistrate* be inserted '."

" The motion was adopted."

It may of course justly be said that what the intention of the legislature was is not really material when a tribunal is called upon to place a construction upon the words of a section in an enactment; but I thought that it would be as well to dissipate any doubt there might be with regard to what was in fact the intention of the Legislative body. It is quite true that in the case of *Emperor* v. *Panchkori Dutt* (1) Mukherji, J., has held that section 164 does not apply to a confession recorded in a Presidency town in the course of a police investigation not held under the orders of a Presidency Magistrate under sections 155 and 156, sub-section (*3*). With every respect to the opinion of that learned Judge I cannot but think that in coming to his decision he has relied upon the case of *Queen-Empress* v. *Nilmadhab Mitter* (2); but that case was decided prior to the amendment to which I have made reference above.

I am at a loss to understand how section 1 of the Criminal Procedure Code can be regarded as preventing a Presidency Magistrate from recording a confession in accordance with the provisions of section 164: he is not a Commissioner of Police or a member of the police force. It is said that section 164 can only be utilized when an investigation is being made by the police *under* the provisions of Chapter XIV of the Code or at any time afterwards before the

(1) (1925) I. L. R. 52 Cal. 67. (2) (1888) I. L. R. 15 Cal. 595.

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commencement of the inquiry or trial resulting from such an investigation: and that as in Calcutta investigations by the police are not effected under the provisions of Chapter XIV the operation of section 164 cannot be brought into play. I can only say that in my view this is a narrow construction of the section with which I do not feel that I can agree: although I am far from suggesting that it is not a possible construction. In my opinion even though the police in Calcutta may not conduct their investigations in precise accordance with the provisions of Chapter XIV a construction of section 164 which would exclude its utilization in Calcutta during a police investigation or at any time afterwards before the commencement of the enquiry or trial is to read it in a somewhat strained and unnatural sense.

As for the remaining points raised by the learned Counsel for these two appellants I can only say that I could see no ground for thinking that there was any irregularity in the way in which the confessions were recorded nor the least indication that they were not entirely voluntary. They bore too intrinsic evidence of truth and though the appellants have now retracted them, they were in my opinion most amply corroborated.

Appellant no. 1 acquitted.

Appeal of appellants 2 and 3 dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

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July, 22, 23, 27.

RAM CHANDRA SINGH

v.

JANG BAHADUR SINGH.*

Hindu Law—karta, power of, to charge the estate—speculative transaction, whether binds the estate—test to be applied.

* Appeal from Appellate Decree no. 14 of 1923, from a decision of J. R. Sweeney, Esq., I.C.S., District Judge of Gaya, dated the 13th June, 1922, reversing a decision of B. Rajnarain, Subordinate Judge of Gaya, dated the 9th November, 1921.

The power of the manager of an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; and the power of a karta of a joint Hindu family stands on the same footing as that of a manager.

The test to be applied in each case is whether the transaction is one into which a prudent owner would enter.

Held, therefore, that it is not in the power of the karta to bind the joint family by entering into speculative transactions and that the question of benefit must be determined by reference to the nature of the transaction and not by reference to the result thereof, although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter.

Hanuman Prasad Panday v. *Mussammat Babooee Munraj Koonweree* (1), *Rambilas Singh* v. *Ramyad Singh* (2) and *Sheotahal Singh* v. *Sitaram Singh* (3), referred to.

Appeal by the plaintiffs.

Dasarat, Nankhu and Ramlochan were three brothers: Ramlochan died leaving a widow Sahodra Kuer and a son Raghubar Dayal. Bhupnarain, cited as defendant no. 1 in this suit, was the son of Nankhu. Bishundayal, cited as defendant no. 8, was the grandson of Dasarat. Defendants 2 to 7 were the sons and grandsons of Bhupnarain. Defendant no. 9 was the son of Bishudayal and defendant no. 10 was the son of defendant no. 9. It was found as a fact by the Court below that Bhupnarain and Bishundayal, together with their sons and grandsons, constituted a joint family. It was also found that Raghubar Dayal was separate from Bhupnarain and Bishundayal.

Raghubar Dayal died leaving, according to the case of all the parties, three daughters, Phalindra Kuer, Lalpari Kuer and Sabinda Kuer. It was the case of Bhupnarain that Raghubar Dayal died leaving also a son Baburam who died shortly after the death of Raghubar; and that, in the events which happened

(1) (1854-57) 6 Moo. I. A. 393 (423). (2) (1920) 5 Pat. L. J. 622.
(3) (1920) 1 Pat. L. T. 136.

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Sahodra Kuer became entitled to succeed to the properties of Baburam on his death as his grandmother, and that the daughters of Raghubar Dayal had no interest in the properties which were once of Raghubar Dayal but which on his death came into the hands of his son Baburam. Bhupnarain contended that he was the reversionary heir of Baburam and would be entitled to succeed to the properties upon the death of Sahodra Kuer. Sahodra Kuer on the other hand contended that Raghubar Dayal died leaving three daughters and she applied in the land registration department for registration of the names of the daughters of Raghubar Dayal who were all minors and whom Sahodra Kuer purported to represent in the matter of that application. On the 20th February, 1909, the land registration case was decided against Bhupnarain, and on the 27th April, 1909, Bhupnarain instituted a title suit as against Phalindra Kuer, Lalpari Kuer and Sabindra Kuer, in substance for a declaration that they, as the daughters of Raghubar Dayal, had no interest in the estate which was once of Raghubar Dayal, and that he was entitled to succeed to the properties on the death of Sahodra Kuer. The suit was resisted by the daughters of Raghubar Dayal; but was ultimately compromised on the 14th February, 1912, by which Bhupnarain got 7 dams 13 kowris out of 10 dams 13 kowris mukarrari in mauza Senaria and 32 bighas of raiyati land, and the daughters of Raghubar Dayal got 3 dams of mukararri in the same village and certain other properties.

In the course of this litigation Bhupnarain had to borrow certain sums of money from time to time from the plaintiffs who were the appellants in the High Court. The money was required by Bhupnarain to enable him to prosecute the suit as against the daughters of Raghubar Dayal. Five mortgage bonds in all were executed between September 1909 and November 1910. Of these, four mortgage bonds were executed by Bhupnarain and Bishundayal, and one was executed by Bhupnarain during the illness of

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Bishundayal. The suit out of which this appeal arose was instituted by the appellants to enforce these mortgage bonds as against the entire joint family consisting of Bhupnarain, Bishundayal and their sons and grandsons. The suit was not resisted either by Bhupnarain or Bishundayal; but it was resisted by their sons and grandsons, and the only question was whether the plaintiffs were entitled to a mortgage decree in this suit. It was conceded that they were not entitled to any personal decree as against Bhupnarain and Bishundayal inasmuch as the suit was brought more than six years after the execution of the mortgage bonds.

The Court of first instance dismissed the suit on the ground that the money was borrowed by Bhupnarain and Bishundayal without any legal necessity. The District Judge reversed the decision on the ground that the expenditure of the money resulted in a benefit to the joint family and that accordingly the creditors were entitled to a mortgage decree as against the joint family.

S. M. Mullick and *S. N. Rai*, for the appellants.

Hasan Jan and *Kailas Pati*, for the respondents.

Cur. adv. vult.

DAS, J. (after stating the facts set out above, proceeded as follows): There is one passage in the judgment of the learned District Judge which requires immediate attention. He says:

> "At the outset I may say that I have not been able to find any authority for the proposition of law advanced by the learned Subordinate Judge, that is, that speculative expenditure will not bind a joint family however beneficial be the result. The law would appear to be that the test of the transactions is the question of the actual benefit, and that, if the joint family derived actual benefit from the expenditure incurred by the kartas, it would be bound by the expenditure, even though the latter may have been speculative at the outset."

I entirely differ from the learned District Judge. It is necessary to remember that "the power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified

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power". I may point out that it is settled law that the power of a karta of a joint Hindu family stands on the same footing as that of the manager. In the leading case of *Hunooman Persaud Pandey* v. *Musst. Babooee Nunraj Koonweree* (1) the position in regard to the power of the manager to charge an estate which belongs to an infant heir is stated in these terms: "It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bonâ fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded". It is obvious, therefore, that the test which must be applied by the Court in each case is—is it a transaction into which a prudent owner would enter? Now I hold that a prudent owner would never think of entering into a speculative transaction which may benefit him, but which may also cause him loss. The question of the right of the creditor or the liability of the joint family cannot depend upon the spin of the coin or the throw of the dice. I may be possibly taking a very extreme case; but the test in my opinion is the same. In *Rambilas Singh* v *Ramyad Singh* (2), the Chief Justice of this Court, after pointing out that it is not desirable to lay down any general proposition, which would limit and define the various cases, which might be classed under the term beneficial as used in the cases, said as follows: "It is clear, however, that all transactions of a purely speculative nature would properly be excluded". I may refer to a passage in my judgment in *Sheotahal Singh* v. *Sitaram Singh* (3): "I quite agree that the manager of a joint family has no authority whatever to affect or dispose of any portion of joint family property in order to enable

(1) (1854-57) 6 M. I. A. 393 (423).

(2) (1920) 5 Pat. L. J. 622.

(3) (1920) 1 Pat. L. T. 136.

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him to embark on speculative transactions ". In my judgment in that case I conceded that there is a certain element of risk in every business transaction and if we are to hold that when the business has succeeded and the entire family has benefited by it, we ought not to uphold the mortgage transaction entered into by the manager to enable him to embark on such a business unless the mortgagee satisfies us that the business was bound to succeed and that benefit was bound to accrue to the family, we would necessarily handicap the managers of joint Hindu families and place a limitation on their powers, which would have the effect of stopping all business transactions in every Mitakshara family But it is one thing to say that a manager of a joint Hindu family has complete power to enter into business transactions, where the particular business is part of the ancestral joint family property; it is another thing to say that he has power to enter into speculative transactions. I still adhere to the opinion which I expressed in that case that the test is not whether benefit was bound to accrue to the joint family; but it is still necessary for the mortgagee to show that the transaction was one into which a prudent owner would enter; and as soon as this test is laid down we must hold that it is not in the power of the karta of a joint family to bind the joint family by entering into speculative transactions. In my opinion the question of benefit must be determined by reference to the nature of the transaction, and not by reference to the result thereof; although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter. The proposition rests on principle and is covered by authorities and it is not necessary to pursue the subject.

The question, however, is somewhat different in this case. It is conceded that the creditor must establish that the transaction was for the benefit of the joint family. The money was borrowed and the mortgages were executed to enable Bhupnarain to

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establish his title to the estate of Baburam. On his own case Bhupnarain was the nearest heir of Baburam expectant on the death of Sahodra Kuer. Bishundayal was one degree removed from Bhupnarain and was not entitled in any case to succeed to the properties of Baburam. If Bhupnarain succeeded in the action he might establish his title to the estate of Baburam; but the joint family of which he was a member would not necessarily participate in the benefit that might accrue to Bhupnarain. What then was the position of the joint family? Bhupnarain might fail to establish his case in which case his suit would be dismissed and no benefit would accrue to the joint family; but Bhupnarain might succeed But if he succeeded the benefit would accrue to him and not to the joint family; for it is well established that unless he chose to share the property along with the members of the joint family the fruits of his victory would belong to him and not to the joint family. How can it then be said that the mortgage transactions were for the benefit of the joint family?

It is said that Bhupnarain has actually made over the property which he gained as a result of his suit to the joint family. That may be so; but the matter rested with Bhupnarain and the joint family could never have compelled him to make over the property to it Benefit has accrued to the joint family not as a result of the transactions which are the subject-matter of the suit, but as a result of an act of bounty on the part of Bhupnarain. If it be contended that there was an agreement between Bhupnarain and the joint family by which the joint family agreed to finance Bhupnarain in the litigation and Bhupnarain agreed to share the property which was the subject-matter of that litigation with the joint family. I would unhesitatingly say that the agreement being of a speculative nature could not bind the joint family.

In my opinion the decision of the learned District Judge cannot be supported. I would accordingly

allow the appeal, set aside the judgment and the decree passed by the Court below and restore the judgment and the decree of the Additional Subordinate Judge. The result is that the suit is dismissed with costs in this Court and in the Court below. So far as the costs in the court of first instance are concerned, I agree with the learned Additional Subordinate Judge that each party should bear his own costs.

DAS, J.

ADAMI, J.—I agree.

Suit dismissed.

CIVIL REFERENCE.

Before Mullick and Kulwant Sahay, J.J.

RUP LAL SINGH

v.

SECRETARY OF STATE FOR INDIA.*

1925.

July, 23, 27.

Bengal Troops Transport and Traveller's Assistance Regulation, 1806 (*Regulation XI of* 1806), *section* 3(1)—"*Native officer*", *whether can impress a cart against the consent of the owner.*

Under section 2 of the Bengal Troops Transport and Traveller's Assistance Regulation, 1806, whenever a detachment of troops, or a single corps, shall be ordered to proceed by land or by water, through any part of the Company's territories, "the Commanding Officer is required to give timely notice to the Collectors of districts through which the troops are to pass". On receipt of such notice the Collector "shall", under section 3, "depute a creditable Native officer to accompany the troops through his jurisdiction.....It shall also be the duty of such Native officer to provide the troops with whatever bearers, coolies, boatmen, carts and bullocks, may be indispensably necessary to enable the troops to prosecute their route".

Held, that the Native officer referred to in section 3 can legally impress carts let on hire against the consent of their owners.

* Civil Reference no. 1 of 1925.

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RUP LAL SINGH v. SECRETARY OF STATE FOR INDIA.

Reference by the subordinate judge of Muzaffarpur under Order XLVI, Code of Civil Procedure, 1908.

It appeared that in order to facilitate the march of a detachment of cavalry through his district the Collector of Muzaffarpur ordered a Native Officer to provide the troops with bullock carts. The Native Officer, acting under Regulation XI of 1806, impressed a number of carts which had been hired by the appellant Ruplal Singh for the purpose of carrying out a contract for the repair of certain roads.

The Subordinate Judge of Muzaffarpur found that the impressment was made against the will of the appellant. He further found that as a result of such impressment the coolies collected by the contractor were idle for two days and that he had to pay them during this time. The contractor claimed as damages the pay of the coolies. The Subordinate Judge was of opinion that a claim for damages would lie if the act of the Secretary of State, who was the defendant no. 1 in the suit brought by the appellant, was a tort. But he was doubtful of the scope of Regulation XI of 1806 and, under Order XLVI of the Civil Procedure Code he referred the case to the High Court for an opinion on section 3 of the Regulation. The question put by him was,

"Whether the Native and Police Officer referred to in paragraphs 3 and 4 of the first clause of section 3 of Regulation XI of 1806 can legally impress a cart let on hire against the consent of the owner."

S. Saran, for the plaintiff.

L. N. Sinha, Government Pleader, for the defendant.

MULLICK, A. C. J.—The Native Officer is directed by paragraph 3 of section 3 of the Regulation to provide the troops with whatever bearers, boatmen, carts and bullocks may be necessary to prosecute their route. The next paragraph empowers him in case of difficulty to seek the assistance of the nearest police

officer who is to afford his aid in providing the number of persons and of carts and bullocks required. The section does not in terms empower the Native Officer or the police to impress any carts or bullocks against the will of their owner but it is obvious that this is intended. It is not necessary here to consider whether private carts can be seized but as regards carts ordinarily let out on hire it is impossible to conceive that when a regiment is on the line of march the refusal of the owner would be sufficient to oust the jurisdiction of the officer concerned. That could not have been intended by section 3 having regard to the object for which it was enacted. This is made clearer by comparison with section 8 which relates to the supply of carts, etc., to military officers not commanding or proceeding with a corps or detachment and to other persons passing through the country. The third paragraph of this section by implication empowers the police officer to impress carts kept for hire and to compel bearers and boatmen who are accustomed to act as such to undertake such involuntary service. From this it would appear that in the case of regiments on the march it is certainly open to the Native Officer or the police officer to impress carts or bullocks which are ordinarily let out for hire.

It is contended on behalf of the plaintiff that the Regulation could not have intended to empower the Native Officer to use means which were contrary to law and thereby encroach upon the liberty of the subject But the answer to this is that when a statute confers a power it implies that the donee of that power shall be competent to do all that is needful for its exercise subject to the limitation that he cannot go beyond what is reasonable. If, in order to carry out the law, he does something which the Courts consider in the circumstances unreasonable, he will be guilty of a tort.

The answer therefore to the question put by the learned Subordinate Judge, in my opinion, is in the affirmative.

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KULWANT SAHAY, J.—I agree that in case of carts let on hire, the Native and police officer referred to in paragraphs 3 and 4 of section 3, clause 1, of the Regulation can legally impress them against the consent of their owner.

Reference answered in the affirmative.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Overruled 28 Pat. 425.

1924.

July, 29.

Before Ross, J.

KRISHNA CHANDRA GAUNTIA

v.

RAJA MAHAKUR.*

Court-Fees Act, 1870 (Act VII of 1870), section 7(v) and (xi)(c)—Occupancy land, suit by tenant against landlord for possession of.

A tenant instituted a suit against his landlord for possession of occupancy land after determination of title. The question of title was decided in favour of the plaintiff and the suit was decreed. The defendant appealed to the District Judge. That appeal was dismissed and he appealed to the High Court. For the purposes of court-fee and jurisdiction the suit was treated as a suit under section 7(*v*)(*b*) of the Court-Fees Act, 1870, and was valued at five times the annual rental of Rs. 3. In the appeal to the High Court it was agreed that the annual rent should be taken to be Rs. 50.

Under section 7(*v*) of the Act, in a suit for " the possession of land " the court-fee is to be computed according to the value of the subject-matter. In a suit which falls within clause (*b*) of section 7(*v*) the value of the subject-matter, was before the amendment of the Court-Fees Act by section 3 of the Bihar and Orissa Court-Fees (Amendment) Act, 1922, deemed to be five times the revenue payable to Government. In a suit under clause (*d*), however, the annual value of the subject-matter is deemed to be the market-value of the land.

* Second Appeal no. 26 of 1924 (Cuttack).

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In the High Court it was contended that the suit was governed by section 7(*xi*)(*c*). Under that clause, in a suit between landlord and tenant "to recover the occupancy of immoveable property from which a tenant has been illegally ejected by the landlord", the court-fee is to be computed "according to the amount of the rent of the immoveable property to which the suit refers, payable for the years next before the date of presenting the plaint".

Held, that the suit fell within section 7(*v*) and that the court-fee was payable on the market-value of the land.

In a suit under section 7(*xi*)(*c*) the Court will not try a question of title.

Bala Sidhanta v. *Permul Chetti* (1) and *Pramatha* v. *Amiraddi* (2), followed.

Appeal by the defendant.

The facts of the case material to this report are stated in the following order of the Taxing-Officer:

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May, 31.

This is a court-fee matter, arising out of a suit instituted by the respondent for declaration of title as an occupancy raiyat to and recovery of possession of 0·31 acres of gounti raiyati land. According to the plaint, the appellant had first settled the disputed land with the plaintiff-respondent on an annual rental of four purugs of paddy; and had later on agreed to settle the land with the plaintiff in perpetuity for a nazarana or salami of Rs. 300: but had afterwards dispossessed him and succeeded against him in a proceeding under section 145 of the Criminal Procedure Code. For the purposes of the court-fee and the jurisdiction, the suit was valued under section 7(*v*)(*b*) of the Court-Fees Act at five times the annual rental of Rs. 3 (which was taken to be the equivalent of the four purugs of paddy). The first Court decreed the suit; and the defendant appeals to this Court, after an unsuccessful appeal to the lower appellate Court, and has, on both occasions, valued the appeal in the same manner as the respondent valued the suit.

The Assistant Registrar as Stamp Reporter would treat the suit as one, not under section 7(*v*)(*b*), but under section 7(*iv*)(*c*), of the Court-Fees Act, and would assess the court-fee in each Court on Rs. 300, taking this amount as a minimum for the market-value of the disputed land since the plaintiff had set up a settlement on a salami of that amount. If this be correct, there would be a deficit of Rs. 26-6-0 in the court-fee on the plaint and, if that should bind the appellant, also on each of his two appeals.

It has, however, been urged on behalf of the appellant that section 7(*iv*)(*c*) cannot apply as against him, because the decree of the first Court, which is all that he is interested in getting upset, shows

(1) (1909) 27 Mad. L. J. 475. (2) (1919-20) 24 Cal. W. N. 151.

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that no declaration was treated as sought and none was given either [*Ramakrishna Reddi* v. *Kotta Koti Reddi* (1) and *Haidari Begum* v. *Gulzar Bano* (2)]. I am inclined to accept this contention as sound.

It has been further urged that the suit being one between landlord and tenant for recovery of possession of land from which the tenant-plaintiff had been dispossessed, section 7(*xi*)(*c*), of the Court-Fees Act, should be held to apply and the matter valued according to the rent of the preceding year, namely, four purugs of paddy. But section 7(*xi*)(*c*) speaks of a tenant being " illegally ejected ", and these words have been held to differ in scope from the word " dispossessed ", in *Sundar Mal Marwari* v. *Murray* (3). This interpretation was, however, not followed in *Jamla Singh* v. *Kingsley* (4); but this latter ruling does not bear on the Court-Fees Act. I am thus inclined to think that the appeal must be valued not under section 7(*xi*)(*c*) but under section 7(*v*) of the Act.

The learned Vakil for the appellant has not been able to show me that if section 7(*v*) be held to apply, the matter comes within clause (*a*) or (*b*) or (*c*) of section 7(*v*). The valuation must, therefore, be based on " the value of the subject-matter " or " the market-value of the land ". In order to avoid delay and cost of an enquiry on this point the learned Vakil has agreed that Rs. 300 might, in the circumstances, be taken as the value of the subject-matter of the appeal. He has, however, asked me to refer to the Taxing-Judge the question whether this matter is not governed by section 7(*xi*)(*c*) as a question of general importance, especially, in view of the facts that *Sunder Mal Marwari* v. *Murray* (3) was not followed in *Jamla Singh* v. *Kingsley* (4) and there is no ruling of the Patna High Court on the point.

Even if section 7(*xi*)(*c*) be held to apply, the taking of four purugs (1 purug = 7 maunds) as equal to Rs. 3 only is manifestly wrong, and the learned Vakil has—again to avoid delay and cost—agreed that the annual rent may be taken to be worth Rs. 50.

Under the provisions of section 5 of the Court-Fees Act I direct that the matter be placed before the Taxing-Judge for final decision. The points arising are:—

(*i*) Whether the suit falls under sub-section (*iv*)(*c*) or (*v*) or (*xi*)(*c*) of section 7 of the Court-Fees Act; and

(*ii*) Whether the appeal should be valued under sub-section (*iv*)(*c*), (*v*) or (*xi*)(*c*) of section 7 of the Court-Fees Act.

Ross, J.—No one appears in this case. The cases referred to on the question, whether the case falls within section 7 (*xi*) (*c*) of the Court-Fees Act or not, are not of much assistance. The decision in *Sunder Mal Marwari* v. *Murray* (3) really proceeded on another ground, namely, that the suit was not one

(1) (1907) I. L. R. 30 Mad. 96. (2) (1914) I. L. R. 36 All. 322.
(3) (1912) 16 Cal. L. J. 375. (4) (1912-13) 17 Cal. W. N. 1201.

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between landlord and tenant only, but also between the tenant and other persons who claimed to have acquired an interest from the landlord. The construction of two words " illegally ejected " suggested in that decision is *obiter* and does not appear to be a final decision. On the other hand, in *Jamla Singh* v. *Kingsley* (1) there is a decision that illegal ejectment is included in dispossession but that was not a decision on the Court-Fees Act. The decisions in *Bala Sidhanta* v. *Permul Chetti* (2) and *Pramatha* v. *Amiraddi* (3) indicate that in a suit under section 7 (*xi*) (*c*), of the Court-Fees Act, the Court will not try a question of title. The present suit is one for possession of land after determination of the question of title and the title was gone into. The case in my opinion falls within section 7 (*v*) of the Act and the Court-Fee is payable on the market-value of the land *i.e.* Rs. 300.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

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Oct., 20.

GANGADHAR MISRA

v.

RANI DEBENDRABALA DASI.

Court-Fees Act, 1870 (*Act VII of* 1870), *section* 7(*iv*)(*c*)—*declaratory suit—order for ad interim injunction—appeal—ad valorem court-fee payable.*

The plaintiff-appellant brought a suit for a declaration of his title only, but subsequently obtained in the Court below, an order for ad interim injunction. His suit was dismissed and he appealed to the High Court; the injunction was subsisting at the date of the appeal. Under section 7(*iv*)(*c*) of the Court-Fees Act, 1870, the amount of fee payable under that Act in a suit to obtain " a declaratory decree.....where consequential relief is prayed ", is to be computed according

(1) (1912-13) 17 Cal. W. N. 1201. (2) (1909) 27 Mad. L. J. 475.
(3) (1919-20) 24 Cal. W. N. 151.

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to the amount at which the relief sought is valued in the plaint or memorandum of appeal. Under article 1 of Schedule I of the Act an ad valorem fee is payable in such a case but under article 17(*iii*) of Schedule II a fixed fee is payable on a memorandum of appeal in a suit to obtain "a declaratory decree where no consequential relief is prayed". *Held*, that although there was no specific prayer in the memorandum of appeal for an interim injunction the suit was nevertheless a declaratory one with consequential relief, and, therefore, that an ad valorem court-fee was payable.

The facts of the case are stated in the following Order of Reference by the Taxing Officer, Circuit Court, Cuttack:—

This court-fee matter arises out of an appeal by the plaintiffs. The suit was brought on the footing that they were the tankidars of mauza Pratap Ramchandrapur with its two independent off-shoots of Bakshibad and Dianbad and that as such they were entitled to realize rents from their "khatak" or subordinate tankidars, the defendants numbered 4 to 187. The "peskash jama" (or tanki revenue) of the mauzas was to be paid to Government, not direct, but through the zamindars, defendants 1 and 2, who, however, according to the plaint, fraudulently got themselves recorded in the Settlement Khewats as having "khas dakhali", or direct, zamindari rights in the mauzas. These dakhali rights were also affirmed by the Revenue Court in a suit, no. 1313 of 1917-18, brought by the zamindars, against the appellants and some of the subordinate tankidars, for the rents of Bakshibad and Dianbad. The zamindars also brought a similar rent suit, no. 1865 of 1923-24, regarding the parent mauza of Pratap Ramchandrapur. According to the plaint, this is what led to the institution of the suit; and the prayers made were:—

(*ka*) that it be declared that defendants 4 to 187 have no relationship of landlord and tenant with defendants 1 to 2 but are "khatak" tankidars under the plaintiffs and have been paying the "tanki jama" to them; and

(*kha*) that a decree may be passed awarding to the plaintiff such other reliefs as they may be entitled to.

There was also a prayer for the costs of the suit with future interest, but that will obviously not affect the category or valuation of the suit and can be left out of account.

The plaintiffs valued the suit at Rs. 11,000 for jurisdictional purposes, and they paid a court-fee of Rs. 15 on the ground that the suit was one for a declaration pure and simple.

They valued the appeal in the same way and paid the same court-fee on it. The Stamp Reporter objected that this was not a pure declaratory suit, since a cloud having been cast on their title, the appeal, like the suit, sought in effect to get rid of that cloud and clear up the title and possession of the plaintiffs-appellants. On the authority

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of the two Patna cases [*Harnarayan Pandey* v. *Suresh Pandey* (1) and *Rachhya Raut* v. *Mussammat Chandoo* (2)], he considered that the appellants ought to pay an ad valorem fee on the market-value of the mauzas in dispute. This view was not accepted by the appellants, and the matter was thus referred to me under section 5 of the Court-Fees Act.

The learned vakil for the appellants has contended before me that the appeal, like the plaint, has been properly stamped, for the reasons given by the learned Subordinate Judge in dealing with issues 4 and 3. He has also urged that if ad valorem fees be held payable, the valuation should be made, on the lines of section 5(*v*) of the Act, at ten-times the amount annually payable to Government for these mauzas, lying as they do in a temporarily-settled estate.

I desire to refer at the outset to some confusion that seems to have occurred owing to the way in which the plaint has been framed. The Stamp Reporter thought that relief was prayed for in respect of two mauzas (Bakshibad and Dianbad) only; and the learned vakil for the appellants also was unable to tell me why exactly the third and parent mauza (Pratap Ramchandrapur) had been brought in. A careful perusal of the plaint, with particular reference to paragraph 18, shows that relief was prayed for in respect of all the three mauzas. The result is that the deficit, if any, will have to be calculated with respect to all the three mauzas.

Turning now to the contentions before me, the first question is whether the suit can be properly regarded as a declaratory suit within the meaning of Article 17(*iii*) of the Second Schedule of the Act. The learned vakil for the appellants adopts the reason given by the learned Subordinate Judge for answering this question in the affirmative; and that reason is that, being in joint possession, the plaintiffs could not consistently have prayed for any relief but the declaration that they are entitled to realize the tanki rents from the subordinate tankidars. But *Raj Krishna Dey* v. *Bipin Behari Dey* (3) is an example of a case where a suit, brought for a declaration that the plaintiff was *sole* shebait notwithstanding an entry in the collectorate register that he was joint with the defendant, was held to be not a pure declaratory suit. It is true that in that case the plaintiff had to add a prayer for consequential relief on an objection made by the defendant under section 42 of the Specific Relief Act; but even so, the case is a complete answer to the contention that in the present case the plaintiffs could not have asked for any but a declaratory relief. Objections under section 42 of the Specific Relief Act are, however, matters for the Court and not for the Taxing Officer, as the learned vakil has rightly urged before me. But is it quite correct to say that the plaint in the present case did not really ask for any other relief? In the first place, there is that prayer (*kha*) for such other reliefs as the plaintiffs may be found entitled to; and it seems to me that the prayer does not cease to be a prayer for further relief merely because it is couched in general terms. Secondly, the plaint is unmistakably designed to reduce the three mauzas into the possession of the plaintiffs to the exclusion of the zamindars, and almost inevitably foreshadows an injunction in respect of the rent-suit of 1923-24 brought by the zamindars. This view is confirmed by

(1) (1921) 63 Ind. Cas. 203. (2) (1921) 6 Pat. L. J. 662.

(3) (1913) I. L. R. 40 Cal. 245.

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the fact that during the progress of the suit the plaintiffs actually moved for and obtained such an injunction, and as far as can be gathered from the order-sheet of the suit, the provisional injunction issued by the learned Subordinate Judge is in force at the present moment. In a somewhat similar case [*Deokali Koer* v. *Kedar Nath* (1)] the first two prayers, which were for declaratory reliefs, were followed by a prayer for any other relief " which the Court may find the plaintiff entitled to ". The declarations sought were found to be not warranted by section 42 of the Specific Relief Act, but before coming to the conclusion that the suit was not one " to obtain a declaratory decree where no consequential relief is prayed ", Jenkins, C. J., observed that " the third prayer expressly seeks relief, though it is general in its terms ". In confirmation of the view, apparently, that consequential relief was prayed for in that case, his Lordships proceeded to refer to the interim injunction obtained by the plaintiff, and remarked that an injunction is consequential relief. Were it not for the fact that *Deokali's* case (1) can, not altogether without force, be distinguished on the ground that the declaration sought in the present case is substantially warranted by section 42 of the Specific Relief Act, I should have considered myself bound, on the authority of that ruling, to hold that the present is not a suit within Article 17(*iii*) of the Second Schedule of the Court-Fees Act.

Coming to the second contention on behalf of the appellants, it seems clear on the authorities that in the face of the prayer for the declaration, the present suit cannot be regarded as one for possession within section 7(*v*) of the Court-Fees Act [vide *Harihar Prasad Singh* v. *Shyam Lal Singh*(2), *Raja Dhakeswar Prasad Singh* v. *Jivo Chaudhury*(3), *Ugramohan Chaudhury* v. *Lachmi Prasad Chaudhury* (4), *Shama Prasad Sahi* v. *Sheoparsan Singh* (5), and *Khetramohan Mahapatra* v. *Ganesh Lal* (6)].

I am therefore inclined to hold that the present suit comes under section 7(*iv*) of the Court-Fees Act, which provides for suits " to obtain a declaratory decree or order where consequential relief is prayed ", and as the plaintiffs (with whom I am at present concerned in their capacity of appellants only) seem to be seeking relief in respect of all the three mauzas, they ought, in my opinion, to pay ad valorem fees on Rs. 11,000, their own valuation of the subject-matter of the suit and appeal. But I have not been able to find any direct authority for or against my view. There are reported decisions in which it has been laid down that we ought not to look beyond the plaint in determining court-fees, but the contrary seems to have been done and the object and effect of plaints considered in several other reported cases. The questions that arise for decision in the present court-fee matter are :—

(*I*) Whether a general prayer for relief, such as is found in (*kha*) in the present case, will suffice to convert what would otherwise be a declaratory suit into a suit within section 7(*iv*)(*c*) of the Court-Fees Act; and

(1) (1912) I. L. R. 39 Cal. 704.
(2) (1913) I. L. R. 40 Cal. 615.
(3) (1918) 3 Pat. L. J. 448.
(4) (1920) 5 Pat. L. J. 339.
(5) (1920) 5 Pat. L. J. 304.
(6) (1921) 6 Pat. L. J. 101.

(2) Whether such a general prayer for relief, taken with the interim injunction subsequently obtained by the plaintiffs, will have that effect.

These questions are of general importance, in my opinion, and must, therefore, be referred for decision under section 5 of the Act.

Let the papers be therefore placed before the Taxing-Judge at Patna for a final decision under section 5 of the Court-Fees Act.

JWALA PRASAD, J.—This is a reference made by the Registrar of the Cuttack Circuit Court relating to revenue.

The plaintiff-appellants must pay ad valorem court-fee under section 7 (*iv*) (*c*) of the Court-Fees Act.

Two reliefs are sought for in the plaint—

(*ka*) that it be declared that defendants 4 to 188 have no relationship of landlord and tenant with defendants 1 and 2 but are " Khatak " tankidars under the plaintiffs and have been paying the " tanki jama " to them;

(*kha*) any other reliefs to which the plaintiffs may be entitled may be granted to them.

The third prayer is for costs which may be ignored. The general relief contained in *kha* does not by itself subject the plaint to the liability of ad valorem court-fee inasmuch as such a prayer is almost customary and being vague and indefinite is never deemed to be a substantial relief. The prayer *ka* is couched in terms that would make it declaratory but the plaintiffs have obtained an ad interim injunction in the lower court which still subsists. The plaintiffs have lost the case and in appeal seek reliefs which they had sought in the first court. The ad interim prayer is a substantial prayer which makes the relief a consequential one bringing the case within section 7 (*iv*) (*c*) of the Court-Fees Act. In the case of *Krishna Das Laha* v. *Hari Charan Banerji* (1) the plaintiff had described the suit as one for declaration

(1) (1911) 14 Cal. L. J. 47.

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of title with consequential relief, although the relief was in the nature of a declaration only. Therefore there was no dispute as to the category in which the suit fell. But the case of *Deokali Kuer* v. *Kedar Nath* (1) lends strong support to the view which I have taken. In that case there was no specific prayer in the memorandum of appeal for an interim injunction and there was, as in the present case, only a prayer for declaration of plaintiff's title. But in that case, as in the present, there was an interim injunction on the court below on the application of the plaintiff and that was construed by Sir Lawrance Jenkins, C. J., as bringing the case within section 7 (*iv*) (*c*).

The questions put in the reference are answered as above and the plaintiff is bound to pay ad valorem court-fee.

REVISIONAL CRIMINAL.

Before Bucknill and Adami, J.J.

1925.

Oct., 27.

BADRI GOPE

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 99 *and* 186—*Obstruction to public servant—Attachment under unsealed writ, illegality of—Right of private defence—Code of Civil Procedure*, 1898 (*Act V of* 1898), *Order XXI, rule* 24(2).

Where a Civil Court peon, in execution of an unsealed writ of attachment, attached a bullock and calf belonging to the judgment-debtor, the latter being absent at the time, and the judgment-debtor subsequently followed and obstructed the peon and others who were with him, and rescued the cattle

* Criminal Revision no. 341 of 1925, from an order of H. R. Meredith, Esq., I.C.S., Sessions Judge of Monghyr, dated 26th June, 1925, affirming the order of Maulavi H. Shamsul Huda, Deputy Magistrate of Monghyr, dated 1st June, 1925.

(1) (1912) I. L. R. 39 Cal. 704.

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after attacking the identifier, *held*, in the circumstances of the case, that the petitioners should not be convicted under section 186, Penal Code.

Reg v. *Boyle* (1), *Reg* v. *Williams* (2), *Reg* v. *Knight* (3), *Bisu Haldar* v. *Emperor* (4), *Shaikh Moinuddin* v. *King-Emperor* (5), *Khidir Bux* v. *King-Emperor* (6), *Sheikh Nasur* v. *Emperor* (7), *Arjun Suie* v. *King-Emperor* (8), *Mohini Mohan Banerjee* v. *King-Emperor* (9), *Debi Singh* v. *Queen-Empress* (10) and *Tannakilal Mandar* v. *King-Emperor* (11), followed.

Order XXI, rule 24(2), provides: "Every process..... shall be sealed with the seal of the Court....."

Held, that an attachment made under a writ which does not bear the seal of the Court as required by this rule, is an invalid and illegal attachment.

Khidir Bux v. *King-Emperor* (6), followed.

The facts of this case were as follows: A decree having been passed against Badri Gope, a writ of attachment was drawn up and made over to the Civil Court peon, Lalji Misser, who, on December 3rd, 1924, went to Gobindpur where Badri lived, together with the identifier, Ramcharan Tanti. Badri Gope was away from home when they arrived at his house, but his mother was there. The peon attached a bullock and a calf and proceeded to take them to Monghyr in company with the identifier and a servant of the decree-holder.

When the party had proceeded and reached a well, situated three miles along the road from Jamalpur to Monghyr, the petitioner, Badri, with the two

(1) (1857) C. C. Cas. 428; 6 Ir. C. L. R. 598.
(2) (1800) 2 Car. & Ker. 1001.
(3) (1908) 73 J. P. 15; 1 Cr. App. R. 186; 25 T. L. R. 87.
(4) (1900-01) 11 Cal. W. N. 846.
(5) Cr. Rev. 36 of 1921.
(6) (1918) 3 Pat. L. J. 636.
(7) (1910) I. L. R. 37 Cal. 122.
(8) (1918) 3 Pat. L. J. 106.
(9) (1916) 1 Pat. L. J. 550.
(10) (1901) I. L. R. 28 Cal. 399.
(11) Cr. Rev. 156 of 1920.

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other petitioners came running up and obstructed the party. The writ was shown to them, but in spite of this, they assaulted the identifier and rescued the cattle. They were prosecuted under section 186, Penal Code, found guilty under that section and sentenced to rigorous imprisonment for one month each. Their defence was a total denial of the attachment and of the occurrence.

When the case came up for trial it was found that not only had a careless mistake been made in dating the writ but also that the writ did not bear the seal of the Court, as required by the provisions of Order XXI, rule 24(*2*).

On appeal the learned Sessions Judge upheld the conviction and sentence, distinguishing the present case from the cases relied on by the appellants [*Khidir Bux* v. *King Emperor* (1) and *Sheikh Nasur* v. *Emperor* (2)] on the ground that here there was no resistance to attachment but a rescue a considerable time after the attachment, so that no right of private defence arose. He held that a technical defect in the warrant could not give the appellants the right forcibly to rescue property of which they had lost possession.

Mihir K. Mukherji, for the petitioners.

H. L. Nandkeolyar (*Assistant Government Advocate*), for the Crown.

ADAMI, J. (after stating the facts as set out above, proceeded as follows): The provisions of Order XXI, rule 24(*2*), are mandatory and an attachment made under a writ which does not bear the seal of the Court, as required by that rule, is an invalid and illegal attachment, as has been held by Mullick and Thornhill J.J., in the case of *Khidir Bux* v. *King Emperor* (1). The defect is not a mere technical one; the presence of the seal of the Court to give authority to the writ is an obviously imperative safeguard.

(1) (1918) 3 Pat. L. J. 636. (2) (1910) I. L. R. 37 Cal. 122.

The writ being thus invalid and the attachment illegal, if resistance had been made to its execution at the time the cattle were being attached, there can, I think, be no question that the petitioner, Badri, would be held to be free from liability for his action as long as no excessive force was used [*Khidir Bux* v. *Emperor* (1), *Sheikh Nasur* v. *Emperor* (2), *Arjun Suie* v. *King Emperor* (3), *Mohini Mohan Banerji* v. *King Emperor* (4), *Debi Singh* v. *Queen Empress* (5) and *Tannakilal Mandar* v. *King Emperor* (6)].

The question to be decided here is whether, when an illegal attachment has been made in the absence of the judgment-debtor and the property has been taken into possession by the Civil Court peon and has been in his possession for some time, the judgment-debtor commits an offence when he obstructs the peon and takes back his property. The learned Sessions Judge has held that in such circumstances no right of private defence of property still exists.

The learned Assistant Government Advocate follows this same line of argument. He contends that in attaching the cattle under a writ which he believed to be valid, the Civil Court peon was not committing an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which was an attempt to commit any of those offences, and therefore the right of private defence of property, as described and defined in section 97 of the Indian Penal Code, did not subsist, and he further contends that, even if ordinarily there would be such right of private defence, the provisions of section 99 of the same Code would prevent the petitioners pleading that right because the peon was acting in good faith under colour of his office, though owing to the defect in the writ his action may not have been strictly

(1) (1918) 3 Pat. L. J. 636.
(2) (1910) I. L. R. 37 Cal. 122.
(3) (1918) 3 Pat. L. J. 106.
(4) (1916) 1 Pat. L. J. 550.
(5) (1901) 28 Cal. 399.
(6) Cr. Rev. no. 156 of 1920.

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justifiable by law. He explains that the effect of section 99 was not taken into consideration in the cases on which the petitioners rely.

In the case of *Bisu Haldar* v. *Emperor* (1) Stephen and Cox, J.J., and in that of *Shaikh Moinuddin* v. *The King Emperor* (2) Jwala Prasad, J., did consider the effect of the words "not strictly justifiable by law" and held that, where the warrant is altogether invalid and illegal the words will not take away the right of private defence.

In the present case the question of private defence of property hardly arises. The petitioner came upon the peon taking his cattle along the road and claimed them. The peon showed him a writ which was of no force because it bore no seal of the Court (though probably Badri did not notice this). The peon not being able to justify his possession of the cattle, the petitioner committed no offence in taking them. There was no assault on the peon, who gave up the cattle when he saw the identifier being assaulted. It was fortunate for the petitioners that the writ proved to be an invalid one, they can have had no knowledge of this, but in their defence they were entitled to rely on its invalidity.

The cases of *Reg.* v. *Boyle* (3), *Reg.* v. *Williams* (4) and *Reg.* v. *Knight* (5) show that under the law of England the petitioners would not in the circumstances of this case be held liable to punishment.

As to the effect of section 99 of the Indian Penal Code a clear explanation has been given by Sir John Edge, C. J., and Burkitt, J., in the case of *Queen Empress* v. *Dalip* (6). If in the present case the petitioners had assaulted or caused grievous hurt to

(1) (1900-01) 11 Cal. W. N. 846.
(2) Cr. Rev. no. 36 of 1921.
(3) (1857) 7 C. C. Cas. 428; 6 Ir. C. L. R. 598.
(4) (1800) 2 Car. & Ker. 1001.
(5) (1908) 73 J. P. 15; 1 Cr. App. 186; 25 T. L. R. 87.
(6) (1896) I. L. R. 18 All. 246.

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the peon, under section 99 they would not have been able to plead the right of private defence of property as a justification because the peon was acting in good faith under colour of his office, though his attachment of the cattle may not have been justifiable by law.

After careful consideration I am of opinion that in the circumstances of this case, the conviction of the petitioners under section 186 should not be upheld, and I would set aside the conviction and sentences and acquit them.

BUCKNILL, J.—I agree.

Convictions set aside.

APPELLATE CIVIL.

Before Das and Ross, JJ.

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Oct., 27.

EAST INDIAN RAILWAY CO., LTD.

v.

KISHUN CHAND KASARWANI.*

Railways Act, 1890 (*Act IX of* 1890), *section* 72(2)(*a*), *meaning of—Risk Note B, execution of, by person delivering the goods—contract, effect of, against the sender.*

Section 72(2) of the Railways Act, 1890, declares that an agreement purporting to limit the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to it to be carried by railway, shall, in so far as it purports to affect such limitation, be void, unless it : "(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods ".

Held, that the sub-section does not contemplate that the sender of goods must necessarily be the person delivering them to the railway administration.

* Appeal from Appellate Decree no. 638 of 1923, from a decision of Rai Bahadur Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 9th April, 1923, affirming a decision of B. Narendra Lal Bose, Munsif of Palamau, dated the 13th February, 1922.

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Where, therefore, *N*, delivered the goods on behalf of the sender and executed the risk note B, *held*, that the case was covered by section 72(2)(*a*), and that the contract was effective as against the sender.

This was an appeal by the East Indian Railway Company against a decision of the Subordinate Judge of Ranchi affirming a decision of the Munsif in a suit brought by the plaintiff-respondent for damages for the loss of one bale of cotton piece-goods. It appeared that two bales of cloth were despatched from Bombay to Daltonganj on the East Indian Railway and only one bale was delivered. The goods were despatched under risk note in Form B.

The Subordinate Judge held that as the risk note was executed by one Narsing, who was not the sender of the goods nor an authorized agent of the sender, the risk note was not an effective contract. He was further of opinion that as the railway company defendant had not pleaded loss, it was not necessary for the plaintiff to show that the non-delivery was due to wilful negligence on the part of the company's servants.

N. C. Sinha, for the appellant.

B. N. Mitter, for the respondent.

Ross, J. (after stating the facts set out above, proceeded as follows): In my opinion the decision of the learned Subordinate Judge is wrong on both points. It was found as a fact by the Munsif that the goods were delivered to the railway administration by Narsing, who signed the risk note. This finding has not been reversed by the Subordinate Judge; and it must be taken that the risk note was executed by the person delivering the goods to the Railway administration. This comes within the language of section 72 (*2*) (*a*); and, in my opinion, the learned Subordinate Judge was wrong in construing that section as meaning that the person sending and the person delivering the goods are necessarily the same. If Narsing delivered the goods on behalf of the sender to the railway administration, then he was the agent

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for executing the risk note under which the goods were despatched. In this view of the case it is unnecessary to deal with the further argument advanced on behalf of the appellant that the plaintiff had ratified the act of Narsing by taking delivery of one bale of goods under this risk note.

ROSS, J.

With regard to the second point, it is clear that this is a case of loss. The plaintiff in his plaint alleged that only one bale was delivered and that there was shortage. The railway company in their defence pleaded that there was no wilful negligence by reason of which the company was liable for any loss sustained by the plaintiff. The case was clearly a case of loss on the pleadings; and, in view of the terms of risk note in Form B, it was for the plaintiff to prove that the loss of one complete package was due to negligence on the part of the company's servants. No such proof was offered and the plaintiff's claim must therefore fail.

The appeal is allowed and the suit of the plaintiff is dismissed with costs in both the Courts below, but in the circumstances of the case there will be no costs of the appeal in this Court.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

BHATU RAM MODI

v.

FOGAL RAM.*

1925.

May, 5; Nov., 3.

Mesne profits, application for ascertainment of, whether can be dismissed—decree-holder, right of, to apply to Court to ascertain mesne profits—limitation.

* Appeal from Original Decree no. 98 of 1922, from a decision of B. Pramatha Nath Bhattacharji, Subordinate Judge of Hazaribagh, dated the 21st January, 1922.

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Where a decree for mesne profits has been passed and an application has been made for ascertainment of the mesne profits it is not competent to a Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed.

It is always open to the decree-holder to ask the Court to ascertain the mesne profits inasmuch as an application for mesne profits is an application in the suit itself and the law of limitation has no application to it so long as the suit is a pending suit.

Lachmi Narain Marwari v. *Balmakund Marwari* (1), relied on.

Appeal by the judgment-debtor.

On the 25th August, 1915, the Ramgarh Raj obtained a decree for possession of certain properties and for mesne profits up to the date of the decree

" at the rate of the rent fixed in the lease with interest thereon at the rate specified in the said lease."

and for subsequent mesne profits

" at the full rate recoverable under the law."

The Ramgarh Raj obtained possession of the properties on the 22nd February, 1916, and it therefore became entitled to mesne profits at the rate of rent up to the 25th August, 1915, and at the full rate from the 25th August 1915 to the 22nd February 1916.

On the 23rd December, 1915, the Raj presented an application for execution claiming Rs. 2,866-14-0 as mesne profits for eleven years up to the date of the decree and Rs. 1,069-11-9 as mesne profits from the date of the decree up to the 23rd December, 1915. The application was presented as a simple application for execution of the decree. Certain proceedings were taken and certain properties of the judgment-debtors were sold in this execution, but an objection having been taken the sale was set aside on the 8th December,

(1) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.

1917, and the decree-holder was directed to file a fresh execution. On the 13th August, 1919, another execution case was started by the Raj. On the 11th November, 1919, this was rejected as infructuous because certain substitutions had not been effected. On the 7th March, 1920, the third execution case was started. The judgment-debtor now for the first time raised the objection that mesne profits could not be ascertained in execution and that there was no application for ascertainment of mesne profits and that the application for execution could not be converted into an application for ascertainment of mesne profits. On the 17th April, 1920, the Court dismissed this application as barred by limitation. The Court also held that the proceedings could not continue as mesne profits had not been ascertained which must be ascertained in a proceeding in the suit itself. The decision of the Court on the question of limitation was subsequently set aside by that Court on review and that decision was upheld by the High Court. Having regard to this decision Fogal Ram who, meanwhile, had purchased the decree from the Raj, instituted the present proceedings on the 29th April, 1920, for the ascertainment of mesne profits. His application succeeded and the judgment-debtors appealed to the High Court, and they contended that having regard to the previous orders, namely, those passed on the 8th December, 1917, 11th November, 1919, and the 17th April, 1920, the present application was not maintainable. The matter was heard before Das and Adami, J.J., on the 5th May, 1925, when their Lordships delivered judgment agreeing with the contention of the appellants. Mr. B. C. De thereafter appeared before their Lordships before they had signed the judgment and he asked for permission to argue the matter again before them. Their Lordships acceded to the request.

Susil Madhab Mullick (with him *Bankim Chandra De*), for the respondent: The previous application for mesne profits does not debar the decree-holder from filing another application for

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realisation of the mesne profits. A decree for mesne profits having been passed, it is not competent to a court to dismiss a suit which is deemed to be still pending. The principle embodied in *Upendra Chandra Singh* v. *Sakhi Chand* (1) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (2) is no more good law. It has been practically overruled by the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (3) where it was held that a default on the part of the decree-holder in taking further steps after the passing of the preliminary decree in a partition suit does not entail the dismissal of the suit. There is no distinction in principle between a suit for partition and a suit for recovery of possession and mesne profits. Order XX, rule 12, does not require an application to be made for ascertainment of mesne profits as is required in the case of a mortgage suit under Order XXIV, rule 5. I also rely on *Ranjit Sahi* v. *Maulavi Qasim* (4) and *Lachmi Narain Tiwari* v. *Ramsaran Tiwari* (5).

Sultan Ahmed (with him *S. N. Dutt*), for the appellant: The court had jurisdiction to dismiss the application for ascertainment of mesne profits. The dismissal of the claim for mesne profits does not operate as the dismissal of the entire suit, nor can it affect the decree passed in the suit. Under the new code an application for ascertainment of mesne profits is a proceeding or a " sub-suit " in the original suit. It follows, therefore, that an order made in respect of the application will not necessarily affect the rights of the decree-holder acquired under the decree passed in the original suit. The point is concluded by *Upendra Chandra Singh* v. *Sakhi Chand* (1) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (2).

(1) (1912) 16 Cal. L. J. 3.
(2) (1919) 29 Cal. L. J. 470.
(3) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.
(4) (1924) 4 Pat. L. T. 257.
(5) (1925) 6 Pat. L. T. 152.

In *Lachmi Narain Marwari* v. *Balmakund Marwari* (1), which related to a partition suit, the court dismissed the entire partition suit although a preliminary decree had been passed. In the present case the court only dismissed the claim of the plaintiffs with respect to mesne profits but did not dismiss the whole suit. *Upendra Chandra Singh* v. *Sakhi Chand* (2) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (3), have not been touched by the Privy Council, and I submit they are still good law.

S. A. K

DAS, J. (after stating the facts set out above, proceeded as follows): In my opinion, having regard to the arguments which have been advanced before us to-day, we must affirm the decision of the lower court and dismiss this appeal.

The short point which falls to be considered is whether there is any power in a court to dismiss an application for ascertainment of mesne profits. It is contended before us by Mr. Susil Madhab Mullick that a decree having been passed for ascertainment of mesne profits it was not competent to the Court at any stage to dismiss those proceedings it being beyond the power of a Court to dismiss a claim which had already been decreed; and it was contended that if the previous applications be regarded as applications for the ascertainment of mesne profits, then the dismissal of those applications were from one point of view illegal and that in any case they could not prevent the decree-holder from inviting the Court to carry into effect the decree of the High Court, dated the 25th August, 1915 This view is supported by the decision of the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1). That decision was pronounced in a suit for partition. A preliminary decree for partition

(1) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.

(2) (1912) 16 Cal. L. J. 3.

(3) (1919) 29 Cal. L. J. 470.

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was made and all that remained to be done was to carry the partition into effect. The Subordinate Judge accordingly fixed a date for hearing the parties as to how the partition was to be effected and gave them notice but the plaintiff did not appear on the date fixed and thereupon the Subordinate Judge dismissed the suit for want of further proceedings. With reference to what was done by the Subordinate Judge, their Lordships said as follows: "After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced"; and then their Lordships said this. "If, for instance, the Subordinate Judge had made an order adjourning the proceedings sine die, with liberty to the plaintiff to restore the suit to the list on payment of all costs and court fees thrown away, it would have been a perfectly proper order".

Now it seems to me that this case decides the present controversy between the parties. The decree of the 25th August, 1915, in terms gave a decree to the plaintiff for mesne profits. There was, therefore, a valid decree which was operative and which the Court had to carry into effect. That decree was not set aside and it seems to me that the proceedings for the ascertainment of mesne profits could not be dismissed for the dismissal of those proceedings would operate as a dismissal of the suit which had already been decreed by the Calcutta High Court.

The question only arises as it is contended before us that although in form the previous applications may have been applications for execution of the decree, in substance they were applications for the ascertainment of mesne profits. I hold that if they were applications for the ascertainment of mesne profits, their dismissal was ultra vires and that it was open to the plaintiff to ask the Court to ascertain the mesne

profits. It is well established that an application for mesne profits is an application in the suit itself and that the law of limitation has no application to it so long as the suit is a pending suit.

Mr. Sultan Ahmed ingeniously argued before us that a distinction should be drawn between a suit and a claim which may be involved in the suit. He admits that the suit having been decreed it was not in the power of the learned Subordinate Judge to dismiss the suit; but he contended before us that the claim for mesne profits stood on a different footing. I am unable to agree with this contention. The only part of the suit that remained was that dealing with the question of mesne profits payable to the plaintiff and in any view the claim for mesne profits had in distinct terms been decreed by the Calcutta High Court and that being so that claim could not be dismissed by the learned Subordinate Judge.

I would accordingly dismiss this appeal. There will be no order as to costs.

It was brought to our notice that the lease does not provide for the payment of any interest. That being so, the plaintiffs will be only entitled to mesne profits at the rate of rent fixed in the lease up to the date of the decree.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mullick and Kulwant Sahay, J.J.

MUHAMMAD SHARIF

v.

RAI HARI PRASAD LAL.*

1925.

Nov., 3.

Code of Criminal Procedure, 1898 (Act V of 1898), section 526(8) and section 528(4)—"enquiry" meaning of—omission to record reasons for transferring a case, whether vitiates the order—jurisdiction.

* *In re.* an application, from an order of J. C. Dutt, Esq., Officiating District Magistrate of Gaya, dated the 15th October, 1925.

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Under section 526(8), Code of Criminal Procedure, 1898, " If in the course of any enquiry or trial ", the complainant or accused notifies to the Court before which the case is pending his intention to make an application for transfer of the case, " the Court shall adjourn the case..... ".

Held, that the words " enquiry or trial " in this section are intended to apply to those enquiries and trials which are specially referred to in the earlier portion of the Code. Therefore, a District Magistrate taking cognizance of an application for transfer is not holding an enquiry within the meaning of section 526(8).

Section 528(2) empowers any Presidency Magistrate, District Magistrate or Subdivisional Magistrate to withdraw any case from any Magistrate subordinate to him. Sub-section (5) provides : " A Magistrate making an order under this section shall record in writing his reasons for making the same ". *Held*, that although it is a sound rule of practice that there should be something on the record showing why an order under section 528 is made, the mere omission on the part of the Magistrate to record reasons for his order is not fatal to the order.

This was an application against an order of transfer made on the 15th October, 1925, by Mr. J. C. Dutt, Officiating District Magistrate of Gaya in a case instituted against Rai Hari Prasad Lal and others by one Muhammad Sharif. It appeared that Muhammad Sharif lodged a complaint before Mr. N. N. Singh, the Sadr Subdivisional Magistrate, who, after recording the complaint, sent it to Mr. Nawab, a Deputy Magistrate at the Sadr station, for inquiry and disposal Mr. Nawab after making an inquiring under section 202 of the Criminal Procedure Code, issued processes against the accused. Thereupon the accused made an application before the District Magistrate for the transfer of the case from the file of Mr. Nawab to that of some other Magistrate. The District Magistrate was of opinion that without the least reflection on the integrity of Mr. Nawab there were good reasons for transferring the case to some other magistrate and as no European Magistrate was available he transferred the case back again to the file of the Subdivisional Officer.

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It appeared that before the District Magistrate made this order the complainant had filed an application before him praying that he should under section 526 of the Criminal Procedure Code stay his hand and allow the complainant to move the High Court in order that the High Court might restrain the District Magistrate from hearing the application. The District Magistrate declined to allow this prayer and disposed of the transfer application.

The present application in revision was made against the transfer of the case on the ground that the District Magistrate had no jurisdiction to refuse to grant a postponement and that his proceedings subsequent to such refusal were void.

Md. Yunus, for the petitioner.

MULLICK, J. (after stating the facts set out above, proceeded as follows): It is urged by the learned Counsel for the petitioner that section 526 of the Criminal Procedure Code applies because the hearing of the transfer application was an inquiry within the meaning of clause (*8*) of the section.

Apart from the difference between jurisdiction and power and the respective results of the illegal exercise thereof I do not think section 526 has any application at all. The reference in clause (*8*) to inquiry or trial is clearly intended to apply to those inquiries or trials which are specially referred to in the earlier portion of the Code and if the argument of the learned Counsel is accepted, then the recording of a complaint might also be restrained under this clause. That obviously cannot have been the intention of the law.

It has been held that section 526 applies to certain cases of a quasi civil nature such as inquiries into disputes about immoveable property, but that does not in any way touch the question now before us.

Nor does principle require us to accept the learned Counsel's interpretation. As a magistrate taking cognizance of an application for transfer is not

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holding any inquiry into the guilt or innocence or into the rights and liabilities of any party it is not clear what urgent necessity can arise at this stage for restraining the magistrate from exercising jurisdiction. And to take a concrete case the inconvenience of accepting the petitioner's contention becomes clear when the facts of the present case are examined. The object of the learned Counsel is to get the order of transfer vacated. For this the law gives him the power to apply under section 526 to the High Court to have the case transferred to some other court or retransferred to the file of Mr. Nawab and pending the orders of the High Court Mr. N. N. Singh is required by clause (*8*) to stay the trial. In support of that application under section 526 it would be open to the petitioner to take the very ground on which he now attacks the District Magistrate's order—namely that he was not competent to hear the transfer application. What then would be the object of giving the petitioner two chances of moving the High Court when one chance is sufficient?

In point of fact no reason has been shown to-day why the District Magistrate was incompetent to hear the transfer application, and if the District Magistrate had allowed the petitioner's prayer and given an adjournment pending an application to the High Court the result would have been nothing short of a wholly vexatious delay. The High Court would have rejected the application, the case would have gone back to the District Magistrate and he would in the end have passed the same order that he passed on the 15th October. The present law even at the risk of having its solicitude abused provides parties with ample opportunities for staying cases and unless compelled by express words I do not think it would be right to add to those opportunities by accepting the interpretation sought to be put upon section 526 by the petitioner.

The substantial question therefore only remains whether the District Magistrate's order will lead to injustice.

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It is urged that the District Magistrate should have recorded his reasons for transferring the case. Now section 528 of the Criminal Procedure Code does not require in terms that the Magistrate should give any reason, but it is a sound rule of practice that there should be something on the record showing why the order was made. In the present case it is possible that the fact that Mr. Nawab had held a preliminary inquiry into the case before the issue of process may have had some weight with the District Magistrate. He may also have thought that there were other grounds but the omission to record these ought not to be fatal to the order. The learned District Magistrate has exercised a jurisdiction vested in him and unless strong grounds for so doing are shown we are not prepared to vacate the order. If Mr. Singh had not transferred the case to Mr. Nawab he himself would have disposed of it. Matters have now been restored to the state in which they were when the complaint was filed and as it has not been shown that Mr. Singh is disqualified in any way from trying the case we ought not to interfere.

The application fails both on the point of jurisdiction and the merits and is dismissed.

KULWANT SAHAY, J.—I agree.

Application rejected.

APPELLATE CIVIL.

Before Das and Adami, J.J.

MAHARAJA KESHO PRASAD SINGH

v.

SHAMNANDAN RAI.*

1925.*

Nov., 3.

Rent Decree against a dead tenant—whether the rest of the decree is a nullity—tenant, joint and several liability of, to pay rent.

* Appeal from Appellate Decree no. 1013 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Shahabad, dated the 26th June, 1923, confirming a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 2nd September, 1921.

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A decree against a dead person is a nullity.

Jungli Lal v. *Laddu Ram Marwari* (1), followed.

But the question whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representative-in-interest of the deceased defendant on the record affects his right to proceed with the suit.

The liability of a tenant to pay rent being joint and several, it is always open to a landlord to bring a suit for rent against all or any of the tenants; though a decree against some of them only can be executed only as a money decree, and a sale held in execution thereof will pass only the right, title, and interest of the judgment-debtors.

Ananda Kumar Naskar v. *Hari Das Haldar* (2), *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (3), *Chandra Nath Tewari* v. *Protap Udai Nath Sahi* (4), *Joy Gobind Laha* v. *Manmotho Nath Banerji* (5), *Abdul Aziz* v. *Basdeo Singh* (6) and *Nathuni Narayan Singh* v. *Mahanth Arjun Gir* (7), relied on.

Where, therefore, a decree was obtained by a landlord against his tenants, some of whom were dead at the time of the institution of the suit, and, in execution thereof, the holding was sold, *held*, that the liability being joint and several, only so much of the decree as affected the rights of the deceased defendants was a nullity and that the sale passed the right, title, and interest of the surviving judgment-debtors.

Appeal by the defendant.

The Maharaja of Dumraon, who was the appellant in this case, brought a rent suit against the present plaintiffs, the present defendants 4 to 10 and seven other persons who were dead at the date of the institution of the suit. The Maharaja was made aware of the fact that seven of the defendants were already dead and it appeared that he filed a petition

(1) (1919) 4 Pat. L. J. 240.
(2) (1899-1900) 4 Cal. W. N. 608.
(3) (1906-07) 11 Cal. W. N. 1026.
(4) (1913-14) 18 Cal. W. N. 170.
(5) (1906) I. L. R. 33 Cal. 580.
(6) (1912) I. L. R. 34 All. 604.
(7) (1925) 6 Pat. L. T. 526.

in the Court asking the Court not to pass any decree against the dead persons. He recovered judgment as against those tenants who are living but in the decree the names of the dead persons were included. The judgment was pronounced on the 26th April, 1919. In due course the Maharaja took out execution and the holding was purchased by the present defendants 2 and 3. It was alleged by the present plaintiffs that defendants 2 and 3 were the benamidars of the Maharaja. The present plaintiffs applied for setting aside the sale under the provisions of Order XXI, rule 90, of the Code and that application was rejected on the 8th May, 1920. On the 17th July, 1920, defendants 2 and 3 took delivery of possession of the holding. On the 18th August, 1920, the suit out of which this appeal arose was instituted by the plaintiffs-respondents for setting aside the decree of the 26th April, 1919, on the ground of fraud. Various allegations were made in the plaint so as to raise a case of fraud from start to finish. These allegations were not examined either by the primary Court or by the lower appellate Court. The courts below decreed the suit on the ground that the decree of the 26th April, 1919, obtained by the Maharaja, was a nullity inasmuch as it was obtained against dead persons. The holding purchased by defendants 2 and 3 comprised an area of 14·55 acres and the plaintiffs in this suit claimed to recover 6·36 acres as their share in the holding.

L. N. Sinha and *N. N. Sinha*, for the appellant.

P. Dayal and *C. S. Banerji*, for the respondents.

DAS, J. (after stating the facts set out above, proceeded as follows): It is not open to doubt that a decree against a dead person is a nullity. This was laid down in *Jungli Lal* v. *Laddu Ram Marwari* (1); but the question whether the whole decree is a nullity must depend on the question whether the failure on the part of the landlord to bring the representatives in

(1) (1919) 4 Pat. L. J. 240.

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interest of the deceased tenants on the record affected his right to proceed with the suit. This again must depend on the question whether the tenants who are properly sued could take the plea that the suit could not proceed until the representatives in interest of the deceased tenants were brought on the record. Now on this question it seems to me that only one answer is possible. Under section 43 of the Indian Contract Act the liability of the joint promissor is joint and several and that section excludes the right of the joint contractor to be sued along with his co-contractors. It was in my opinion open to the landlord to bring a suit for rent against all or any of the tenants; though it may be conceded that a decree against some of the tenants cannot be executed as a rent decree and can only be executed as a money decree. This view has been affirmed in cases far too numerous to mention. In *Ananda Kumar Naskar* v. *Hari Das Haldar* (1) a decree was obtained in a suit for rent against some only of the tenants. It was held that the sale did not pass the entire jama but that only the right, title and interest of the judgment-debtors passed. In *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2) it was held that a suit for rent against some of several joint tenants is maintainable as joint tenants are jointly and severally liable. In *Chandra Nath Tewari* v. *Protap Udai Nath Sahi* (3) it was held that a decree obtained against some of the tenants cannot be executed as a decree for rent but that it is open to the landlord to treat the decree as a decree for money and to execute it as such. In *Joy Gobind Laha* v. *Manmotho Nath Banerji* (4) the question arose whether the whole appeal had abated because one of the tenants had died and no legal representative of the decease had been brought on the record. It was held that the liability of the tenants being joint and several the death of one of the tenants without his legal representatives being substituted in his place did not have the

(1) (1899-1900) 4 Cal. W. N. 608.
(2) (1906-07) 11 Cal. W. N. 1026.
(3) (1913-14) 18 Cal. W. N. 170.
(4) (1906) I. L. R. 33 Cal. 580.

effect of exonerating the other defendants from the liability. This case was followed in *Abdul Aziz* v. *Basdeo Singh* (1). I find that a similar view has been taken in this Court in *Nathuni Narayan Singh* v. *Mahanth Arjun Gir* (2).

Now this being the position, it is quite clear that the entire decree obtained by the Maharaja on the 26th April 1919 cannot be regarded as a nullity. It is quite true that the holding did not pass at the execution case which followed the decree of the 26th April 1919 and it is also true that the interests of those tenants who were dead before the institution of the suit did not pass at the sale. But the present plaintiffs were parties to the suit and their interests undoubtedly passed at the sale. In my opinion the Courts below were wrong in decreeing the claim of the plaintiffs on the ground that the decree of the 26th April, 1919, was a nullity.

But the questions which were raised by the plaintiffs have not been investigated by the Courts below and I should like to point out that the course adopted by the learned Additional Subordinate Judge was wrong. It may be that he was confident that his decision on the point of law was a correct decision; but it is at least conceivable that a superior court may differ from him as to his decision on the point of law and in my opinion the learned Additional Subordinate Judge should have tried all the issues that arose in the case. This would have had the effect of not only shortening the litigation but of saving of costs to the parties.

I would allow the appeal, set aside the judgments and the decrees passed by the Courts below and remand the case to the lower appellate court with instructions that it should remand the case to the Court of first instance for decision of the questions of facts raised in the case. The appellant is entitled to the costs both of this Court and in the Courts below. The costs

(1) (1912) I. L. R. 34 All. 604. (2) (1925) 6 Pat. L. T. 526.

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incurred in the first court will abide the result and will be disposed of by the learned Subordinate Judge.

We are informed that one of the plaintiffs is the representative in interest of one of the dead persons. If that be so, his interest has not passed by the execution sale. The learned Subordinate Judge in dealing with the case will bear this in mind.

ADAMI, J.—I agree.

Case remanded.

APPELLATE CRIMINAL.

Before Mullick and Kulwant Sahay, J.J.

1925.

Nov., 4, 5.

RAMSUNDAR ISSER

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 34, 149 *and* 436—*Notification making an offence under section* 436 *triable by a jury, whether applicable to a trial for an offence under section* 436 *read with section* 149.

Under section 269(*1*) of the Code of Criminal Procedure, 1898, "The Local Government may.....by order in the official Gazette direct that the trial.....of any particular class of offence, before any Court of Session, shall be by jury in any district".

By a notification published in the official Gazette on the 11th September, 1921, certain offences, including an offence under section 436, Penal Code, were directed to be tried by jury, in the district of Darbhanga. An accused person was committed by the Subdivisional Magistrate to the Court of Session for trial on charges of arson and abetment of arson. In the Session Court these charges were dropped and the accused was charged under section 436 read with section 149, and was tried by a Judge with the aid of assessors.

Held, that the effect of the notification was to make a charge under section 436 read with section 149 triable by jury, and, therefore, the trial by the Judge with the aid of assessors was void.

* Criminal Appeal no. 158 of 1925, from a decision of Rai Bahadur J. Chattarji, Sessions Judge of Darbhanga, dated the 29th August, 1925.

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The appellants Amrit Gope, 'Ali Hussain and Gopal Dusadh were the peons of the appellants Ramsunder Isser and Jagdambi Isser. Ramdhani was the tenant of the maliks, Ramsunder and Jagdambi. He lodged an information at the police-station to the effect that the maliks had made an attack on his house and had caused his hut to be set on fire. The Sub-Inspector who investigated the case reported that the case was false.

Further investigations were then made by another Sub-Inspector and also an Inspector; but the police were unanimous that Ramdhani's complaint was not true and they declined to send up the accused for trial. The Subdivisional Magistrate, however, thought that there was a prima facie case and he directed a charge-sheet to be sent up against the five appellants and eventually he framed charges under section 436, Penal Code, and 436 read with 109 against the appellants and committed them for trial to the Court of Session.

In the Session Court the charge framed by the Subdivisional Magistrate upon the evidence recorded by him as regards the offence of arson and abetment of arson was dropped and a new charge of which there had been no mention in the Committing Magistrate's Court was added at the suggestion of the Public Prosecutor, namely, one under section 149 read with section 436, Penal Code. The alteration had an important bearing upon the trial. For in the Darbhanga district certain offences, including an offence under section 436, were specially enumerated in a notification published in the official Gazette on the 11th September, 1921, as triable by jury. All other offences remained triable by assessors. In the opinion of the learned Sessions Judge an offence under section 149 read with section 436 not being an offence under section 436 but a separate offence the accused could not claim the right of trial by jury.

For the purpose of understanding the arguments the facts appear sufficiently in the above head-note.

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Hasan Imam (with him *Baikunth Nath Mitter*, and *G. N. Mukherjee*), for the appellant: I am entitled to be tried by a jury for an offence under section 436 read with section 149, Penal Code. Section 149 does not constitute an independent offence by itself. If an accused person is charged under section 149, he is virtually charged for the offence created by the section which is tied up with section 149. The appellant in the present case is really charged under section 436 but he is liable to be so charged by reason of section 149. The language of section 149 is entirely different from that of sections 109 and 511 which makes the abetment and attempt to commit an offence, a like offence; and the accused, though not really liable for the offence, is punishable in the same manner as if he were in fact liable. Hence these sections were specifically mentioned in the notification as triable by a jury, but a case covered by section 149 stands on a different footing.

[MULLICK, J.—But the Judicial Committee in *Barendra Kumar Ghosh* v. *King-Emperor* (1) says that section 149 creates a " specific offence ".]

It creates a specific offence in this way: If *A* commits an offence he is guilty of that offence, but *B* by being a member of the unlawful assembly is liable for the same offence by reason only of section 149; in other words, had it not been for section 149, there would have been no offence.

[KULWANT SAHAY, J.—What is meant by " specific offence " is that although *B* does not actually commit the offence he is guilty for an offence created by section 149.]

I submit not. *A* by committing an offence is liable for it. *B* although not actually committing it, is also liable for that offence by reason of section 149. *B* is a sharer in the principal offence, and if he is to be charged and convicted for the offence, surely he is to be tried for the offence.

(1) (1925) I. L. R. 52 Cal 197, P. C.

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H. L. Nandkeolyar, Assistant Government Advocate, for the Crown: The observation of Lord Sumner in *Barendra Kumar Ghosh* v. *The King-Emperor* (1) makes it clear that the offence under section 149 is a specific and separate offence. If an accused person is charged under section 436 read with section 149 he is really charged with an offence created by section 149. It is section 149 alone that makes him liable for the offence. A person charged under sections 109 and 511 stands in a similar position. He does not actually commit the offence but he is made liable by reason of sections 109 and 511. These two sections are specially mentioned in the notification which specifies the offences triable by a jury and the omission of section 149 therefrom is significant. I submit, therefore, on the authority of *Barendra Kumar Ghosh* v. *The King-Emperor* (1) that the Sessions Judge was right in treating section 149 as constituting a separate and specific offence not included in the notification and hence triable with the aid of assessors.

Hasan Imam, replied.

S. A. K.

MULLICK, J. (after stating the facts of the case, proceeded as follows): The first question that arises is one of jurisdiction. Was the learned Judge right in holding that a trial for an offence under section 149 read with section 436 and a trial for an offence under section 436 are trials for different offences so that the notification does not apply? It may be contended that neither section 34, Indian Penal Code, nor section 149 create distinct offences and that they are merely rules of evidence or of common law which fix liability upon joint wrong-doers. On the other hand it may be argued that just as specific provision has been made for abetments, attempts and conspiracies and they are treated as separate offences, so also does section 149 create a distinct and separate offence and

(1) (1925) I. L. R. 52 Cal. 197, P. C.

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that the offence of one who participated is not the same as that of him who set fire to the house. Some support for this view might at first sight seem to be furnished by the judgment of Lord Sumner in *Barendra Kumar Ghosh* v. *Emperor* (1). Lord Sumner there speaks of section 149 creating a specific offence and dealing with the punishment of that offence alone, but the learned Judge was there merely considering the difference between section 34, section 149 and section 114 of the Penal Code and in particular whether any of these sections were redundant and how far they overlapped. He came to the conclusion that although sections 34 and 149 overlap they do not wholly cover the same field, and as regards section 114 his opinion was that it was evidentiary and not punitory. The observations of his Lordship do not affect the questions now before us. It is true section 149 is an offence in respect of which there has been participation. It prescribes a new set of conditions to which the section shall become applicable but in the end the guilt of the person shall be the guilt attaching to the principal's crime. Now when the notification of the 11th September, 1921, declares that the trial of an offence under section 436 must be by jury and not by assessors it means that assessors are incompetent to determine whether a certain set of facts constitute the offence. It follows that the disability continues where the inquiry is whether upon the additional set of facts widening the field of liability prescribed in section 149 the accused has rendered himself punishable for the same offence. The trial remains a trial under section 436; the Court must always first determine whether that offence has been committed by an individual and next whether section 149 makes the participators responsible; and so it is with section 34 also. The trial in the present case was a trial for the offence of arson and by no stretch of argument can I persuade myself that the object of the notification was that while Amrit Gope would have been triable by a jury those who assisted in the prosecution of the

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common object of the unlawful assembly were triable by assessors whose opinion was less final on a question of fact than the verdict of a jury.

We cannot tell on the facts before us for what reason the alteration of the charge was made. It was open to the learned Sessions Judge to add an alternative charge but I do not think that it was a proper exercise of discretion to withdraw the charge which the Committing Magistrate thought to be proved and put the accused under a disadvantage by substituting another so that he might be deprived of the right of trial by jury.

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In my opinion, therefore, the trial was held without jurisdiction and the question is whether we should order a retrial. The answer to that question depends upon the evidence adduced.

[After considering the evidence his Lordship concluded that in the circumstances a fresh trial should not be ordered. The appellants were acquitted.]

KULWANT SAHAY, J.—I agree.

Convictions set aside.

CRIMINAL REFERENCE.

Before Adami and Bucknill, J.J.

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Oct., 29; Nov., 6.

FIRANGI SINGH

v.

DURGA SINGH.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 249, *applicability of, to warrant cases—Magistrate, power of, to start a fresh case upon a complaint, while the police case is already on the file.*

* Criminal Reference no. 63 of 1925. Reference made by M. G. Hallett, Esq., I.C.S., District Magistrate of Gaya, dated the 25th July, 1925.

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An accused person in a warrant case was released by the Subdivisional Magistrate who purported to act under section 249 of the Code of Criminal Procedure. Subsequently, upon a complaint made by the informant in that case, the successor-in-office of the Magistrate summoned the accused.

Section 249, which appears in Chapter XX of the Code, the heading of which is " Of the Trial of Summons Cases by Magistrates ", provides: " In any case instituted otherwise than upon complaint " a Magistrate " may.....stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused ".

Held, (*i*) that the order of release was invalid; (*ii*) that the case being still on the file of the Magistrate it could be reopened either upon application by the Crown or suo motu by the Magistrate; but (*iii*) that while the police case was already on the file of the Magistrate, he could not start a fresh case upon a complaint made by a private party.

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

Manohar Lal, in support of the reference.

H. L. Nandkeolyar, Assistant Government Advocate (with him *K. P. Jayaswal*), against the reference.

BUCKNILL, J.—This was a reference made to this Court by the District Magistrate of Gaya under the provisions of section 438 of the Criminal Procedure Code. This reference came before Macpherson, J., on the 2nd of September last and that learned Judge, thinking that a novel point arose in connection with it, referred the matter to a Bench; the learned Judge also considered that it was desirable that the Crown should appear.

The difficulties which have occasioned this reference arose out of some rather confused criminal proceedings; and to what appear to be some mistakes in procedure made by two Subdivisional Officers which under the circumstances are not perhaps surprising. The position may be thus shortly explained. Last October there was a dispute about irrigation between the inhabitants of two villages

called Kunj and Chari in the Gaya district. As a result no less than three cases were started. What is called case no. 1 was a summons case; the charge was under section 143 of the Penal Code and was against the men of both the villages. What is called case no. 2 was a warrant case drawn up against certain persons under the provisions of sections 148, 323 and 430 of the Penal Code. It was against villagers of Kunj and in connection with that case a man of Chari village had been injured. What is called the third case was also a warrant case. This was directed against the villagers of Chari. All the cases came before the Subdivisional Officer. He tried case no. 2 but kept cases nos. 1 and 3 pending until the result of the trial with which he was proceeding. The upshot of case no. 2 was that he convicted the accused. He then, in respect of the case no. 1, passed an order (as he was entitled to do) under section 249 of the Code of Criminal Procedure stopping the proceedings and releasing the accused. In case no. 3 he also passed a similar order, purporting to act under section 249; he also directed the case to be entered as false. No question arose as to the Subdivisional Officer's power to deal as he did deal with the first case. But a question does arise whether he had any power to deal with case no. 3 (a warrant case) under the provisions of that section. But in case no. 2 there was an appeal and the Sessions Judge reversed the decision of the Subdivisional Officer, and set aside the conviction. The Subdivisional Officer's order of conviction took place on the 23rd March last and his two orders relating to case nos. 1 and 3 were made on the same day. The learned Sessions Judge's decision was on the 6th May last. The next thing which happened was that on the 16th June the person who had been the informant in the case no. 3 applied to the Subdivisional Officer (who was not the same individual as the Subdivisional Officer who had tried case no. 2) making what purports to be a complaint; at any rate he was examined on oath by the new Subdivisional Officer; he sent for the connected records

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and on the 26th of June he passed an order summoning the accused. The District Magistrate in his reference suggests that both the orders of the Subdivisional Officers of the 27th March, 1925, purporting to stop case no. 3 under the provisions of section 249 of the Code of Criminal Procedure and that of his successor of the 26th June summoning the accused on what appears to be a complaint made by the informant in case no. 3 are wrong and should be set aside. There seems no doubt that both these orders must be set aside. In the first place there appears to be no good authority of any kind for suggesting that section 249 can be utilized in respect of a warrant case. The heading of Chapter XX of the Code of Criminal Procedure which comprises sections 241—249 refers to the

"Trial of summons cases by Magistrates",

and, as has been pointed out by the learned Assistant Government Advocate, it is quite clear that, upon a perusal of sections 247—249, the last named section is only intended to apply to summons cases instituted other than upon complaint. It is true that Mr. Sohoni on page 614 of his work on the Code of Criminal Procedure (11th edition) seems to think that the procedure contemplated under section 249 might be applicable to warrant cases; but it is an old section and so far as can be ascertained there is no case which lays down such a proposition. Indeed from reading the preceding sections it certainly seems evident that section 249 only deals with summons cases instituted other than upon complaint. Section 247 relates to summonses issued upon complaint and what the Magistrate's duties are if the complainant does not appear. Section 248 contemplates the possibility of withdrawal of a complaint by a complainant whilst section 249 contemplates the powers of a Magistrate as to stopping cases and releasing the accused in any case instituted other than upon complaint. This order, therefore, thus made by the Subdivisional Officer on the 23rd March last is obviously one which he could not make and although it is in effect of no

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value it is, I think, desirable, in order that there should be no future difficulty, that we should formally declare that it is illegal and, so far as may be, if at all necessary, set it aside.

Now, although it has been suggested that what the complainant in case no. 3 did when he came up before the new Subdivisional Officer with his petition on the 16th of June last amounted only really to an informal drawing of the attention of the Subdivisional Officer to the fact that case no. 3 was still in existence on his file and had not been disposed of, I do not think that such a suggestion can on examination be seriously entertained; nor was it, I think, very seriously put forward by the learned Counsel who in effect appeared in support of what the Subdivisional Officer had directed by his order of the 26th June. The fact remains that it would seem that the Subdivisional Officer treated the petition as a complaint; he examined the accused on oath and in this way he seems to have treated the matter as one of which cognizance was being taken under the provisions of section 190 (*1*) (*b*) of the Code of Criminal Procedure; in other words as a fresh affair. It need hardly perhaps be pointed out that, as the order made by his predecessor on the 23rd March purporting to act under section 249 was void, the case was still really on his file and cognizance had already been taken of it under section 190 (*1*) (*a*). It has been suggested, somewhat tentatively, that the order in case no. 3 made by the Subdivisional Officer on the 27th March last, although purporting to be made under section 249, might be regarded as one made properly under section 253(*2*) as it is argued that the upshot is really the same and that it is merely a difference of form. I am not prepared to say that there is no difference in the effect of stopping a case under section 249 and the discharge of an accused under section 253(*2*); but in this case I do not think that such a question is material or really arises because the Subdivisional Officer expressly purported to deal with the matter under section 249 and in addition ordered that the case should be entered as false. Now

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in his order of the 26th June the new Subdivisional Officer after reciting what had previously taken place and the order made in the 3rd case observes:

"Durgi Singh who is the complainant in case no. 8 now comes up and files this petition that his case might now be taken up and dealt with according to law. His prayer seems reasonable. I accordingly summon the accused under sections 430 and 147, I. P. C. Also summon prosecution witnesses for that date."

Now the learned Assistant Government Advocate has pointed out that it was not open to the Subdivisional Officer to take any such action as he did in re-opening a warrant case which was already on his file on an application of a private party. It seems very clear that what the Subdivisional Officer actually did (although his order is not particularly lucid) was that he really started a case de novo; but this he could not do because case no. 3 was still really on his file. There seems no doubt that he thought that his predecessor's order with regard to case no. 3 was a valid one and that it was not was never brought to his notice. It is quite clear that he could not act as he did in re-opening the case supposing that what he did could be regarded as his having done so upon the application of a private party. The learned Assistant Government Advocate points out that the Subdivisional Officer could of course re-open the case either upon application by the Crown or suo motu; but in this case he did neither. Whilst the police case was already on his file he could not start a fresh case upon a complaint. There is no authority of any kind given to us to controvert the views which have been placed before us by the learned Assistant Government Advocate. We, therefore, consider (*a*) that the order of the Subdivisional Officer of the 27th March under section 249 of the Code of Criminal Procedure was altogether an invalid order. It is hereby set aside. The result is that the warrant case no. 3 is still on the file of the Subdivisional Officer. (*b*) The order of the Subdivisional Officer of the 26th June is also invalid; it too must be set aside. The result will be as before that the warrant case no. 3 is still on the Subdivisional Officer's file as it stood on

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the 27th of March last at the time of the invalid order purporting to be made under section 249 with regard thereto. (*c*) The reference of the District Magistrate of 25th July, 1925, is therefore accepted. (*d*) The Subdivisional Officer either of his own motion or of course upon the application of the Crown may, if he so thinks fit, proceed with the warrant case no. 3.

ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Dawson Miller, C.J., and Foster, J.

SRI SRI BAIDYANATH JIU

v.

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Limitation Act, 1908 (*Act IX of* 1908), *section* 10, *and Schedule I, Articles* 102, 120 *and* 131—*Suit to enforce payments due as remuneration arising out of a recurring right—right to be paid out of the proceeds of trust property—section* 10, *applicability of.*

Article 131, Limitation Act, 1908, prescribes the period for a suit "to establish a periodically recurring right". *Held*, that the Article has no application to a suit where the claim is not for the establishment of a periodically recurring right but for remuneration arising by reason of the right itself.

Lachmi Narain v. *Turab-un-Nissa* (1), approved.

Manevikrama Zamorin Raja Avergal of Calicut v. *R. P. Achutha Menon* (2) and *Sakharam Hari* v. *Lachmipriya Tirtha Swami* (3), dissented from.

* Second Appeal no. 625 of 1923, from a decision of R. E. Russell, Esq., I.C.S., District Judge of the Santal Parganas, dated the 7th May, 1923, affirming a decision of B. Satish Chandra Mukherji, Subordinate Judge of Deoghar, dated the 29th December, 1922.

(1) (1912) I. L. R. 34 All. 249. (2) (1915) I. L. R. 38 Mad. 916, F. B.

(3) (1910) I. L. R. 34 Bom. 349.

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The plaintiffs instituted a suit for the recovery of certain dues which they claimed to be payable to them as remuneration in respect of their hereditary services as dwaris of a certain temple. The claim covered a period of thirteen years before the institution of the suit.

Held, (*i*) that the suit was not governed by Article 102, which relates to a suit for wages, inasmuch as the plaintiffs were not entitled to regular recurring wages but merely to certain fees by way of emoluments attaching to an hereditary office; (*ii*) that it was not governed by Article 131 as it was not a suit "to establish" a periodically recurring right; but (*iii*) that it was governed by Article 120, which prescribes a six years' period of limitation for a "suit for which no period of limitation is provided elsewhere in" Schedule I of the Act; and (*iv*) that the claim in respect of the period prior to six years from the institution of the suit was barred; *held*, further, that section 10 of the Limitation Act, which provides that, "no suit against a person in whom property has become vested in trust for a specific purpose.....for the purpose of following in his.....hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time", does not apply to a suit brought, not for the purpose of following the trust property in the hands of the trustee, but for the recovery of payments in the nature of wages out of the proceeds of the trust property.

Appeal by the defendant.

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

N. C. Sinha and *B. B. Ghose*, for the appellant.

A. B. Mukherji and *B. B. Mukherji*, for the respondents.

DAWSON MILLER, C.J.—The plaintiffs, who are respondents in this case, are three dwaris of the celebrated temple of Baidyanath at Deoghar. They have instituted this suit to recover certain dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple. The remuneration consists of payments for the greater part in kind which are said to be due for special services in connection with the performance of the hom puja and to a small extent in cash in respect of

other services. The suit was instituted originally against Sadhupadhya Umesha Nand Jha who was the high priest in charge of the temple of Sri Sri Baidyanath but pending the suit, sometime in 1920, the high priest died and, as there was a dispute about the succession, a Receiver was appointed to take charge of the properties of the temple, and he (the Receiver, Babu Suresh Chandra Chaudhury) has been substituted in place of the original defendant.

Amongst other defences to the suit, it was contended on behalf of the defendant that the claim, which covers a period of thirteen years before the institution of the suit, was barred or partly barred by limitation. On the other hand the plaintiffs contended that section 10 of the Limitation Act applied to a suit of this nature and consequently that no period of limitation applied in the case. This view was accepted by the learned District Judge whose judgment is the subject of this appeal. The contention apparently is that the suit is one for the purpose of recovering part of the trust property or the proceeds thereof from the hands of those who are responsible for its distribution. It seems to me that it is impossible to regard a suit of this nature as coming within the purview of section 10. The plaintiffs, although no doubt they are entitled out of the proceeds of the property belonging to the temple to certain payments in the nature of wages and to certain remuneration, cannot, in my opinion, be said to be bringing this suit for the purpose of following the trust property in the hands of the trustee. Their claim is not one which has been shewn to be in any way charged upon the trust property, although no doubt the payments made to them must come out of the proceeds of the endowment, but if one were to hold that this is a suit coming within section 10 then it seems to me that it would equally follow that any claim by a servant or other person who had a right to be paid remuneration even for wages would equally be bringing a suit within the meaning of section 10. It is sufficient to say that, in my opinion, section 10 has no application to the present suit.

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It was contended by the appellant, in the first place, that the claim was one for wages and was covered by Article 102 of the Limitation Act which provides for a suit for wages not otherwise expressly provided for by the schedule, the period being three years from the date when the wages accrued due. Alternatively he relied on Article 120 which provides a 6-years' period of limitation. The respondents, who sue on behalf of themselves and the other dwaris attached to the temple, although they are in a sense servants of that institution, hold in fact an hereditary office. They are bound to perform certain services, and by way of emolument they are entitled to certain specific payments. Although the services, on the occasions when they officiate, are performed only by a few of them, the fees to which they are entitled are distributed amongst the whole body of the dwaris. They are not paid a regular recurring wage but certain fees as emoluments attaching to the hereditary office. It does not appear to me that a case like this is one which is governed by Article 102 of the Limitation Act. I do not consider that the payments made in this case which were almost entirely payments made in kind, so much ghee per year, can come under the head of wages.

It was contended by the respondents that if section 10 had no application, then Article 131 applied to the case. That Article provides for a suit to establish a periodically recurring right, and the period of limitation is twelve years from the time the plaintiff is first refused the enjoyment of the right. There have been conflicting decisions in the High Courts in India as to the applicability of that Article in cases where the claim is not for the establishment of a periodically recurring right but for the remuneration arising by reason of the right itself. The High Court at Madras has taken the view that Article 131 of the schedule applies to a suit to recover sums due under such a right, whether there is a prayer for declaration of the plaintiff's right or not, and in the case of *Manavikrama Zamorin Raja Avergal of*

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Calicut v. *R. P. Achutha Menon* (1) a full bench of the Madras High Court, after expressing some doubt as to the propriety of earlier decisions of the same Court, eventually arrived at the conclusion that those decisions should not be interfered with. In fact the Chief Justice states his opinion thus: "If this matter had been *res integra* I should have been disposed to hold that Article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right." He felt, however, that the earlier decisions of the same Court ought not to be overruled and Sankaran Nair, J., who agreed with him, admitted that the question was not free from doubt. Oldfield, J., also agreed with the learned Chief Justice for the reasons stated by him. That decision undoubtedly finds some support also from a decision of the Bombay High Court [*Sakharam Hari* v. *Luxmipriya Tirtha Swami* (2)]. After expressing the opinion that a cash allowance due from one temple to another was in the nature of nibandha or immoveable property, the Court there held that where it was annually payable the right to payment gave to the person entitled a periodically recurring right as against the person liable to pay, and the right to any amount which has become payable stands, as to such person, on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. As against these decisions we have a different view taken by the High Court at Allahabad. In the case of *Lachmi Narain* v. *Turab-un-Nissa* (3) it was held that the words of Article 131 are altogether inapplicable to a suit to recover arrears of payments due under a registered contract and an earlier case of the Chief Court of the Punjab was followed in preference to the view held by the Madras High Court.

(1) (1915) I. L. R. 38 Mad. 916, F. B. (2) (1910) I. L. R. 34 Bom. 349.
(3) (1912) I. L. R. 34 All. 246.

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It seems to me that there is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. In the present instance a suit has been brought and went on appeal to the High Court and was finally decided in July, 1920, in which the present plaintiffs sued the present defendant for declaration of the very right in respect of which the remuneration is now claimed. Having had their right declared in that suit they then brought the present suit claiming not to establish their right, which is already established by the decree of the High Court, but to recover the remuneration due to them for the hereditary services for which they had not been paid, and which in fact they had not been allowed to perform pending the dispute between the parties. I think that some light can be thrown upon this matter by reference to Articles 128 and 129 which almost immediately precede the Article in question. It is quite clear from a perusal of those Articles, one of which applies to a suit by a Hindu for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance, that the framers of this Act had clearly in mind the distinction between a suit for a declaration of a right and a suit claiming arrears of remuneration arising out of the exercise of that right, and had it been the intention to include both classes of suit under Article 131 I think that we should have found words appropriate to that effect. It seems to me that Article 131 was intentionally drafted so as to include merely a suit to establish a right.

In these circumstances as none of these Articles appear to be applicable to the facts of the present case one must look to the general Article 120 which the appellant relied on if Article 102 should not apply; and this appears to me to be the Article applicable to the present case. It provides for a suit for which no period of limitation is provided elsewhere in the schedule and the period of limitation is six years from the date when the right to sue arises. If that Article

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is applicable, as I think it is, it follows that the claim of the plaintiffs in this case is barred beyond six years back from the period when the suit was brought.

The result is that the decree of the learned District Judge will be varied by limiting the amount recoverable to the dues falling within six years from the date when the suit was instituted. I think that the appellant is entitled to his proportionate costs of this appeal.

FOSTER, J.—I agree.

Decree varied.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

SHEIKH ABDUL GHAFFAR

v.

F. B. DOWNING.*

1925.

Nov., 7.

Court-Fees Act, 1870 (*Act VII of* 1870, *as amended by Bihar and Orissa Act II of* 1922), *Schedule II, Article* 10—*Advocate, power of appointment in writing filed by, whether requires a stamp—" vakalatnama ", meaning of—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 2(15) *and Schedule I, Order III, rule* 4(3)—*Stamp Act*, 1899 (*Act II of* 1899), *section* 2(21) *and Schedule I, Article* 48—*Government of India Act*, 1919 (9 *and* 10 *Geo. V., Ch.* 101), *section* 101(d).

The word " vakalatnama " as used in Article 10, Schedule II of the Court-fees Act, 1870, refers to a power-of-attorney filed by a " pleader " within the meaning of section 2(15) and Order III, rule 4, Code of Civil Procedure, 1908.

Therefore, a power of appointment in writing filed by an advocate, whether he be a barrister or not, authorizing him

* In the matter of appeal from Original Decree no. 185 of 1922.

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to make or do any appearance, application or act on behalf of his client, requires to be stamped as a vakalatnama under Article 10, Schedule II of the Court-fees Act.

Parmanand v. *Sat Prasad* (1) and *Reference under section 46 of the Indian Stamp Act, 1879* (2), relied on.

Laurentius Ekka v. *Dukhi Koeri* (3), referred to.

The facts of the case material to this report are stated in the order of Jwala Prasad, J.

S. M. Naimatullah, for the appellants.

L. N. Singh, for the respondents.

JWALA PRASAD, J.—This is a reference to me as a Taxing Judge under section 5 of the Indian Court-fees Act. The question is whether a particular document requires any stamp. The document is a letter of appointment given by two persons, Sheikh Abdul Ghaffar and Sheikh Abdul Jabbar, appellants in First Appeal no. 135 of 1922 pending in this Court, to Mr. S. M. Naimatullah, Barrister-at-Law, who has been enrolled as an advocate of this Court. The letter of appointment runs as follows:

"Dear Sir,

I/We hereby appoint you to act and plead on my/our behalf in the above noted case and to make or withdraw all deposits that may have to be made or withdrawn on my/our behalf in connection with the said case."

It bears the following heading:

"F. A. no. 135 of 1923, Sheikh Abdul Ghaffar (Appellants/Respondents) *versus* F. H. Downing (Respondents—Opposite party)."

This is in accordance with notification no. 57, dated the 16th September, 1925, published in the Gazette on the 7th October, 1925, which runs as follows:

"Notwithstanding anything contained in Order III, rule 4(3), of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly

(1) (1911) I. L. R. 33 All. 487, F. B.
(2) (1886) I. L. R. 9 Mad. 358, F. B.
(3) (1925) I. L. R. 4 Pat. 766.

authorized by power-of-attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorized to act on behalf of such person."

Previous to the aforesaid notification no advocate who was a barrister was required to present any document empowering him to act by virtue of clause (*3*) of rule 4 of Order III of the Code of Civil Procedure. The first clause of that rule requires that the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf. The word "pleader" is defined in section 2, clause (*15*), Civil Procedure Code, as:

"any person entitled to appear and plead for another in court, and includes an advocate, a vakil and an attorney of a High Court."

Therefore, in order to exempt an advocate from the necessity of filing his appointment by his client in writing, clause (*3*) of rule 4 of Order III was enacted. The effect of the recent notification referred to above is to dispense with clause (*3*) of rule 4 and an advocate has now to file his appointment in writing like any other legal practitioner in the High Court. The appointment is for the purpose of authorizing him to make or do any application or appearance or act on behalf of a suitor in this Court. Rule 1 of Order III enacts,

"Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf."

The subsequent rule defines "Recognized agents" as including amongst others persons holding powers-of-attorney, authorizing them to make and do such appearance or applications or acts on behalf of such parties. Therefore the letter of appointment authorizing an advocate to make or do appearance or

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application or act on behalf of any party in a litigation in this Court is a power-of-attorney. It is distinguishable from a power-of-attorney given to one who does not belong to the legal profession inasmuch as an advocate is a pleader within the meaning of the term as defined in the Code of Civil Procedure. The letter of appointment being a power-of-attorney is not a document exempted from payment of stamp duty for all powers-of-attorney are chargeable to duty whether they come within the definition of a power-of-attorney given in clause (*21*) of section 2 of the Stamp Act or are powers-of-attorney which go by the special name of vakalatnamas or mukhtarnamas. The former are chargeable with the duty prescribed in Article 48, Schedule I of the Indian Stamp Act, and the latter under Article 10, Schedule II of the Court-fees Act. There can, therefore, be no doubt that the letter of appointment in question in the present case filed by Mr. Naimatullah, and for the matter of that any similar power-of-attorney called by whatsoever name filed by an advocate, whether he is a barrister or not, must bear stamp duty. Formerly the barrister-advocates were exempted from filing their appointment in writing and therefore there could be no question of their payment of any duty: but since they are now required to put in their appointment in writing for the specific purposes of making or doing any appearance, application or act on behalf of any suitor in this Court or in the courts subordinate to this Court, the letter of appointment must be stamped with duty. Under the old rules also the power-of-attorney in question was chargeable with duty for it authorizes Mr. Naimatullah to withdraw deposits in Court on behalf of his client.

It was ruled long ago by Sir Edward Chamier, C.J., that if a barrister wanted to perform the functions of a pleader he must file a vakalatnama [vide letter no. 5306, dated the 15th August, 1917, from the Registrar of this Court to the Registrar of the Circuit Court, wherein it is stated that Counsel must file a written authority similar to that required

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from vakils to enable him to withdraw money]. In the case of *Laurentius Ekka* v. *Dukhi Koeri* (1) I have referred to the case of Mr. Misra, a barrister-advocate of this Court, practising at Cuttack. He applied for refund of money on behalf of his client and filed a petition under his own signature without filing a vakalatnama. The learned Chief Justice observed that if Mr. Misra wanted to perform the functions of a pleader he must file a vakalatnama. This view has been maintained in this Court in several cases and a practice has been established of not allowing refund of money to an advocate unless he is especially authorized in that behalf and files a duly stamped vakalatnama. The stamp law requires that a refund of money can only be made to a person holding a power-of-attorney duly stamped from the person on whose behalf withdrawal is sought. Therefore in so far as the letter of appointment in question authorizes Mr. Naimatullah to withdraw deposits on behalf of his client it is chargeable with a court-fee prescribed for a vakalatnama under Article 10, Schedule II of the Court-fees Act, irrespective of the notification in question. The power-of-attorney authorizes Mr. Naimatullah to act in the appeal on behalf of his client and the object of the Taxing Officer in referring the case to me is for the purpose of having a decision upon the general question whether a power of appointment which authorizes an advocate to act, who is a barrister or not, should be stamped as a vakalatnama under Article 10, Schedule II of the Court-fees Act, for he says that the question is one of importance and is likely to be raised frequently until the matter is finally decided. The general question is whether a power of appointment which authorizes an advocate of this Court to make or do any appearance, application or act on behalf of his client, should be stamped as a vakalatnama under the Court-fees Act. The recent notification requires an advocate of this Court, whether he is a barrister or not, to file a power of appointment in writing for the purpose of acting, appearing or making application on behalf of his

(1) (1925) I. L. R. 4 Pat. 766.

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client. I have already held that such a power of appointment must bear a stamp as a power-of-attorney either under Article 48, Schedule I, read with clause (*21*) of section 2 of the Stamp Act, or as a vakalatnama or mukhtarnama under Article 10, Schedule II of the Indian Court-fees Act.

It was held in the Full Bench case of *Parmanand* v. *Sat Prasad* (1) that a document purporting to authorize the person in whose favour it was executed, who was not a certificated mukhtar or pleader, to appear and do all acts necessary for the execution of a decree of a court, outside the United Provinces, which had been transferred to a court in those provinces for execution, required to be stamped as a power-of-attorney with a one rupee stamp and not as a vakalatnama or mukhtarnama. To the same effect is the Full Bench decision of the Madras High Court in a reference under section 46 of the Indian Stamp Act, 1879 (2). The distinction drawn is based on the principle that a pleader should file a power-of-attorney called mukhtarnama or vakalatnama as provided for in Article 10, Schedule II of the Court-fees Act, whereas any person who is not a pleader may file a power-of-attorney as provided for in the stamp law.

Now the word " pleader " as defined in section 2, clause (*15*) of the Code of Civil Procedure, includes an advocate, a vakil and an attorney of a High Court, and his appointment to make or do any appearance, application or act for a suitor, will, for the purpose of rule 4, Order III, clause (*1*), be an appointment of a pleader. Inasmuch as the appointment in writing of a pleader, under rule 4, Order III, requires a fee prescribed for the power-of-attorney known by the name of vakalatnama in Article 10 of Schedule II of the Court-fees Act, a similar power of appointment in writing filed by an advocate, whether he is a barrister or not, will also require a stamp prescribed for a vakalatnama. It is contended that the word

(1) (1911) I. L. R. 33 All. 487.

(2) (1886) I. L. R. 9 Mad. 358.

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" vakalatnama " applies to a power-of-attorney given to a vakil and consequently a power-of-attorney given to an advocate would not come under the word " vakalatnama " mentioned in Article 10, Schedule II of the Court-fees Act.

Reference has been made to the Legal Practitioners' Act which recognizes three classes of practitioners called Vakils, Pleaders and Advocates and it is said that the word " vakalatnama " used in the aforesaid Article 10 of the Court-fees Act refers only to the power-of-attorney filed by a vakil and not to a power-of-attorney filed by an advocate. The argument ignores the fact that the pleaders of the subordinate courts who are not vakils in the special sense of the term as not being entitled to practise in the High Court, are also required to file vakalatnamas for which a fee is payable as prescribed in Article 10, Schedule II of the Court-fees Act. The word ' vakil ' used in Article 10 does not, to my mind, refer to the special class of practitioners known as ' vakils '. It is a vernacular word and connotes in English a document which authorizes one person to represent another. The word ' vakil ' itself means an agent or representative authorized to conduct any business on behalf of another person, and in the Muhammadan law persons who conduct marriages on behalf of the principals are called vakils. Persons who conduct a case in court for another came subsequently to be called vakils and such agents were recognized in the law courts prior to the establishment of the British Courts in India and any pleader practising in the lower courts even now is popularly called a vakil though he is not a vakil in the special sense of the term which applies only to one entitled to practise in the High Court. The word ' pleader ' as used in the Code of Civil Procedure includes a ' vakil ' and an ' advocate ' and in the Government of India Act, section 101 (*d*), a vakil is described as a pleader of a High Court. Article 10 of the Court-fees Act uses the word ' vakalatnama ' as meaning a power-of-attorney executed for the conduct of any case in a court

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and its various provisions indicate that the word 'vakalatnama' relates to a power filed by a legal practitioner to conduct a case on behalf of a suitor irrespective of the class to which that legal practitioner belongs. The word 'vakalatnama' there refers to a power-of-attorney filed by a pleader as used in the Code of Civil Procedure, section 2, clause (*15*), and Order III, rule 4. Therefore a power-of-attorney filed by an advocate would also come under the category of vakalatnama mentioned in Article 10 of the Court-fees Act when it authorizes an advocate for the purpose of conducting a case to make or do any appearance, application or act on behalf of his client.

I therefore hold that the power of appointment in writing filed by an advocate, whether he is a barrister or not, authorizing him to make or do any appearance, application or act on behalf of his client, would require a court-fee payable upon a vakalatnama as prescribed in Article 10, Schedule II of the Act.

APPELLATE CRIMINAL.

Before Adami and Bucknill, J.J.

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Oct., 27, 28; Nov., 10.

RANJIT NARAIN SINGH

v.

RAMBAHADUR SINGH.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 476, 476A and 476B—appellate court making complaint under section 476B, whether appeal lies against the order of interference by the High Court in extraordinary cases.

A money suit was dismissed by the Munsif who tried it on the ground that he was not satisfied that the signatures on certain receipts and other documents were genuine. This decision was confirmed by the Subordinate Judge on appeal. Thereupon the defendants applied to the Munsif to make

* Criminal Appeal no. 186 of 1925, from the decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 10th July, 1925.

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a complaint against the plaintiff and some of his witnesses in respect of offences under sections 467 and 471, Penal Code. The Munsif declined to make a complaint and the defendants appealed to the District Judge under section 476B of the Code of Criminal Procedure. The District Judge agreed to the institution of a prosecution and forwarded to the District Magistrate a complaint " under sections 471 and 193 of the Penal Code or any other section or sections that may apply ". From this order, the plaintiff presented a memorandum of appeal to the High Court.

Section 476 of the Code of Criminal Procedure, 1898, authorizes any civil, revenue or criminal Court, where it is of opinion that it is expedient in the interest of justice that an enquiry should be made into certain offences, to make a complaint thereof in writing. In any case in which such Court has neither made a complaint under section 476 nor rejected an application for the making of such complaint", section 476A authorizes a complaint to be made by the Court to which such first mentioned Court is subordinate within the meaning of section 195(3), and provides that, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly. Under section 476B, " Any person against whom such a complaint has been made may appeal " to the Court to which the Court making the complaint is subordinate within the meaning of section 195(3).

Held, on the facts stated above, that the person against whom the complaint had been made by the District Judge had a right of appeal to the High Court.

The question, however, whether a complaint should be made under section 476, Code of Criminal Procedure, is almost invariably a matter of discretion and the High Court will not interfere with the exercise of that discretion except in extraordinary cases.

Mohommad Haroon v. *King-Emperor* (1) and *Faqidar Rai* v. *King-Emperor* (2), followed.

Muhammed Idris v. *The Crown* (3), dissented from.

Sonabhai Valabhbhai v. *Adibhai Parshotam* (4), *Kalisadhan Addya* v. *Nani Lal Hazra* (5), *Gajaram Marwari* v. *The King-Emperor* (6) and *Bhiki Sao* v. *King-Emperor* (7), referred to.

(1) Cr. A. no. 115 of 1925. (2) Cr. Rev. no. 5 of 1925.
(3) (1925) I. L. R. 6 Lah. 56. (4) (1924) 26 Bom. L. R. 289.
(5) (1925) I. L. R. 52 Cal. 478. (6) Cr. A. no. 22 of 1925.
(7) Cr. A. no. 37 of 1925.

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This was a matter referred to a Bench by Macpherson, J., on the 2nd September, 1925: it had come before him when sitting as Vacation Judge as a proceeding which purported to be an appeal from a decision of the District Judge of Gaya, dated July 10, 1925.

The respondents to the present proceeding brought, in 1923, a money suit, against the first petitioner for a share in certain bhaoli produce-rent of some 53 bighas of bakasht lands; the first petitioner (or appellant here) pleaded payment and in support of this defence referred to certain receipts and papers of account which were produced on his behalf and which were either in part or in whole exhibited in evidence by the petitioners 2 and 3.

The Munsif of Gaya who tried the suit gave judgment in the respondents' favour for he was

> " not satisfied that the signatures on the receipts and the bujhaotas were the genuine signatures of these persons " (whose signatures they were alleged to be).

The decree was dated 21st July, 1924.

The first petitioner appealed; the appeal was heard on 5th February, 1925, and was dismissed by the Additional Sessions Judge and Subordinate Judge of Gaya, who, agreeing with the Munsif that the receipts and bujhaotas were not genuine, dismissed the appeal.

Almost immediately after this appeal had been dismissed, the respondents, on 16th February, 1925, applied under section 476 of the Code of Criminal Procedure to the Munsif of Gaya (who was, however, not the same person as the Munsif who had tried the suit in 1924) requesting him to hear the parties and to make a complaint under the provisions of section 476 against the petitioners. They suggested that the petitioners ought to be prosecuted under certain sections of the Indian Penal Code, *viz.*, section 467 (forgery of a receipt) and section 471 (using as genuine

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a forged document). The Munsif, however, after hearing the parties, refused on 23rd April, 1925, to make any complaint as requested. The Munsif seemed to have thought that as there was no direct finding of forgery by either the trial or appellate court and as neither of those courts had thought fit to take any step proprio motu under the provisions of section 476, he himself should not think it desirable to take any action.

From this decision the respondents, under section 476B of the Code of Criminal Procedure, appealed to the District Judge of Gaya, who on 10th July, 1925, took a different view from that expressed by the Munsif; he considered,

"A good case for prosecution had been made out and the prosecution should be sanctioned."

He added,

"I therefore institute a complaint against Ranjit Singh, Ajodhya Singh and Bagho Singh (the appellants here) for their prosecution under sections 471 and 193 of the Indian Penal Code or any other section or sections that may apply and forward it to the District Magistrate."

From this decision the appellants purported to appeal to the High Court. It was entered as Criminal Appeal no. 133 of 1925 and was admitted as an appeal by Jwala Prasad and Macpherson, J.J., on 24th July, 1925. It came before Macpherson, J., sitting as Vacation Judge: the question was raised before him by the Crown as to whether in a case such as this an appeal lay to the High Court and, as there appeared to be some doubt as to this point and some possible conflict of decisions, the learned Judge referred the matter to a Bench.

H. L. Nandkeolyar, Assistant Government Advocate, took a preliminary objection that no appeal lay.

M. Yunus (with him *Shiva Narain Bose* and *R. K. Nandkeolyar*), for the appellant: An order passed by an appellate court by virtue of the provisions

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of section 476B, Code of Criminal Procedure, is one made under section 476. The concluding words of section 476B contemplate that when an appellate court either directs the withdrawal of a complaint, or itself makes a complaint which the court of first instance might have made, the provisions of section 476, shall, to all intents and purposes, govern such an order. That being so, an appeal lies under the earlier portion of section 476B. The position of course would have been different if the appellate court had either rejected the application and refused to make a complaint, or had affirmed the order of the first court making a complaint, for in both cases there would not have been a complaint within the meaning of section 476. If the appellate court had made a complaint under section 476A, when the first court had not exercised its powers under section 476, clearly an appeal to the superior appellate court would have been competent; but can it be said that this right of appeal is taken away when the appellate court has made a complaint under section 476B in disagreement with the first court which has refused to make a complaint and has passed a judgment in my favour? *Muhammed Idris* v. *The Crown* (1) was wrongly decided and *Kalisadhan Addya* v. *Nani Lal Hazra* (2), referred to by Macpherson, J., in his letter of reference, is distinguishable as this point was never raised there. But a contrary view has been expressed by this court in *Foujdar Rai* v. *King-Emperor* (3) which was followed in the later case of *Mahommad Haroon* v. *King-Emperor* (4) by Macpherson, J., who although he did not specifically decide the point, accepted the view expressed in *Foujdar Rai* v. *King-Emperor* (3). There are, however, some other cases of this court [*Gajaram Marwari* v. *King-Emperor* (5) and *Bhuki Sao* v. *King-Emperor* (6)] which under similar circumstances were treated as appeals although the point in dispute was neither raised nor decided. If the old

(1) (1925) I. L. R. 6 Lah. 56. (2) (1925) I. L. R. 52 Cal. 478.
(3) Rev. No. 15 of 1925. (4) Cr. A. No. 115 of 1925.
(5) Cr. Rev. No. 32 of 1925. (6) Cr. A. No. 87 of 1925.

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section 195, Criminal Procedure Code, had stood I would have had a right of appeal; could it then be said that the legislature, by the amendment of sections 195 and 476, intended to take away this right when the sole object of the amendment was to safeguard the interests of the accused?

H. L. Nandkeolyar: No appeal lies from the order of an appellate court made under the provisions of section 476B. The Code only gives a right of appeal from an order made by the first court under section 476, or from an order made by the appellate court under section 476A. It is nowhere expressly provided that an order made under section 476B shall likewise be appealable. The legislature did not contemplate a second appeal. In *Muhammed Idris* v. *The Crown* (1), this point was specifically taken and a Division Bench of the Lahore High Court ruled that an appeal from an appellate order making a complaint under section 476B is not permitted by law. The observations of the learned Judge in *Foujdar Rai* v. *King-Emperor* (2) are mere obiter dicta. In *Somabhar Valabhbhai* v. *Aditbhai Parshotam* (3) it was held that no appeal lies under the provisions of the Code against an order of the appellate court made under section 476B.

[ADAMI, J.—But this case is distinguishable. There the Judge had withdrawn the complaint.]

Withdrawal in effect means refusal.

[ADAMI, J.—If that be the construction there can be no protection against the order of the superior court.]

In *Kalisadhan Addya* v. *Nani Lal Harza* (4) their Lordships of the Calcutta High Court under similar circumstances did not entertain the appeal, but dealt with the matter in their revisional jurisdiction.

Yunus, replied.

S. A. K. *Cur. adv. vult.*

(1) (1925) I. L. R. 6 Lah. 56.
(2) Cr. Rev. no. 5 of 1925.
(3) (1924) 26 Bom. L. R. 289.
(4) (1925) I. L. R. 52 Cal. 478.

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BUCKNILL, J. (after stating the facts set out above, proceeded as follows): It may at once be stated that applications to this court under section 476B of the Code of Criminal Procedure have at times been made both as appeals and in revisional jurisdiction: and in other High Courts also. For example, in this court in *Gajaram Marwari* v. *King-Emperor* (1) and *Bhuki Sao and Ramdhani Sao* v. *King-Emperor* (2), (which were heard together), the general features of the position were somewhat parallel to those displayed in the matter now under consideration: one Mahabir Sao applied to a Magistrate who had under the provisions of section 203 of the Code of Criminal Procedure dismissed a complaint made by another individual asking that that complainant and two others should be ordered by the Magistrate to be prosecuted by virtue of the provisions of section 476 of the Code. The Magistrate refused to make a complaint. Mahabir thereupon appealed to the Sessions Judge who differed from the Magistrate and himself made the complaint requested under section 476B. The three persons thus ordered to be prosecuted thereupon appealed to this court; no question was ever raised at any stage of the proceedings as to there being no right or possibility of an appeal. The cases were admitted as appeals by Kulwant Sahay, J., and myself on 4th February, 1925, and were heard as appeals on 16th April, 1925, by Macpherson, J., and myself: the appeal in the case of one appellant was allowed and in the case of the other two rejected.

I need not refer, I think, to cases which have come up as applications in revision: for it is common ground that such have occurred.

In Criminal Appeal no. 115 of 1925, Macpherson, J., apparently decided a case—similar in general features to the present one—as an appeal: the Magistrate in that case had refused to make a complaint: on appeal under section 476B the Sessions Judge differed from the Magistrate and himself made the complaint: the person ordered to be prosecuted

(1) (1925) Cr. Ap. no. 22 of 1925. (2) (1925) Cr. Ap. no. 37 of 1925.

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appealed to this Court: the appeal came before Macpherson, J., sitting as Vacation Judge and the point that no appeal lay was specifically taken. Macpherson, J., then expressed the opinion that, sitting singly, he ought to follow the expression of opinion given by Mullick, J., in *Faujdar Rai* v. *King-Emperor* (1), and hold that an appeal did lie: but, whilst expressing this view, he decided to reject the application on its merits, whether it was rightly to be regarded as an appeal or as an application in revisional jurisdiction.

And, in the present case, as has already been observed, the same learned Judge, at a later date (*i.e.*, on 2nd September, 1925), the same point being more specifically perhaps raised by the Crown, referred the matter to a Bench. In the Lahore High Court, in *Muhammed Idris* v. *The Crown* (2) the question as to whether an appeal lies from a decision under section 476B has been discussed and decided by Martineau and Zafar, J.J. In that case their Lordships held that no appeal lies under section 476B to the High Court from an appellate order of a District Judge making a complaint which the Sub-Judge might himself have made but refused to make. This was a reference to a Bench made by Scott-Smith, J., who was doubtful as to whether an appeal lay under such circumstances.

This case is, of course, directly in point here: but it has been suggested to us that the decision is not legally correct. The judgment is very short and was given on October 24, 1924. It simply reads thus:

"The question referred to us in this appeal and in appeals nos. 233 and 286 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under section 476 of the Criminal Procedure Code. Section 476B of the Code gives a right of appeal only

(1) (1925) C.-Cr. Rev. no. 5 of 1925. (2) (1925) I. L. R. 6 Lah. 56.

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when a court has made or refused to make a complaint under section 476 or section 476A, and neither of those sections relates to a complaint made by a court on appeal from an order of a subordinate court refusing to make a complaint. We, therefore, answer the question referred to us in the negative. The appeals will be laid before the referring Judge for disposal."

In the Calcutta High Court a case similar in features to the present one has been dealt with in revisional jurisdiction and the decision of the Sessions Judge reversed [*Kalisadhan Addya* v. *Nani Lal Hazra* (1)] by Newbould and Mukerji, J.J., but the question of the possibility of an appeal did not there arise.

It is, I think, necessary now here to explain the argument which has been well placed before us upon this question by the learned Counsel who has appeared for the appellants. He draws a distinction in different sets of circumstances between the possibility of an appeal lying from a decision given by an appellate court under the provisions of section 476B. He argues that there may be different positions as a result of a proceeding under section 476B in appeal. The first position is when the original tribunal has made a complaint (*i.e.*, ordered a prosecution under section 476): the person ordered to be prosecuted has appealed under section 476B: the appellate court has dismissed the appeal: in such case he admits that there is no further appeal: though revision by the High Court may be conceivable. This position has been the subject of a decision in the Bombay High Court in *Somabhar Valabhbhai* v. *Aditbhai Parshotam* (2). In that case a Subordinate Judge had, on the appeal of one Somabhar, under section 476, issued a complaint and directed the prosecution of certain persons: they appealed to a Sessions Judge who allowed the appeal. Somabhar appealed to the High Court. Macleod, C.J., and Shah, J., held that there was no appeal. In their judgment their Lordships state, "We are clearly of opinion that no

(1) (1925) I. L. R. 52 Cal. 478. (2) (1924) 26 Bom. L. R. 289.

appeal lies under the provisions of the Code against an order made by the court to which the court making a complaint is subordinate ". It will be observed that the point raised before us as disclosed by the 4th position (vide infrâ) was not before the Bombay Court nor decided by it. The second position is when the original tribunal has refused to take action under section 476: the applicant has appealed under section 476B: the appellate court has dismissed the appeal: he thinks that in this case too there is no further appeal: though again revision by the High Court is conceivable. The third position is when the original tribunal has made a complaint: the person ordered to be prosecuted has appealed: the appellate court has dismissed the appeal: he thinks that in this case too there is no further appeal: though once more revision by the High Court is possible. The fourth, and, of course, last possible position, is that existing in the present case: the original tribunal has refused to make a complaint: the applicant has appealed and the appellate court has itself made a complaint. It is argued that in such case the party ordered to be prosecuted has a right of appeal; and revision also might be possible; except that if an appeal lies revisional jurisdiction would not, it is imagined, be exercised. This is the position upon which the Lahore High Court has given the decision quoted above: but it seems that a contrary view has been expressed in this court by Mullick, J., in *Faujdar Rai* v. *King-Emperor* (vide suprâ) (1).

In that case the circumstances were as follows: An application was made under section 476 to a Sub-Deputy Collector to make a complaint against one Faujdar Rai directing his prosecution for the offences of using a forged document and giving false evidence. The Sub-Deputy Collector, after enquiry, refused to take any action. The complainant appealed to the Collector under section 476B. The Collector disagreed with the Sub-Deputy Collector's view and

(1) (1925) Cr. Rev. no. 5.

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himself made a complaint. Faujdar Rai thereupon appealed to the Divisional Commissioner who held on 30th March, 1925, that no appeal lay. From the Commissioner's decision Faujdar Rai applied to this court in revision: not against the Commissioner's decision that no appeal lay but against the Collector's complaint. The first point taken was that the High Court had no jurisdiction to interfere with the Collector's order but Mullick, J., rejected this contention: his Lordship then dealt with the matter in revision and allowed Faujdar's application. But, so far as is here material, the most important matter in the judgment lies in the following observations: the learned Judge writes, " There is a third point raised, namely, that the learned Commissioner was wrong in declining to hear the appeal preferred by the petitioner. I think the contention must be accepted. Section 476B of the Code of Criminal Procedure appears to contemplate that, if an appellate court sets aside the order of the original court, the party prejudicially affected has a right of appeal to the court to which appeals from that appellate court ordinarily lie. In this case, therefore, the Commissioner had jurisdiction to hear the appeal from the order of the Collector and to set it aside if necessary and I am asked to direct that the criminal prosecution should not proceed till the Commissioner has disposed of the appeal. In my opinion it is not necessary to make any such order as I think I have jurisdiction to interfere under sections 115, Code of Civil Procedure, and 107 of the Government of India Act ".

If this view is correct the same reasoning would apply in the present case and the person against whom the appellate court (*i.e.*, the District Judge) has under section 476B made a complaint could appeal to the High Court.

It is important in endeavouring to come to a correct decision upon this question to examine carefully the provisions of sections 476, 476A and 476B in order to ascertain what is their proper construction.

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I may here say that as a result of such investigation as I have been able to make I have not been able to ascertain that in the Report of the Joint Committee on the Bill to make in the Criminal Procedure Code the amendments now comprised in section 476B or in the debates when the Bill was in the Legislature the question now arising was in any way envisaged: and indeed it was hardly likely that it should have been in view of its somewhat involved nature.

Section 476 contemplates that a court may either of its own motion or on application make a complaint. Section 476A contemplates that an appellate court may make a complaint if its subordinate court has taken no action under section 476 suo motu or has rejected any application made to it to do so. Section 476B gives a right of appeal to an appellate court under certain circumstances, *viz.*:

(*a*) where the appellate court's subordinate court has refused on application made to it under section 476 to make a complaint;

(*b*) where an appellate court has refused on application made to it under section 476A to make a complaint;

(*c*) where the appellate court's subordinate court has made a complaint either suo motu or on application, *i.e.*, included in the words "or against whom such a complaint has been made";

(*d*) where an appellate court has itself made a complaint.

In following out the effect of this it will be simplest to illustrate by reference to Munsif, District Judge and High Court as instances of original, appellate and superior appellate courts.

It would seem clear that in case—

(*a*) where a munsif has refused an application made to him under section 476 to make a complaint an appeal lies to the District Judge by the applicant;

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the position does not fall within 476A but within 476B: at the appeal no complaint has yet been made: the District Judge may take the same view as the Munsif and dismiss the appeal. In such case there is no sort of prescribed procedure for an appeal to the High Court. On the other hand the District Judge may disagree with the Munsif and himself make a complaint and the complaint then is amenable to the provisions of section 476; that is to say, it is, under section 476B, subject to appeal to the High Court: for section 476B reads,

> "Any person against whom a complaint under section 476 has been made by any court."

In the case mentioned the District Judge is making the complaint under section 476: the District Judge's court is subordinate to the High Court within the meaning of section 195 (*3*) and, therefore, the appeal lies to the High Court.

As to (*b*) the Munsif has done nothing and has been asked to do nothing. The District Judge has either suo motu or on application made a complaint. All this is under section 476A. The complaint is amenable to the provisions of section 476: clearly the complaint can, under the provisions of section 476B, be the subject of appeal to the High Court from the District Judge. For the only complaint is by the District Judge.

As to (*c*) the Munsif has suo motu or on application made a complaint: clearly there is an appeal to the District Judge under section 476B. The District Judge may uphold the Munsif's view: but in dismissing the appeal he (the District Judge) makes no complaint: and it is only against the complaint that so far as (*c*) is concerned a right of appeal is given. But the District Judge may direct the withdrawal of the complaint: but even so the District Judge makes no complaint: and it will be once more observed that it is only when the District Judge makes the complaint that the provisions of section 476 apply to it.

Lastly, as to (*d*), the Munsif has done nothing and has never been asked to do anything under section 476. But the District Judge has made a complaint either suo motu or on application under section 476A: to this complaint the provisions of section 476 are applicable: and under section 476B such a complaint can be the subject of appeal: but to what court? Obviously only to the High Court because it is from the District Judge.

In my opinion, therefore, upon a proper construction of sections 476, 476A and 476B and still retaining the illustration of the three ascending courts as Munsif, District Judge and High Court there would lie an appeal from the District Judge to the High Court—

(*a*) where the Munsif has refused on application made to him under section 476 to make a complaint, where there has been an appeal to the District Judge and where the District Judge disagreeing with the Munsif, has made a complaint;

(*b*) where, under section 476A (the Munsif has taken no action suo motu and has not been asked to take any action), the District Judge has (*i*) on application to him made a complaint, or (*ii*) on application to him has refused to make a complaint.

I can see no possibility of an appeal lying under any other of the positions referred to.

The same reasoning would of course apply to any other chain of three courts (contemplated by section 476) of ascending jurisdiction. Being, therefore, of opinion that in the present case an appeal does lie, one must therefore examine the circumstances under which the District Judge was induced to make the complaint.

I think it is desirable to remark, as is pointed out by Macleod, C.J., and Shah, J., in the case decided in the Bombay High Court, that the question whether

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a complaint should be made under section 476 is almost invariably a matter of discretion: and the High Court is under those circumstances always loath to interfere except in extraordinary cases.

[The remainder of the judgment is not material to this report. In the result the appeal was dismissed.]

BUCKNILL, J.

ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Jwala Prasad, J.

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Nov., 16.

PARSHAN SAHI

v.

G. L. RICHARDSON.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151—*application impugning a compromise-decree, dismissal of—whether bars subsequent suit.*

The dismissal of an application under section 151, Code of Civil Procedure, 1908, impugning the validity of a compromise-decree, is not a bar to the institution of a subsequent suit to avoid the compromise on the ground of fraud.

Ramratan Singh v. *Khublal Gope* (1), followed.

Kailash Chandra Poddar v. *Gopal Chandra Poddar* (2), distinguished.

Appeal by the plaintiffs.

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

L. N. Sinha, for the appellants.

S. Dayal and *Sambhu Saran*, for the respondents.

JWALA PRASAD, J.—The plaintiffs are the appellants. They ask for an adjudication of their title to and confirmation of possession over 1 bigha, 9 kathas,

* Appeal from Appellate Decree no. 18 of 1923, from a decision of M. Wali Muhammad, Additional Subordinate Judge of Muzaffarpur, dated the 18th September, 1922, confirming a decision of B. Jugal Kishore Narain, Additional Munsif of Muzaffarpur, dated the 27th September, 1921.

(1) (1917) 39 Ind. Cas. 891. (2) (1913-14) 18 Cal. W. N. 1204.

of land situate in mauza Yusufpatti, pargana Morwah Khurd, bearing tauzi nos. 4388 and 4390. They also seek to recover Rs. 173-8-0 as the price of sugarcane raised on the disputed land, and an injunction restraining the defendants first party from paying the price of the sugarcane to the defendants second party. The disputed land is a part of a holding consisting of 6 bighas, 9 kathas, and 1 dhur. The holding belonged to the defendants second party and one Abdhu Singh. It was sold in an execution sale and was purchased in the name of plaintiff no. 1, Parshan Sahi, on the 19th May, 1896 (*vide* sale certificate, Exhibit M, which shows the area sold to be 3 bighas and not 6 bighas as claimed by the plaintiffs). The plaintiffs base their title upon this auction-purchase and upon a compromise said to have been filed subsequently in suit no. 360 of 1918 whereby the defendants and Abdhu Singh relinquished their claim to the land. The plaintiffs say that in spite of the said compromise, the defendants brought a small cause court suit against the defendants first party and obtained a decree for the price of the sugarcane which was supplied by the plaintiffs to the defendants first party who now refuse to give the price of the sugarcane to the plaintiffs. The plaintiffs base their cause of action upon this refusal and on account of resistance of the possession by the defendants. Defendants second party, on the other hand, contend that at the auction sale they purchased the property in the farzi name of the plaintiff no. 1 who is their close relation and that the alleged compromise is fraudulent, void and inoperative and that they and not the plaintiffs are entitled to the price of the sugarcane. The defendants first party have no objection to the payment of the price of the sugarcane to the party who may be held by the court to be entitled to receive the same. The real contest is therefore between the plaintiffs and the defendants second party, and several issues were raised in the trial court. The only important issues tried in the lower appellate court are:

(*1*) Have the plaintiffs got any title to the disputed land? and

(*2*) Is the compromise decree binding on the defendants?

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The courts below have concurrently held that the plaintiffs have failed to prove their title to the land in dispute, and that in spite of the purchase being in the name of the plaintiff no. 1, the defendants continued to be in possession of the property. They have further held that the auction-purchase was only farzi; that the real purchasers were the defendants second party in the name of their close relation, Parshan Sahi, whose father, Ramdihal was the maternal uncle of Ramdhari, defendant no. 5 and that Abdhu Singh is a full brother of Ramdhari. The lower appellate court has further held that neither any dakhaldehani was taken out by the plaintiffs nor any chalan for payment of the purchase-money has been produced and though the sale took place prior to 1896 and the finally published record-of-rights in 1897, yet the name of Parshan was not substituted therein. Similarly the batwara papers of 1915 contained the name of Awadh Singh in respect of several plots including plots nos. 12 and 24 which are the disputed ones. His name also appears in Exhibits E, J and J(a). In the criminal case (Exhibit N) defendant no. 5 was found to be in possession.. It has not been shown before me that the finding of the court below as to the purchase being farzi in the name of plaintiff no. 1 and the continuity of the possession by the defendants over the property in spite of the sale is in any way vitiated by the court in not having taken into consideration any relevant evidence on the record. The finding of the court below that the plaintiff did not acquire any title by the auction-purchase of 1896 in the name of plaintiff no. 1, is a finding of fact and not open to challenge in second appeal. As to the compromise (Exhibit 4) the court below in concurrence with the trial court has come to the conclusion that it was a fraudulent one. The compromise petition was filed in a suit (no. 360 of 1919) after the aforesaid criminal case was upheld. Under this compromise, Ramdhari, defendant no. 5, and Abdhu relinquished all claims to the entire land. The compromise, as stated therein, was to be given effect to by executing a registered deed. No registered deed was however executed. The compromise petition

has not been legally proved and defendant no. 6 who is son of defendant no. 5, is no party to it. The court below has held that it has not been proved that the defendants had any knowledge of the terms of the compromise petition. The finding of the court below that the compromise petition is fraudulent and inoperative is again a finding of fact and cannot be challenged in second appeal.

The learned advocate on behalf of the appellants has, however, urged that the compromise has become final and is not open to challenge by the defendants in this suit. In support of this contention he has referred to the case of *Kailash Chandra Poddar* v. *Gopal Chandra Poddar* (1). In that case, after the compromise was filed in a suit and decree prepared in accordance therewith, one of the plaintiffs applied to the court for a review of the decree and to set aside the compromise and his application was based upon the allegation that he had not consented to the compromise. The review petition was dismissed by the trial court. Subsequently a suit was brought by another plaintiff along with the plaintiff who had applied for the review of the judgment. The ground of attack to the compromise taken in the suit was the same as in the review petition, *viz.*, that the plaintiffs had given no consent to the compromise. It was further suggested that there was fraud. The alleged fraud was, however, negatived and the only ground of relief was the absence of consent. It was held that the dismissal of the petition of review was a bar to the subsequent suit contesting the validity of the compromise filed in the previous suit. It seems to me that the aforesaid case was decided upon the principle of res judicata inasmuch as the review matter and the subsequent suit were founded upon the same ground, *viz.*, the absence of the consent to the compromise in question. The parties and the subject-matter of the relief sought were the same in both the proceedings in the suit and the review. The matter in controversy in the review proceeding and in the suit was decided and the relief sought was refused and the court which

(1) (1913-14) 18 Cal. W. N. 1204.

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dealt with the review-matter was competent to deal with the suit. All the conditions embodied in section 11 of the Code of Civil Procedure were fully satisfied. The learned advocate on behalf of the appellant, however, contends, that the principle of the aforesaid case would apply to the present case inasmuch as the defendants had challenged the compromise decree in an application made by them under section 151 of the Civil Procedure Code and their petition was rejected. There is no substance in this contention. The application under section 151 was not an application which the defendants could, as a matter of right, press. It simply invoked the inherent power of the court. In the next place the matter was not gone into in the court below and the application under section 151 was dismissed summarily upon the ground stated by the Munsif that he could not, under the provision of section 151, give the defendants the relief which they sought. There was no decision as to whether the compromise was fraudulent or not in the miscellaneous application of the defendants under section 151 of the Civil Procedure Code and no res judicata can apply to a matter left undecided. The defendants in the present case stand on a firmer ground. They attack the compromise upon the ground of fraud. The learned Chief Justice, Sir Lawrence Jenkins, in the case referred to above, clearly stated that in the review question the allegation of fraud was negatived. In the present case the ground of fraud urged to impugn the validity of compromise by the court below has been upheld. The case will, therefore, be governed by the principle laid down by this court in the case of *Ramratan Singh* v. *Khublal Gope* (1). The defendants were quite competent to take the plea of fraud in order to avoid the compromise and fraud having been once established, the compromise is void and cannot stand.

The result is that the decision of the court below is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

(1) (1917) 39 Ind. Cas. 891.

APPELLATE CIVIL.

Before Das and Ross, J.J.

JHAPSI SAO

v.

MUSSAMMAT BIBI ALIMAN.*

1925.

Dec., 1.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section 22(2)—co-proprietor purchasing occupancy holding, whether entitled to retain possession after partition.*

Under section 22(2) of the Bengal Tenancy Act, 1885, "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".

Held, that the privilege conferred on the purchasing co-sharer by section 22(2), in derogation of the common right of the other co-sharers, is not taken away by reason only of a partition taking place. Therefore a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of the holding on payment of rent to his co-sharers even after the estate in which the land is situate has been partitioned among the co-proprietors.

Babu Ram Prasad v. *Munshi Gopal Chand* (1), *Nandkishore Singh* v. *Chanderdip Singh* (2) and *Basdeo Narain* v. *Radha Kishun* (3), followed.

Rambahadur Lal v. *Gungora Kuar* (4), referred to.

Quamuddin Khan v. *Ramyad Singh* (5), distinguished.

Midnapore Zamindary Company, Limited v. *Naresh Narayan Roy* (6), explained.

* Appeals from Appellate Decrees nos. 55, 116 and 263 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Patna, dated the 9th November, 1922, affirming a decision of Lala Tarak Nath, Subordinate Judge of Patna, dated the 30th September, 1925.

(1) (1921) 2 Pat. L. T. 163.
(2) (1922) 3 Pat. L. T. 13.
(3) (1922) 3 Pat. L. T. 22.
(4) (1925) 89 Ind. Cas. 282.
(5) (1922) I. L. R. 1 Pat. 600.
(6) (1924) I. L. R. 51 Cal. 631, P. C.

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Appeal by the plaintiffs.

These three appeals were directed against the judgment of the learned District Judge of Patna affirming a decision of the Subordinate Judge in suits brought by the plaintiffs for recovery of possession of certain lands as being bakasht lands to which they were entitled as the result of a partition. Mauza Dariapur Hasan was originally an estate bearing tauzi no. 88 in the Patna Collectorate. It was first partitioned in the year 1901 and on that partition one of the takhtas created was a takhta of 14-annas 15-dams which became tauzi no. 5146. One of the proprietors of that estate was Dr. Abdulla. The record-of-rights was finally published on the 22nd of February, 1911, when the lands in suit were recorded as bakasht lands subject to the incident that they were held by the defendants by virtue of purchase on payment of a proportionate share of rent to their co-sharers; that is to say, as being held under section 22(2) of the Bengal Tenancy Act. In 1912 further partition proceedings in respect of tauzi no. 5146 began and certain orders were passed by the Board of Revenue which are referred to in the judgment of Ross, J. The share of Dr. Abdulla became tauzi no. 5146 (new) and this estate was subsequently sold to the plaintiffs. The plaintiffs brought these suits to recover possession of the lands held by the defendants. The courts below held concurrently that the lands in suit were acquired by the defendants or their ancestors by purchase. There was no finding that the lands were acquired by the defendants or their predecessors before they became co-sharers in the village. The District Judge held that on this finding the defendants were entitled to continue to possess the lands on payment of rent under section 22(2) of the Bengal Tenancy Act, and that they were not liable to be ejected from cultivating possession.

Manuk (with him *Sushil Madhab Mullick*), for the appellants: A co-sharer landlord cannot retain possession of land on the ground that he is recorded

in the survey record as being entitled to keep the land in his possession on payment of rent to his co-sharers. He cannot resist partition on that ground. The respondents are estopped from upsetting the partition of the Board which proceeded on the assumption that the land in dispute was bakasht land. They cannot take shelter under section 22(2) which ceases to be applicable after partition. The Judicial Committee, in *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (1), clearly lays down that where a co-sharer purchases a jote right in land held in common by co-sharers, such a purchase will be held in law to be for the benefit of all the co-sharers. Section 22(2) provides for an arrangement that so long as they are co-sharers the jote will be in the exclusive possession of one proprietor; but the arrangement will not derogate from the common law right of each proprietor to get back his property after partition. The case of *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (1) in terms lays down that the co-sharer cannot resist partition on the ground that he is entitled to the exclusive possession of the jote. I also rely on *Quamuddin Khan* v. *Ramyad Singh* (2). Section 22(2) has no application after there has been a partition because the section contemplates the existence of co-proprietors and as soon as there is no joint interest subsisting in the land, the section ceases to have operation.

Sultan Ahmed (with him *Hasan Jan* and *Ahmed Reza*), for the respondents: A purchasing co-proprietor has a peculiar status under section 22(2) and this status will not be disturbed by reason only of a partition having been effected. The question is concluded by *Babu Ram Prasad* v. *Munshi Gopal Chand* (3) which has been followed in *Nandkishore Singh* v. *Chanderdip Singh* (4) and *Basdeo Narain* v. *Radha Kishun* (5).

(1) (1924) I. L. R. 51 Cal. 631, P. C. (2) (1922) I. L. R. 1 Pat. 600.
(3) (1921) 2 Pat. L. T. 163. (4) (1922) 3 Pat. L. T. 13.
(5) (1922) 3 Pat. L. T. 22.

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[DAS, J.—Does not the word "co-proprietors" in section 22 indicate that the purchase was for the benefit of all the co-sharers?]

I am holding the land for the benefit of my co-sharers only to this extent that I must pay rent to them. If certain rights have vested in me before partition, they cannot be taken away by partition; if the intention of the legislature had been otherwise, there would have been an express provision to that effect. The case of *Quamuddin Khan* v. *Ramyad Singh* (1) related only to pure bakasht lands and I submit that the position would be quite different if, as in the present case, it is bakasht land burdened with a right to hold it subject to the payment of rent to the co-sharer-landlords. The principle of trust is applicable in so far as it relates to the payment of rent only, the co-sharers having no right to claim any interest in the land itself.

[DAS, J.—Where there is a fiduciary relationship between the parties you cannot take any advantage to yourself without giving a share in the advantage to your co-sharers.]

The question is how far that fiduciary relationship extends. I submit it only extends to their right of receiving proportionate rent from me. Even in *Quamuddin Khan* v. *Ramyad Singh* (1) a few exceptions have been pointed out, *viz.*, a case where there is an arrangement between the co-sharer-landlords; and section 22(2) has been expressly referred to as coming within those exceptions.

In the case of *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (2) the question of section 22(2) was not raised. Moreover there is a world of difference between the status of a purchaser from the co-proprietor and that of a co-proprietor having an interest in the land after partition. The first distinguishing element is that a person entitled to retain

(1) (1922) I. L. R. 1 Pat. 600. (2) (1924) I. L. R. 51 Cal. 631, P. C.

possession must remain a proprietor. As soon as he ceases to be a proprietor, section 22(2) has no application.

[ROSS, J.—Does not section 22(2) contemplate that he should remain a co-proprietor?]

I submit not. Section 22(2) was enacted for the protection of a co-proprietor-purchaser, because even if this section had not existed the purchaser was bound to pay the proportionate share of rent as the tenant had been doing.

Manuk, in reply: There is no difference between a co-proprietor who voluntarily transfers his right and a person who by operation of law is compelled to transfer his right.

[ROSS, J.—A purchasing co-sharer acquires a privilege under section 22(2) in derogation of the common law. What is there to take away that privilege after partition?]

The fact that he ceases to be a co-sharer-landlord. The Privy Council says that he is in a less favourable position than an outsider-purchaser.

[ROSS, J.—After partition he might become a tenant, but how can partition give you any title?]

The privilege acquired by virtue of section 22(2) in derogation of my common right continues so long as the purchaser remains a co-proprietor.

[DAS, J.—The holdings which the co-proprietor purchases cannot form the subject-matter of partition because technically there is no proprietary interest.]

But the Privy Council in *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (1) has held that the co-sharer cannot resist partition on the ground that he is entitled to the exclusive possession of the jote.

[ROSS, J.—What the Privy Council says is that a landlord cannot prescribe against his co-sharer. He cannot be allowed to acquire an occupancy right as against his co-sharer-landlord.]

It goes further than that.

S. A. K. *Cur. adv. vult.*

(1) (1924) I. L. R. 51 Cal. 631.

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Ross, J. (after stating the facts set out above, proceeded as follows): The contentions on behalf of the plaintiffs-appellants are, first, that the defendants are estopped by the judgment of the Board of Revenue in the partition proceedings from claiming to retain possession of these lands; secondly, that the claim of the defendants is virtually one contesting the allotment made by the Board of Revenue and cannot be entertained under section 119 of the Estates Partition Act; and, thirdly, that the acquisition of these holdings by the defendants as co-proprietors was an acquisition for the benefit of all the proprietors and that they were not entitled to retain possession of the lands after partition of the estate, the plaintiffs' remedy against exclusive possession by any co-sharer being a suit for partition. The first two contentions do not call for any detailed consideration. It is true that the defendants gave up their claim, that these lands were raiyati lands, in the partition proceedings, and that the lands were allotted as bakasht lands by the Board of Revenue in order to equalize the amount of bakasht lands held by the different proprietors in the different takhtas; it is true that the judgment of the Board of Revenue shows that the allegation that the lands were raiyati lands was not pressed before the Board; but there is nothing to show that the defendants gave up the position recorded in the record-of-rights that they held the lands under section 22(2). The order of the Board of Revenue was that if the arrangement suggested in the judgment could be made without any valid objection, effect should be given to it; otherwise the existing arrangement would have to stand. It appears that effect was given to the arrangement suggested and the partition was confirmed. Subsequently it was brought to the notice of the Revenue authorities that there had been a misunderstanding and that the lands which were allotted as bakasht were not lands of which direct possession could be given. But as the partition had been confirmed, nothing resulted from these subsequent proceedings except certain pious observations. The contention of the learned Counsel for the

appellants is that the judgment of the Board of Revenue gave them a clear title to direct possession of these lands and that the subsequent proceedings were ultra vires. The subsequent proceedings were without any effect and did not purport to effect anything. But the judgment of the Board of Revenue, whether due to a misunderstanding or not, could not take away any title to the possession of these lands which was in the defendants, and did not purport to do so. Strictly speaking all that it declared was that the lands were bakasht lands, and this is not denied. But whether they were bakasht lands of which direct possession would be given to the proprietor of the takhta in which they were situated on partition is another question altogether and is unaffected by the judgment of the Board of Revenue. Nor do I see how section 119 of the Estates Partition Act can assist the appellants. That is a section which bars certain suits and it is not available to the plaintiffs in these actions; and to argue that the defence is in effect contesting the allotment made by the Board of Revenue is in my opinion begging the question at issue.

The main argument on behalf of the appellants rests on certain observations of the Judicial Committee in *Midnapore Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (1) where it is said that partition is the remedy which a co-owner has if he and his other co-owners cannot agree as to how the lands which they hold in common should be managed; and, further, "If the Midnapore Company has in fact been cultivating any of these lands, it cannot, by such separate use of the lands, have acquired any jote rights in them. Even if the Midnapore Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers and the jote right so purchased would by the purchase be extinguished". Now this general statement of the law must be read subject to the provisions of

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ROSS, J.

section 22(2) of the Bengal Tenancy Act, where the consequences of the purchase of an occupancy holding by a person jointly interested in the land as proprietor are enacted. Learned Counsel relies on the language of that sub-section and contends that if it be construed strictly it has no application after partition occurs. The section enacts that a co-proprietor acquiring an occupancy right in land

> "shall be entitled to hold the land subject to the payment to his co-proprietors.....of the shares of the rent which may be from time to time payable to them."

He argues that as from the moment of partition there are no longer any co-proprietors, the sub-section ceases to have any operation; and the land must be treated as ordinary bakasht land falling to the direct possession of the proprietor of the takhta to which it is allotted. In principle I do not see why this consequence should ensue. Section 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee quoted above. I do not see what there is in partition to take away that privilege. On the contrary it would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, section 22(2) imposes a limitation on the rights of the co-sharers for the benefit of the purchasing co-sharer; and there is no reason why this limitation should be removed by reason only of a partition taking place. That no undue stress is to be laid on the word "co-proprietors" in the sense contended for by the appellants would appear from the decision of this court in *Bambahadur Lal* v. *Gungora Kuar* (1) where the status conferred by section 22(2) was discussed and it was held that the status created was a peculiar status which attached to the co-sharer so long as he remained a co-sharer; it was held that when the co-sharer parted with his interest in the estate he lost the right to retain land

(1) (1924) 89 Ind. Cas. 282.

under that section. But in referring to the decisions where it had been held that on partition the purchasing co-sharer was entitled to retain possession of land recorded in his name under section 22(2) of the Bengal Tenancy Act, Kulwant Sahay, J., said, "In these cases the interest of the co-sharer who had purchased the holding did not cease; he continued to be the proprietor after the partition and hence it was held that he was entitled to retain possession". His right to possession was therefore not limited to the period of the co-proprietorship but continued because the co-proprietor continued to be proprietor (though of another takhta) after the partition. The authorities bearing directly on the question are conclusive in favour of the respondents. In *Babu Ram Prasad* v. *Munshi Gopal Chand* (1) the precise question now under consideration was dealt with and it was held that the defendants could not be ejected from such lands upon partition; and that the legislature never intended nor did the language of section 22(2) give rise to the interpretation that the co-proprietor acquiring an occupancy holding by purchase, although entitled to retain possession on payment of rent to his co-sharers, must give it up the moment the estate in which the land is situate is partitioned among the co-proprietors. The same view was taken in *Nandkishore Singh* v. *Chanderdip Singh* (2) where the argument that the purchasing co-proprietors ceased to be co-proprietors after the partition, and that the partition effected a complete change in the status, was dealt with and was negatived. A similar view was taken in *Basdeo Narain* v. *Radha Kishun* (3), a case which dealt with section 22(2) of the Act as it stood before the amendment in 1907. In that case their Lordships observe as follows: "Now if this be correct, something must happen subsequent to the acquisition of the holding by the co-sharer-landlord to put an end to the holding. It is suggested that the partition between the co-sharer-landlords puts an

(1) (1921) 2 Pat. L. T. 163. (2) (1922) 3 Pat. L. T. 13.
(3) (1922) 3 Pat. L. T. 22.

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JHAPSI SAO v. MUSSAMMAT BIBI ALIMAN.

ROSS, J.

end to the holding; but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned Vakil appearing on behalf of the respondents". Learned Counsel for the appellants relied on the decision in *Quamruddin Khan* v. *Ramrad Singh* (1) as laying down a different principle. Now that case was expressly decided on the ground that it was not a case under section 22(2) of the Bengal Tenancy Act, and the decisions referred to above, which were considered, were not dissented from but were distinguished precisely on that ground. The lands in that case were treated as ordinary bakasht lands of the maliks without more, which on partition would necessarily go to the proprietor of the takhta to which they were allotted.

On the principle and on authority I am of opinion that the decision of the learned District Judge in this case was correct and that these appeals should be dismissed with costs.

DAS, J.—I agree.

Appeals dismissed.

PRIVY COUNCIL.

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Dec., 2.

RAO BAHADUR MAN SINGH

v.

MAHARANI NOWLAKHBATI.*

Hindu Law—Widows' Estate—Surrender to Reversionary Heirs—Reservation of Maintenance Allowance—Widows Disqualified Proprietors—Invalidity of Deed of Surrender—Court of Wards Act, 1879 (*Ben. Act IX of* 1879), *section* 60.

The two widows of a Hindu who were in possession of his property for a joint widows' estate were declared in 1907 to be disqualified proprietors under the Court of Wards Act,

* PRESENT: Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

(1) (1922) I. L. R. 1 Pat. 600.

1879, and the Court of Wards took charge of their property under the Act; a maintenance allowance of Rs. 625 each per mensem was made to the widows who resided in the house on the property. In 1908 the widows, without the sanction of the Court of Wards, executed a deed by which they purported to surrender all their rights in the property to the two grandsons of their deceased husband, as next heirs, the grandsons agreeing to pay to the widows Rs. 2 000 per mensem for maintenance. The widows informed the Court of Wards of the deed and requested that the charge of the property should be made over to the grandsons, unless it was desired to retain it.

By section 60 of the above Act "No ward shall be competent to create, without the sanction of the Court" (*i.e.* the Court of Wards) "any charge upon, or interest in, his property, or any part thereof".

Held, that the surrender was void under Hindu law, also as being in contravention of section 60 abovementioned, and that the transaction was ineffectual to vest the property in the grandsons.

Sureshwar Misser v. *Mahashrani Misrain* (1), explained and distinguished.

Judgment of the High Court (2) affirmed.

Appeal (no. 95 of 1924) from a decree of the High Court (April 6, 1923) affirming a decree of the Additional Subordinate Judge of Bhagalpur (June 5, 1922).

The suit was brought by the appellant to obtain possession of half the Sonbarsa estate, valued at over forty lakhs of rupees, from the first respondent, the junior widow of Maharaja Sir H. N. Singh, the last male holder. The claim made was that the first respondent and her co-widow (since deceased) surrendered the property to the father (since deceased) of the plaintiff by a deed, dated December 18, 1918, and that the plaintiff, on his father's death, became entitled to a moiety of the property. At the date of

(1) (1921) I. L. R. 48 Cal. 100; L. R. 47 I. A. 233.

(2) (1923) I. L. R. 2 Pat. 607.

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the deed the widows were disqualified proprietors under the Court of Wards Act, 1879, the Court of Wards having charge of the property under that Act.

The facts appear more fully from the judgment of the Judicial Committee.

The following were among the issues framed, and the findings of the Courts in India.

4. Whether the said deed of surrender amounts to a surrender of the entire interest of the Maharanis in the Sonbarsa estate. Trial Judge, Yes; on appeal, No.

5. Is the deed of surrender valid having regard to the provisions of section 60 of the Court of Wards Act (IX of 1890 B.C.). Both courts, No.

6. Did the aforesaid deed of surrender accelerate the succession of plaintiff's father and defendant second party, the next reversioners to the said estate, and vest it in plaintiff's father and defendant second party, and did they acquire right, title and equal share to the said estate as proprietors and become entitled to possess it by virtue of the said surrender. Trial Judge, Yes; on appeal, No.

The Subordinate Judge dismissed the suit having regard to his finding on issue 5.

On appeal the decree was affirmed. Das, J., with whose judgment Sahay, J., agreed, was of opinion that the transaction of December 18, 1918, came within the prohibition of section 60 of the Court of Wards Act, and that therefore it was invalid. The learned Judge, after discussing the authorities with regard to relinquishment by a Hindu widow, said: "I have come to the conclusion that it cannot be laid down as an inflexible rule applicable to all cases that the heir takes by operation of law whenever as a result of a transaction to which the widow and the heir are parties, the entire estate becomes vested in the heir or goes to a stranger with the consent of the heir. In a case of disclaimer by the widow at the time of the death of her husband or of relinquishment,

properly so called, afterwards, the title of the heir would undoubtedly arise by operation of law, and, in my opinion, section 60 of the Court of Wards Act would not operate to the prejudice of the heir, assuming that, at the date of the relinquishment, the widows were wards of the Court. But a case of relinquishment must be carefully distinguished from a case which is not one of relinquishment, but which is capable of being supported by reference to the theory of relinquishment. A true case of relinquishment arises when there is the renunciation of the world by the widow and the abandonment of the estate by her or some act by her which might in the eye of law justify the inference that she is civilly dead."

The appeal to the High Court is reported at I. L. R. 2 Pat. 607.

1925. Oct. 30, Nov. 2, 3. De Gruyther, K. C., and *Hyam*, for the appellant: Section 60 of the Court of Wards Act has no application to the case. The deed operated simply to extinguish the widows' interest in their husband's estate; the reversionary heirs succeeded not by virtue of the conveyance but by the operation of Hindu law. No sanction of the Court of Wards was necessary for the purpose. Renunciation of the world is not essential to an effectual relinquishment by a Hindu widow. A surrender of the estate to the reversionary heirs can operate to accelerate the reversion although it is coupled with a reasonable provision for the maintenance of the widow. Reference was made to *Shama Soonduree* v. *Surut Chunder Das* (1), *Noferdoss Roy* v. *Modhu Soondari Burmonia* (2), *Rangasami Gounden* v. *Nachiappa Gounden* (3), *Bhagwat Koer* v. *Dhanukhdari Prasad Singh* (4), *Sureshwar Misser* v. *Maheshrani Misrain* (5), *Kustoora Koomaree* v. *Monohur Deo* (6), *Dhunput Singh* v. *Shoobhudra Kumari* (7);

(1) (1867) 8 W. R. 500.
(2) (1880) I. L. R. 5 Cal. 732.
(3) (1918) I. L. R. 42 Mad. 523; L. R. 46 I. A. 72.
(4) (1919) I. L. R. 47 Cal. 466; L. R. 46 I. A. 259.
(5) (1920) I. L. R. 48 Cal. 100; L. R. 47 I. A. 233.
(6) (1864) W. R. 38.
(7) (1882) I. L. R. 8 Cal. 620.

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Mayne's Hindu Law, para. 638 and Golap Chundra Sarkar's Hindu Law, p. 444.

Lowndes, *K.C.*, and *E. B. Raikes*, for the respondents: Having regard to section 60 of the Court of Wards Act, 1879, the Maharanis were not competent to surrender their life-interests to the reversioners without the consent of the Court of Wards. The plaint was based entirely upon the deed of December 18, 1918. If the deed was invalid no further question arises. The deed purports to be a transfer, and one for consideration; and within the meaning of the section it purports to create an interest in the property, and, as to the maintenance, to charge the property. The deed is not one which merely recognizes a relinquishment by the widows under Hindu law; there was no such relinquishment. The widows could not be regarded as being civilly dead since they were to be entitled to maintenance; a widow cannot be "partly effaced and partly not so". *Rangasami Gounden* v. *Nachiappa Gounden* (1). The decision of the Board in *Sureshwar Misser* v. *Maheshrani Misrain* (2) in which part of the estate was retained for maintenance rested on the widow's power to compromise claims upon the estate, not upon the Hindu law as to a relinquishment. Neither of the above cases dealt with a widow who was a disqualified proprietor under the Court of Wards; as the property was in the possession and management of the Court of Wards there could be no effectual relinquishment effected by Hindu law. The deed gives the grandsons the estate in moieties as tenants in common. If the widows had died the grandsons would have taken as joint tenants subject to survivorship: *Chalikani Venkayamma* v. *Chalikani Venkataramanayamma* (3).

De Gruyther, *K.C.*, replied.

(1) (1918) I. L. R. 42 Mad. 523, 532; L. R. 46 I. A. 72, 80.

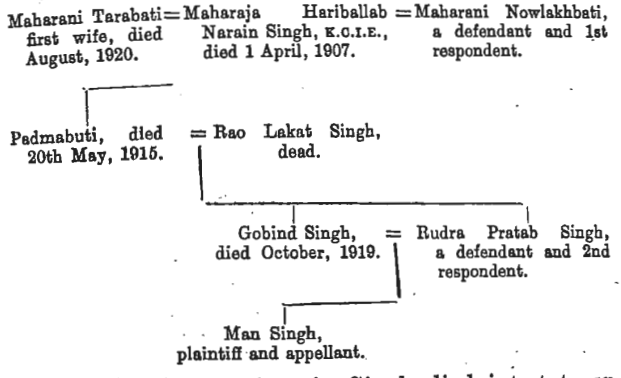
(2) (1920) I. L. R. 48 Cal. 100; L. R. 47 I. A. 283.

(3) (1902) I. L. R. 25 Mad. 678; L. R. 29 I. A. 156.

Dec., 2. The judgment of their Lordships was delivered by—

SIR JOHN EDGE.—This is an appeal from a decree, dated the 6th April, 1923, of the High Court at Patna, which affirmed a decree, dated the 5th June, 1922, of the Additional Subordinate Judge of Bhagalpur.

The parties to the suit in which this appeal has arisen are Hindus, by caste Rajput, of the district of Bhagalpur, who are governed by the law of the Mitakshara, and the following pedigree shows how they are related :—



Sir Hariballab Narain Singh died intestate on the 1st April, 1907, possessed of the Sonbarsa estate, which was situate principally in the district of Bhagalpur and produced an income of about two lakhs of rupees a year. On his death his two widows, Maharani Tarabati and Maharani Nowlakhbati, succeeded him in the possession of the estate. On the 30th April, 1907, the two widows, who were pardanashin ladies, jointly presented to the Collector of Bhagalpur a petition in which they alleged that the estate was heavily involved in debt, that there were large arrears of income to be collected, and that they were unable to manage the estate, and asked that they

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should be held under section 6 of the Court of Wards Act, 1879, to be disqualified proprietors, and should be declared by the Court of Wards incompetent to manage their own property and that the estate should be taken over by the Court of Wards. That application was forwarded by the Collector to the Court of Wards, and thereupon the Court of Wards under section 27 of the Act made on the 27th May, 1907, an order declaring that the widows were incompetent to manage their own property and declaring that it was determined under section 35 of the Act that the Court of Wards should take charge of the property of the widows and directed that possession of such property should be taken on behalf of the Court of Wards. Thereupon the widows became wards of the Court of Wards. The Court of Wards allowed to each of the widows Rs. 625 a month for her maintenance. On the death of Maharani Tarabati in 1920 the monthly allowance made by the Court of Wards to Maharani Nowlakhbati for her maintenance was increased to Rs. 1,250. The widows and the survivor of them continued to live in the family house of the Sonbarsa estate.

On the 18th December, 1918, the widows, as parties of the first part, and Gobind Singh and Rudra Pratab Singh, as parties of the second part, made a deed, written in English, which, omitting the schedule, is so far as is material as follows:

"(Sd.) Sri Maharani Tarabati. By my own pen.

(Sd.) Sri Maharani Nowlakhbati. By my own pen.

This INDENTURE made the eighteenth day of December of the Christian year One Thousand Nine Hundred and Eighteen BETWEEN Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widow respectively of the late Maharaja Harballab Narain Singh Bahadur, K.C.I.E., residing at Sonbarsa in thana Sonbarsa, pargana Nisankhpur Korha, district Bhagalpur, hereinafter called the First Party of the one part; and Rao Bahadur Govind Singh and Rudra Pratab Singh, sons of the late Rao Bahadur Takat Singh and daughter's son of the said Maharaja Hariballab Narain Singh Bahadur, K.C.I.E., residing at Barware, in the Jeypore State in Rajputana, hereinafter called the second party of the other part, WHEREAS the late Maharaja Hariballab Narain Singh Bahadur, K.C.I.E., died intestate on the 1st day of April, 1907, leaving considerable property, movable and immovable, commonly called

the Sonbarsa Estate, mostly situate in pargana Nisankhpur Kurha in the subdivision of Madhipura, district Bhagalpur, and leaving behind him no male issue but only two widows, namely, the First Party and an only daughter, namely, Maharaj Kumari Padmabati, mother of the Second Party, and two daughter's sons by the said daughter, namely, the Second Party AND WHEREAS on the death of the said Maharaja Bahadur the First Party succeeded to and came into possession of all property, movable and immovable, left by him, with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur AND WHEREAS by reason of the FIRST PARTY being Pardanashin ladies incapable of managing a big property like the Sonbarsa Estate, the Court of Wards has taken up the management of the said Estate under the provisions of ACT IX of 1879 (B.C.) on their behalf, and is at present managing the property through Rai Sahib Nilmoney Dey, Manager appointed under the provisions of the said Act and WHEREAS the First Party are now getting a monthly allowance of Rs. 625 (Rupees six hundred and twenty-five) each from the Court of Wards for their respective maintenance. AND WHEREAS the said Maharaj Kumari Padmabati died on the Twentieth day of May, 1915, AND WHEREAS the First Party are now growing old and are desirous of remaining aloof from the concerns of the world and of spending their latter days in Divine Worship and meditation in the Holy City of Benares, with an allowance for their maintenance befitting their rank and position. AND WHEREAS for the reasons aforesaid the First Party wish to relinquish and surrender their Hindu Widows' Estate in the said property left by the said Maharaja Bahadur, their deceased husband, to the next heirs, the Second Party who have undertaken to pay them or the survivor of them, out of the income and profits of the said Estate left by the said Maharaja Bahadur, the monthly sum of Rs. 2,000 (Rupees two thousand) for maintenance and also to defray the expenses of the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo and Radha Krishan Jeo, at a cost of Rs. 100 (Rupees one hundred) per mensem. AND WHEREAS the Second Party have agreed to all the terms aforesaid.

NOW THIS INDENTURE WITNESSETH :—

1. That the first party Maharani Tarabati and Maharani Nowlakhbati do hereby relinquish and surrender all their rights in the property movable and immovable, left by their husband, the late Maharaja Hariballab Narain Singh Bahadur, K.C.I.E., commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the Second Party Rao Bahadur Gobind Singh and Rudra Pratab Singh, the next heirs of the said Maharaja Bahadur under the Hindu law, and in pursuance thereof the first party do hereby make over the entire property aforesaid to the second party in full extinction of their rights therein as Hindu widows.

2. That the second party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's sons succeeding to the property of their maternal grandfather under the Benares School of Hindu Law, the share of each being a moiety of the said property.

3. That the second party will be entitled to have their names entered as proprietors in equal share in respect of the revenue-paying

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or revenue-free estates included in the said property by removing the names of the first party now recorded in the Registers maintained under ACT VII of 1876 (B. C.).

4. That the first party will at once inform the Court of Wards of this surrender and request the court to make over the charge and management of the said property to the second party subject to the court's retaining the management if it thinks fit, under section 18A of the said Act IX of 1879 (B. C.).

5. That the first party or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, from the second party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the second party undertake to keep up and maintain the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo, and Radha Krishna Jeo, installed at the Sonbarsa House left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem, and should they omit or neglect to carry out that undertaking the first party will be entitled to enforce the fulfilment thereof.

In WITNESS WHEREOF the said parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of:—

Witnesses.—(1) Bindhyeswari Prasad Singh, High Court Vakil, Monghyr.

(2) Ajodhya Prasad Choudhary, M.C., resident of Kassim Bazar, Monghyr.

Witness.—Prabhu Charan Ambasta, Bhikhanpur, Bhagalpur.

" Bindyeswari Prasad Singh, Vakil, Monghyr.

" Anirudh P. Singh, Pleader and Zamindar, Panjwara, Bhagalpur.

" Ram Chandra Singh of Mohanpur, Bhagalpur.

" Ram Chandra Singh of Mauza Chakla Hanuman Nagar. By my own pen.

" Babu Nirbhay Narayan Singh of Bindwara, Pargana Monghyr. By my own pen."

The deed was registered on the 18th December, 1918.

On the same day, 18th December, 1918, Gobind Singh and Rudra Pratab Singh by their ekrarnama agreed in writing with the widows so far as is material as follows:

" This agreement made on the 18th (Eighteenth) day of December one thousand nine hundred and eighteen Between Rao Bahadur Gobind Singh and Rudra Pratap Singh, *alias* Begai Singh, sons of the late Rao Bahadur Lakat Singh, and daughter's sons of the late Maharaja

Hariballab Narain Singh Bahadur, K.C.I.E., residing at Barwara in the Jaipur State, Rajputana, hereinafter called the first party of the one part and Maharani Tarabati and Maharani Nowlakhhati, the senior and junior widows, respectively, of the said Maharaja Hariballah Narain Singh Bahadur, K.C.I.E., residing at Sonbarsa, in thana Sonbarsa, pargana Nisankpur Karha, district Bhagalpur, hereafter called the second party of the other part, whereas the said Maharaja Hariballab Narain Singh Bahadur, K.C.I.E., died intestate on the 1st April, 1907, leaving considerable property movable and immovable, commonly called the Sonbarsa estate, mostly situate in pargana Nisankpur Karha in the subdivision of Madhipura, in the district of Bhagalpur, but also situate in part in pargana Farakya, in the district of Monghyr, and leaving behind him no male issue, but only two widows, namely, the second party, and an only daughter, namely, Maharaj Kumari Padmabati, mother of the first party, and two daughter's sons by the said daughter, namely, the first party. And whereas on the death of the said Maharaja Bahadur, the second party, succeeded to and came into possession of all property, movable and immovable, left by him with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur, and whereas by reason of the second party being Pardanashin ladies, incapable of managing a big property like the Sonbarsa estate the Court of Wards has taken up the management of the said estate, under the provision of Act IX of 1879 (B. C.) on their behalf, and is at present managing the property through Rai Sahib Nilmoney Dey, Manager appointed under the provisions of the said Act: And whereas the said Maharaj Kumari Padmabati died on 20th (Twentieth) day of May, 1915. And whereas the second party, who are now growing old and are desirous of remaining aloof from the concerns of the world, and of spending their latter days in Divine Worship and meditation in the holy city of Benares, have proposed to surrender their estate to the first party who are now the next reversionary heirs of the said Maharaja Bahadur under the Hindu law on getting a suitable maintenance for the remainder of their natural lives, and an assurance that the worship of the family deities at Sonbarsa should be kept up and maintained in the proper stage by the first party. And whereas the first party have agreed in the event of the said surrender being made, to give the second party or the survivor of them, a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, and also to keep up and maintain the worship of the said family deities in a suitable style at the cost of Rs. 100 (Rupees one hundred) per mensem. And whereas the second party consider the said amount of maintenance allowance and of the expenses of worship fair and reasonable, and therefore they are executing the deed of surrender contemplated by them. The first party, therefore, in consideration of the premises, do hereby agree of their own free will and accord that from the day they became the proprietors of the said Sonbarsa estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the second party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (Rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any months (which is to be taken as an English month) on the first day of the following month, the second party will be at liberty to enforce the payment thereof, with simple interest at the rate of twelve per cent. per mensem, by process of court, and the said

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arrears of allowance, with interest and the costs of the suit if any to enforce the payment thereof shall be the first charge on the property mentioned in the schedule hereto annexed which forms a part of the estate surrendered by the second party as mentioned above. And the first party further agree, that from the day aforesaid they shall keep up and maintain the daily and periodical worship of the family deities Lachhmi Narain Jeo, Ram Chander Jeo, and Radha Krishna Jeo, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem (the month being taken as an English month), and should they omit or neglect to carry out this agreement the second party will be entitled to enforce the fulfilment thereof. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of witnesses (1) Bindyeswari Prasad Singh, High Court Vakil, Monghyr, (2) Ajodhya Prasad Choudhary, M.C., resident of Kassim Bazar, Monghyr."

That agreement was registered on the 18th December, 1918.

On the 23rd December, 1918, the two widows sent the following letter to the Collector of Bhagalpur:

"To

The Collector of Bhagalpur.

Dated Bhagalpur, the 23rd December, 1918.

Sm,

We have the honour to state the following for your information:—

That we are disqualified proprietresses of the Estate known as the Sonbarsa Estate and we are Wards of the Court.

That we have two grandsons named Rao Bahadur Gobind Singh and Rudra Pratap Singh.

That for sometime past we had been contemplating surrendering our rights to the estate in favour of our two grandsons who are the reversioners to the estate and we had informed Mr. B. C. Sen, I.C.S., the then Collector, and the Hon'ble Mr. H. J. McIntosh, I.C.S., the then Commissioner, informally about our intentions.

That we have kept Mr. Sen informed informally about all the steps that we have been taking in connection with our intention to surrender the estate.

That we had taken the best legal advice (*e.g.*) of the Government Advocate, Bihar and Orissa, and Government Pleader, Bhagalpur, and we were given to understand that under the law we had every right to surrender the estate in favour of our two grandsons.

That in pursuance of our intentions to keep the authorities informed about all our actions in connection with the surrender, we so far back as March, 1918, sent a copy of the proposed deed of surrender to the Collector of Bhagalpur with our forwarding letter, dated the 4th March, 1918,

That we have executed and registered the deed of surrender on the 18th instant and as provided in para. 4 of the said deed we beg to inform you about the same and request you to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudra Pratap Singh, our two grandsons aforesaid, if the Court of Wards do not think fit to rotain management under section 13(*a*) of Act IX of 1879 (B. C.).

That we have been given to understand that our two grandsons aforesaid are applying for the mutation of their names in the registers maintained under Act VII of 1876 (B. C.) and that we have no objection to their so doing.

We have the honour to be,

SIR,

Your most obedient servants,

(Sd.) Sri Maharani Tarabati,

(Sd.) Sri Maharani Nowlakhbati,
Maharanis of Sonbarsa."

The gentlemen whom the widows mentioned as the Government Advocate and Government Pleader in giving any advice to the widows acted as their legal advisers, and not in any respect as representing the Court of Wards.

On the 15th April, 1919, the Court of Wards through their Deputy Collector sent the following reply to the widows to their petition of the 23rd December, 1918:

"To

Maharani Tarabati Kumari and Nowlakhbati Kumari, Sonbarsa.

Their petition no. nil, dated the 23rd December, 1918.

The Maharanis of Sonbarsa are informed that the Board of Revenue, Bihar and Orissa, considers that the deed of relinquishment executed by them in favour of their grandsons is invalid.

(Sd.) H. Bhattacharyja,
Wards Deputy Collector."

The Court of Wards had never given any sanction to the widows or to either of them to create any charge upon or interest in the property of the wards or any part thereof.

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In February, 1919, Gobind Singh applied to the court of the Deputy Collector of Bhagalpur for mutation of names in his favour in respect of an eighth share in the estate on the ground that he had a right to the moiety of the estate, his contention being that the deed of the 18th December, 1918, operated as a surrender of the interests of the widows of their interests in the estate. Rudra Pratab Singh did not oppose the application. The application was opposed by the Manager of the Court of Wards on various grounds, one of which it is only necessary in the view their Lordships take of the law applicable to the case to consider, and that is that the Court of Wards had not sanctioned the so-called surrender and that it was consequently invalid under section 60 of the Court of Wards Act, 1879. That section is as follows:

"60. No ward shall be competent to create, without the sanction of the court, any charge upon, or interest in, his property or any part thereof."

The court in that section mentioned was the Court of Wards. Gobind Singh's application for mutation of names was rejected.

Gobind Singh died in October, 1919. Maharani Tarabati (the first wife) died in August, 1920. Man Singh, who was the son of Gobind Singh, brought this suit on the 17th January, 1921. In his plaint Man Singh referred to the deed of the 18th December, 1918, and relied upon it as a surrender by the widows of their interest as proprietors of the Sonbarsa estate and as having vested that estate in his father, Gobind Singh, and in Rudra Pratab Singh. The eleventh, twelfth and thirteenth paragraphs of the plaint state the title upon which the suit was brought, thus:

"11. That by the said deed of surrender the said Maharanis having put an end to their life estate as Hindu widows in favour of the entire body of the then reversioners the aforesaid Rao Bahadur Gobind Singh and Rudra Pratap Singh, the defendants, second party in the aforesaid Sonbarsa estate, all the properties both movable and immovable appertaining to the said Sonbarsa estate vested solely and absolutely in the said reversioners, who became entitled to hold, possess and enjoy the aforesaid estate as the absolute owners of and successors to the properties left by their maternal grandfather by right of inheritance under the Benares School of Hindu Law.

12. That as the aforesaid heritage being one which is known as obstructed heritage, the plaintiff's father, Rao Bahadur Gobind Singh, and Rao Bahadur Rudra Pratap Singh, the defendant, second party acquired equal rights in the same and the share of each being a moiety of the said properties.

13. That the plaintiff's father, Rao Bahadur Gobind Singh, died in October, 1919, leaving the plaintiff his only son and the sole heir to his estate and he is lawfully entitled to all the rights and interest acquired by his late father in the aforesaid Sonbarsa estate by virtue of the aforesaid deed of surrender."

Man Singh, the plaintiff, prayed for the following amongst other reliefs:

"(*a*) That the court be pleased to declare that by the deed of surrender and the ekrarnama, dated the 18th of December, 1918, the plaintiff's father and the defendant second party became entitled as the next immediate reversionary heirs of the late Maharaja Sir Hariballab Narain Singh Bahadur, K.C.I.E., to all the properties left by him and the defendant, first party has no right to withhold possession of the Sonbarsa estate from the plaintiff and the defendant second party.

(*b*) That the court be pleased to pass a decree for recovery of possession of all the properties movable and immovable mentioned in Schedule A and B annexed to the plaint as well as any other properties that may be found on discovery to appertain to the Sonbarsa estate in favour of the plaintiff and the defendant, second party, by dispossessing the defendant, first party."

In schedule B of the plaint, which contains a list of the movable properties which were claimed, carriages, palkis, cattle, elephants, bullocks, cows, buffaloes, horses, and other things are mentioned as having been retained in the possession of Maharani Nowlakhbati.

The defendants, Maharani Nowlakhbati and Rudra Pratab Singh, filed separate written statements. The Maharani Nowlakhbati in her written statement pleaded amongst other things that the widows being disqualified persons and their estate being under the management of the Court of Wards, they had no authority to execute the alleged deed of surrender without the sanction of the Court of Wards and that the plaintiff's father did not acquire any valid title under the said deed, and also did not admit as correct the view of the law propounded in paragraphs 12 and 13 of the plaint and put the plaintiff to proof of his title.

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The defendant, Rudra Pratab Singh, in his written statement pleaded amongst other things that the alleged deed of surrender was not a surrender of the whole interest of the Maharani's and was void and illegal, and also that it was void and ineffectual as not having the sanction of the Court of Wards. Rudra Pratab Singh by his written statement put the plaintiff to proof of his title.

The Subordinate Judge framed twelve issues, of which the fifth is in the opinion of their Lordships the crucial issue in this case. It was: "5. Is the deed of surrender valid having regard to the provisions of section 60 of the Court of Wards Act (IX of 1879)?" If it is found that the deed of the 18th December, 1918, was in contravention of that section the plaintiff's suit fails and this appeal fails, and it is not necessary for their Lordships to consider whether the widows understood the deed or had executed it under any misrepresentation as to its object or effect, or without any independent advice, or to consider any other issue, or the questions of law raised in the eleventh paragraph of the written statement of the Maharani Nowlakhbati, which was that "the plaintiff should prove that he is entitled to a moiety share in the Sonbarsa estate, even if the said deed of surrender be held to be a valid document." Whilst saying this, their Lordships feel it right to say that the lengthy and elaborate judgments of the courts below have been of assistance to them in understanding the facts which were in dispute between the parties to this suit.

In this case no question, that there was any necessity for the surrender, arose. There was in fact no necessity for a surrender of the interests of the widows. The Subordinate Judge and the High Court in appeal concurrently found in effect that the parties to the deed of the 18th December, 1918, intended by that deed that the widows should surrender some of their interests in the Sonbarsa estate to Gobind Singh and Rudra Pratab Singh, and that the so-called surrender was void as being in contravention of

section 60 of the Court of Wards Act, 1879. Those learned Judges might have found on the facts that the deed was void independently of section 60 of the Act.

The question as to whether a surrender without necessity by a Hindu widow of her widow's interest in her deceased husband's estate, even in favour of the nearest reversioner, is valid was considered by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1). In the judgment of the Board in that case, it was said:

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bonâ fide* surrender, not a device to divide the estate with the reversioner."

In *Sureshwar Misser* v. *Mahashrani Misrain* (2), the Board affirmed that pronouncement of the law. In the latter case, in which the parties were subject to the law of the Mithila school, the widow of the deceased proprietor on the death of her infant son took absolutely the movable property. In that case there were serious disputes in the family as to title and the next reversioners to the son sued the widow and her daughters to set aside the Will of her husband under which the daughters were entitled to succeed to the immovable property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the immovable property, and the plaintiff the next reversioner, and her daughters gave her for her life a small portion of the land for her maintenance. The Board held that the compromise was a *bonâ fide* surrender of the estate, and

(1) (1918) I. L. R. 42 Mad. 523, 532; L. R. 46 I. A. 72, 80.
(2) (1920) I. L. R. 48 Cal. 100; L. R. 47 I. A. 233.

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not a device to divide it with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1).

The so-called surrender in the present case was, as stated above, void in law, and was also void as being in contravention of section 60 of the Act.

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

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

Solicitors for respondents: *Watkins and Hunter.*

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

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Nov., 3, 4.

SYED QAZI MUHAMMAD AFZAL

v.

LACHMAN SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), section 148—suit, withdrawal of, with liberty to bring a fresh suit on payment of costs within two months—whether time is of the essence of the order—Court, power of, to extend the period—condition precedent, failure—order inseparable.

Where a court permits the plaintiff to withdraw a suit with permission to institute a fresh suit on payment of costs within a prescribed period, payment of the costs is a condition precedent to the institution of a fresh suit and must be made within the prescribed period.

* Appeal from Appellate Decree no. 401 of 1925, and Civil Revision no. 510 of 1924, from a decision of Ashutosh Chattarji, Esq., Additional District Judge of Patna, dated the 19th March, 1925, confirming a decision of B. Jamini Mohan Mukherji, Munsif of Barh, dated the 18th February, 1923.

(1) (1918) I. L. R. 42 Mad. 523; L. R. 46 I. A. 72.

Kuldip Singh v. *Kuldip Chowdhury* (1), distinguished.

The court, however, has power under section 148 of the Code of Civil Procedure, 1908, to extend the prescribed time.

Suranjan Singh v. *Ram Bahal Lal* (2), distinguished.

Where the plaintiff complies with the conditions on which a withdrawal is permitted, the withdrawal is complete and the suit is at an end. If he does not, the suit remains pending and the plaintiff may, if he chooses, elect to proceed with it; and in the latter case, the court must dispose of the suit according to law.

Shital Prasad Mandal v. *Gaya Prasad Dingal* (3) and *Deb Kumar Roy Choudhury* v. *Debnath Baran Bipra* (4), approved.

Hari Nath Bose v. *Syed Hossainali* (5), *Subal Chandra Chowdhury* v. *Mosaraf Ali* (6) and *Goolapudi Seshayya* v. *Nadendla Subbiah* (7), disapproved.

Appeal and application by the plaintiff.

On the 15th August, 1923, the Munsif of Barh made the following order in a suit:—

"I therefore permit the plaintiffs to withdraw this suit with permission to bring a fresh suit on condition that they pay all costs to defendants besides pleader's fee Rs. 32 within two months from the date of the decree."

Subsequently the village in which the cause of action arose was transferred to the jurisdiction of the Munsif of Patna and, on the 12th September, 1923, a second suit on the same cause of action was lodged before the latter Munsif. But the costs directed to be deposited under the order of 15th August, 1923, were not deposited in the Court of the Munsif of Patna till the 1st February, 1924, and at the trial it was contended that the money not having been paid within the two months allowed by the order of the 15th August, 1923, the suit was not maintainable. The Munsif accepted this objection and dismissed the suit.

(1) (1918) 3 Pat. L. J. 63.
(2) (1913) I. L. R. 35 All. 582.
(3) (1914) 19 Cal. L. J. 529.
(4) (1921) 64 Ind. Cas. 738.
(5) (1905) 2 Cal. L. J. 480.
(6) (1917) 38 Ind. Cas. 476.
(7) (1924) 47 Mad. L. J. 646; 82 Ind. Cas. 499.

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In appeal the Additional District Judge of Patna agreed with this view and second appeal no. 401 of 1925 was preferred to the High Court against the District Judge's order.

After the suit was dismissed by the Munsif of Patna an application was made to the Munsif of Barh for an extension of the time allowed for the payment of the costs decreed by him. The Munsif held, first, that he had no jurisdiction to entertain the application, and, secondly, that on the merits no sufficient reason had been made out for allowing the plaintiff any extension of time, and he declined to extend the period of two months allowed by his order of the 15th August, 1923. Against this order of refusal the plaintiff moved the High Court under section 115 of the Civil Procedure Code in Civil Revision Case no. 510 of 1924.

Muhammad Hassan Jan and *Sashi Sekhar Prashad Singh*, for the appellant petitioner.

S. Dayal and *Raghunandan Prasad*, for the respondent opposite party.

MULLICK, J. (after stating the facts set out above, proceeded as follows):

The argument addressed to us by the learned advocate for the plaintiff-appellant is that time was not of the essence of the order of the 15th August, 1923, and that it is competent to the second Munsif of Patna to proceed with the suit provided the costs are paid any time before the disposal of the suit, and reference is made to *Kuldip Singh* v. *Kuldip Choudhury*[1].

But in that case the court did not fix any time within which the payment was to be made. The order in that suit was that the plaintiff might withdraw the suit and might bring a fresh suit if not otherwise barred, and that the payment of costs should be a condition precedent to the institution of a fresh suit. But in the present case a very

(1) (1918) 3 Pat. L. J. 63.

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different state of things exists. Here a definite time was fixed for the payment of the costs and it was not open to the court in which the second suit was instituted to accept the costs.

The question however is whether the present case comes within the rule laid down by Sir Lawrence Jenkins, C.J., in *Shital Prashad Mandal* v. *Gaya Prasad Dingal*(1). MULLICK, J.

On behalf of the defendant-respondents reliance is placed upon *Hari Nath Dass* v. *Syed Hossainali*(2). There it was held that when a plaintiff fails to pay the costs within the time prescribed he cannot be permitted to bring a fresh suit upon the same cause of action because the withdrawal in that case was a withdrawal without permission which, for practical purposes, was a dismissal of the suit. Reliance is also placed upon *Goolapudi Seshayya* v. *Nadendla Subbiah*(3). There Phillips, J., of the Madras High Court, put the argument in a somewhat different form. He held that the order allowing the withdrawal of a suit upon terms was separable into two parts, one allowing the withdrawal which ipso facto carried a dismissal of the suit and the other allowing the institution of a fresh suit upon complying with the conditions laid down by the court, and, that the withdrawal being complete, the plaintiff could not, upon failure to comply with the conditions prescribed, elect to treat the suit as still pending. The learned Judge dissented from the view taken by Sir Lawrence Jenkins, C. J., in *Shital Prosad Mondal's* case(1). Now the reasoning of Sir Lawrence Jenkins appears to us to be conclusive. He observes that what the court allows is not a withdrawal and an institution separately but a withdrawal and institution on certain conditions; the whole is one order and the one part cannot be severed from the other. It seems to us that this is the correct view

(1) (1914) 19 Cal. L. J. 529. (2) (1905) 2 Cal. L. J. 480.
(3) (1924) 47 Mad. L. J. 476; 82 Ind. Cas. 499.

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of the order. It is open to a court to say to a plaintiff 'Your suit is defective and I give you leave to institute a fresh suit on conditions.' If then the plaintiff complies with the conditions the withdrawal is complete and the suit is at an end. If he does not, he may, if he chooses, elect to go on and the court must dispose of the suit according to law. If the court directs that on failure to comply with the conditions by a certain date the suit shall stand dismissed and the plaintiff defaults the suit is at an end from the date prescribed. It follows, therefore, in the present case, that the Munsif before whom the second suit was instituted was not entitled to dismiss the suit outright but was bound, under section 10 of the Civil Procedure Code, to stay the trial of the second suit on the ground that the first suit was still pending.

The same view has been taken by the Calcutta High Court in *Deb Kumar Roy Choudhury* v. *Debnath Barna Bipra* (1). But in *Subal Chandra Chaudhury* v. *Mosaraf Ali*(2), the learned Judges, while approving of Sir Lawrence Jenkins' judgment in *Shital Prosad Mondal's* case(3) appeared to have made an order which was not consistent with the view that the previous suit was still pending. They observed that the permission to withdraw with liberty to bring a fresh suit must be construed in accordance with the wording of the order in each particular case, and that where the order was that the payment of costs was a condition precedent to the institution of the second suit failure to pay the amount before the institution of such suit effected a dismissal of the first suit. Upon the reasoning in *Shital Prasad Mondal's* case(3) we prefer to hold that until the conditions are complied with, the original suit still remains pending and the second suit though maintainable cannot be proceeded with by reason of section 10 of the Civil Procedure Code.

(1) (1921) 64 Ind. Cas. 738. (2) (1917) 38 Ind. Cas. 476.
(3) (1914) 19 Cal. L. J. 529.

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In this view of the case the order of the District Judge in second appeal 401 of 1925 cannot be supported. The suit was maintainable, but as the first suit was still pending the proper direction was that it be stayed. The appeal therefore succeeds.

There remains the application under section 115 of the Civil Procedure Code The Munsif of Barh before whom the first suit must be still considered to be pending had jurisdiction under section 148 to extend the time for depositing the costs. In our view the order of the 15th August, 1923, merely meant " I give you time to pay within two months from this date and if you pay before that date you will be entitled to institute a fresh suit upon the same cause of action but if you fail then from the expiry of the time so granted this suit will stand dismissed. " This was an order he was entitled to make under the Civil Procedure Code and, therefore, he was entitled to give an extension of time under section 148. The argument on the other side is that it was not an order to which section 148 applies and the authority of *Suranjan Singh* v. *Ram Bahal Lal*(1) was invoked. But in that case it was held that where a preliminary decree in a pre-emption suit fixed the time for payment, it was not open to the Court to resort to section 148, for the purpose of extending the time. It was observed that the extension of time effected a variation of the decree in the suit and that section 148 could not be called in aid. That, however, is not the case before us and we think that under the Civil Procedure Code time could have been extended by the Munsif if he had chosen to do so. Now although we are told that owing to the negligence of the karpardaz and the pleader's clerk the money could not be deposited within the time allowed, it does not appear that any evidence to that effect was given before the Munsif and we think that having regard to the fact that the sum was only Rs. 32 and that no attempt to pay was made

(1) (1913) I. L. R. 35 All. 582.

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till the 1st February following, the Munsif was justified in holding that no proper reason had been shown for the delay and in refusing to extend time to authorize the institution of the suit.

Therefore the only thing that remains for the plaintiff to do is to prosecute the suit as framed in the court where it was originally lodged or in such other court as is competent to try it. It will be that court's duty to continue the suit from the stage at which it was on the 15th August, 1923, and to dispose of it according to law.

The order in Civil Revision no. 510 of 1924 is modified. The declaration that the suit stands dismissed is set aside but the decision that no further time be allowed to the plaintiff to pay the costs incidental to the institution of a fresh suit is affirmed.

Each party will pay his costs both in the revision and in the second appeal. All orders as regards costs in the lower courts will stand.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

Application allowed in part.

PRIVY COUNCIL.*

1925.

Dec., 5.

LALCHAND MARWARI

v.

MAHANTH RAMRUP GIR.

Evidence Act, 1872 (*Act I of* 1872), *section* 108—*Presumption of date of death—Disappearance for over seven years—Hindu Law—Religious Institution—Suit by Mahanth to recover alienated properties of Math—Limitation—Indian Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 144.

The mahanth of a math brought, on November 30, 1916, four suits to recover properties of the math alienated by his

* PRESENT: Lord Phillimore, Lord Blanesburgh, and Sir John Edge.

predecessor before 1880. The preceding mahanth had abandoned his office in 1892, but a previous suit brought by the present plaintiff to recover alienated properties had been dismissed in 1897 upon the ground that it was not established that his predecessor was then dead. The plaintiff, by his present plaints, contended that as his predecessor had not been heard of since that date it should be presumed that he died seven years later, which was not more than twelve years before the present suits.

Held, that the suits were barred by the Limitation Act, 1908, Schedule I, Article 144, whether the period ran from the date of the alienations or from the death of the preceding mahanth, since upon the evidence adduced by the plaintiff himself his predecessor died in 1892; it was therefore not necessary to determine whether the onus of proving the date of death was upon the plaintiff or the defendants.

Under the Evidence Act, 1872, section 108, when the court has to determine the date of the death of a person who has not been heard of for a period of not less than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date.

In re. Phene's Trusts (1), explained and applied.

Rango v. *Mudiyeppa* (2), approved.

Judgment of the High Court (3) reversed.

Consolidated Appeal (no. 34 of 1924) from four decrees of the High Court (April 12, 1922) reversing four decrees of the Subordinate Judge of Muzaffarpur (September 12, 1918).

The four suits giving rise to the consolidated appeal were brought by the first respondent on November 30, 1916, to recover from the defendants (appellants) certain immoveable properties with mesne profits: two other plaintiffs who had acquired an interest in the properties were joined as plaintiffs. By his plaints the first respondent claimed to be mahanth of a math of sanyasis in succession to one Bhuban Gir, and alleged that the properties were

(1) (1869) L. R. 5 Ch. 139. (2) (1898) I. L. R. 23 Bom. 296.
(3) (1922) I. L. R. 1 Pat. 475.

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math properties which had been alienated by the previous mahanth Bhuban Gir without legal necessity. A suit brought by the first respondent in 1895 to recover math properties alienated by Bhuban Gir had been finally dismissed upon November 30, 1897, on the ground that it was not established that Bhuban Gir was dead. The present plaint alleged that since the decision of the High Court in 1897 nothing had been heard of Bhuban Gir, and the Court was asked to presume that his death took place in November 30, 1904, and that the cause of action arose at that date.

The defendants among various other defences pleaded that the suits were barred by limitation.

The facts appear from the judgment of the Judicial Committee. The Subordinate Judge, while deciding all other issues in favour of the plaintiffs, held that the suits were barred under the Indian Limitation Act, 1908, Schedule I, Article 134, since they had not been commenced within twelve years of the alienations. He accordingly dismissed the suits.

On appeal to the High Court the decrees were reversed and decrees for possession with mesne profits were made.

Das, J. (with whose judgment Bucknill, J., agreed) held, having regard to the decision of the Privy Council in *Vidya Varuthi* v. *Balusami*[1], that Article 134 did not apply, and that the period of limitation as provided by Article 144, was twelve years from the date when the possession of the defendants became adverse to the plaintiffs, which was upon the death of Bhuban Gir. The Court was entitled to presume that Bhuban Gir was dead, but that there being no presumption or evidence when he died, the suits were not barred. Upon the other issues the court agreed with the Subordinate Judge.

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

1925, July 21, 23, 24.—*DeGruyther, K.C.*, and *E. B. Raikes*, for the appellants. The most favourable view for the plaintiffs-respondents is that their cause of action did not arise until the death of Bhuban Gir; but even on that supposition the suits were barred by limitation. According to the evidence adduced by the plaintiffs Bhuban Gir died in 1892; there was no evidence that he was alive within twelve years of the suit. No presumption arose under section 108 of the Indian Evidence Act, 1872, that he died at any particular date: *In re Phene's Trusts*(1), *Muhammed Sharif* v. *Bandi Ali*(2), —dissenting from *Dharup Nath* v. *Gobind Saran*(3), —*Rango* v. *Mudiyeppa*(4), *Fani Bhushan Banerji* v. *Surjya Kanta Roy*(5). The onus was upon the plaintiffs to show that the suits were not barred under the Indian Limitation Act, 1908, Schedule I, Article 144: *Perhlad Sein* v. *Rajender Kishore Sing*(6)—decided under section 32 of the Limitation Act, 1859—*Mahomed Ibrahim* v. *Morrison* (7), *Mahomed Ali Khan* v. *Khaja Abdul Gunny*(8), Code of Civil Procedure, 1908, Order VII, rr. 1(*e*), 11(*d*). But the cause of action really arose at the date of the alienations under *Damodar Das* v. *Adhikari Lakhan Das*(9) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*(10). There was no math such as is referred to and described in *Ram Parkash Das* v. *Anand Das*(11), consequently *Vidya Varuthi* v. *Balusami Ayyar*(12) did not apply. Further Article 134, and not Article 144 applied to the case. [Referenee

(1) (1869) L. R. 5 Ch. 139.
(2) (1911) I. L. R. 34 All. 36, 41.
(3) (1886) I. L. R. 8 All. 614.
(4) (1898) I. L. R. 23 Bom. 296.
(5) (1907) I. L. R. 35 Cal. 25.
(6) (1869) 12 Moo. I. A. 334, 337.
(7) (1878) I. L. R. 5 Cal. 87.
(8) (1883) I. L. R. 9 Cal. 744.
(9) (1910) I. L. R. 37 Cal. 885; L R. 37 I. A. 147.
(10) (1910) I. L. R. 38 Cal. 526; L. R. 38 I. A. 76.
(11) (1916) I. L. R 43 Cal. 707; L. R. 43 I. A. 73.
(12) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

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was also made as to the presumption under section 108 of the Indian Evidence Act to *Hickman* v. *Upsall* (1), and *Doe* v. *Nepean*(2).]

There Lordships intimated that in their view Article 134 did not apply.

Dunne, K. C., and *Wallach*, for the respondents. The suits were not barred by limitation. The plaintiffs having established that Bhuban Gir was dead, and proved the title of the first plaintiff, the onus under Article 144 was upon the defendants to prove that they had been in adverse possession for twelve years: Mitra's Law of Limitation, page 1163 and cases there referred to. There was no clear evidence when Bhuban Gir died, but in the previous suit the defendants contended that he was alive then; having regard to the decree of 1897 the plaintiffs were entitled under section 108 of the Indian Evidence Act to presume that he did not die more than twelve years before the present suits were brought. The cause of action arose only upon Bhuban Gir's death. There was no gift to an idol, as a juridical person, and *Damodar Das* v. *Adhikari Lakhan Das* (3) and similar cases did not apply: *Vidya Varuthi* v. *Balusami Ayyar*(4) applied. [Reference was also made to *Nainapillai Marakayar* v. *Ramanathan Chettiar*(5).]

Lord Phillimore referred to *Subbaiya Pandaram* v. *Mahammad Mustapha Maracayar*(6).

De Gruyther, K. C., in reply referred to Mayne's Hindu Law, paragraphs 621, 626.

December 5. The judgment of their Lordships was delivered by—

LORD BLANESBURGH.—These are consolidated appeals by the defendants in four out of eight suits

(1) (1875) L. R. 20 Eq. 136
(2) (1833) 5 B. & Ad. 86.
(3) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A 147.
(4) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(5) (1923) I. L. R. 47 Mad. 337; L. R. 51 I. A. 83.
(6) (1923) I. L. R. 46 Mad. 751; L. R. 50 I. A. 295, 299, 300.

instituted by one Ramrup Gir in the court of the First Sub-Judge at Muzaffarpur on the 30th November, 1916. The suits were brought on the allegation that the plaintiff, as the then mahanth of an asthal or math at Parprikhan Karan, was entitled to recover from the defendants different properties, endowments of the math, then in their possession. These properties had, it was alleged, been alienated without warrant by Bhawan Gir, deceased, the immediate predecessor as mahanth of the plaintiff. The suits, as they progressed, were amended by the joinder as co-plaintiffs of three persons to whom in consideration of their supplying funds for the conduct of the litigation Ramrup Gir had agreed to transfer when recovered certain portions of the properties in question. As so amended they were heard at length by the learned Subordinate Judge, and, on appeal, by the High Court at Patna, where many issues were raised and strenuously contested. Of these one only remains for determination by their Lordships, namely, the issue of limitation. The learned Trial Judge held that the suits were barred by statute. The High Court, on appeal, held that they were not, and made decrees for possession of the properties with mesne profits. It is against these decrees and on the ground that the suits should have been dismissed as being out of time that the present appeals have been brought and argued.

The math in question has a considerable history. It is a math of the sanyasis who are celibate and have renounced the world. The properties in suit had been amongst its endowed properties for a period of nearly 150 years. They stood in the name of the mahanth for the time being, but he had no right to alienate them otherwise than for necessity. The income from them at one time, at all events, amounted to Rs. 4,000 a year, appropriated not to a single deity, but for puja of Siuji, the principal deity, for the pujas of the other established deities of the math and in the entertainment of mendicants and ascetics. These matters, all in dispute in the courts below, were

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not again raised in contest before the Board, and may now be taken to be accepted.

In the year 1880 or shortly afterwards Bhawan Gir became mahanth of this asthal or math. He had, as his elder chela, the plaintiff Ramrup Gir, and, as his younger chela, one Harihar Gir. Bhawan Gir was drunken, immoral and dissolute, and, as might be expected of such a person, profligate and extravagant. Portions of the endowed properties he mortgaged without justification by way of security for loans made to himself. Other portions equally without justification he purported to sell outright. The proceeds in every case were, it can hardly be doubted, spent mainly, if not entirely, upon himself. The properties mortgaged have since been sold under decrees made in suits brought to enforce the securities. And so it has come about that those properties now in dispute have all of them been in the exclusive possession of the defendants or their predecessors in title as for absolute interests for periods exceeding on the 30th November, 1916, in every instance a term of 26 years of continuous duration.

By 1888, Bhawan Gir had denuded himself and the math of all its endowed properties. In March, 1892, he made the asthal over to the plaintiff, and, as the plaintiff recites in a deed of sale of the 15th June, 1917, left the place for good. And he has never returned. He went on pilgrimage and Harihar Gir went with him. Some weeks later Harihar Gir came back alone and reported to the plaintiff that Bhawan Gir had died in his arms at Hardwar on the 27th April, 1892.

The plaintiff accepted that statement. It was, of course, then greatly to his interest to do so. He had become mahanth if it were true. It is, however, contrary to his interest now to accept it. Indeed, if the fact be as stated it is fatal to his present claims. Yet in his evidence in these suits—to his credit be it said—he has again declared his belief that Harihar Gir's statement as to Bhawan Gir's death at Hardwar

in April, 1892, is in accordance with fact. And his actions since the date of Harihar Gir's return, if they be honest, have been consistent, and consistent only with a constant belief that Bhawan Gir was dead. Almost at once he performed his bhandara and shadh, and he was himself instituted as mahanth of the math and got chadder and pagree and was installed in the gaddi. Three years later, that is to say on the 16th April, 1895, with money found by others on terms analogous to those on which the funds for the present litigation have been obtained, he instituted a series of suits against the present defendants or their then predecessors in title to recover the properties on the allegation that he had on the death of Bhawan Gir succeeded thereto as mahanth. In those suits the plaintiff gave evidence to the effect just stated. Harihar Gir, too, was called as a witness, and he directly deposed to Bhawan Gir's death in his presence on the date already given. His statements at that date were of course highly interested. Moreover, it was essential to the plaintiff's case then that they should be true. The learned trial judge, however, disbelieved them, accepting as preferable, and perhaps as true, a body of evidence adduced by the then defendants—suspicious only because of its volume and circumstance—that Bhawan Gir was alive after April, 1892: that indeed he had been seen alive in 1895 after action brought. For the reason therefore that the plaintiff had failed to establish the fact essential to the validity of his claim, namely, that Bhawan Gir was dead when the suits were instituted, the trial judge by decrees dated the 27th January, 1896, dismissed them all with costs. The plaintiff appealed to the High Court but the learned Judges of that court, finding themselves unable on the materials before them to review the trial judge's finding on this issue of facts, by orders, dated the 30th November, 1897, dismissed the appeals. And so that litigation ended. Attention must be given to this last date. It will be found that the plaintiff sets great store by it in these proceedings.

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The plaintiff in 1905, again performed the bhandara of Bhawan Gir and was again installed in the gaddi, although in his own view, as he stated in evidence in these suits that ceremony was neither essential to his institution nor redundant in its repetition. On the 30th November, 1916, he instituted the present litigation. The date is significant. Required by Order VII, r. 1(*e*) of the First Schedule to the Code to set forth in his plaint the facts constituting his cause of action, and when it arose, the plaintiff in each of the plaints alleges that the Judges of the High Court in the earlier proceedings had, on the 30th November, 1897, accepted the then defendant's statement that the plaintiff's Guru, Mahanth Bhawan Gir, was then alive: that no particulars regarding him had been known for seven years from the date of that judgment, and that it was necessary for the plaintiff to accept the 30th November, 1904, as the date of death of his Guru when the cause of action accrued to him. His suits were in time—such is the implication of the allegation, and such is his way of establishing it—in that they were commenced within twelve years to a day from the 30th November, 1904.

This view is undoubtedly mistaken. It would be fatal to the plaintiff if it were not. For his case on his chosen foundation fails upon the facts. It is not correct to say that the High Court in the earlier litigation found that Bhawan Gir was alive on the 30th November, 1897. What that Court did find, affirming the Subordinate Judge, was that he had not been proved to be dead on the 16th April, 1895. The latest date at which anyone deposed to his being alive was a later date in the same year. And there is no evidence, either in that litigation—if it may be regarded—or in this that he has ever since been heard of. So far indeed as the present suits are concerned the only testimony adduced, apart from that of Harihar Gir, is that he has been neither seen nor heard of since he left the math in March, 1892.

Putting the case therefore at its highest for the plaintiff—that is excluding altogether from consideration both Harihar Gir's direct evidence of death and the plaintiff's belief in its truth—the position is that Bhawan Gir has not been seen or heard of since the year 1895. If so, on the principle set up by the plaintiff, he must be presumed to be dead by the end of 1902. Accordingly these suits commenced only in 1916 are clearly statute barred as against the defendants.

But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the plaintiff's error. Yet, in another part of their judgment, if their Lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the defendants to prove that date if they relied on it. Yet at the same time they have acceded to the plaintiff's claim for mesne profits which, at all events as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

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Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Indian Evidence Act and the Law of England [*Rango* v. *Mudiyeppa* (1),] and searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts*,(2) 5 Ch. 139, run as follows:—

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed—not perhaps unnaturally—that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years".

To resume, however. It is manifest that the attempt made by the plaintiff in his plaint to comply with Order VII, r. 1(*e*) and set forth the date when his cause of action arose has failed him on the facts. The result is to disclose, so far as he is concerned, a very serious position. It is made plain by the plaint that as against him the defendants had at the institution of the suits been by themselves and their predecessors in adverse possession of the properties in question for more than twelve years—in point of fact since 1895 at least when the earlier litigation

(1) (1898) I. L. R. 23 Bom. 296. (2) (1869) L. R. 5 Ch. 139.

against them was commenced by the plaintiff, and which is the last year in which anyone proposes that Bhawan Gir was seen alive. The plaint itself accordingly discloses a state of things to which section 144 of the Indian Limitation Act is applicable. In such circumstances it may well be that it is the obligation of the plaintiff by the law of India as it is by the law of England to satisfy the Court that his action is not barred by lapse of time. See as to India *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Sing*,(1); *Mahomed Ibrahim* v. *Morrison* (2); as to England:—"There is no doubt," said the Court of Queen's Bench in *Doc* v. *Nepean*(3), "that the lessor of the plaintiff must recover by the strength of his own title and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before ejection brought".

To all of which may be added the comment by Giffard, L. J., on *Doc* v. *Nepean*,(3) that the onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential: *In re. Phene's Trusts* (4).

On this footing therefore the plaintiff here would fail in the absence of evidence of the death of Bhawan Gir within twelve years before the institution of the suits.

But it is unnecessary in the state of the evidence in this case to proceed upon any such strict view of the plaintiff's position. He has himself, and in these suits, supplied affirmative evidence, which their Lordships cannot disregard. Harihar Gir was called as a witness on his behalf. In his evidence in chief he solemnly deposed that Bhawan Gir died in his

(1) (1869) 12 Moo. I. A. 334, 337.

(2) (1878) I. L. R. 5 Cal. 37.

(3) (1833) 5 B. & Ad. 86, 94.

(4) (1869) L. R. 5 Ch. 139, 151, 152.

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presence at Hardwar in April, 1892. In cross-examination he added that he himself performed his funeral ceremonies, and that if anybody said that he did not die in April, 1892, it would be false. And by way of confirmation the plaintiff stated in his evidence, as their Lordships have already observed, that he himself believed that Harihar Gir was telling the truth in this matter, while, as has also been shown, his own actions and claims ever since have alone been consistent with that belief.

To their Lordships it seems impossible that such evidence adduced by the plaintiff himself, fatal as it is to his case, can be ignored. They are not blind to the difficulty. They do not forget the wealth of circumstantial evidence to the effect that Bhawan Gir was alive as late as 1895 adduced by the defendants or their predecessors in title in the earlier litigation, and then accepted and acted upon by the trial judge to the plaintiff's undoing. They do not forget that at that time such evidence was vital to the defence, nor do they fail to note the absence now of any counterpart to it when the lapse of time has made it to the highest interest of the defendants to accept the plaintiff's story that Bhawan Gir has been dead all these years. Their Lordships bear all this in mind, and see no occasion to commend these highly sophisticated tactics of the defendants. But they find it impossible to ignore the consistent attitude of the plaintiff, supported now by uncontradicted direct evidence of death and a wealth of concurring testimony to the effect that since Bhawan Gir abandoned the math in 1892 with Harihar Gir he has not been seen or heard of. If these suits were being brought against defendants neither parties nor privies to the earlier litigation there could, in their Lordships' view, have been no question that the evidence now adduced on behalf of the plaintiff would have been completely destructive of his case. Is the position of the defendants so compromised by their attitude in the earlier litigation that they are in effect estopped

from deriving benefit from the plaintiff's evidence of death even if it now by reason of the lapse of time has gained so greatly in force? It is of course hard upon the plaintiff that evidence rejected in 1895, when it would have helped him, should now be accepted when it hurts him. On the other hand, it must be remembered that the complete disappearance down to the present time of Bhawan Gir and the now disinterested character of the evidence adds to the plaintiff's story of his death a strength from external circumstances altogether lacking in 1895. Moreover, to ignore the evidence altogether would be to fly in the face of the statute.

The difficulty of the plaintiff's present position in this matter was not, it would seem, at all appreciated in the Courts below. Das J. in the High Court, for instance, proceeded upon the footing that his evidence on this point was adduced only in the earlier proceedings, and the learned Judge disposed of the point:—

"It is quite true that it was the plaintiff's case in the suit which he instituted in 1895 that Bhawan Gir died on the 15th Baisak, 1299, but that case was not accepted by the Courts."

That is all. To the evidence in the present suit the learned Judge makes no allusion. It is that evidence which their Lordships find themselves unable to ignore. The plaintiff must, as it seems to them, take the consequences of solemn testimony given by himself and adduced on his behalf.

This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the defendants from the dates of the wrongful alienations of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das* v. *Lakhan Das* (1), may be taken as the leading authority:

(1) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.

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or by the line of authority of which *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(1), may be taken as typical. Their Lordships while not pronouncing upon it have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned the question remains entirely open to be determined when it arises.

For the reasons above given, however, they are of opinion that the decree of the High Court should be recalled and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly. The respondents must pay to the appellants their costs before the Board and in the High Court.

Solicitors for appellants: *Watkins and Hunter.*

Solicitor for respondents: *H. S. L. Polak.*

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

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Contract Act, 1872 (*Act IX of* 1872), *sections* 59, 60 *and* 61—*creditor, right of, to appropriate payments towards any of his debts—absence of direction by debtor—continuance of right till intimation by creditor.*

Under section 60 of the Contract Act, 1872, where a debtor owing several distinct debts to one person makes a payment, and omits to intimate and there are no circumstances indicating to which debt the payment is to be applied, the creditor

* Appeal from Original Decree no. 138 of 1922, from a decision of Md. M. Zahur, Subordinate Judge of Muzaffarpur, dated the 16th January, 1922.

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

may apply it at his discretion to any of the debts. Where neither party makes any appropriation, then under section 61 "the payment shall be applied in discharge of the debts in order of time". *Held*, that where a debtor who owes more than one debt to the same creditor makes a payment to the latter without appropriating it towards the discharge of any particular debt, the right of the creditor to appropriate the amount paid towards any of the debts due to him continues up to the time when he applies the payment towards the discharge of a particular debt.

Cory Brothers and Company, Limited v. *The Owners of the Turkish Steamship "Mecca"*(1), and *Simon* v. *Ingham*(2), followed.

Devaynes v. *Noble* (3), not followed.

Appeal by the plaintiffs.

The plaintiffs were (*1*) Francis Henry Manisty, (*2*) James Boyd Simpson Hill and (*3*) Henry Walter Dunlop Hill. The defendants were (*1*) Julian Veitch Jameson and (*2*) Mrs. Georgina Gertrude Munro Jameson. Defendant no. 2 was the wife of defendant no. 1.

The plaintiffs brought an action to enforce a simple mortgage (Exhibit 1), dated the 15th January, 1920, and confirmed by an agreement (Exhibit 2), dated the 12th March, 1920. The indentures were executed by both the defendants in respect of a debt of Rs. 21,000 due from Mr. J. V. Jameson alone to the plaintiffs, and as security for repayment of the debt Mr. Jameson mortgaged the whole of the Jalaha Indigo Concern which belonged to him and Mrs. Jameson mortgaged her undivided two-sixteenths share in an Indigo Concern called the Karnowl Indigo Concern. The loan was to be repaid in four instalments, namely, (*1*) Rs. 3,000 on the day of handing over the indenture; (*2*) Rs. 6,000 on the 30th June, 1920; (*3*) Rs. 6,000 on the 31st December, 1920; and (*4*) Rs. 6,000 on the 30th June, 1921, with a stipulation that in case any of the instalments remained

(1) (1897) L. R. A. C. 286. (2) (1823) 2 B. & C. 65; 107, E. R. 807.
(3) 1 Mer. 585.

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unpaid on the due date the mortgagees would have a right to take action on the indenture to recover the whole of the balance due after giving Mr. Jameson one month's notice in writing of their intention to do so. The mortgagor, however, had a right to pay any instalment or any part thereof before the date mentioned as that on which it fell due. As Mrs. Jameson was not the principal debtor it was stipulated for her benefit that as soon as the total amount due under the mortgage became less than Rs. 12,001 and the rents due to the Bettiah Estate on account of the leasehold properties—whether mukarrari or otherwise—should have been paid, the liability of Mrs. Jameson under the indenture should cease and determine and thereafter the remaining amount unpaid should continue to be the first charge on Mr. Jameson's Jalaha Indigo Concern alone.

The first instalment of Rs. 3,000 was paid on the day the mortgage indenture was executed, i.e., on 15th January, 1920; the second instalment of the 30th of June, 1920, was not paid on the due date. On the 27th September, 1920, Rs. 3,500 was sent by Mr. Parmer on behalf of Mr. Jameson to Mr. J. B. S. Hill through one Mr. Kasturi Lal and received by Mr. Hill on the 28th September, 1920 (receipt, Exhibit 3). Mr. Parmer did not state whether the said sum of Rs. 3,500 was to be credited towards the mortgage loan or the personal loan which admittedly Mr. Jameson owed at that time to Mr. J. B. S. Hill. On the 8th November Mr. Parmer sent another sum of Rs. 3,000, stating in his letter (Exhibit 9) of that date that it was paid on account of the mortgage on behalf of Mr. Jameson. On the 18th November Mr. J. B. S. Hill intimated to Mr. Jameson by his letter of that date (Exhibit 4) that he had appropriated Rs. 2,083 due to him on account of the personal loan from Mr. Jameson out of Rs. 3,500, and the balance, together with Rs. 3,000, was credited towards the mortgage loan, thus leaving a balance of Rs. 2,524-4-0 due in respect of the June kist under the mortgage. He asked him to send this sum so as to clear off the June

kist. On the 25th November, 1920, Mr. Parmer, as manager of the Jalaha Indigo Concern, wrote a letter (Exhibit 12) to Mr. J. B. S. Hill on behalf of Mr. Jameson, sending Rs. 1,515-12-6 along with two statements of account up to the 27th November, 1920: (*1*) for the personal loan and (*2*) for the mortgage (Exhibits 12 and 12-*b*, respectively). He credited the entire sum of Rs. 6,500 aforesaid towards the mortgage loan, and out of Rs. 1,515-12-6 he credited Rs. 541 towards the mortgage and the balance of Rs. 974-12-6 towards the personal loan, thus reducing the loan account to Rs. 1,200 and the mortgage to Rs. 11,900. As the mortgage loan was thus brought down under Rs. 12,000 he claimed in his letter the release of Mrs. Jameson's undivided two-sixteenths share in the Karnowl Indigo Concern in accordance with the stipulation in the mortgage bond, the kist due to the Bettiah Estate having been paid in full on the 30th September, 1920, on account of the leasehold properties and mukarrari. Mr. Hill acknowledged the letter and the sum of Rs. 1,515-12-6 on the day he received them, by letter (Exhibit A), and said that as he was going that night to the mela he would send his reply later which he did on the 9th December (Exhibit 10). In that letter he credited the aforesaid Rs. 1,515-12-6 towards the unpaid amount of the June kist referred to in his letter of the 18th November (Exhibit 4) reducing it to Rs. 1,008-7-6 (i.e., Rs. 2,524-4-0 minus Rs. 1,515-12-6). He insisted upon the appropriation made by him in his earlier letter of the 18th November on the ground that Mr. Jameson had promised payment of his personal loan in June. He also pointed out certain small inaccuracies in the accounts given by Mr. Parmer.

The December kist of Rs. 6,000 fell due on the 21st December and was not paid. Mr. Hill accordingly, on the 9th January, 1921, wrote a letter (Exhibit 6) to Mr. Jameson stating that as the balance of June kist according to his letter of the 9th December and also the December instalment were not paid he would give due notice that if the full amount was

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not paid within a month he would take action to realise the whole amount of the mortgage under the terms of the deed. He sent the notice that very day (Exhibit 13) and it was received by Mr. Jameson on the 14th January (Exhibit 5). On the 13th February, 1921, Mr. Jameson wrote to Mr. Hill refusing to accept Mr. Hill's mode of appropriation of the payments made by him and asking him to appropriate the same in the manner stated by Mr. Parmer in his letter of the 25th November. He also asked him to release the Karnowl Indigo Concern of his wife from the mortgage. Mr. Hill wrote back to him (Exhibit 11) on the 19th February refusing to accede to his request and insisting upon his right to appropriate Rs. 3,500 paid in September 1920 towards his personal loan inasmuch as it was not suggested to him that it was to be credited to the mortgage account.

Mr. Hill brought his suit to enforce the mortgage against both the defendants Mr. and Mrs. Jameson, inasmuch as according to him Rs. 1,008-7-6 was due to him in respect of the June kist of 1920 and Rs. 12,000 for the December kist of 1920 and June kist of 1921 making a total of Rs. 13,008-7-6, which with interest on the date of the suit amounted to Rs. 13,265-12-5.

The defendants filed separate written statements. The principal contention, however, on their behalf was that the plaintiffs ought to have credited the entire sum of Rs. 3,500 paid on the 27th September, 1920, to the mortgage account instead of crediting only a portion of it, namely, Rs. 1,417 after paying off the personal loan of Mr. J. B. S. Hill amounting to Rs. 2,083, and that the plaintiffs' claim should thus be reduced which would bring down their claim to less than Rs. 12,000 on the 8th of November 1920, the date on which another sum of Rs. 3,000 was paid. Accordingly, on behalf of defendant no. 2 it was contended that her liability under the mortgage ceased and determined and that the plaintiffs were not entitled to a decree against her own share in the Karnowl Indigo Concern. The other pleas of the

defendants were of minor importance and the court below decided those issues against them. They did not arise in this appeal.

The principal contentions of the defendants gave rise to the following issues:—

"3. Whether the plaintiffs were entitled to credit Rs. 8,500 towards the loan account as alleged by them?"

"4. Did the defendant no. 1 promise to pay up the loan account in June? If so, does it entitle the plaintiffs to credit Rs. 8,500 to the loan account?"

The court below decided these two issues together and held that the defendant no. 1 had promised to pay the personal loan to the plaintiff no. 2 along with the June instalment of 1920 but that the plaintiffs were not entitled to credit any amount out of the sum of Rs. 3,500 against the loan account and ought to have credited the same towards the mortgage account. Accordingly, the court below reduced the claim of the plaintiffs to Rs. 11,900 on the 8th of November, 1920, as contended for by the defendants and as this sum was under Rs. 12,000 and the arrears of rent due to the Bettiah Estate were paid up, the court below released Mrs. Jameson and her Karnowl Indigo Concern from the mortgage.

The plaintiffs appealed against this decision. Mr. Jameson did not appear in the High Court. The appeal was resisted by Mrs. Jameson only.

B. N. Mitter, for the appellants.

S. N. Palit, for the respondents.

JWALA PRASAD, J. (after stating the facts set out above, proceeded as follows): The only question before us is whether Mr. J. B. S. Hill, one of the plaintiffs, was entitled to appropriate Rs. 2,083 out of Rs. 3,500 paid on the 27th of September, 1920, towards his personal loan then due from Mr. Jameson. In order to appreciate the point it is necessary to give shortly a history of both the personal loan due to Mr. J. B S. Hill, one of the plaintiffs, and the

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mortgage debt due to him along with the other two plaintiffs, Messrs. F. H. Manisty and H. W. D. Hill.

It appears from an agreement (Exhibit 17), dated the 27th January, 1919, that the three plaintiffs and the defendant Mr. Jameson were owners of the Jalaha Indigo Concern. Mr. J. B. S. Hill had advanced from his own pocket a large sum of money for the outlay of the said concern during the year 1915 which together with interest amounted to Rs. 8,964-7-9 on the day the agreement was executed. The plaintiffs and the defendant Mr. Jameson hypothecated the whole of the indigo made by the Jalaha Concern in 1918, which on the day of the agreement was lying in the godowns of Messrs. Moran and Company and Messrs. Thomas and Company, Calcutta, weighing 28 maunds 25 seers and 8 chittaks, as security for repayment of the aforesaid loan of Rs. 8,964-7-9 due to Mr. J. B. S Hill, one of the proprietors. By the agreement the proprietors of the Concern promised to pay the amount due with interest on demand, or, if no demand was made, then within one month from the date of the agreement.

The indenture (Exhibit 1), dated the 15th January, 1920, on foot of which the mortgage action was brought, shows that Mr. Jameson had an undivided half share in the Jalaha Concern The remaining eight annas belonged to the plaintiffs. The plaintiffs sold their 8 annas share to Mr. Jameson. Thus Mr. Jameson became the proprietor of the 16 annas of the Jalaha Indigo Concern. On the date of the mortgage indenture Rs. 12,000 out of the purchase money due to the plaintiffs remained unpaid, and Rs. 9,000 out of the plaintiffs' share of monies outstanding and owing to the said Concern was also due to the plaintiffs from the Concern. Thus, Mr. Jameson as 16 annas proprietor of the Jalaha Indigo Concern owed to the plaintiffs Rs. 21,000. The negotiations for the sale of the plaintiffs' share in the Jalaha Indigo Concern to Mr. Jameson were carried

on through Mr. J. B. S. Hill as is apparent from Mr. Jameson's letter (Exhibit 8), dated the 15th October, 1919. While the negotiations were going on Mr. J. B. S. Hill insisted on having some definite date of payment of his personal loan fixed, and Mr. Jameson as proprietor of the Jalaha Indigo Concern agreed to fix the 30th of June as the date on which the personal loan of Mr. J. B. S. Hill would be repayable whether the hypothecated indigo was sold by that date or not: vide Exhibits 7 and 8, dated the 11th and 15th October 1919 respectively. The hypothecated indigo lying in the firms referred to in Exhibit 17 was in the meantime sold and the sale proceeds were paid to Mr. J. B. S. Hill to the credit of his personal loan account. The indenture was discovered to be defective for want of valid attestation and negotiations for curing the defects arose. When this was going on, Mr. J. B. S. Hill insisted on payment of the balance of his personal loan and before the agreement (Exhibit 2) curing the defects in the mortgage indenture and confirming it was executed on the 12th March, 1920, Mr. J. B. S. Hill obtained from Mr. Jameson a definite promise that his loan would be paid at the same time as the June kist of 1920. In his letter (Exhibit 15), dated the 8th March 1920, Mr. Jameson says—

> "I propose to pay the balance of your loan at the same time as the June instalment of 1920."

This was in reply to Mr. Hill's letter (Exhibit 16) of the same date.

Thus, when Rs. 3,500 was paid on the 27th September, 1920, Mr. Jameson owed to Mr. J. B. S. Hill Rs. 2,083 under the personal loan account (vide the account given in Exhibit 4). The June kist under the mortgage payable to Mr. J. B. S. Hill and the other plaintiffs had become overdue. Mr. Parmer on behalf of Mr. Jameson sent Rs. 3,500 on the 27th of September, 1920, per Kasturi Lal. Mr. J. B. S. Hill was not at all told as to how this money was to be appropriated and whether it was paid towards the

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mortgage debt or the personal loan. Mr. Parmer subsequently sent Rs. 3,000 on the 8th November, 1920, with a letter in which he earmarked the payment as being

"on account of the mortgage on behalf of Jameson."

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In these circumstances Mr. Hill, out of Rs. 3,500, first paid off his personal debt of Rs 2,083 and appropriated the balance towards the mortgage debt due to himself and the other plaintiffs. The learned Subordinate Judge says that he had no right to do this although he holds that

"the money due on the loan account was promised by Mr. Jameson to be paid on the 30th June 1920"

and that

"Mr. Parmer, the manager of the Jalaha Concern on behalf of Mr. Jameson, however, sent Rs. 3,500 to Mr. Hill without any intimation as to how the money was to be appropriated, whether towards the loan account or the mortgage account....."

and that

"Kasturi Lall who had taken the said loan to Mr. Hill has not been examined to prove any verbal intimation;"

yet the learned Subordinate Judge refuses to accept the contention of the plaintiffs that

"they had a right or an option to credit it towards any of the debts and therefore they preferred clearing off the loan account to the mortgage account."

Argues the learned Subordinate Judge,

"The money due under the loan account was a debt due from Mr. Jameson and not from Mrs. Jameson to the plaintiff no. 2 only and not to all the plaintiffs and that the money sent was in excess of the amount due under the loan account and the June kist of the mortgage was also due. The plaintiff no. 2 alone had no option to clear off his loan account first and leave the balance to his mortgage loan."

The fallacy in the latter portion of the argument is obvious. On the day the sum of Rs. 3,500 was received by Mr. J. B. S. Hill, plaintiff no. 2, it was not sufficient to pay off the June kist of Rs. 6,000, whereas his personal debt was only Rs. 2,083 which was less than Rs. 3,500. The personal loan could thus be fully satisfied out of the sum of Rs. 3,500 received, and the June kist could not be satisfied in full; it had already become overdue. There was no meaning in paying off

the mortgage debt because the liability under the mortgage for payment of the kists had occurred on account of the default of the June kist and would have continued even if Rs. 3,500 was credited towards the June kist. The first portion of the argument that the mortgage debt was payable by both Mr. and Mrs. Jameson to plaintiff no. 2 and the other plaintiffs whereas the personal loan was payable by Mr. Jameson only to Mr. J. B. S. Hill alone, overlooks the fact that the mortgage debt was due from Mr. Jameson, and Mrs. Jameson had only given her property as security for the sake of her husband. It was Mr. Jameson as proprietor of the Jalaha Indigo Concern, who had to pay the mortgage loan and as such he had also to pay the personal loan to Mr. J. B. S. Hill advanced to the factory. Therefore, Mr. Jameson was the debtor with respect to both the loans and both the liabilities were incurred by him as proprietor of the Jalaha Indigo Concern. The payment of Rs. 3,500 was made by Mr. Parmer as Manager of the Jalaha Concern on behalf of Mr. Jameson. Although there were three mortgagees, Mr. J. B. S. Hill was acting on behalf of all the plaintiffs and was practically representing them, and the plaintiffs do not dispute his right to appropriate the payment towards his personal loan in preference to the mortgage loan.

From Mr. Hill's letter (Exhibit 4), dated the 18th November, 1920, wherein he stated that he had appropriated the aforesaid sum of Rs. 3,500 towards the personal loan account and from the fact that no ledger or cash book showing the appropriation had been produced, the learned Subordinate Judge infers that the loan had not been

"cleared off on the date of the receipt of Rs. 3,500."

He says

"It struck Mr. Hill to appropriate the said sum towards the loan account when he received Rs. 3,000 on the 18th November, 1920, from Mr. Parmer to be credited towards the mortgage account, but as a matter of fact he had not done so on the date he received the said sum of Rs. 3,500."

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The inference drawn is not legitimate; the letter only shows how he had already appropriated the amount. Suppose for the sake of argument that Mr. J. B. S. Hill had not appropriated the said amount earlier than the 18th November, his right to appropriate it towards any of the debts had not been extinguished; it continued up to the time that he had communicated the appropriation to Mr. Jameson. Admittedly he had not done so before he wrote the letter of the 18th November wherein he stated how he had appropriated the said sum of Rs. 3,500. In the case of *Simson* v. *Ingham* (1) it was laid down that the right of the creditor to appropriate the payment towards any of the debts due to him continues up to the time that he intimates the appropriation to the debtor. The decision goes further and holds that the creditor has a right to cancel his own appropriation towards a particular debt and to appropriate subsequently towards another debt provided he does so before he had communicated the previous appropriation to the debtor. Referring to the aforesaid case Sir Henry Cunningham and Sir Horatio Shephard in their commentary on the Indian Contract Act under section 60 observe. " This is contrary to the rule of civil law according to which an appropriation, whether by debtor or creditor, is necessarily made at the time of payment. " The learned Subordinate Judge tries to get round the principle enunciated in the aforesaid case by holding that it was the intention of Mr. Jameson to pay off the mortgage debt, and this intention he infers from the fact that the penalty for non-payment of the personal debt in June was only the charge of interest according to the stipulated rate, whereas the penalty for non-payment of the June kist of the mortgage was more serious; consequently, says the learned Subordinate Judge,

" The payment of the mortgage money was prominent and predominant in the mind of the mortgagors and therefore they would have naturally wished to pay off the June kist of the mortgage. The

(1) (1823) 2 B. & C. 65; 107 E. R. 307.

circumstances are such that they clearly implied that the payment was not only intended but made to be applied to the liquidation of the mortgage debt."

It seems to be an assumption only on the part of the learned Subordinate Judge to say that the payment was

"made to be applied to the liquidation of the mortgage debt."

He has already held that there was no intimation given to Mr. J. B. S. Hill as to how the money was to be appropriated. Mr. Parmer, who sent the money, and Kasturi Lall, who carried the money, have not been examined in the case. Mr. Jameson in his evidence does not say that the payment was expressly made towards the mortgage debt. He only says that he intended to send the loan account and the June kist of the mortgage money and possibly he may have directed Mr. Parmer to send the June kist of the mortgage debt; but he confesses that he has no copy of the letter he wrote to Mr. Parmer

"pressing him to make arrangements for the payment of the mortgage money of the June kist."

He says,

"I have no proof to show that I wrote to Mr. Parmer to clear off the June kist of the mortgage debt first."

It seems that a fair inference from the evidence can be raised that Mr. Jameson instructed Mr. Parmer to send Rs. 3,500 without any direction or without any intention for which of the debts the money was to be appropriated. This is the reason why the money was paid without any intimation as to appropriation. It is more likely that it was intended that the money be appropriated towards the personal loan account, as naturally Mr. Hill would do, insistent as he was from the very beginning that his loan account should be satisfied and he had obtained a solemn promise from Mr. Jameson to that effect.

Therefore, the finding of the learned Subordinate Judge referred to above is erroneous.

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Suppose for a moment that Mr. Jameson intended that the said sum of Rs. 3,500 should be appropriated towards the June kist of the mortgage, but his intention will not be of any avail until it was communicated to the creditor. The principle of appropriation of payments made by a debtor, who owes several debts, to a creditor has been enunciated in the case of *Cory Brothers and Company, Limited versus Owners of the Turkish Steamship "Mecca"* (1) where it has been laid down that the right to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and lastly, if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon the appropriation being made in the chronological order in which the debts stand. These principles have been so firmly established that it is needless to refer to any further authority. Suffice it to say that the principles have been crystallised in the Indian Contract Act in sections 59 to 61. The present case lies in a nutshell. Mr. Jameson as proprietor of the Jalaha Indigo Concern owed two debts to Mr. J. B. S. Hill: (*1*) on account of his loan advanced to the Jalaha factory at a time when he along with the other plaintiffs and Mr. Jameson was the proprietor and which subsequently became the sole property of Mr. Jameson; and (*2*) the mortgage debt due to Mr. J. B. S. Hill and the other two plaintiffs in the case, Mr. Hill acting on their behalf and representing them throughout the transactions. Mr. Jameson had promised to pay off the personal loan along with the June kist under the mortgage. In September 1920, long after the June kist had become due, Mr. Jameson paid Rs. 3,500 on the 27th September, 1920, to Mr. Hill without telling him towards which of the two debts payment was to be appropriated. In the absence of any such direction Mr. Hill appropriated the same towards the full satisfaction of

(1) (1897) L. R. Ap. Cas. 286.

his personal loan and the balance towards the mortgage debt, and he indicated the same to Mr. Jameson on the 18th of November, 1920. Mr. Jameson subsequently asked him to credit the entire sum of Rs. 3,500 towards the mortgage loan, and not towards his personal loan. Mr. Hill refused to do so. Thereafter Mr. Jameson on the 13th January, 1921, objected to the appropriation and asked Mr. Hill to appropriate the entire sum of Rs. 3,500 towards the June kist, which Mr. Hill refused in the following words :—

"With reference to your letter, dated 13th instant, I have to write to you that I am sorry I cannot accept the suggestions made in your said letter.

At the time of the payment of Rs. 3,500-0-0 in September, 1920, it was not suggested to me that the payment should be first credited to the mortgage account *B* or that any specified amount should be credited to the mortgage account *B*. I had the right to credit to whichever account I liked and as I considered it proper to credit it first to the loan account I did so and you were duly informed about it. You are wrong in thinking now that you have a right to ask me to credit any portion of the sum credited to the loan account to the mortgage account."

The position taken by Mr. Hill in this letter is fully in consonance with the law on the subject as stated above. Therefore, Rs. 3,500 was properly credited towards the personal loan account of Mr. J. B. S. Hill. The result of this appropriation is that the mortgage debt due at the date of the suit, or when the cause of action arose, was not under Rs. 12,000 but it was as claimed in the plaint, and therefore Mr. Jameson or Mrs. Jameson or her two-sixteenth share in the Karnowl Indigo Concern could not be exempted from the mortgage. The view taken by the learned Subordinate Judge is wrong, and differing from him I set aside the decree made by him and decree the appeal with costs.

Accordingly, we decree the plaintiffs' suit in terms of the reliefs sought for by them against both the defendants and the properties mortgaged in the mortgage indenture (Exhibit 1), dated the 15th January, 1920. The plaintiffs will get an ordinary mortgage decree with six months' grace allowed to the

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defendants to pay up the principal sum claimed with interest at the stipulated rate, failing which the plaintiffs will be entitled to sell the properties mortgaged. After the expiry of the perod of grace interest will run at the rate of 6 per cent. per annum. The plaintiffs will also get a decree under Order XXXIV, rule 4 of the Code of Civil Procedure.

BUCKNILL, J.—I should like to add only a few words to the judgment of my learned brother. I think that the law on this subject is clear. In the House of Lords in the case of *Cory Brothers and Company, Ltd.*, v. *Owners of the Turkish Steamship "Mecca"* (1) his Lordship Lord Macnaghten there states in clear language that when a debtor is making a payment to his creditor he may appropriate the money as he pleases and that the creditor must apply it accordingly. But if the debtor does not make any appropriation at the time when he makes the payment the right of appropriation devolves upon the creditor. In the old and famous case of *Devaynes* v. *Noble* (2) [usually known as Clayton's case] which was decided in 1816, it was held that the creditor was bound to make his election at once or within a reasonable time. But Lord Macnaghten observes that it had long been held and is now quite settled law that the creditor has the right of election up to the very last moment. It was also stated in the same case decided in the House of Lords to which I have already referred that the appropriation of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed and the same principle is no doubt applicable to appropriation by the debtor. Now in this appeal now before this Court it is common ground that there certainly was no *express* information given by the debtor to the creditor as to the appropriation of the sum; nor, so far as I could see, was there any ground for suggesting that with regard to this sum (the appropriation of which is now in dispute) there had taken place anything from which the credi-

(1) (1897) L. R. Ap. Cas. 286. (2) (1816) 1 Mer, 585; 35 E. R. 767.

tor could or should have extracted any implied intention on the part of the debtor as to the method of its appropriation. Still less was there in my view any presumption which could be fastened upon the creditor that the debtor's intention was that the money should be appropriated to the later of the two specific debts, *i.e.* to the mortgage debt. Under these circumstances it appears to me that in this case, as the law stands, it is hopeless to argue and cannot seriously be maintained that Mr. Hill could not have had the right of appropriating this sum in whatever manner he might have thought fit.

Appeal decreed.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

BADRI NARAYAN SINGH

v.

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Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Article* 144—*Mahanth of math, nature of the office of—alienation made by mahanth, suit to set aside—limitation, terminus a quo—whether each succeeding mahanth gets a fresh cause of action.*

The mahanth of a math is merely the manager or custodian of the institution and he does not hold the math properties as a life-tenant or trustee.

Sri Vidya Varuthi Thirtha Swamigal v. *Balusami Ayyar* (1) and *Kailasam Pillai* v. *Natraja Thambiran* (2), followed.

Vidyaporna Tirtha Swami v. *Vidyanidhi Tirtha Swami* (3), disapproved.

Therefore, the effect of a sale by a mahanth in excess of his authority, is not to give each succeeding mahanth

* Appeal from Appellate Decree no. 35 of 1923, from a decision of B. Kamal Prasad, Additional Subordinate Judge of Shahabad, dated the 21st November, 1922, reversing a decision of B. Kamini Kumar Banerji, Munsif of Arrah, dated the 6th May, 1922.

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1910) I. L. R. 33 Mad. 265, F. B.
(3) (1904) I. L. R. 27 Mad. 495.

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a new cause of action for setting aside the alienation; consequently adverse possession commences from the date of the original disposition of the property and is not interrupted by the death of the original mahanth and the succession of a new mahanth; each succeeding mahanth does not get a new start for the purpose of limitation.

Nilmony Singh v. *Jagabandhu Roy* (1), *Damodar Das* v. *Lakhan Das*(2) and *Madhusudan Mandal* v. *Radhika Prasanna Dass* (3), followed.

Appeal by the defendant.

This was an appeal on behalf of the defendant in an action in ejectment. The only important question for decision in the appeal was the question of limitation.

The plaintiff-respondent was the mahanth of Noornagar, otherwise called Jalpura, and he brought a suit for a declaration that a deed of sale executed by Ram Kishun Gir, a former mahanth of the math, to Tilak Singh, an ancestor of the defendant, in the year 1894, was not binding upon him; and that it did not convey any title inasmuch as the vendor mahanth had no right to sell the property, which was a property endowed to the math, without any justifying necessity of the math. The present suit was instituted on the 29th of July, 1921. The defendant, in his written-statement, alleged inter alia that he and his ancestors had been in adverse possession for more than twelve years and that the suit was accordingly barred by limitation.

The learned Munsif held that the defendant had been in possession of the land at least from the year 1895 and that the plaintiff and the math represented by him had been out of possession for about 27 years before the suit. He held that the article applicable was Article 144 of Schedule I of the Indian Limitation Act and that the defendant was in adverse possession since after the death of Ram Kishun Gir,

(1) (1896) I. L. R. 23 Cal. 536.
(2) (1910) I. L. R. 37 Cal. 885; L. R. 37 I. A. 147.
(3) (1912-13) 17 Cal. W. N. 873.

he being of opinion that during the lifetime of Ram Kishun Gir the possession of the defendant was permissive possession. He accordingly dismissed the suit.

On appeal the Subordinate Judge held that time began to run as against the plaintiff when he became the mahanth of the math. It appeared that since Ram Kishun Gir there had been three mahanths of the math, namely, Sheodhyan Gir, Ganesh Gir and the plaintiff Kailash Gir. The Subordinate Judge was of opinion that the mahanth for the time being was a tenant for life and any alienation of the math property made by him which was not for the benefit of the math was valid during his lifetime, and that if the successor of the vendor did not sue the purchaser for more than twelve years he would be barred only for the period that he remained the mahanth of the math, and that after him his successor would have a fresh start of limitation from the time of the death of his predecessor. He accordingly held that as the suit was brought within 12 years of the death of the plaintiff's immediate predecessor, Mahanth Ganesh Gir, the suit was not barred by limitation. He accordingly decreed the suit with costs.

N. N. Sinha and *B. P. Sinha*, for the appellant.

P. Dayal and *R. Prasad* for the respondents.

KULWANT SAHAY, J. (after stating the facts as set out above, proceeded as follows): The only question is as to whether the suit is barred by limitation.

The determination of this question depends on the determination of the status of the mahanth of a math. The property admittedly was endowed property and belonged to the math. The question as regards the true position of a mahanth of a math in relation to the properties belonging to the math or to any idol in the math has been considered in a number of cases. His position has been expressed variously in

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various decisions. Sometimes his position is described as that of a life-tenant, sometimes as that of a trustee, in some cases he is described to hold the position of a guardian of a minor, and in some cases he is described as a corporation sole. The question, however, was considered by the Privy Council in a very recent case in *Sri Vidya Varuthi Tirtha Swamigal* v. *Balusami Ayyar*(1) and it was held that the mahants of maths, called by whatever names, are only the managers or custodians of the institution and that in no case is any property conveyed to or vested in them; nor are they "trustees" in the English sense of the word, although they are answerable as trustees in the general sense for maladministration. The learned Subordinate Judge was of opinion that the position of a mahanth of a math was that of a life-tenant. This view was taken by the Madras High Court in *Vidyaporna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(2) where the learned Judges observed that the mahanth is, as he would be described in England, a "corporation sole" having an estate for life in the permanent endowments of the math and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution; but in a later Full Bench decision of the same Court in *Kailasam Pillai* v. *Natraja Thambiran*(3) it was held that it could not be predicated of the head of a math that as such he holds the math properties as a life-tenant or trustee. The view taken in *Vidyaporna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(2) was disapproved of by the Privy Council in the case of *Sri Vidya Varuthi Tirtha Swamigal* v. *Balusam Ayyar*(1) referred to above. The learned Subordinate Judge was wrong in his view that the position of each succeeding mahanth was that of a life-tenant.

(1) (1921) I. L. R. 44 Mad. 881; L. R. 48 I. A. 302.
(2) (1904) I. L. R. 27 Mad. 435.
(3) (1910) I. L. R. 33 Mad. 265, F. B.

The question as to whether each succeeding mahanth gets a fresh start of limitation from the date of his succession as mahanth was directly raised and considered in several cases. In *Nilmony Singh* v. *Jagabandhu Roy*(1), Bannerji, J., after considering the position of a mahanth of a math, held that although it is true that an idol holds a property in an ideal sense, and its acts relating to any property must be done by or through its manager or shebait, yet that does not show that each succeeding manager gets a fresh start as far as the question of limitation is concerned on the ground of his not deriving title from any previous manager. The succeeding shebaits were considered as forming a continuing representation of the idol's property. In *Damodar Das* v. *Lakhan Das* (2) it was held by the Privy Council, affirming the decision of the High Court at Calcutta, that the property vested not in the mahanth but in the legal entity, the idol, the mahanth being only its representative and manager and that the title of a transferee from the mahanth became adverse to the right of the idol and of the senior chela as representing that idol and that the suit brought by the successor of that chela was barred by limitation. In *Madhusudan Mandal* v. *Radhika Prasanna Das*(3) it was held by Mookerjee and Beachcroft, J.J., that the effect of a lease granted by a shebait in excess of his authority is not to give each succeeding shebait a new cause of action for setting aside the alienation, and adverse possession commences from the date of the original disposition of the property and is not interrupted by the death of the original shebait and the succession of the new shebait, and that each succeeding shebait does not get a new start for the purpose of limitation.

It is clear from these authorities that the plaintiff in the present case could not get a fresh start for the purposes of limitation from the date of his succession

(1) (1896) I. L. R. 23 Cal. 536. (2) (1910) I. L. R. 37 Cal. 885.
(3) (1912-13) 17 Cal. W. N. 873.

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as mahanth. The possession of the transferee became adverse to the institution from the date of the transfer upon the finding that the transfer was without any legal and justifying necessity; but even assuming that his possession was permissive during the lifetime of the vendor Ram Kishun Gir, the cause of action in any event accrued on the death of Ram Kishun Gir, and it is admitted that Ram Kishun Gir died more than twelve years before the suit. The succeeding mahanths represented the institution completely and the defendant did acquire a title by adverse possession for more than twelve years not only from the date of his purchase but also from the death of the vendor.

I am, therefore, of opinion that the decision of the learned Subordinate Judge cannot stand. The result is that the appeal is decreed. The decree of the Subordinate Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs.

MULLICK, J.—I agree.

Appeal decreed.

APPELLATE CRIMINAL.

1925.

Dec., 21.

Before Ross and Foster, J.J.

ILTAF KHAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 162—*Police diary, contradiction of witness by.*

In a trial on a charge of murder two witnesses deposed that on the evening of the occurrence they saw the accused persons passing through the village and thereafter they did

* Death Reference no. 22 of 1925 and Criminal Appeal no. 198 of 1925, from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 18th November, 1925.

not see them at their house. The sub-inspector deposed that in the course of the investigation these witnesses had stated to him that the accused persons had been found absent from the village after the occurrence, but had not stated that they had seen them fleeing on the date of the murder. One of the witnesses referred to above admitted at the trial that he did not inform the sub-inspector that he had seen the accused that evening. The other witness maintained that he had so informed the sub-inspector. The trial court held that by reason of section 162 the sub-inspector's evidence on this point was inadmissible.

Held, in appeal, that the sub-inspector's evidence was admissible.

[*cf. Guhi Mian* v. *King-Emperor* (1), Rep.].

Badri Chowdhury v. *King-Emperor* (2), doubted.

Iltaf Khan and Shamsuddin Khan were sentenced to death by the Judicial Commissioner of Chota Nagpur on conviction of a charge of murdering Ram Sawarath Dubey on the 2nd of May, 1925, at Chanderpura. The sentences were submitted to the High Court for confirmation, and the prisoners appealed against their convictions.

The most important question which arose in the appeal was whether the accused persons had been seen fleeing away from the vicinity of the scene of occurrence shortly after the murder.

Athar Hussain, for the appellants.

L. N. Sinha, Government Pleader, for the Crown.

Ross, J. (after stating the facts of the case and considering the other evidence, proceeded): There remain four witnesses Jogeswar Dusadh, Mahabir Dhobi, Munshi and Bhajan; and their evidence is directed to prove the fact that the accused were seen running away shortly after the murder. Jogeswar

(1) (1925) I. L. R. 4 Pat. 204. (2) (1925) 6 Pat. L. T. 620.

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is the brother-in-law of Munshi and Mahabir is a neighbour. They are both residents of Kamat and their evidence in court is that on the evening of the day of occurrence, about 2 gharis before sun-set, they saw the two accused passing through the village and thereafter they did not see them at their home. The weak point about their evidence is that they did not make any such statement to the police. Before the Sub-Inspector all that was said was that the accused had been found absent from the village after the occurrence. Jugeswar Dusadh admitted that he did not mention to the Sub-Inspector his having seen the accused in the lane, but Mahabir Dubey maintained that he did make that statemnt. The Sub-Inspector says that he examined these witnesses on the 9th and that they stated only that the accused were absent from the village from the day of occurrence and they did not, so far as he remembered, say that they had seen the accused fleeing on the date of the murder.

On this evidence a question of law arises in the view of the learned Judicial Commissioner. Plainly there is a very important discrepancy between the evidence of these witnesses in court and their statements to the police; and if their statements to the police were in the form deposed to by the Sub-Inspector, the statements made subsequently at the trial cannot safely be acted upon. The learned Judge, however, considering himself bound by the decision of this Court in *Badri Chowdhuri* v. *King Emperor*(1) held that such use of the notes of the witnesses' statements in police diaries was not warranted by law and apparently rejected the police statement; and, in consequence, believed the evidence at the trial. Now, so far as Jogeswar is concerned, no question arises. He admitted that he did not make the statement to the police that he had seen the accused that evening. Mahabir Dubey

(1) (1925) 6 Pat. L. T. 620.

maintained that he did and the Sub-Inspector contradicted him. Why should this not be evidence? Apparently the learned Judicial Commissioner is referring to the observation by one of the learned Judges who decided that case (an observation which on the facts found must be regarded as obiter, because on the facts no question of the construction of section 162 of the Code of Criminal Procedure arose) that only a part of the recorded statement can be used and that " it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer ". To construe section 162 of the Code of Criminal Procedure as meaning that while any part of the statement of a witness to the police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the police, such a contradiction cannot be proved, seems to be an artificial construction. I am unable to adopt it; and, with respect, I must dissent from that view. I can find nothing in the language of section 162 which would lead to such a conclusion. I would therefore hold that the evidence of the Sub-Inspector with regard to these witnesses is relevant and on the strength of that evidence I would discard their evidence in Court.

[After dealing with the remainder of the evidence his Lordship proceeded as follows:]

On the whole therefore I feel convinced that in this case the evidence falls far short of proof to justify the conviction of the appellants. I would therefore allow the appeal and set aside the conviction and sentence and direct that the appellants be acquitted and set at liberty.

FOSTER, J.—I agree.

Convictions and sentences set aside.

APPELLATE CIVIL.

Before Adami and Sen, J.J.

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v.

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June, 23.

Hindu Law—limited owner, power of to alienate—legal necessity—surrender, meaning of—presumptive heir, whether has any interest in the property during the lifetime of limited owner—female holder, duty of, to maintain persons entitled to maintenance by last holder.

Under the Hindu law the liability of a woman who takes property, either by inheritance or survivorship, to maintain those whose maintenance was a charge upon it in the hands of the last holder, is the same as that of a man who inherits or succeeds to property.

The interest of a Hindu reversioner is a mere spes successionis which confers no right on the reversionary heir in the estate of the deceased, present or future, vested or contingent.

Amrit Narain Singh v. *Gaya Singh* (1) and *Mussammat Bhagwati Kuer* v. *Jagdam Sahay* (2), followed.

An alienation by way of compromise entered into between a limited owner and persons who had no bona fide claim to the property at the time of the compromise, is not binding on the reversioners.

Anup Narain Singh v. *Mahabir Prasad Singh* (3), followed.

An alienation by a limited owner of the estate held by her may be validated (*i*) if it can be shown to be a bona fide surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time

* Appeal from Appellate Decree no. 849 of 1922, from a decision of B. Harihar Charan, Subordinate Judge of Muzaffarpur, dated the 19th June, 1922, reversing a decision of B. Debi Prasad, Munsif of Hajipur, dated the 10th June, 1921.

(1) (1918) I. L. R. 45 Cal. 590; L. R. 45 I. A. 35.
(2) (1921) 6 Pat. L. J. 605 (613).
(3) (1918) 3 Pat. L. J. 83.

of the alienation, or (*ii*) if there was a legal necessity for the alienation of the whole or part of the estate.

A Hindu widow mortgaged the estate which she held, to *J*, to defray the expenses of the marriage of the son's daughter of the last male holder's paternal uncle, and the property having been sold in execution of the decree on the basis of that mortgage, was purchased by the decree-holder. *D*, a presumptive reversioner, brought a suit challenging the mortgage to *J* and all proceedings based thereon. The suit was compromised by an ekrarnama whereby *J* and *D* each took one-third of the property and the remaining one-third was retained by the widow. The share of *J* was purchased by the plaintiff, who in turn, conveyed his share in zarpeshgi to *B*. Thereafter the actual reversioners of the last male holder (the limited owner having died in the meantime) entered into possession of the estate and redeemed *B's* zarpeshgi. Plaintiff instituted the present suit on the basis of the ekrarnama for a declaration that he was entitled to obtain his share of the property on payment of the zarpeshgi money, and for a decree for redemption and possession in his favour. The suit was resisted by the reversioners who challenged the validity of the ekrarnama.

Held, (*i*) that the ekrarnama having been executed to compromise a suit brought by the heir-presumptive who had no title to the property itself during the lifetime of the limited owner, was without legal necessity and hence invalid; (*ii*) that it could not be supported on the ground of surrender as there was no alienation of the whole interest of the limited owner in the whole estate in favour of the next reversioner.

Second appeal by the plaintiff.

The appellant instituted the suit out of which this appeal arose for redemption and possession of certain specified shares in the properties set out in the plaint which he alleged were in the wrongful possession of the defendants first party. The following facts were undisputed, the questions raised being only as to the character and legal effect of some of the transactions:

Upon the death of one Ram Ratan Singh the family property, except certain parcels which went to some widows in lieu of their maintenance, came into the hands of one Dhuna Singh, his grand-son, by his

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son Maniar Singh. Subsequently, on the death of Dhuna Singh, the estate went by inheritance to his mother Mussammat Ramdularee Kuer, the widow of Maniar Singh. On the 11th April, 1896, Ramdularee executed a mortgage bond (Exhibit 8) for Rs. 1,000 in favour of one Jagannath Sahi, cousin of Durga Prasad Narain Sahi (the father of the plaintiff). By this mortgage bound the Mussammat purported to hypothecate 12-annas of tauzi nos. 2345 and 2346 by way of security for the loan which she purported to raise for defraying the expenses of marriage of Mussammat Ramsumaree Kuer with the plaintiff. Mussammat Ramsumaree was the son's daughter of Johnti Singh, the elder brother of Maniar Singh. On the 19th August, 1897, an ex-parte decree was obtained on foot of the mortgage above mentioned and the properties mortgaged brought to sale and purchased in the name of Jagannath Sahi. On the 16th November, 1898, Dhanpat Singh, the next reversioner, instituted a suit, being Suit no. 110 of 1898, challenging the mortgage in favour of Jagannath Singh and all proceedings based thereon. This suit was compromised, and the result was that on the 22nd August, 1899, an ekrarnama (Exhibit 11) was executed whereby Jagannath Sahi relinquished his claim to 12-annas of tauzi nos. 2345 and 2346 and accepted a third share of the estate subject to all debts and liabilities of Dhuna Singh. Ramdularee also took one-third and Dhanpat Singh, the next reversioner, took the remaining one-third share. On the 24th September, 1899, Jagannath sold his entire interest by kebala (Exhibit 1) to plaintiff for a consideration, it was alleged, of Rs. 3,500. Hence the plaintiff claimed to have become entitled to the shares in the mauzas claimed in the suit.

Then came another set of transactions which were the immediate cause of the plaintiff's suit. The plaintiff alleged that on the 18th September, 1909, he and the then presumptive heir, Dhanpat Singh, borrowed a sum of Rs. 1,995-0-0 from Bechan Sahi, father of defendant no. 9, and Basist Sahi, defendant

no. 10, and executed a zarpeshgi bond in respect of the tauzi nos.comprised within the estate of Dhuna Singh, in favour of Bechan and Basist Narain. It was said that out of the sum of Rs. 1,995 the plaintiff obtained Rs. 595 only and Basist Narain the balance of Rs. 1,400. Thereafter Dhanpat Singh, the presumptive reversioner, died, and his son Ramparichan Singh came into possession of all his estate. He applied for mutation of his name before the Collector; the application was opposed by the actual reversioners of Dhuna Singh who were the defendants first party in the suit (for by that time Musammat Ramdularee had died and succession had opened to the reversioners). On the 28th November, 1918, it was alleged by the plaintiff, a collusive and fraudulent ekrarnama was entered into between Ramparichan Singh and the defendants first party, whereby the defendants first party obtained a portion of the zarpeshgi property, and, on the strength thereof, on the 14th March, 1919, collusively got the entire amount of zarpeshgi, that is, Rs. 1,995, deposited in Court in the name of the creditors, that is, the defendants third party, without the knowledge of the plaintiff, and the defendants third party collusively withdrew the said bond money from the Court and gave up possession of the zarpeshgi property to them. Hence the plaintiff was denied the opportunity of depositing his proportionate share of the debt. As a result the defendants first party obtained possession of the entire zarpeshgi property and were still in possession thereof. On the facts above mentioned the plaintiff prayed for a declaration that he was entitled to get possession of his share of the properties given in zarpeshgi on payment of his share of the debt and for a decree for redemption and possession in his favour. The defendants first party, the present reversioners, were the contesting defendants. They assailed the mortgage (Exhibit 8) as unsupported by any legal necessity and the transactions entered into under Exhibit 8, Exhibit 11 and Exhibit 1 as being void and of no effect as they were alleged to be parts of a device to deprive the

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reversioners of their just rights and to divide up the estate between the limited owner Ramdularee and the presumptive owner Dhanpat Singh. They alleged that Jagannath was a mere farzidar of Ramdularee and no interest passed under the ekrarnama (Exhibit 11) to Jagannath, and, consequently, none passed to the plaintiff under the sale deed (Exhibit 1). As regards the zarpeshgi deed dated the 18th September, 1909, their case was that that was really a transaction entered into by Ramdularee in the name of the plaintiff and Dhanpat Singh for the purpose of paying up the debts of Dhuna Singh due to Gopal Sahi and others; that they were just debts of the last male holder and, therefore, binding on the reversioners and on the estate; that the allegation of the plaintiff that a portion of the zarpeshgi money was due from him was utterly false; that upon the death of Dhanpat his son Ramparichan realised that the estate had passed to the defendant first party, the present reversioners, and he thereupon saw the necessity of executing the ekrarnama dated the 28th November, 1918, to discharge the aforesaid debt; that the defendants first party had as such reversioners paid off the zarpeshgi debts and secured possession of the property to which they were justly entitled and that the plaintiff's claim to redemption and possession should be dismissed. The suit was decreed by the trial court but this decision was reversed in appeal.

S. M. Mullick and *S. Dayal*, for the appellants.

L. N. Sinha and *L. K. Jha*, for the respondents.

SEN, J. (after stating the facts set out above, proceeded as follows): Two main points of law have been put forward before us. First, whether the expenses of marriage of Ramsumaree Kuer could come within the description of legal necessity; and consequently whether the mortgage (Exhibit 8) or any rights thereunder could be deemed to be valid beyond the lifetime of the limited owner. Secondly, did the ekrarnama (Exhibit 11) pass a valid title to Jagannath Singh or was it invalid and of no effect? Was it

a mere device by the limited owner to defeat the right of the reversioners?

As a question of fact it is now beyond all dispute that the amount of Rs. 1,000 which was raised upon the mortgage (Exhibit 8) was actually employed on the marriage expenses of Mussammat Ramsumaree Kuer. What is disputed is that there was any duty cast upon the limited owner Mussammat Ramdularee to defray the marriage expenses of Ramsumaree Kuer out of the estate in her hands. It is urged that the duty of marrying Mussammat Ramsumaree lay on Jhonti Singh, or, in the last instance, upon Dhuna Singh, the last male holder. It is also urged that directly the estate passed by inheritance to Mussammat Ramdularee Kuer it ceased to be bound to pay the marriage expenses of Jhonti's son's daughter. This view appears to me clearly untenable. The true principle as laid down by the Shastras is that where a person takes a property, either by inheritance or survivorship, he is legally bound to maintain those whose maintenance was a charge upon it in the hands of the last holder (*see* Mayne, Article 453).

"A female heir is under exactly the same obligation to maintain the members of a family as a male heir would have been by virtue of succeeding to the same estate. The obligation extends even to the King when he takes the estate by escheat or by forfeiture." (*See* Mayne, Article 458.)

In fact the duty of the person who inherits is to provide for the maintenance, education, marriages, sradhs and other usual religious expenses of the coparceners and of such members of their family as they are, or were when alive, legally or morally bound to maintain. Now, Ramsumaree Kuer would easily come within the description of such members as were dependent on the male coparceners when they were alive. In this view it appears that the mortgage (Exhibit 8) was for legal necessity and the mortgagee decree-holder got a valid right and title to the properties purchased by him at the execution sale.

The next question relating to the validity or otherwise of the ekrarnama (Exhibit 11) calls for a

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somewhat detailed investigation. The Munsif held that the ekrarnama was not supportable on the ground of alienation by Ramdularee for legal necessity, nor was it supportable on the doctrine of surrender or renunciation. He further held that Dhanpat Singh, the presumptive reversioner, had no right or interest in praesenti in the property which Ramdularee held for life until it vested in him on her death should he survive her. He had no substantial claim on which to litigate with her at the time and that therefore the ekrarnama which purported to compromise the matters in dispute and difference between the parties to that suit could not be held to be legally valid. On this ground he held that the plaintiff who derived his title from Jagannath on foot of the said ekrarnama could not recover possession by redemption of any portion of the estate as against the reversioners. He accordingly dismissed the suit. On appeal the learned Subordinate Judge held that the plaintiff's vendor Jagannath had derived a good title under the mortgage; that he could not be blamed for suing on it when the mortgage money was not paid; that the ekrarnama whereby Jagannath relinquished what he had purchased under the decree and took what was given to him as one-third of the estate plus the encumbrance thereon was good and valid so far as Jagannath was concerned and it conferred a title on him. With regard to the other parties to the ekrarnama he observes—

"Whether it operated as surrender or alienation on behalf of the lady in favour of Dhanpat is a different question with which we are not concerned in the present suit."

Upon these findings he proceeded to hold that the plaintiff had a right to redeem the zarpeshgi which Dhanpat executed in favour of the defendant third party and he allowed the appeal.

It has been urged before us that a disposition by compromise such as that effected by the ekrarnama (Exhibit 11) is perfectly valid as the entire estate was then in the hands of Mussammat Ramdularee, and that although a limited owner, she was still the manager,

and as such manager was quite competent to dispose of the estate to the best of her discretion. The subject of the power of a limited owner to deal with the estate of the last male holder as against the rights of the reversioner was dealt with very fully in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). The Judicial Committee in that case observed :—

" This raises a consideration of the whole subject of the power of a Hindu widow over the estate which belonged to her husband to which she has succeeded either immediately on the death of her husband or as heir on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually; it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination.

* * * *

" It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the term of English law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction, which as Seshagiri Ayyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

" To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them.

(1) (1919) I. L. R. 42 Mad. 523; L. R. 46 I. A. 72.

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They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can so to speak by voluntary act operate her own death." (Pages 531 and 532.)

At page 536 their Lordships observed—

"The result of the consideration of the decided cases may be summarized thus: (*1*) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (*2*) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C.J., and Mookerjee, J., in the case of *Debi Prosad*." (1)

The question to be considered, therefore, is whether the ekrarnama in question can be supported on either of the principles above laid down. There can be no valid contention in this case that the ekrarnama is supportable on the doctrine of legal necessity. On the finding that the mortgage deed was for legal necessity the sale of 12 annas in favour of

(1) (1913) I. L. R. 40 Cal. 721.

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Jagannath of tauzi nos. 2345 and 2346 may be considered to be valid and binding. But thereafter we find that Dhanpat, the presumptive reversioner, institutes a suit against Musammat Ramdularee and Jagannath for a declaration that the mortgage was not for legal necessity and that therefore the sale was not binding. It was this suit which was purported to be compromised by the ekrarnama (Exhibit 11) and by virtue of that ekrarnama each of the three parties to the suit got a third share in the whole estate. The transaction has to be looked into from different points of view. First, had Dhanpat at that time any right or interest in the property in regard to which he instituted the suit? True he was entitled as presumptive reversioner, to institute a suit for a declaration, but was he under any circumstances entitled to a share in the property? The interest of a Hindu reversioner has been defined as spes successionis, that is, a mere possibility of succession. Such a possibility gives no interest to the reversionary heir in the estate of the deceased, present, or future, vested or contingent. this principle is supported by various rulings among which may be mentioned the case of *Amrit Narain Singh* v. *Gaya Singh* (1) and *Musammat Bhagwati Kuer* v. *Jagdam Sahay* (2). On this principle it has also been laid down that an alienation by way of compromise entered into between a limited owner and persons who had no bona fide claim to the property at the time of the compromise is not binding on the reversioners. [*Anup Narain Singh* v. *Mahabir Prosad Singh*, (3).] Therefore it is clear that the ekrarnama in question offends the principle laid down in these rulings on account of the fact that it purports to give Dhanpat Singh who had no interest in praesenti at the moment a third share in the whole estate which he was clearly not entitled to.

Secondly, looking at it from the point of view of the limited owner, Mussammat Ramdularee Kuer, the

(1) (1918) I. L. R. 45 Cal. 590; L. R. 45 I. A. 35.
(2) (1921) 6 Pat. L. J. 605, 613.
(3) (1918) 3 Pat. L. J. 88.

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question that has to be considered is whether she purported to efface herself completely and to operate her own death as it were by relinquishing the entire estate and consequently accelerating the interest of the consenting heir. This she clearly did not do, for she purported to take under the ekrarnama one-third of the estate. It is urged before us that this share in the estate was given to her in lieu of her maintenance. It is doubtful if she could do so, but the matter does not arise at all inasmuch as there is no evidence on the record, nor does it appear to have been contended in any stage of the proceedings that the share that she took was by way of her maintenance. On this ground it appears to me to be quite clear that the ekrarnama is illegal and invalid as against the right of the actual reversioners. The learned Subordinate Judge seems to think that it is not necessary to consider whether the ekrarnama operated as a surrender or alienation on behalf of the lady in favour of Dhanpat, but that it is sufficient to consider as to whether Jagannath got a valid title under it. Such a piecemeal consideration of the ekrarnama is wholly unwarranted. It is either valid or invalid and if it be invalid, it must be held to be invalid in respect of all the parties. That being so, the conclusion is irresistible that Jagannath never got a valid title under the ekrarnama and that therefore the plaintiff is not entitled to any relief.

This decision will not in any way prejudice such rights as the plaintiff or his vendor Jagannath might have in respect of tauzi nos. 2345 and 2346 which Jagannath purchased at auction in execution of his mortgage decree.

The appeal must therefore be allowed with costs. The judgment and decree of the learned Subordinate Judge must be reversed and the judgment and decree of the learned Munsif restored.

ADAMI, J.—I agree.

Appeal allowed.

FULL BENCH.

Before Dawson Miller, C.J., Mullick, Jwala Prasad, Das and Foster, J.J.

RAMGULAM SAHU

v.

CHINTAMAN SINGH.*

1925.

Dec., 4, 7, 22.

Mesne Profits—suit for immoveable property and past and future profits—decree for possession and directing ascertainment of profits in execution—application for ascertainment of profits—Court-fee, whether payable on—Dismissal of application for non-payment of court-fees, illegality of—Restoration of order of dismissal, application to set aside—Revision—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151, *Order VII, rule* 2, *Order XX, rule* 12—*Court-fees Act*, 1870 (*Act VII of* 1870), *section* 11.

Where, in a suit for recovery of immoveable property and for mesne profits antecedent to, as well as subsequent to the institution of the suit, the decree directs the profits to be ascertained in the execution department, a court-fee is payable with respect to the claim for such profits but the fee cannot be claimed until the amount actually due on account of the profits has been ascertained.

Dwarka Nath Biswas v. *Devendra Nath Tagore* (1), approved.

Vinayak Amrit Deshpande v. *Abaji Haibatrav* (2), dissented from.

Nand Kumar Singh v. *Bilas Ram Marwari* (3), *Rambilas Singh* v. *Amir Singh* (4), *Ram Krishna Bhikaji* v. *Bhima Bai* (5), *Sellamathu Servagar* v. *Ramaswami Pillai* (6) and *Maiden* v. *Janakiramayya* (7), referred to.

Therefore, where the decree directs mesne profits to be ascertained "in execution", an application made to the executing court for ascertainment of the profits cannot be

* Civil Revision no. 183 of 1925, from an order dated the 9th September, 1925, passed by M. Wali Mohammad, Subordinate Judge of Bhagalpur.

(1) (1906) I. L. R. 33 Cal. 1232. (4) (1920) 55 Ind. Cas. 24.
(2) (1888) I. L. R. 12 Bom. 416. (5) (1891) I. L. R. 15 Bom. 416.
(3) (1918) 3 Pat. L. J. 67. (6) (1902) 12 Mad. L. J. 66.
(7) (1898) I. L. R. 21 Mad. 371.

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dismissed, before the profits have been ascertained, on the ground of non-payment of the court-fee on such profits.

Per MULLICK, J.—Where a plaint claims future mesne profits the only order which the court can pass with respect to the claim is an order for an inquiry as to such profits. Such an order is a preliminary decree and under the present Code the inquiry as to mesne profits must be made in the suit itself and not in execution. Order VII, rule 2, which provides that where the plaintiff sues for mesne profits " the plaint shall state approximately the amount sued for ", applies to an application for ascertainment of mesne profits in accordance with the preliminary decree. But the decree-holder is not liable to make with his application any deposit of court-fee as a condition precedent to the inquiry. The deficit court-fee, if any, can be demanded from him under section 11 of the Court-fees Act only when the inquiry has been held and the total amount of mesne profits has been determined by a final decree.

Per DAWSON MILLER, C. J. AND MULLICK, JWALA PRASAD, J.J.—An application for ascertainment of mesne profits in accordance with the directions contained in a preliminary decree is not a " plaint ".

Bidyadhar Bachar v. *Manindra Nath Das* (1), referred to.

Per JWALA PRASAD, J.—An order rejecting such an application is not a " decree ".

Neither Order VII, rule 2 of the Code of Civil Procedure, nor section 7(*iv*)(*f*) of the Court-fees Act, applies to unascertained mesne profits.

An application for ascertainment of future mesne profits in accordance with a preliminary decree may be made verbally.

Query.—Whether such an application is subject to any period of limitation.

Puran Chand v. *Radha Kishun* (2), referred to by Mullick, J. *Gangadhar Manika* v. *Balkrishna Soiroba Kasbekar* (3), *Ramana Reddi* v. *Babu Reddi* (4), and *Puran Chand* v. *Roy Radha Kishen* (2), referred to by Jwala Prasad, J.

(1) (1925) 42 Cal. L. J. 49, F. B.
(2) (1892) I. L. R. 19 Cal. 132, F. B.
(3) (1921) I. L. R. 45 Bom. 819.
(4) (1914) I. L. R. 37 Mad. 186.

A decree-holder having applied for ascertainment of mesne profits in accordance with directions contained in the decree, his application was dismissed on the ground of non-payment of the court-fee. The court-fee was subsequently filed with an application for restoration which purported to be made under Order IX, rule 4. The court restored the case. The judgment-debtor moved the High Court in revision against the order of restoration. A Full Bench of the High Court held that the order dismissing the original application was without jurisdiction and, therefore, declined to interfere in revision with the order of restoration although it was held that Order IX, rule 4, under which the order of restoration purported to be made, did not apply to the case.

Per DAWSON MILLER, C. J. (agreeing with the referring Judges, DAS and ROSS, J.J.).—"The powers of revision should not be exercised in such a case, for by so doing the court would be giving effect to a technicality of procedure at the expense of manifest justice."

Per JWALA PRASAD, J.—"The lower court had inherent power to set aside its order dismissing the application and to treat it as null and void, and this should be the view taken of its subsequent order restoring the application though it purported to have been passed under a wrong section of the Code of Civil Procedure."

Application by the judgment-debtor.

The facts of the case material to this report are stated in the following Order of Reference:—

DAS AND ROSS, J.J.—This application is directed against the order of the learned Subordinate Judge of Bhagalpur, dated the 9th September, 1924, restoring certain proceedings for the ascertainment of mesne profits under the provision of Order IX, rule 4, of the Code. The material facts are these: On the 15th September, 1914, the opposite party instituted a suit against the petitioner for declaration of title to, and for recovery of possession of, certain properties fully described in the plaint. He claimed mesne profits up to the date of the suit and

"from the date of the suit to the date of direct possession."

He assessed the mesne profits payable to him up to the date of the institution of the suit at Rs. 10,000 and paid Rs. 505 as court-fee payable on that amount. In regard to the future mesne profits, he said as follows:

"The amount of mesne profits from the date of the suit to the date of recovery of possession may be determined during the pendency of the suit or in the execution stage, and the plaintiff may be directed to furnish court-fee on the amount of mesne profits that may be determined."

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The plaintiff failed in the court of first instance, but succeeded in obtaining a decree in this Court which directed that

"the mesne profits shall be ascertained in execution."

The decree of the High Court was affirmed by the Judicial Committee of the Privy Council on the 9th June, 1921.

On the 7th June, 1924, the opposite party applied for the ascertainment of mesne profits and claimed that a very large sum of money would be found due to him on such ascertainment. It appeared that on the claim now put forward on behalf of the plaintiff, Rs. 2,421-12-0 was payable by him as court-fee and on the 21st July, 1924, the court directed him to pay that amount as a condition for the ascertainment of mesne profits and fixed a definite time within which it was to be paid. The court subsequently extended the time for payment of the money from time to time and ultimately dismissed the application for the ascertainment of mesne profits on the 30th August, 1924, on account of failure on the part of the opposite party to pay the court-fee. On the 9th September, 1924, the opposite party applied for restoration of the proceedings and the learned Subordinate Judge restored the proceedings under Order IX, rule 4, of the Code. It is this order which is the subject-matter of the application before us.

It may be conceded that Order IX, rule 4, of the Code, has no application to this case and that the learned Subordinate Judge was not justified in restoring the proceedings under that particular provision of the Code. But the petitioners are invoking the revisional jurisdiction of this court; and it is well settled that the court should not exercise its revisional jurisdiction except in aid of justice. Whether we should interfere in this case depends on whether the court had any jurisdiction to dismiss the proceedings for the ascertainment of mesne profits on the ground that the opposite party failed to pay the court-fee within the time fixed for such payment. If we are satisfied that that order was without jurisdiction, we should not be justified in setting aside the order which is the subject-matter of the present application, although we are satisfied that Order IX, rule 4, of the Code under which the court acted has no application to this case.

Order VII, rule 2, of the Code provides that

"where the plaintiff sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for."

Section 7, paragraph 1, of the Court-fees Act provides that court-fee is to be paid "according to the amount claimed",

"in suits for money (including suits for damages or compensation, or arrears of maintenance of annuities, or of other sums payable periodically)."

Section 11 of the Court-fees Act provides that

"where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the court shall fix, the suit shall be dismissed."

It has been held that court-fees are payable under section 7, paragraph 1, only upon the mesne profits claimed antecedent to the suit and that a plaint is not liable to stamp-duty in respect of mesne profits subsequent

to the suit. Whether this be the right view or not may be open to some doubt; but there is no room for controversy that in regard to future mesne profits, section 11 is at least applicable and that there is no jurisdiction in the court to insist upon the payment of additional court-fee as a condition for proceeding with the enquiry that may be claimed by the plaintiff and to dismiss the proceedings for ascertainment of mesne profits if the court-fee be not paid.

The following cases may be referred to in this connection:—*Ramkrishna Bhikaji* v. *Bhima Bai* (1), *Saminatha Vellala Thevan* v. *Muthusawmi Vellala Thevam* (2), *Maiden* v. *Janakiramayya* (3), *Bunwari Lal* v. *Daya Sunker Misser* (4), *Dwarka Nath Biswas* v. *Devendra Nath Tagore* (5), *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (6), *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (7) and *Chedi Lal* v. *Kirath Chand* (8).

It will be noticed that although there is a divergence of judicial opinion on the question whether court-fee is at all payable in respect of a claim for mesne profits subsequent to the suit, there is no decision which supports the view that a court is entitled to call upon the plaintiff to pay additional court-fee on a claim for future mesne profits as a condition for making the inquiry relative thereto. Section 11 of the Court-fees Act seems to me to be perfectly clear and in my opinion there is no doubt whatever that the court acted without jurisdiction in dismissing the proceedings for the failure on the part of the opposite party to pay the additional court-fee demanded. There are, however, two cases of this court which support the view of the petitioners. In *Nand Kumar Singh* v. *Bilas Ram Marwari* (9) the plaintiffs sued for setting aside a revenue sale, for possession of the disputed property and for recovery of mesne profits to be ascertained in execution proceedings. The plaint did not disclose the amount claimed as mesne profits and no court-fee was paid on the plaint. The court gave the plaintiffs a decree for possession and awarded them mesne profits from the date of the decree and directed that the same were to be ascertained in the execution proceedings. Subsequently a question arose as to whether the mesne profits were payable from the date of the decree of the court of first instance or from the date of the Privy Council decree. The executing court decided that mesne profits were payable from the date of the Privy Council decree and the plaintiffs appealed to this court paying a court-fee of Rs. 2 on the memorandum of appeal. It was objected that the court-fee paid was insufficient. It will be noticed that the mesne profits awarded to the plaintiffs were in respect of the period subsequent to the suit, and the decisions, both of the Bombay High Court and of the Calcutta High Court, establish that on such a claim no court-fee is payable. In deciding the point contended before the High Court, Chapman, J., said as follows: "In regard to the amount of the court-fee payable it cannot be said to be a case in which the value of the appeal cannot be ascertained. The appellant hopes, if he succeeds in this appeal, to obtain a large sum which he has stated in his plaint. The court-fee payable is, therefore, in my opinion

(1) (1891) I. L. R. 15 Bom. 416.
(2) (1910) 20 Mad. L. J. 98.
(3) (1898) I. L. R. 21 Mad. 371.
(4) (1908-09) 13 Cal. W. N. 815.
(5) (1906) I. L. R. 33 Cal. 1232.
(6) (1916) I. L. R. 43 Cal. 650.
(7) (1914) 24 Ind. Cas. 232.
(8) (1880) I. L. R. 2 All. 682.
(9) (1918) 3 Pat. L. J. 67.

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an ad valorem fee. In expressing this view we are conscious that we are departing from what was considered to be the practice, and it would, in our opinion, be fair to allow the appellant time until Monday, the 26th February, 1917, to amend the valuation in his plaint. Now that he is aware that he will have to pay an ad valorem court-fee he may, if he thinks it desirable, amend the valuation in his plaint. If he does so he will be limited to the amount stated in his plaint, and will not be permitted to recover any amount in excess of that. On that date an order will be given giving the appellant time to pay the court-fee ". Roe, J., concurring with Chapman, J., expressed himself in these words :—" A suit for mesne profits is a suit for money demanded as damages or compensation, and in that sense it is to be assessed with an ad valorem fee even if it be regarded as a suit for an account. The Court-fees Act, section 7(*iv*), in its last clause, is peremptory that any such suit shall be approximately valued. The same provision has now been introduced into the Civil Procedure Code. The old practice of allowing plaintiffs to include in a suit for land a suit for money as mesne profits without paying any court-fee upon the mesne profits was undoubtedly wrong, and in my view, a circular should be issued to the lower courts drawing attention to this error of practice." This view was accepted without any discussion in *Ram Bilas Singh* v. *Amir Singh* (1).

It will be noticed that there is no discussion in either of these cases as to the principle governing a question of this nature. No cases were cited before their Lordships and it does not appear that their Lordships were aware of the decisions of the Calcutta High Court, of the Bombay High Court, of the Madras High Court and of the Allahabad High Court on this point. I am myself unable to agree with these decisions and I am clearly of opinion that those cases were wrongly decided.

This being the position what order should be passed in this case? I am clearly of opinion that we should not interfere with the order passed by the learned Subordinate Judge in this case if we are satisfied that the order dismissing the proceedings for the ascertainment of mesne profits was without jurisdiction. In my opinion the order dismissing those proceedings was without jurisdiction; but as there are two decisions of this court in which a different view was taken and with which I do not agree, we refer the following questions for decision by a Full Bench:

(*i*) Is any court-fee payable in respect of a claim for future mesne profits, that is to say, mesne profits from the date of the institution of the suit up to the date of the realization?

(*ii*) Has the court any jurisdiction to require the plaintiff to pay additional court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has it any jurisdiction to dismiss the proceedings if the additional court-fee is not paid?

Under the rules of this court, we refer the case for the final decision of the Full Bench.

Naresh Chandra Sinha (with him *Susil Madhab Mullick* and *Shiv Narain Bose*), for the petitioner: The court had jurisdiction to dismiss the application

(1) (1920) 55 Ind. Cas. 24.

for ascertainment of mesne profits for non-payment of court-fee; and even if the order was without jurisdiction, the application could not be subsequently restored under Order IX, rule 4. The order dismissing the application could be set aside only on appeal or review. The referring judges are of opinion that as the initial order dismissing the application was without jurisdiction, the order of restoration should not be interfered with in aid of justice. My first submission, therefore, is that the court had jurisdiction to dismiss the application for enquiry inasmuch as the plaintiff had failed to pay court-fee within the time allowed by the court. Under the present Code of Civil Procedure an application for ascertainment of mesne profits is a subsidiary claim in the suit itself. or, in other words, it is a subsidiary plaint, and, therefore, the provisions of Order VII, rule 2, Code of Civil Procedure and section 7(*1*), Court-fees Act, apply to it. It is no longer a matter in execution.

[DAS, J.—The application is made only to ask the court to do what the decree directs it to do.]

Section 7(*1*), Court-fees Act, provides that an ad valorem court-fee has to be paid on the amount claimed as mesne profits by way of damages. Therefore, the application for enquiry, which is in fact a subsequent claim made at a stage when the plaintiff is in a position to ascertain the amount and to make a definite claim, is covered by that section. The claim previously made was, as if it were, an inchoate claim in respect of an amount which had not till then accrued due.

[DAS, J.—Does not *Lachmi Narain Marwari* v. *Balmakund Marwari* (1) conclude the case? When the decree directs the ascertainment of mesne profits, how can the court refuse to do so? It is not in the power of the court to dismiss a claim which has already been decreed.]

In that case there was no question of an indefinite claim becoming definite after the decree. But in the

(1) (1925) I. L. R. 4 Pat. 61, P. C.

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present case the claim was indefinite before, and it was laid when it had become definite.

[MULLICK, J.—What provision of the Court-fees Act entitles the Court to demand court-fee on an application for ascertainment of mesne profits?]

The fee is demandable under Order VII, rule 2, Code of Civil Procedure, and section 7(*l*) of the Court-fees Act.

[FOSTER, J.—Do you admit that there is nothing in the Court-fees Act on which you rely except section 7(*l*) which provides for the court-fee payable on a plaint?]

Yes. My point is that the application is an amendment of the original plaint and hence an ad valorem court-fee is payable thereon. See *Rambilas Singh* v. *Amir Singh* (1), *Nandkumar Singh* v. *Bilas Ram Marwari* (2).

[MULLICK, J.—There the point decided was that an ad valorem court-fee was payable on the memo. of appeal.]

They go further than that.

[CHIEF JUSTICE.—In these cases no question was raised as to whether the court-fee was payable before ascertainment.]

The effect of the decisions is that an ad valorem court-fee is payable on the application. When the plaintiff chooses to put in an application laying claim to the mesne profits, it must be taken that he makes a supplementary claim by amending the original plaint.

[DAS, J.—This is not a plaint within the meaning of the Court-fees Act.]

I submit it is, because the plaintiff lays a claim within the meaning of section 7(*l*). He need not have

(1) (1920) 55 Ind. Cas. 24.

(2) (1918) 3 Pat. L. J. 67.

chosen to make a claim, but when he has in fact done so, it is a plaint all the same.

[FOSTER, J.—Do you say that section 11, Court-fees Act, has no application at all?]

It will apply only when, subsequent to the ascertainment, it is found that the sum ascertained is in excess of the amount originally claimed. It has no application at present when the amount is not yet ascertained.

Nirsu Narain Sinha, for the opposite party: No court-fee is payable on mesne profits pendente lite, and even if it is payable it is demandable under section 11, Court-fees Act, only after the amount has been ascertained. Court-fee on the plaint is payable under section 7(*i*), Court-fees Act. Order VII, rule 2, however, assumes that the plaintiff has to mention the amount which he can approximately value. If I could value only the antecedent mesne profits and not the subsequent mesne profits, there being an element of uncertainty, the provisions of Order VII, rule 2, and section 7(*i*), Court-fees Act, would not apply. It is only by virtue of section 11 of that Act that I am liable to pay court-fee on the ascertained mesne profits. But if section 11 has no application, there is nothing in the statute by which the court can claim any court-fee on future mesne profits. Section 11 proceeds on the assumption that I have valued the claim and the sum ascertained exceeds the amount claimed; but when I am precluded from valuing the claim section 11 can have no application.

[MULLICK, J.—Order VII, rule 2, does not specify how much you have to pay for antecedent mesne profits and how much for future mesne profits.]

I cannot pay on future mesne profits because I cannot value them even approximately. Order VII, rule 2, Code of Civil Procedure, and section 11, Court-fees Act, contemplate some valuation and the payment of court-fee on that valuation. In *Bidyadhar*

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Bachar v. *Manindra Nath Das* (1) and *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (2) it was held that the court-fee cannot be ascertained pendente lite.

[CHIEF JUSTICE.—But you have to pay under section 7(*1*).]

I did pay court-fee on the amount which I claimed and which was capable of being valued at the time of the suit. The provisions of section 7(*1*) were complied with. I rely on *Ram Krishna Bhikaji* v. *Bhima Bai* (3), *Maiden* v. *Janakiramayya* (4), *Banwari Lal* v. *Daya Sunker Misser* (5), *Saminath Vellala Thevan* v. *Muthusawmi Vellala Thevan* (6).

But a contrary view has been taken in *Dwarka Nath Biswas* v. *Devendra Nath Tagore* (7). Having regard to the decisions of the other High Courts, I submit that it is not good law and should not be followed. Mesne profits, antecedent and pendente lite, stand on a different footing. See *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (8).

The learned Advocate was not called upon on the second point.

S. A. K.

Cur. adv. vult.

DAWSON MILLER, C.J.—This is an application in revision asking us to set aside an order of the Subordinate Judge of Bhagalpur dated the 9th September, 1924, restoring to his file a petition for ascertainment of mesne profits which had previously been dismissed for non-payment of the court-fee.

The plaintiff, who is the opposite party in the present application, sued the defendants, who are the present petitioners, for possession of certain lands together with mesne profits up to the institution of

(1) (1925) 42 Cal. L. J. 49, F. B.
(2) (1916) I. L. R. 43 Cal. 650.
(3) (1891) I. L. R. 15 Bom. 416.
(4) (1898) I. L. R. 21 Mad. 371.
(5) (1908-09) 13 Cal. W. N. 815.
(6) (1910) 20 Mad. L. J. 98.
(7) (1906) I. L. R. 33 Cal. 1232.
(8) (1916) I. L. R. 43 Cal. 650.

the suit. The mesne profits were valued in the plaint at Rs. 10,000 and covered the period of three years before the institution of the suit. The court-fee amounting to Rs. 505 was paid in respect thereof when the plaint was filed. The plaintiff also claimed an enquiry as to future mesne profits for the period between the institution of the suit and delivery of possession. In 1919 after failing in the trial court, he obtained a decree in the High Court for possession, together with mesne profits, and by the decree it was ordered that mesne profits should be ascertained in execution. The decree was subsequently affirmed by an order of the Privy Council on the 9th June, 1921. The plaintiff subsequently applied for possession of the property and finally obtained it on the 23rd June, 1922, and under his decree he would be entitled to mesne profits up to that date. On the 7th June, 1924, he presented an application to the Subordinate Judge for ascertainment of the amount of mesne profits up to the date of delivery of possession in June, 1922. The amount estimated in his application included the sum of Rs. 10,000 as the mesne profits for the three years preceding the institution of the suit upon which sum, as stated, the court-fee had already been paid. The value of the subsequent mesne profits payable up to the date of delivery of possession was estimated in the application at Rs. 1,36,000. The Subordinate Judge ordered that the court-fee payable upon this amount should be deposited before proceeding with the enquiry. A date was fixed for payment which was subsequently extended up to the 29th August, 1924. The court-fee was not paid by that date, and on the 30th August the Subordinate Judge ordered that the application should be dismissed for default. On the 9th September the plaintiff applied for restoration of the application for ascertainment of mesne profits and offered to pay the court-fee. The application was heard on the 13th September when the Subordinate Judge granted the application, restored the case to his file and directed the court-fee to be deposited which was done the same day.

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The Subordinate Judge purported to act under Order IX, rule 4, of the Code of Civil Procedure. The judgment-debtors then applied to this Court in its revisional jurisdiction to set aside the order of the 13th September. The application was heard by a Division Bench consisting of Das and Ross, JJ. The learned Judges were of opinion that the case could not be restored under Order IX, rule 4, which provides for restoration only under certain conditions which did not exist in the present case. They refused, however, to interfere under the revisional jurisdiction of the court on the ground that the previous order of the 30th August dimissing the application for ascertainment of mesne profits for default in payment of the court-fee was itself without jurisdiction. If they were right on that point, then I agree with the view expressed by the learned Judges that the powers of revision should not be exercised in such a case, for by so doing the court would be giving effect to mere technicalities of procedure at the expense of manifest justice. There are, however, two decisions of this court which the learned Judges considered were in conflict with their opinion as to the liability to pay court-fees for future mesne profits as a condition precedent to their ascertainment. The case was accordingly referred to a full bench for determination.

The plaintiff has contended, first, that no court-fee is leviable at all in respect of future mesne profits, that is for the period between the institution of the suit and the date of possession, and secondly, that, even if leviable, the fee cannot be exacted before the amount of such profits has been ascertained as directed by the decree, and that the court has no jurisdiction to exact payment as a condition precedent to the ascertainment of the profits or to dismiss an application on the ground of non-payment of such fee at that stage.

The determination of these questions depends upon the interpretation of certain sections in the Court-fees Act and in the Civil Procedure Code.

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Section 7(*1*) of the Court-fees Act provides that the amount of fee payable in suits for money (which would include the present claim) shall be computed according to the amount claimed; and by Order VII, rule 2, of the Civil Procedure Code, where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed: but where the plaintiff sues for mesne profits the plaint shall state approximately the amount sued for. When the suit was instituted in 1914 the only mesne profits that could be estimated were those which had already accrued due and these were estimated, as already stated, and the proper court-fee was paid thereon with the plaint. No cause of action had arisen at that time with regard to future mesne profits, for no amount was due and no estimate could be made with respect to a future claim which might or might not arise. The Civil Procedure Code, however, provides by Order XX, rule 12, that where a suit is for the recovery of possession of immoveable property and for rent or mesne profits the court, in addition to granting a decree for possession and mesne profits up to the institution of the suit, may also direct an enquiry as to the mesne profits from the institution of the suit until either delivery of possession to the decree-holder, or relinquishment of possession by the judgment-debtor, or the expiration of three years from the date of the decree, whichever event first occurs. This provision was no doubt inserted in the Code in order to prevent multiplicity of suits, as without it a further suit would be necessary in order to recover the rents and profits for the period during which the decree-holder was kept out of possession after the suit. The relief provided by this enactment is not an immediate right to any ascertained amount, or to any amount which is capable of being estimated, but a right to an enquiry only, in case the plaintiff should be kept out of possession after the institution of the suit, and no special court-fee appears to be provided for such relief. Where such an enquiry is directed by the court then Order XX, rule 12(*2*), provides that a final decree in

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respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.

Under the Code of 1882, as under the present Code of 1908, the court could either determine at the trial the amount of mesne profits due before institution and pass a decree for such amount, or it could order an enquiry, whilst with regard to future mesne profits it could only order an enquiry. In this respect there is no difference between the two Codes, but by section 244 of the old Code questions regarding the amount of any mesne profits as to which the decree had directed an enquiry were to be determined by the executing court, whilst under the present Code of 1908 there is no such provision and the enquiry may presumably take place either before the trial court itself, or in such manner as it may direct, and a final decree must then be passed in accordance with the result of the enquiry. Under the old law when the executing court held the enquiry no court-fee was ever paid or exacted, so far as I am aware, as a condition precedent to the holding of an enquiry as to future mesne profits, but section 11 of the Court-fees Act provides as follows:

"11. In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the court shall fix, the suit shall be dismissed."

This section contemplates two cases in which provision is made for exacting an additional court-fee after the profits have been ascertained. The first paragraph would appear to relate to a case where the profits claimed before institution of the suit had been

ascertained in the trial court and provides for payment of a fee upon the excess amount found due, under penalty of having the execution stayed if the fee is not paid. The second paragraph appears to apply to all cases of past or future mesne profits which have been ascertained in execution and provides for payment of a court-fee upon the excess of the profits so ascertained over and above the amount claimed and paid for in the plaint and the fee payable is the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits eventually ascertained. In such case the court may fix a time within which the additional fee should be paid and may dismiss the suit for default of payment. As in the present case the mesne profits past and future were directed to be ascertained in execution it would appear that the second paragraph of section 11 applies. It is clear, to my mind, from this section that the fee payable is not the fee upon an estimated amount stated in the petition, but upon the excess of the amount actually found due by the enquiry over and above the amount upon which the fee has already been paid. From this it would follow, and indeed the language of the section seems clear enough, that no excess fee can be claimed until the actual amount due has been ascertained. In other words the fee payable is not calculated by reference to the amount estimated in the petition but by reference to the amount actually ascertained on enquiry.

It was contended, however, that the application for ascertaining future mesne profits should be treated as either a supplementary or amended plaint, and viewed from this aspect the court-fee on the amount estimated in the application should be paid on the presentation of the application as if it were a plaint. This argument would no doubt be entitled to consideration if it were put forward in support of what the law ought to be, but I can find nothing either in the Civil Procedure Code, or in the Court-fees Act, which enacts that an application to hold

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an enquiry directed by the decree, and to which the decree-holder is already entitled under his decree, should be treated as a plaint, and I agree with the view expressed by the learned Judges of the Division Bench in the order of reference that the Subordinate Judge in dismissing the application for ascertainment of mesne profits on the 30th August was exceeding his jurisdiction.

I wish to add a word about the case of *Nand Kumar Singh* v. *Bilas Ram Marwari* (1) which was relied on as expressing a contrary view. The question in that case was whether the fee payable was an ad valorem fee, or a fee calculated on some other basis, and the question arose in respect to the fee payable, not on a plaint, but on a memorandum of appeal. The appeal was by the plaintiff as decree-holder against an order of the executing court deciding that mesne profits were payable from the date of the decree of the Privy Council and not from the date of the original decree of the trial court which had decreed possession and directed that mesne profits should be ascertained in execution and which had been affirmed by the Privy Council. The judgment-debtors raised, amongst other points, a preliminary objection that the fee paid on the memorandum of appeal was insufficient and that it ought to have been an ad valorem fee on the value of the appeal calculated on the difference between the total estimated profits claimed and the estimated profits for the period allowed. The court decided that the fee payable on the memorandum of appeal was an ad valorem fee and should be calculated on the value of the appeal estimated at the amount of the profits claimed for the period disallowed under the order appealed from. That question does not arise in the present case and it is not necessary now to express an opinion on the correctness of the decision. The ground upon which it is based may possibly be in conflict with the view I have already expressed upon the present case but

(1) (1918) 3 Pat. L. J. 67.

I prefer to reserve my judgment upon the correctness of the decision itself until the matter directly arises for consideration.

The subsequent case of *Ram Bilas Singh* v. *Amir Singh* (1) decided in 1918 by a Division Bench of which I was a member followed the decision in *Nand Kumar Singh's* case (2) (ubi supra) to the extent that the fee payable on the memorandum of appeal was an ad valorem fee, but in neither of those cases does it appear to have been argued that the excess fee could only be exacted after ascertainment of mesne profits and when the excess amount had been definitely determined.

There is some authority for the proposition that no court-fee can be exacted at any time in respect of future mesne profits even after ascertainment. See *Ram Krishna Bhikaji* v. *Bhima Bai* (3) This view, however, has not found favour in the Calcutta High Court. In *Dwarka Nath Biswas* v. *Devendra Nath Taqore* (4) it was held by Rampini and Harrington, J.J., that where past and future mesne profits had been claimed and a court-fee had been paid with a plaint on the estimated mesne profits up to the date of suit and both classes had been subsequently ascertained in execution, section 11 of the Court-fees Act applied and the court-fee on the future mesne profits so ascertained could be demanded on pain of having the suit dismissed if not paid within the time fixed. In my opinion the Calcutta view is right and under section 11 of the Court-fees Act a fee is claimable upon future mesne profits after ascertainment.

If I am right in the view already expressed, it follows that a court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry, and the court has no jurisdiction to dismiss an application for enquiry for non-payment of court-fee in advance.

(1) (1918) 55 Ind. Cas. 24.
(2) (1918) 3 Pat. L. J. 67.
(3) (1890) I. L. R. 15 Bom. 416.
(4) (1906) I. L. R. 33 Cal. 1232.

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I consider that we should in the particular circumstances of this case and in the ends of justice refuse to exercise our powers of revision even though technically the order complained of, dated the 13th September, may have been wrong. By setting aside the order complained of we should be depriving the plaintiff of the right which was improperly withheld from him by the previous order and be perpetrating an injustice for the sake of a technicality of procedure which has nothing to commend it. The application is dismissed but in the circumstances we think that each party should bear his own costs.

MULLICK, J.—I agree with the learned Chief Justice.

By reason of the special provisions of Order II, rule 4, and Order XX, rule 12, of the Code of Civil Procedure a plaintiff may, in a suit for recovery of possession of immoveable property, also claim (*a*) mesne profits which have accrued on the property prior to the institution of the suit or (*b*) an inquiry as to such mesne profits or (*c*) an inquiry as to mesne profits from the institution of the suit until delivery of possession to the decree-holder or relinquishment of possession by the judgment-debtor with notice to the decree-holder on the expiration of three years from the date of the decree whichever event first occurs. The Code of 1882 required that an inquiry into mesne profits should be made in execution; but the Code of 1908 has effected a change and now all such inquiries must be made in the suit itself and there must be a final decree settling the amount due. The decree directing that the plaintiff be put in possession is final. So also is a decree for a specific sum on account of mesne profits which have accrued due prior to the institution of the suit. If, however, the court considers it necessary to direct an inquiry then the order for such inquiry is always a preliminary decree. With regard to the mesne profits which have accrued due subsequent to the institution of the suit, the court cannot make any order except an order for

inquiry and that must always be a preliminary decree. The Code does not prescribe any special form in which the application is to be made for holding the inquiry; nor is it necessary to consider here what is the period of limitation for making such an application. One view is that there can be no period of limitation as it is the duty of the court to carry out that which is ordered by its preliminary decree. [See *Puran Chand* v. *Radha Kishun* (1).] That question, however, does not arise in the present case; the only question we have to consider here is whether the applicant, when he applies for the inquiry which the court has ordered, should put any, and if so, what valuation upon his application. Now Order VII, rule 2, requires that some estimate should be made in the plaint in respect of mesne profits. It may be contended that this refers only to mesne profits which have accrued before the institution of the suit and that it cannot refer to mesne profits which have accrued since the institution of the suit for which the cause of action has not yet arisen. In my opinion the answer is that for the protection of the revenue the law compels the plaintiff to make a valuation of some kind. If he claims mesne profits both in respect of the period antecedent to the suit and also the period subsequent thereto, the valuation will be held to refer to both periods. If he sues for mesne profits in respect of only one of these two periods, the valuation will be held to refer to that period only. The provision is not based on any logic; it is purely fiscal and arbitrary and compels the plaintiff to make an estimate even though he may have no materials for doing so. When the court by its final decree has determined the total amount of mesne profits due in respect of both or either of the periods as the case may be, an application must be made in the form prescribed for the execution of the decrees in the execution department; and section 11 of the Court-fees Act then comes into play and empowers the execution court to stay the execution of the decree till the court-fee on the difference

(1) (1892) I. L. R. 19 Cal. 132, F. B.

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if any between the valuation contained in the plaint and the amount ascertained in the final decree has been paid.

But there may be cases where a decree has been passed under the old Code directing that the inquiry into mesne profits be made in the execution department. Such is the decree in the case now before us and it becomes the duty of the execution court to make the inquiry. In such a case the latter part of section 11 of the Court-fees Act operates to protect the revenue. This part of section 11 of the Court-fees Act requires that the execution of the decree shall be stayed until the additional fee, if any, be paid within the time fixed by the court, and that in default the suit shall be dismissed. But the court cannot demand that the court-fee or any portion of it shall be paid before it has completed its inquiry.

Nor does the argument, which I think must be accepted, that since the present Civil Procedure Code came into force there can be no application in execution for holding an inquiry to ascertain the amount of mesne profits and that all such applications must be regarded as applications in the suit, affect the matter. The decree-holder is not liable to make with his application any deposit of court-fee as a condition precedent to the inquiry. The deficit court-fee, if any, can only be demanded from him under section 11 of the Court-fees Act after the decree has been put in execution.

The fact is that the application to the court to ascertain the mesne profits after a preliminary decree has been made is not in any sense a plaint and there is no statute for the levy of ad valorem fee on it. The object of levying ad valorem court-fees on claims for money is to secure revenue; it has no reference to the labour expended by the court upon the adjudication of the claim and the decree-holder is entitled to demand that the taxing statute must be strictly construed.

Therefore there being no provision for taxing an application for inquiry whether in the suit or in execution the Subordinate Judge was wrong in dismissing the application.

Finally, there was nothing in *Nand Kumar Singh* v. *Bilas Ram Marwari* (1) to justify his order. I have examined the record of that case and find that the suit was for recovery of possession of land and for mesne profits from the date of dispossession to that of recovery of possession, but the decree awarded mesne profits only from the date of the decree to that of recovery of possession. In the course of execution a dispute arose as to whether the date of the decree was the date of the trial court's decree or the date of the decree subsequently made by the Privy Council and an appeal was preferred to the High Court on this point. The High Court held that before the memorandum of appeal could be entertained the appellant must first pay ad valorem court-fee on the value of the appeal which was the amount of mesne profits which he hoped to recover if the appeal was decreed in his favour. The court also held that as in the trial court the plaintiff had omitted to estimate the value of the mesne profits claimed he must amend the plaint and pay deficit court-fees thereon. There was nothing in the order of the High Court to suggest that the court required the decree-holder to pay in the execution court any ad valorem court-fee as a condition precedent to the holding of the inquiry.

I agree therefore that neither *Nand Kumar Singh's* case (1) nor *Ram Bilas Singh* v. *Amir Singh* (2) which follows it, affects the decision of the case now before us.

JWALA PRASAD, J. (after stating the facts of the case, proceeded as follows): The judgment-debtor has come to this Court in Revision and contends that the order of the Subordinate Judge dated the 9th September, 1924, restoring the application of the plaintiff-decreeholder for ascertainment of mesne

(1) (1918) 3 Pat. L. J. 67. (2) (1918) 55 Ind. Cas. 24.

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profits, which was already dismissed on account of non-payment of court-fee, is bad inasmuch as Order IX, rule 4, has absolutely no application. He further contends that the order of the Subordinate Judge dismissing the application could not be set aside except upon a review to that court or in an appeal to this court. This contention assumes that the plaintiff had a right of a review of or an appeal from the order of the 30th August 1924, dismissing his application for ascertainment of mesne profits. It is obvious that the order of the 30th August was not capable of review. The right of review is given by Order XLVII of the Code of Civil Procedure and can only be exercised within the limitation prescribed by rule 1 of that Order and is dependant upon a discovery of new matter or evidence which after the exercise of due diligence was not within the knowledge of or could not be produced by the plaintiff at the time when the decree or order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient cause. The grounds enumerated in that rule upon which the review is permissible. do not exist in this case and the words "any other sufficient cause" have been held to refer to causes which are ejusdem generis with those specifically mentioned in the rule. Therefore the order of the Subordinate Judge of the 30th August was not capable of review.

There cannot be any appeal from that order inasmuch as it was not a decree within the meaning of the word as defined in section 2, clause (*2*). The learned advocate on behalf of the applicant relies upon the last part of clause (2) which says that "decree"

> "shall be deemed to include the rejection of a plaint."

This assumes that the application of the plaintiff for the ascertainment of mesne profits was a plaint. This is wholly an untenable position. The plaintiff's application can, in no sense, be said to be a plaint. The plaintiff had already filed his plaint when he instituted the suit which ultimately resulted in a

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decree in his favour for possession and mesne profits. That plaint was presented under Order IV, read with Orders VI and VII and section 26 of the Code. The application for ascertainment of mesne profits was filed either by way of execution of the decree based upon the plaint already filed by him, or for an enquiry under Order IV, rule 12, of the Code in pursuance of the preliminary decree which was passed on the foot of his plaint. Such an application cannot be said to be a plaint. The learned advocate has invented a felicitous expression and calls the application a supplementary plaint. But there is no provision in the Code for presenting a supplementary plaint. Even applications for amendment of plaints or addition of parties or reliefs do not count as plaints. It is not necessary to pursue the point further inasmuch as the learned advocate, towards the close of his argument, admitted that it was not a supplementary plaint and pointed out to us the latest decision of the Calcutta High Court in the case of *Bidhyadhar Bachar* v. *Manindra Nath Das* (1) wherein it has been clearly held that such an application is not a plaint. Therefore the rejection of the plaintiff's application cannot stand on the same footing as the rejection of a plaint under Order VII, rule 11(*c*), on account of the failure of the plaintiff to supply the requisite stamp paper within the time fixed by the court and the order rejecting the application is not a decree within the meaning of section 2 of the Code of Civil Procedure and hence there is no appeal from this order. In refusing the application the court refused to exercise jurisdiction, and this Court can, in revision, direct the lower court to entertain the application and proceed according to law. The lower court also can suo motu disregard its order refusing the application as ultra vires.

The next question is, could the court dismiss the application on the ground that it was not properly stamped. Section 6 of the Court-fees Act prohibits the acceptance of a document chargeable in the first

(1) (1925) 42 Cal. L. J. 49, F. B.

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or second schedule of the Act unless in respect of such a document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. The schedules do not require a petition for the ascertainment of mesne profits to bear an ad valorem court-fee and the application was properly stamped with a court-fee of Re. 0-12-0 prescribed in Schedule II of the Court-fees Act for all applications to the subordinate courts. Therefore the application could not be dismissed upon the ground that it did not bear the proper court-fee. The learned Subordinate Judge had no jurisdiction to reject the plaint originally filed upon the ground that it did not bear the proper court-fee. The plaintiff claimed past mesne profits, which according to him, approximately amounted to Rs. 10,000 as required under Section VII, rule 2, of the Code of Civil Procedure and paid a court-fee thereon under section 7, clause (*iv*)(*f*), of the Court-fees Act. He also prayed for determination of his right to future mesne profits. The amount of future mesne profits was not ascertainable at that time on account of the uncertainty of time during which the plaintiff would be out of possession as well as the uncertainty of the profits which the defendant would be expected to reasonably earn from the land and appropriate. To take the extreme case, the land might be submerged by water and remain so after the institution of the suit till the plaintiff recovered possession of the property and in that case there would be no profit earned by the defendant which could be claimed as mesne profits by the plaintiff. Therefore to ask the plaintiff to state in his plaint the 'approximate amount of mesne profits' would be to ask him to value his relief upon an imaginary figure. This position is so absurd that the legislature has not thought it fit to compel the plaintiff to value the future mesne profits or to pay any court-fee thereon at the time of filing the plaint. Neither Order VII, rule 2, of the Code of Civil Procedure nor section 7, clause (*iv*) (*f*), of the Court-fees Act would apply to unascertained

future mesne profits. No court-fee is payable upon future mesne profits until after the amount is already ascertained.

It is only to avoid multiplicity of suits that the plaintiff in a suit for possession is entitled to ask in his plaint not only for the past profits which had accrued at the date of the institution of the suit but also for future mesne profits from the date of the suit up to the date of delivery of possession to him and when the plaintiff claims mesne profits, past and future, the court may in the same suit, while decreeing the suit for possession, determine the amount of mesne profits. The present Code of Civil Procedure, 1908, lays down the procedure for determining the mesne profits in Order XX, rule 12. Under section 196 of the Procedure Code (Act VIII of 1859), the court could provide in the decree for the payment of mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. Section 197 provided that the court could determine the amount prior to the passing of a decree for land or pass a decree for the land reserving an enquiry into the amount of mesne profits in the execution of the decree according as it appeared most convenient. Similar were the provisions made in the later Code (Act XIV of 1882) in sections 211 and 212, with this difference, that under the latter section the enquiry into and determination of the mesne profits to be incorporated and named in the decree for possession was limited to the period prior to the 'institution of the suit', whereas in Act VIII of 1859 it was up to the 'passing of the decree for the land'. But in these Acts there was no specific provision for the determination by the trial court and incorporation in the decree of the amount of mesne profits from the date of the institution of the suit or decree up to the date of the delivery of possession. This, therefore, used to be done under the old Acts in execution proceedings, and, as pointed out by this court in *Harakhpan Missir* v. *Jagdeo Misser* (1), much

(1) (1925) I. L. R. 4 Pat. 57.

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divergence of opinion prevailed as to whether an application for ascertainment of future mesne profits in the execution proceedings was governed by the three years' rule of limitation [Vide *Gangadhar Manika* v. *Balkrishna Soiroba Kasbekar*, *Ramana Reddi* v. *B. Babu Reddi* (1) and *Puran Chand* v. *Roy Radha Kishen* (2)]. The present Code has made it clear that the court which passes a decree for possession of land may direct an enquiry as to the mesne profits both prior to the institution of the suit and subsequent thereto up to the delivery of possession or up to three years whichever date is earlier. No court-fee used to be paid when the old Codes of Civil Procedure were in force before the future mesne profits were determined whether they were determined in the execution proceedings or in proceedings in continuation of the suit. The present Code in providing for the enquiry as to mesne profits by the court passing a decree for possession of land does not purport, in any way, to affect the law as to the time when the court-fee is payable with respect to future mesne profits. It has simply amalgamated the provisions of the old Codes spread over several sections and has clearly defined the power of the court passing a decree with respect to the holding of an enquiry and ascertaining the mesne profits which was somewhat vague and doubtful in the old Acts. The Court-fees Act (VII of 1870) remains unaltered and the change in the Procedure Code as to the mode of, or the forum in which the enquiry is to take place does not alter the time when the court-fee upon future mesne profits is payable. It must be presumed that the legislature did not intend to effect any change in this respect and that the law as to the court-fee governing the matter which existed prior to the present Code was considered by the legislature to be sufficient to meet the present situation created by the Code of 1908 whereby the court passing a decree for possession can declare the plaintiff's rights to recover mesne profits and then

(1) (1921) I. L. R. 45 Bom. 869.

(2) (1914) I. L. R. 37 Mad. 186.

hold an enquiry, ascertain the amount of mesne profits and embody the same in a final decree capable of execution.

Both under the new and the old Codes the plaintiff need only state

" approximately the amount of mesne profits sued for ",

and upon the amount so stated, he is required to pay ad valorem court-fee under section 7(*iv*) (*f*) of the Court-fees Act at the time of filing the plaint. But the amount actually found due to him may exceed the rough valuation stated by him in the plaint. For this contingency the Court-fees Act makes provision in section 11. This section is split up into two parts or paragraphs. The first relates to the excess amount found upon an enquiry in the suit itself and incorporated in the decree of the court. Under the old Code, the court could determine the amount of mesne profits pendente lite up to the institution of the suit and pass a decree for it along with a decree for possession. The court could not, under the old Act, determine the future mesne profits in the suit and pass a decree therefor. Under the present Code, the court can determine past and future mesne profits in the suit itself and make a decree called a 'final decree' for the mesne profits capable of execution. The first paragraph applied in practice formerly to a decree for mesne profits which accrued up to the institution of the suit. Inasmuch as under the present Code, a decree may be passed in the suit itself called the final decree for future mesne profits as well, hence the first paragraph would apply to such a decree also. The change in the Procedure Code did not necessitate any change in the first part of section 11, as the words employed therein are sufficient to cover such a decree. Where the plaintiff in his plaint for recovery of possession of immoveable property claims a determination of his right to past and future mesne profits, his suit is a " suit for immoveable property and mesne profits " in terms of section 11, mesne profits, past and future, to be regarded in such

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a plaint as one entire claim for mesne profits, to use the language of Sargent, C.J., in the case of *Ram Krishna Bhikaji* v. *Bhimabai* (1). In such a case the plaintiff

> " approximately states the amount of past mesne profits which had already accrued to him at the time the suit is instituted "

and accordingly values the amount of mesne profits and pays court-fee thereon. The future mesne profits, which at that time, were not capable of ascertainment, become so and are actually ascertained by the court and a decree is passed thereon under Order XX, rule 12, if the amount of mesne profits thus found and decreed exceeds the amount of past mesne profits approximately stated by the plaintiff. Section 11, paragraph 1, says that

> " the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the amount of profits or the amount so decreed would have been paid to the proper officer."

Under this clause the court-fee upon the future mesne profits is not to be paid until the same have been actually determined and no time is to be fixed for the payment of such a court-fee nor the claim for mesne profits is to be dismissed on failure to pay the court-fee. The penalty in this clause is that the decree for mesne profits, whether past or future " shall not be executed " until the excess court-fee is paid. In the Full Bench case of the Calcutta High Court referred to above [*Bidhyadhar Bachar* v. *Manindra Nath Das* (2)] where, after the plaintiff had obtained possession of the property, he applied, under Order XX, rule 12, for the ascertainment of future or pendente lite mesne profits and valued his claim at Rs. 3,000, the question was whether this valuation affected the jurisdiction of the Munsif who had decreed the suit, it was held that the plaintiff's valuation in the application did not affect the jurisdiction of the Munsif which he originally had at the time the suit for possession was brought to enquire into the mesne profits. The decision was based upon the view that the plaintiff

(1) (1891) I. L. R. 15 Bom. 416.

(2) (1925) 42 Cal. L. J. 49, F. B.

in such a case is not required, nor is it possible for him, to value even approximately the amount of mesne profits pendente lite, which must vary according to the period the defendant retains the property. It was further observed that the plaintiff is not required to value the subsequent mesne profits in advance or at a higher value than is leviable by law, i.e., the value of mesne profits claimed up to the date of the institution of the suit; he cannot value subsequent mesne profits in advance. It follows from the above observations in that case that the plaintiff in the present case could not be asked to pay any court-fee upon the amount of mesne profits stated by him in his application for ascertaining the actual amount of mesne profits due to him. This view is supported by the case of *Sellanuthy* v. *Ramaswami* (1).

In the present case the High Court which passed the decree for possession directed that the mesne profits

"shall be ascertained in the execution."

If the application of the judgment-debtor was an application to ascertain the mesne profits in execution proceedings, the second clause of section 11 would apply to it. The second clause says that where the amount of mesne profits is left to be ascertained in the course of the execution of the decree and if the profits so ascertained exceed the profits claimed, then the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. Thus if this clause applied the court could not ask the plaintiff to pay any court-fee until the amount was ascertained, much less could it make the payment of court-fee a condition precedent for the enquiry as to the amount payable as mesne profits. Section 11 of the Court-fees Act is the only provision under which additional court-fee could be demanded upon mesne profits and under that clause no fee is demandable until the actual amount is ascertained

(1) (1902) 12 Mad. L. J. 66.

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and found in excess of the amount for which court-fee has already been paid whether the enquiry for the ascertainment of mesne profits is made in the course of the suit or in execution proceedings. If the decision of this court in the case of *Nand Kumar Singh* v. *Bilas Ram Marwari* (1) and the circular issued on the strength of it lay down a different rule, I would respectfully differ from it. The decision does not quote any authority in support of it nor does it take into consideration the true meaning and import of the provisions in the Court-fees Act. In the case of *Maiden* v. *Janakiramayya* (2) where, in a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit, the defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. He did not pay any court-fee and it was held that no court-fee was payable in respect of the mesne profits subsequent to the institution of the suit. This case supports the view that no court-fee is payable for future mesne profits unless they are ascertained. Therefore the order of the court refusing to ascertain the mesne profits before the court-fee was paid upon the amount mentioned in the plaintiff's application seems to me to be illegal and without jurisdiction. In reason also it would appear to be so, for the plaintiff might be found entitled to much more or much less than the amount of mesne profits named by him in the application. My answer, therefore, to the second question is in the negative, viz. that the learned Subordinate Judge had no jurisdiction to require the plaintiff to pay additional court-fee as a condition for proceeding with the investigation of the claim, nor had he any jurisdiction to dismiss the proceedings if the additional court-fee was not paid.

I have already held that there is no provision in the Court-fees Act for payment of the court-fee

(1) (1918) 3 Pat. L. J. 67.

(2) (1898) I. L. R. 21 Mad. 371.

demanded by the court and the application for ascertaining the mesne profits, therefore, could not be rejected. Supposing, for argument's sake, that no enquiry into the amount of mesne profits could be made unless court-fee upon the mesne profits claimed by the plaintiff in his application was paid beforehand. No written application was necessary for asking for an investigation into it and a verbal application was sufficient for the plaintiff to demand an enquiry into the matter. The court-fee was actually paid on the 13th September and it appears from the order sheet that the court was asked to hold an enquiry. Therefore there was before the court on the 13th September a proper court-fee paid with a prayer for holding an enquiry into the amount of mesne profits. The court had no right to refuse to enter into an enquiry for ascertaining mesne profits, and as a matter of fact, it proceeded to enquire into the matter. If the order of the 30th August, 1924, was without jurisdiction, the order of the 13th September, 1924, though wrongly stated to have been passed under Order IX, rule 4, should be deemed to have been really passed by virtue of the inherent jurisdiction of the court vested by section 151 for the ends of justice. The operative part of the order of the 9th September is contained in the concluding sentence of the order. It restores the application which was dismissed implying thereby that the order passed without jurisdiction on the 30th August was set aside. In the case of *Raja Devi Bux Singh* v. *Habib Shah* (1) the plaintiff's suit was dismissed for default. It appears that the plaintiff had died before the dismissal and that subsequently upon an application of his son, the order was set aside under Order IX, rule 9, Code of Civil Procedure. But on appeal by the defendant, the Judicial Commissioner set aside the order as the application was not made within 30 days under Order IX, rule 9, of the Civil Procedure Code. Lord Shaw set aside the order of the Judicial Commissioner of Oudh and observed as follows: "By the Code of Civil Procedure, 1851, it is provided

(1) (1913) I. L. R. 35 All. 331; L. R. 40 I. A. 151.

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that 'nothing in this rule shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the courts'. In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.".

The Subordinate Judge, in the present case, had, therefore, inherent power to set aside his order dismissing the application and to treat it as null and void and this should be the view taken of his subsequent order restoring the application though it purports to have been passed under a wrong section of the Code of Civil Procedure.

As to the first question, it seems to me that in spite of some divergent views taken in some cases, the court-fee is leviable upon the amount of mesne profits for a period subsequent to the date of the institution of the suit when that sum is actually ascertained. There is no provision in the Court-fees Act exempting such a claim from the payment of duty. On the other hand, section 11 clearly indicates that the fee is leviable upon future mesne profits. The plaintiff could restrict his claim to the mesne profits which accrued up to the date the suit for possession was instituted and reserve his claim with respect to future mesne profits for a subsequent suit, for the cause of action for future mesne profits had not then arisen. The future mesne profits which were incapable of being estimated at the time when the suit for possession was instituted can become ascertainable and capable of valuation at a future date, and there is no reason why the plaintiff would not have to pay court-fee when the amount is actually ascertained.

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His liability to pay court-fee, therefore, does not cease, because in the suit for possession he was permitted for the sake of convenience and to avoid multiplicity of suits, to include in one suit a claim for past and future mesne profits. The real distinction seems to be that no court-fee is payable upon future mesne profits until they are ascertained, but when ascertained they are chargeable with duty under section 11, the failure to pay which causes the penalty imposed by that section. This view is supported by the case of *Dwarka Nath Biswas* v. *Debendra Nath Tagore* (1).

The answers which I have given above to the questions referred to this bench for decision lead to the conclusion that the defendant's application should be dismissed and the rule discharged.

As regards costs, I agree to the order proposed by the Chief Justice.

DAS, J.—I agree with my Lord the Chief Justice.

FOSTER, J.—I agree generally; but in particular I wish to express my agreement with the view propounded in the judgment of my learned brother Jwala Prasad, J., as to the applicability of the second clause of section 11 of the Court-fees Act to the provisions of the present Civil Procedure Code in respect of suits for recovery of land and for ascertainment of mesne profits.

APPELLATE CIVIL.

Before Das and Foster, J.J.

MAHANTH RAM LOCHAN DAS

v.

NANDI JHA.*

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Jan., 2.

Record-of-Rights—holding recorded occupancy holding—Landlord's claim to it as malik's zerait—presumption—burden

* Appeal from Original Decree no. 212 of 1923, from a decision of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 24th July, 1923.

(1) (1906) I. L. R. 33 Cal. 1232.

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of proof—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 103B.

In a suit for partition the plaintiff claimed certain land to be the malik's zerait, while the defendants contended that it was their occupancy holding; the record-of-rights supported the defendants. The plaintiff contended that the presumption arising from the entry in the record-of-rights was rebutted by the fact of the disputed land falling within the ambit of the plaintiff's zamindari.

Held, that the plaintiff had no presumptive right generally to possession of raiyati holdings and that, therefore, there being no conflict of presumptions, the burden of proof lay on the plaintiff.

Jagdeo Narain Singh v. *Baldeo Singh* (1), distinguished.

Sri Nath Rai v. *Pratap Uday Nath Sahi Deo* (2), referred to.

Appeal by the plaintiff.

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

Murari Prasad, for the appellant.

B. N. Mitter and *N. N. Sinha*, for the respondents.

FOSTER, J.—The plaintiff has proprietary interest to the extent of 11 annas odd in Mauza Biaspur and the defendants are proprietors of the residue. The plaintiff's suit is for partition. The only point which is in dispute between them is whether the lands described in Schedules A and B of the plaint are zerat land of the village or the occupancy holding of the defendants. The learned Subordinate Judge heard the defendants' evidence first and then that of the plaintiff. In his judgment he first examined the defendants' evidence. He pointed out that the record-of-rights was entirely in favour of the defendants. As against this the plaintiff contended that it was brought about by the fraud of the defendants. The date of final publication was the 13th October, 1899, and from 1883 to 1920 the defendants' ances-

(1) (1923) I. L. R. 2 Pat. 38, P. C.
(2) (1923-24) 28 Cal. W. N. 145, P. C.

tors held the plaintiff's share in thika. So, it is urged, they had every chance of obtaining a fraudulent entry in the record. It is also urged that as the lands in dispute fell within the ambit of the plaintiff co-sharers' zamindari then under the ruling in *Jagdeo Narain Singh* v. *Baldeo Singh*(1) the record-of-rights must be considered to be rebutted. This is how the case is stated; I shall have more to say on this point later. The learned Subordinate Judge examined the oral evidence and came to a finding that the plaintiff's agents attended at the time of the survey and settlement operations. He remarked upon the uncertainty of the plaintiff's claim: though the suit was instituted in June 1922 the identity of the property claimed to be zerat was not established till June, 1923, when the plaint was extensively amended and the claim largely reduced. After noting that it lay upon the plaintiff to prove what is zerat and what is kasht of the defendants, he points out that the plaintiff has not discharged the onus. The defendants produced old rent receipts which he found to be genuine, and he deduced from these documents the conclusion that the defendants, from the time of very remote ancestors, have been raiyats of this village. He examined the two pattas granted to the ancestors of the defendants in 1883 and 1908 and pointed out that in the first one there is no mention of any zerat at all, and laid great stress upon the second patta which mentions only 7 bighas and odd as zerat. He remarked that the defendants do not for a moment claim those lands, described in the second patta, to be part of their holding. Then he examined the road-cess returns of 1919, and pointed out that the lands in dispute are shown there as raiyati kasht of the defendants and that these returns are signed by the plaintiff's manager and attorney. As to these documents, the plaintiff pointed to the fact that they were drawn up on information provided by the defendants who were in possession as thikadars. Proceeding to the evidence of the plaintiff, the learned Subordinate

(1) (1923) I. L. R. 2 Pat. 38, P. C.

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Judge examined the kabuliat of 1869 executed by an indigo factory manager in favour of the plaintiff's predecessor in interest. In that document there is mention of zerat but without specification. The learned Subordinate Judge thought that this must be a mere formality copied from precedents. It should be noted however that one at least of the plaintiff's witnesses, an old man of 75 years, Somedat Thakur, deposed

"Kuthi grew indigo in the land and so I called it zerat."

He also stated that during the time of the factory there were 30 or 40 bighas of zerat in the factory's possession. Now looking at the terij jamabandi of 1875 (Exhibit 2), I see that within each tenant's holding there was some area appropriated to the cultivation of indigo; in the total it must amount to a considerable area. Each tenant's rent was at certain rates according to the classes of land comprised within the holding, and a deduction of 10 annas per bigha was made upon the total area in consideration of the cultivation of indigo. The learned Subordinate Judge then examined khasras for the period 1875 to 1879. These are partly lists of trees subject to danabandi (appraisement), and there are several khasra danabandi (accounts of appraisement). The learned Subordinate Judge is not correct in saying that these do not show what village they refer to. They refer to Biaspur and the names of the Brahmin tenants include several persons who we know were ancestors of the defendants. The learned Subordinate Judge found that in the plaintiff's oral evidence there is no precise statement found as to the identity of the zerat lands. So he decided this issue against the plaintiff, who is now appealing.

The onus of proof rests upon the plaintiff, not only because he is plaintiff but because he has the record-of-rights against him. In my opinion the case of *Jagdeo Narain Singh* v. *Baldeo Singh*(1), which has been quoted on the plaintiff's side, has no applica-

(1) (1923) I. L. R. 2 Pat. 38, P. C.

tion to the present discussion. The right of the zamindar to rent is so universal as to be a presumptive right; section 114 of the Evidence Act would raise the presumption. It is a right all the more enforceable because the zamindar has to pass on a share of the collection to Government in the form of revenue. But the zamindar has no right generally to possession of the raiyati holdings. The raiyat existed before the zamindar came, and in the permanent settlement it was laid down that the raiyats are to be protected in their possession. That policy is carried out in the Bengal Tenancy Act. It is a mere truism to say that the zamindar has a right to all lands not held by tenants, and the proposition appears to be irrelevant, until the record-of-rights, prepared under the Bengal Tenancy Act, is rebutted. There is here no conflict of presumptions. In *Jagdeo Narain Singh* v. *Baldeo Singh*(1) the fact that the land of the tenants fell within the ambit of the plaintiff's zamindari was sufficient to rebut the entry in the record-of-rights showing the defendants' land to be free of rent; and the defendant had the duty of showing by some grant or such like evidence, that he in particular was relieved from the universal duty of paying rent. In the case of *Sri Nath Rai* v. *Pratap Uday Nath Sahi Deo* (2) the plaintiff was purchaser of the pargana which in the judgment of their Lordships of the Privy Council is found to have been a rent-paying jagir within the ambit of the zamindari of Chota Nagpur. The plaintiff's vendor purported to be an independent talukdar of the pargana, and the defendant, the zamindar of Chota Nagpur, contended that the pargana had been resumed on failure of male issue in the line of dependant talukdars. The plaintiff urged that the pargana was not resumable. The record-of-rights showed it to be resumable; and their Lordships laid great stress on the presumption prescribed in section 103B of the Tenancy Act. This case appears to me to establish my argument as to the burden of proof. Had the

(1) (1923) I. L. R. 2 Pat. 38, P. C.
(2) (1923-24) 28 Cal. W. N. 145, P. C.

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entry been " non-resumable ", the same presumptive weight would have attached to it, and the burden would have rested on the defendant zamindar: here also the zamindar has the duty of proving his claim, in face of the record-of-rights.

FOSTER, J.

I have examined the oral evidence in this case. In my opinion the judgment of the learned Subordinate Judge is careful and well founded. [His Lordship then proceeded to analyse the plaintiff's oral evidence, and proceeded as follows.]

It may be mentioned here that it is not seriously contended that the term zerat as applied to the land in dispute is accurate; it should be probably bakast malik or ghairmazrua malik, according to its condition.

I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Das and Ross, J.J.

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Jan., 4, 5.

MUHAMMAD IBRAHIM

v.

CHHATTOO LAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 41— *Court to which a decree has been sent for execution, jurisdiction of, when ceases.*

The jurisdiction of the court to which a decree has been sent for execution ceases as soon as the court takes action under section 41, Code of Civil Procedure, and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree.

J. G. Bagram v. *J. P. Wise* (1), distinguished.

Manorath Das v. *Ambika Kant Bose* (2), followed.

* Civil Revision no. 328 of 1925, from an order of the Munsif of Muzaffarpur, dated the 29th June, 1925.

(1) (1868) 10 W. R. 46, F. B. (2) (1908-09) 13 Cal. W. N. 533.

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Application by the decree-holders.

This application was directed against an order of the Munsif of Muzaffarpur, dated the 29th June, 1925. The circumstances were these: On the 18th May, 1925, the petitioners obtained a decree for Rs. 1,449-5-9 against Chhattoo Lal in the Court of Small Causes in Calcutta. On the application of the petitioners, the Small Cause Court, Calcutta, sent the decree for execution to the Muzaffarpur Court under the provision of section 39 of the Code of Civil Procedure. The petitioners applied for execution in accordance with law; but ultimately on the 21st May, 1924, the execution case was dismissed for default and the Munsif in seisin of the matter certified to the Calcutta Small Cause Court the circumstances attending the failure to execute the decree. The order of the Munsif was not before the High Court but apparently the Munsif acted under section 41 of the Code of Civil Procedure. Thereafter certain properties belonging to the judgment-debtors were sold at the instance of Mohan Prosad Sahu who had obtained a decree as against the judgment-debtors, and, there being assets of the judgment-debtors in the hands of the Muzaffarpur Court, the petitioners applied on the 20th April, 1925, for attachment of the surplus sale-proceeds which amounted to Rs. 3,436-15-3. On the 27th April, 1925, Rs. 1,432-15-9 out of the surplus sale-proceeds in the hands of the Muzaffarpur Court was attached at the instance of the petitioners, the court at the same time directing that the petitioners should obtain another order from the Calcutta Small Cause Court transferring the decree for execution to that court. The order of the Calcutta Small Cause Court transferring the decree for execution to the Muzaffarpur Court was received on the 30th April, 1925. Thereafter other decree-holders who had obtained decrees as against the judgment-debtors came in and the surplus sale-proceeds were attached at the instance, first, of Mohan Prosad, then of Bihari Lal, and, lastly, of Sham Narain Singh. On the 24th June 1925, the petitioners

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applied for liberty to withdraw Rs. 1,432-15-9 out of the surplus sale-proceeds. They contended that their attachment was first in order of time and that they were entitled to withdraw the sum attached without reference to the rights of the other attaching creditors. Similar applications were presented on behalf of the other attaching creditors and they applied for rateable distribution of the assets. The Munsif took the view that section 73 of the Code of Civil Procedure did not apply to the facts of the case and that the distribution of the assets could only be made in order of respective attachments. That being the position, the petitioners contended that their attachment being first in point of time, they were clearly entitled to withdraw the sum of Rs. 1,432-15-9 from the court. In dealing with that application, the Munsif came to the conclusion that the attachment at the instance of the petitioners was wholly irregular inasmuch as the Muzaffarpur Court was no longer in seisin of the execution case. It was the propriety of this order which was the subject-matter of the present application.

Khurshaid Husnain and *Syed Ali Khan*, for the petitioner: The court to which a decree has been sent for execution under section 39, Code of Civil Procedure, retains its jurisdiction so long as the decree is not completely executed or has not become impossible of execution, and the executing court certifies that fact to the court which passed the decree. The mere striking off the execution for default does not terminate the jurisdiction, even if the court executing the decree informs the court which passed the decree of the result of that execution. Section 41; Code of Civil Procedure, may be construed to empower the executing court to keep the court which passed the decree regularly informed of the result of each execution but the jurisdiction comes to an end only when that court certifies under section 41 that it is unable to execute the decree that has been sent to it any further, either because it has been fully executed or there is no possibility of executing it, in other words, when

it certifies the fact of complete execution or final failure. I rely on *J. G. Bagram* v. *J. P. Wise*(1), *Abda Begum* v. *Muzaffar Husen Khan* (2) and *R. B. Indra Raj Singh* v. *Murad Khan*(3).

Rai Tribhuan Nath Sahai (with him *Aditya Narain Lal*), for the opposite party: When a court executing the decree sent to it for execution informs the court which passed the decree of the result of an execution it acts under section 41, Code of Civil Procedure, and when once the court takes action under that section its jurisdiction ceases to exist. Section 41 does not contemplate that the court has only to certify complete execution and final failure. If the proceeding is struck off the file, or is dismissed, the court fails to execute the decree within the meaning of section 41 and when this fact is certified to the court which passed the decree the jurisdiction of the executing court is extinguished. *J. G. Bagram* v. *J. P. Wise*(1) and all the cases that follow that decision are distinguishable inasmuch as they do not decide the question whether the court retains its jurisdiction even after it has reported the fact of failure to the court which passed the decree. *R. B. Indra Raj Singh* v. *Murad Khan*(3) was wrongly decided as the reasons given for the decision are unsound. On the other hand, there is a decision of the Calcutta High Court in *Manorath Das* v. *Ambika Kant Bose*(4) which supports my contention. I also rely on *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Belliar Simhulu Bahadur Garu*(5).

Syed Ali Khan, in reply: I adopt the reasoning in *R. B. Indra Raj Singh* v. *Murad Khan*(3) and *Abda Begum* v. *Muzaffar Husen Khan* (2). The cases of *Manorath Das* v. *Ambika Kant Bose*(4) and *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Belliar Simhulu Bahadur Garu*(5) are distinguishable as has been pointed in *R. B. Indra Raj Singh* v.

(1) (1868) 10 W. R. 46, F. B.
(2) (1898) I. L. R. 20 All. 129.
(3) (1922) A. I. R. Nag. 210.
(4) (1908-09) 13 Cal. W. N. 533.
(5) (1913) I. L. R. 37 Mad. 231.

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Murad Khan(1) inasmuch as the fact of failure of the infructuous application had apparently not been certified to the court which passed the decree.

S. A. K.

DAS, J. (after stating the facts set out above, proceeded as follows): I am of opinion that the view taken by the learned Munsif is correct and that this application must be dismissed. I entirely agree that the court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; but the point is whether on the 27th April, 1925, the date of the order of attachment of Rs. 1,432-15-9 the Muzaffarpur Court had any jurisdiction over the matter. It will be remembered that on the 21st May the Muzaffarpur Court had not only dismissed the execution case for default but acted under the provision of section 41 of the Code of Civil Procedure. Various cases have been cited before us by Mr. Khurshaid Husnain but those cases decide that the mere striking off an application for execution does not terminate the jurisdiction of the court to which the decree is sent for execution to execute the decree; but at the same time those cases recognize that the jurisdiction ceases as soon as the court takes action under section 41 of the Civil Procedure Code and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree. In the Full Bench case of *J. G. Bagram* v. *J. P. Wise* (2) the question was whether or not a court to which a decree passed by another court had been transmitted under the provision of section 286 of Act VIII of 1859 was competent of its own authority to entertain a fresh application for execution after the first application had been struck off by itself for default. It will be noticed that in the Code of 1859 there was no provision similar to the one contained in section 223 of the Code of 1882 or section 41 of the present Code. In dealing with this point Mitter, J., said as follows:— "It will be further observed that the law does not

(1) (1922) A. I. R. Nag. 210.

(2) (1868) 10 W. R. 46, F. B.

contain any express provision as to how and when the execution records are to be retransmitted to the court by which the decree was passed. I do not mean to say that such a thing cannot be done at all, but all that I mean to say is that it can be done only when an order to that effect has been received from the said court, or from some other court exercising appellate jurisdiction over the matter." It was clearly recognised by Mitter, J., in the Full Bench case to which I have referred, that the jurisdiction to execute a decree by a court to which the decree is sent for execution ceases when an order is passed by that court to the effect that it is unable to execute the decree. In delivering the judgment of the Full Bench, Peacock, C. J., said:—"The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the court to which it was sent for execution; and as long as it remains there, the court to which it was sent may deal with it, and any application for execution of it as if it was a judgment of that court." But in this case the decree was no longer in the record of the Muzaffarpur Court on the 27th April, 1925. This was the view which I think was taken by Mukherji, J., in *Manorath Das* v. *Ambika Kant Bose*(1). That learned Judge said that the court to which a decree is transferred for execution retains its jurisdiction to execute the decree until the execution had been withdrawn from it or until it had fully executed the decree and had certified the fact to the court which sent the decree, or had executed it so far as that court was able to do within its jurisdiction and certified that fact to the court which sent the decree. In my opinion section 41 of the Code makes it quite clear that the court to which a decree is sent for execution has no jurisdiction to deal with the execution case after it takes action under section 41 of the Code.

I would dismiss this application with costs.

ROSS, J.—I agree.

(1) (1908-09) 13 Cal. W. N. 538.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, J.J.

LALU MATHURA PRASAD SINGH

1926. *v.*

Jan., 8. LALU JAGESHWAR PRASAD SINGH.*

Chota Nagpur Encumbered Estates Act, 1876 (*Act VI of* 1876), *sections* 2, 3, 8, 11 *and* 12—*debt, revival of—release after approval of scheme by Commissioner—section* 12(6), *applicability of—Order under section* 2, *effect of—Limitation Act*, 1908 (*Act IX of* 1908), *section* 15—*whether applicable—original debt, if revived.*

Held, (*i*) that an order under section 2 of the Chota Nagpur Encumbered Estates Act, 1876, bringing an estate under protection, is a vesting order staying all proceedings and, therefore, in computing limitation, the period of protection should be excluded under section 15, Limitation Act; (*ii*) that when the bar imposed by section 3(*1*) is removed by a subsequent notification releasing the estate, claims against the estate are revived under section 12 of the Act; (*iii*) that, in the case of a debt, what is revived is the original debt at the original rate of interest;

Although the sixth clause of section 12 purports to apply to cases covered by the second clause of that section, which provides for revival of a debt in case of the estate being released before the scheme has been approved by the Commissioner, the section must be construed to provide for all cases where the estate is released from management before the debts have been paid off.

Appeal by the defendants.

The material facts of the case were as follows:—

This appeal arose out of a suit for the recovery of Rs. 20,705-7-1 as principal and interest due upon a hand-note executed by defendant no. 1 as karta of

* Appeal from Original Decree no. 87 of 1923, from a decision of Rai Bahadur Amrita Nath Mitra, Special Subordinate Judge of Palamau, dated the 16th February, 1923.

the family on behalf of himself and his brother, defendant no. 2. The hand-note was executed in favour of the father of the plaintiff on the 18th of October, 1902, for a sum of Rs. 6,918. The loan was taken for the purpose of meeting the cost of litigation and saving the joint family property. On the 18th of June, 1904, the defendants applied to the Deputy Commissioner for protection under the Chota Nagpur Encumbered Estates Act, and on the 30th of October 1904, an order was passed vesting their estate under a manager under the provisions of the Act. The order was published in the Gazette on the 11th of January, 1905. After publication of the order the manager called upon the creditors to submit their claims. The defendants in their application had given a list of their debts and the second item in the Schedule was the debt of Rs. 6,198 on the bond of 18th of October, 1902. Interest at 1 per cent. per month had risen to Rs. 829-11-0 and the total debt was Rs. 7,027-11-0. The application was signed and verified by both the defendants. The manager proceeded to determine the claims under section 8 of Act VI of 1876 and the defendants admitted the claim. The manager thereafter drew up a scheme for the repayment of this debt of Rs. 6,198 and interest Rs. 914. That scheme was Exhibit 4. The scheme was submitted to the Commissioner under section 11 of the Act and was approved by him. According to section 11, Act VI of 1876, as it stood before the amending Act, Bihar and Orissa Act VIII of 1922, a scheme

> " when approved by the Commissioner shall be carried into effect. '

The manager, however, failed to carry out the scheme so far as it affected this debt, and no money was received from him by the plaintiffs. On the 21st of June, 1921, the estate was released from the operation of the Act by notification under orders from the Board of Revenue. The notification was published in the Gazette on the 13th of July, 1921. The notification did not state under what section the release was

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ordered. It merely stated that the provisions of the Act had ceased to apply to the proprietor of the estate. Thereafter the plaintiff, Lalu Jageshwar Prasad Singh, instituted a suit out of which this appeal arose on the 9th of May, 1922. The plaintiff claimed that the period during which the estate was under protection of the Act should be excluded in computing limitation. The plaint also alleged that the defendants had admitted the debt both when they submitted their application for protection and also when the manager was determining the claims.

The defendants pleaded that the suit was barred by limitation and that there was no legal necessity for the loan in 1902. Defendant no. 1 admitted execution of the hand-note but denied that consideration had passed. He alleged that in 1904, when he was intending to apply for protection under the Chota Nagpur Encumbered Estates Act, knowing that he had a daughter to marry and that it would be hard to obtain money from the manager, he executed several hand-notes in collusion with and in favour of various relatives, so that those relatives might submit claims to the manager and get the money from him and make the money over to the defendant so that he could spend it on his necessary expenses. Defendant no. 2 denied that he was any party to the loan, or that defendant no. 1 borrowed the money for family necessity. He alleged that he was separate from defendant no. 1 and was not bound by the hand-note.

The Subordinate Judge considered the question whether the period during which the estate was under protection could be excluded when computing the period of limitation. He noticed that the second clause of section 12 of the Act did not meet the present case, because the estate was released after the Commissioner had given approval, and, therefore, the provisions of the sixth clause to that section could not be applied to the case in their strict interpretation; but he found himself unable to put a strict interpretation upon the section and found that the

sixth clause provides in general terms for all cases where the estate is released from management before the debts have been paid off. He held that section 12 applied to the case and that the plaintiff was entitled to the benefit of the section. He also found that the provisions of section 15 of the Limitation Act applied and enabled the plaintiff to exclude the period of protection. He disbelieved the defendant's story about the absence of consideration and also the story about the taking of the money in order to provide for the defendant's daughter's marriage. He held that defendant no. 1 borrowed the money as karta of the joint family for the purposes of the family and that defendant no. 2 was liable. He decreed the plaintiff's suit.

Ganga Charan Mukerjee, for the appellant: My first submission is that in spite of section 3, Chota Nagpur Encumbered Estates Act, a suit could have been instituted in respect of the present claim during the period of management; and, the plaintiff having neglected to sue, the present suit is barred by limitation. The reason is that " such debts and liabilities " mentioned in section 3 have reference to those mentioned in section 2, and have no reference to the determined debts of section 8.

[KULWANT SAHAY, J.—But the debt admitted and determined by the manager is a debt all the same.]

There is a considerable difference; one is the original unproved claim while the other is a judicially determined debt having the force of a decree. Section 3 bars a suit in respect of the former and not in respect of the latter. The only authority on the point is *Kameshwar Prashad* v *Bhikhan Narain Singh* (1) which seems to be against me. But it was a decision before the amendment of 1909, whereby elaborate rules of procedure for a judicial determination of what is " justly due " were laid down. The decision of the manager is now subject to appeals to the Deputy

(1) (1893) I. L. R. 20 Cal. 609.

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Commissioner and the Commissioner, and to revision by the Board of Revenue. Hence their Lordships in *Kameshwar Prashad* v. *Bhikhan Narain Singh*(1) considered it to be merely a debt admitted by the manager and not a judgment-debt having the force of a decree.

My next submission is that assuming that the plaintiff had no right to sue upon his debt during the period of management, he had still a right to sue when there was a default in the payment of the debt by the manager according to the scheme.

[KULWANT SAHAY, J.—But the creditor is not a party to the scheme.]

Nevertheless he is bound to accept payments under it. Section 11 strictly enjoins that a scheme shall be carried into effect and if it is not so carried the management becomes ultra vires and the protection under section 3 is forfeited.

My next submission is that even if there is a bar imposed by section 3 in respect of such a debt, there is no revivor of the same under section 12(6) which refers only to cases covered by section 12(2) which in turn has reference to cases prior to the approval of the scheme. There can be a revivor of the claim only in the circumstances mentioned in clause (2) of section 12 which, however, does not cover the present case inasmuch as the estate was released after the scheme had been approved by the Commissioner. We have to read the section as it is and we will not be justified in speculating as to what the meaning ought to have been. By the amending Act VIII of 1922 the legislature has extended the scope of section 12(6), so as to cover a case like the present one. This enactment, which evidently supplies an omission which existed in the old law, is only prospective inasmuch as the legislature has not by express words given it retrospective effect [See *Javanmal Jitmal* v. *Mukta Bai*(2)].

Section 15, Limitation Act, is similarly inapplicable. The bar contemplated by section 3 is a bar not

(1) (1893) I. L. R. 20 Cal. 609. (2) (1890) I. L. R. 14 Bom. 516 (525).

merely for the period of management but is an absolute bar once for all. Under that section the suit is not stayed, but it is barred in consequence of the publication of the vesting order. If there is a mere stay and not a bar there is nothing to prevent the revivor of the original debt after release, even though the determined debt may have been paid. This anomalous position will render the whole Act infructuous.

My last submission is that even if there is a revivor, what is revived is the determined debt at the reduced rate of interest and not the original debt which is merged in the determined debt. A determination of the debt under section 8 is conclusive proof of what is "justly due" to the creditor.

Susil Madhab Mullick, (with him *Hareshwar Prasad Sinha*) for the respondent. The effect of the vesting order is to stay the suit and this stay continues until the management lasts. It has been held in *Kameshwar Prashad* v. *Bhikhan Narain Singh* (1) that a suit is barred during the continuance of the management.

The stay comes to an end when the management is over. I rely on *Raja Jyoti Prasad Singh Deo* v. *Ranjit Singh*(2).

[KULWANT SAHAY, J.—There the stay was for a limited period.]

Here also it will be limited to the period of management. It was held in *Lakhan Chunder Sen* v. *Madhusudan Sen*(3) which was affirmed by the Judicial Committee in *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(4) that if a person who seeks a remedy in the civil court was incompetent to institute a suit on account of certain things having happened, the time during which he is so prevented should be excluded.

[KULWANT SAHAY, J.—That case proceeded upon section 14 and not section 15.]

(1) (1893) I. L. R. 20 Cal. 609. (3) (1908) I. L. R. 35 Cal. 209.
(2) (1921) 6 Pat. L. J. 328. (4) (1916) I. L. R. 43 Cal. 660, P. C.

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But the same principle should be applied on the analogy of section 14. The same view has been taken in *Shaikh Abdul Rahim* v. *Mussammat Barira*(1).

[KULWANT SAHAY, J.—But if an absolute bar is imposed by section 3, section 15 would not apply.]

Yes. But my submission is that the bar subsists so long as the order continues.

My second submission is that in considering section 12, the subsequent amendment must be left out of account. The meaning of section 12 is that so long as there is a workable scheme the estate cannot be released, but when there is no scheme to be worked out, then and then alone the estate can be released. Hence the section in effect contemplates all cases of release. Moreover in the present case there has been no approval, because it has been subsequently cancelled by the Board. Clause (*2*) of the section must be read to imply an approval subject to revision by the higher tribunal. If, therefore, the approval is set aside at any time, the position would be just the same as if there had been no approval and the relinquishment of the management in these circumstances will be covered by clause 2 of the section.

Lastly, I submit that the original debt cannot be said to have merged in the determined debt and what is revived therefore is not the reduced amount fixed by the Commissioner but the original debt which still subsists. The Act having ceased to apply anything done under the Act will have no effect.

S. A. K.

Cur. adv. vult.

ADAMI, J. (after stating the facts set out above, proceeded as follows): Mr. Gangacharan Mukherji has argued this appeal with great ability on behalf of the defendants-appellants. The main part of his argument has been devoted to the question of limitation.

(1) (1921) 2 Pat. L. T. 556.

The three questions which arise under this head are: Whether section 12 of the Chota Nagpur Encumbered Estates Act, clause 6, saves the suit from being barred by limitation, secondly, whether if section 12, clause 6, does not apply, section 15 of the Limitation Act applies; and thirdly, whether there was such acknowledgment by the defendants as would save the suit from being barred by limitation. Mr. Mukherji has taken us through the sections of the Encumbered Estates Act and his argument is that the first clause of section 3 of the Act is an absolute bar to all proceedings and suits after the publication of an order under section 2 of the Act. He points out that the sixth clause of section 12 refers only to a release covered by clause 2 of the section, that is to say

"if the Commissioner at any time before a scheme has been approved by him under section 11 thinks that the provisions of this Act should not continue to apply to the case of the holder of the said property or his heir."

In the present case the estate was released after approval of the scheme by the Commissioner, and therefore the sixth clause cannot apply and there can be no revival of claims. His contention is that the first clause of section 3 which is the bar to all proceedings still holds good even though the estate has been released because sub-clause 6 of section 12 does not apply in the circumstances of this case. There is no doubt, as has been often remarked, that the Chota Nagpur Encumbered Estates Act, 1876, is inartistic in its drafting. That this has been recognised with regard to such circumstances as we find in the present case is shown by the amendments made by the Legislature by the Bihar and Orissa Act VIII of 1922, whereby in section 4 the following words have been added to the second clause of section 12:

"Or if after the scheme has been so approved an application is made under section 11B for the relinquishment of the property."

The framers of the Act do not seem to have contemplated that even when a scheme has once been approved and has to be carried into effect under section 11, there could be a release under any circumstances other than those mentioned in the first three

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clauses of section 12, and as the Act stood before the amendment of 1922 the strict wording of the Act seems to show that no revivor was contemplated in circumstances other than those mentioned in clause 2 of section 12. The learned Subordinate Judge has, I think, taken the right view in holding that too strict an interpretation cannot be placed on section 12.

Section 3, it is true, states that on the publication of an order under section 2 all pending proceedings shall be barred and all processes, executions and attachments for, or in respect of, debts and liabilities shall become null and void, whereas the second and third clauses are limited in their operation to the period during which such management continues. It is contended that save in the case mentioned in section 12, clause 6, the bar shall be absolute and that no process or execution or attachment can, after the publication of an order under section 2, be served or made. But surely when the order itself is cancelled by a subsequent notification, the effect of the first clause of section 3 disappears. It could never have been in the contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. But I think it is quite clear that even were it to be held that as the Act is drafted no revivor of proceedings is allowed, the provision of section 15 of the Limitation Act must apply. Though the word "bar" is used with regard to pending proceedings in clause 1 of section 3, its real meaning is clearly that they should be stayed, for clause 6 of section 12 shows that in certain circumstances proceedings may be revived. In the present case we have not to do with proceedings which were pending at the time the notification was published; the question is whether any process can issue or any suit be instituted after the order of release. Clause first of section 3 states that processes, executions and attachments shall become null and void on the publication of an order under section 2; after that order has been cancelled, there is no bar to any process, execution or attachment; there

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has really been merely a stay. The order under section 2 bringing the estate under protection was a vesting order staying all proceedings, and under section 15 of the Limitation Act I am satisfied that there should be a revivor, the period of protection being excluded. I would refer to the case of *Raja Jyoti Prasad Singh Deo* v. *Ranjit Singh*(1). It is true that there Das, J., did not consider the difficulty which we have now before us with regard to the wording of clause 2 of section 12; but it may be that in that case the point did not arise. The general principles however are given as to the right of revivor. I am quite satisfied that the plaintiff is entitled to exclude the time during which he was barred from suing on the debt due to him by reason of the estate being under protection.

Mr. Mukherji has argued that after the manager had examined the claim and had judicially determined the debt under section 8 of the Act, the plaintiff could have sued the manager within three years of the determination of the debt; but I think that this contention cannot in any way be upheld for under the wording of clause first of section 3 any such suit would be barred. Secondly, it is contended that when the manager heard the claims and determined the debt and thereafter drew up a scheme, he was in fact contracting with the plaintiff to pay the debt in a certain manner and within a certain time; and when in 1916, which was the last date of payment under the scheme, he had failed to pay to the plaintiff, the plaintiff might have sued him on the contract. But it is clear that in a case like this there was no contract between the manager and the plaintiff. The manager determined the scheme without reference to the wishes of the plaintiff.

Thirdly, it is argued that, even if a suit in respect of such determined debt was barred during the period of management, what would revive after release from management would be the debt determined by the

(1) (1921) 6 Pat. L. J. 328.

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manager and not the original debt. In the present case the manager determined the original debt to be due but decided that he would pay interest at 6 per cent. and not at 12 per cent. per annum. After the release the whole scheme came to nothing and anything arranged in the scheme would not affect the revival of the original debt at the original rate of interest. Mr. Mukherji would have us hold that the determination of a debt by the manager is a judicial proceeding and his decision as to what the debt is amounts to a decree. But here the original and determined debts are exactly the same and so the point does not arise. I must hold that the plaintiff was entitled to exclude the period of management. It is certainly hard on the defendants that their debts should have been allowed to accumulate for so long a time as 19½ years; but it has to be remembered that through the protection of the Act the defendants' property has been preserved. The plaintiff has also suffered in not being able to obtain repayment of the debt during so long a period.

The debt would be barred, even if the period of management were excluded, if the defendants had not in 1904 acknowledged their indebtedness. The Schedule to their application in 1904 cites and admits the debt. That application is signed and verified by both the defendants. Again when the debt was examined by the manager under section 8 the defendants both admitted it, and in his written statement defendant no. 1 acknowledged that he admitted the debt before the manager. These acknowledgments save the claim from the bar of limitation.

With regard to the passing of consideration the learned Subordinate Judge has I think correctly found that consideration passed. The defendant has brought no evidence to show that he gave hand-notes in favour of his relatives for the purpose of obtaining money from the manager. As to the liability of defendant no. 2, it is clearly shown, I think, that he joined with defendant no. 1 in conducting the

litigation. Furthermore he joined with defendant no. 1 in presenting the application for protection and in that application admitted his joint indebtedness. Defendant no. 2 failed to prove that he was separate from defendant no. 1.

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With regard to the legal necessity, defendant no. 1 himself says that there was litigation over Lot Chandu which continued for a long time. It is argued that there is no evidence that the plaintiff made enquiries as to the necessity of the loan; but it is clear that necessity was pressing, because the litigation was proceeding. I can see no reason to differ from the finding arrived at by the learned Subordinate Judge, and I would therefore dismiss the appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

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Nov., 19, 20, 23, 24, 25, 26. Dec., 18.

Patni Regulation, 1819 (*Bengal Regulation VIII of* 1819), *sections* 3, 5, 6 *and* 11—*Patni tenure, sale of, for arrears of rent—Non-registration of patnidar's name in landlords' sarishta, effect of—recorded tenant, liability of—Rent for more than one year, whether the first charge on the tenure—section* 11, *scope of—Representative, meaning of—Public Demands Recovery Act*, 1914 (*Bihar and Orissa Act IV of* 1914), *section* 46.

Under section 5 of the Bengal Patni Taluks Regulation, 1819, the zamindar is entitled, on an alienation of a patni taluk taking place, " to exact a fee upon every such alienation and he is also entitled to demand substantial security from the transferee or purchaser ". Section 6 empowers the

* Appeal from Original Decree no. 135 of 1922, from a decision of B. Suresh Chandra Sen, Subordinate Judge of Purnea, dated the 7th February, 1922.

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zamindar " to refuse the registry of any transfer until the fee above stipulated be paid and until substantial security be tendered and accepted ".

Held, (*i*) that until the transfer of a patni tenure has been registered the original patnidar remains the landlord's tenant and there is no relationship of landlord and tenant between the landlord and the transferee; (*ii*) that, if the tenure is sold by the landlord for arrears of rent due therefor in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting patnidar, his representatives or assignees, the zamindar having an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure; (*iii*) that although an unregistered transferee cannot claim to be a tenant of the landlord he has an interest independently of the Regulation and is entitled to impugn a sale held to realize arrears of rent on the ground of illegality or fraud; but he has no right to have the sale set aside on the ground that he was not a party to the proceeding taken by the landlord to realize his rent by sale of the holding; (*iv*) that the obligation imposed by the Regulation on the transferee of a patni tenure to have his name recorded in the landlord's sarishta, applies to a purchaser in execution of a decree, other than a decree for arrears of rent due from the tenure.

Nitya Behari Saha Paramanick v. *Hari Govinda Saha* (1), *Gayanada Kantho Roy Bahadur* v. *Brommoty Dassi* (2), *Surendra Narain Singh* v. *Gopi Sundari Dai* (3), *Luckhi Narain* v. *Khettro Pal* (4), *Surendranath Pal Choudhury* v. *Tincowri Dasi* (5), *Rajnarain Mitra* v. *Kristo Lal Chowdhuri* (6), *Rajah Sir Sourindra Mohan Tagore* v. *Moharani Surnomoyee* (7), *Golam Sattar* v. *Maharaja Sir Prodyat Kumar Tagore Bahadur* (8), *Behari Lal Biswas* v. *Nasimannessa Bibi* (9), *Kali Kumar Ghose* v. *Bidhu Bhusan Banerjee* (10), *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar* (11), *Raja Jagdish Chandra Deo* v. *Bhabel Deo* (12), *Provash Chandra Chatterjee* v. *Jaharuddin Mondal* (13), *Gobinda Sunder Sinha Chowdhury* v. *Srikrishna Chakravarti* (14), *Sham Chand* v.

(1) (1899) I. L. R. 26 Cal. 677.
(2) (1890) I. L. R. 17 Cal. 162.
(3) (1905) I. L. R. 32 Cal. 1031.
(4) (1873) 20 W. R. 380.
(5) (1893) I. L. R. 20 Cal. 247.
(6) (1892) I. L. R. 19 Cal. 703.
(7) (1898-99) 3 Cal. W. N. 88.
(8) (1919) 29 Cal. L. J. 481.
(9) (1923) 73 Ind. Cas. 842.
(10) (1912) 16 Cal. L. J. 89.
(11) (1897) I. L. R. 24 Cal. 62, F. B.
(12) 1918) 44 Ind. Cas. 26.
(13) (1910) 49 Ind. Cas. 49.
(14) (1909) 10 Cal. L. J. 588.

Brojanath (1) and *Profulla Kumar Sen* v. *Nawab Sir Salimulla Bahadur* (2), referred to.

The provisions of sections 5 and 6 of the Regulation do not apply to the transfer of a fractional share of a patni taluk, nor to any alienation other than transfers of the entire interest unless made under the zamindar's special sanction; the mere receipt of money or rent from the transferee of a portion of a patni taluk does not amount to a recognition of the transfer or a splitting up of the tenure.

The Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him the additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for one year. If, therefore, he allows his rent to fall into arrears for a period exceeding one year he does not thereby lose the benefit of section 11 of the Regulation which makes the rent the first charge on the property.

Brindaban Chunder Sircar Chowdhury v. *Brindaban Chunder Dey Chowdhury* (3), *Durga Prasad Bundopadhya* v. *Brindaban Roy* (4) and *Kumar Satya Sankar Ghoshal Bahadur* v. *Mon Mohan Guha Ray* (5), referred to.

Under section 46 of the Bihar and Orissa Public Demands Recovery Act, 1914, " every question arising between the certificate-holder and the certificate-debtor or their representatives relating to the execution, etc., of a certificate duly filed under this Act or relating to the.....setting aside by an order under this Act of a sale held in execution of such certificate, shall be determined not by suit but by an order of the Certificate-Officer before whom such question arises..... : Provided that a suit may be brought in a civil court in respect of any such question upon the ground of fraud ". *Held*, that where the recorded patnidar is the farzidar of another, or where the recorded patnidar has transferred his interest to another, the latter is the representative of the recorded tenant and is bound by a decree against the recorded tenant and by the sale held thereunder, section 46 being a bar to his suit for setting aside the decree on grounds other than that of fraud.

(1) (1873) 21 W. R. 94, F. B.
(2) (1918-19) 23 Cal. W. N. 590.
(3) (1873-74) 1 I. A. 178.
(4) (1892) I. L. R. 19 Cal. 504.
(5) (1918) 43 Ind. Cas. 996.

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Ishan Chandra Sarkar v. *Beni Madhab Sarkar* (1), *Kali Sundari Debi* v. *Dharani Kanta Lahiri* (2) and *Brindaban Chunder Sircar Chowdhury* v. *Brindaban Chunder Dey Chowdhury* (3), followed.

Appeal by the plaintiffs.

The plaintiffs claimed to recover possession of an eight-annas share of a patni taluq, Mahals Khoragach, Bormasea, Dipnagar, Kantari and Sedabad in pargana Fatehpur-Sedia, district Purnea, upon a declaration of their title thereto and upon a declaration that the sale of the patni on 4th November, 1920 in execution of a certificate debt for arrears of rent under the Bihar and Orissa Public Demands Recovery Act (IV of 1914) was fraudulent, illegal, null and void and not binding upon them.

The sixteen-annas disputed patni taluq was originally owned by the defendants nos. 2 and 3, Janardan Prasad Thakur and Tirpurari Prasad Thakur, who, for convenience sake, will hereafter be referred to as the Thakur defendants.

Previous to the present sale in question, the patni was sold in 1909 in execution of a certificate debt for arrears of rent and was purchased by defendant no. 4, Haji Shaikh Majidur Rahman. By a compromise, the auction-purchaser, defendant no. 4, retained the eight-annas share and the other eight-annas share went to the Thakur defendants. Thus defendants nos. 2-4 became owners of the patni taluq in 1909 and their names were recorded in the register of the zamindar, defendant no. 1.

Defendant no. 5 was the purchaser of the patni taluq at the auction sale now sought to be set aside.

Defendant no. 4 was a step-brother of the plaintiffs and in 1907 was appointed guardian, under the Guardian and Wards Act (VIII of 1890), by the Dis-

(1) (1907) I. L. R. 24 Cal. 62. (2) (1905) I. L. R. 33 Cal. 970

(3) (1872 74) [illegible]

trict Judge of Purnea, of the two plaintiffs and his other brothers, Abdul Wahab, Abdul Halim, Abdul Samad, Abdul Sattar and Muhammad Siddique, who were all minors at that time. Plaintiff no. 1, Abdul Gaffar, and his two brothers, Abdul Sattar and Abdul Siddique. attained majority in the year 1915, and the guardianship of Haji Shaikh Majidur Rahman ceased. By a compromise petition (Exhibit 3) filed before the District Judge on the 26th February 1915, Haji Shaikh Majidur Rahman's guardianship was withdrawn from the person and properties of the remaining brothers also, namely, Abdul Jabbar, Abdul Halim, Abdul Wahab and Abdul Samad, and in his place their mother Mussammat Nasiban was appointed guardian (vide Exhibit 5, extract from Order sheet in Miscellaneous Case no. 21 of 1907).

The plaintiff's case was that defendant no. 4 purchased the patni taluq at the first certificate sale in the year 1909 for himself as well as for the plaintiffs and his other minor brothers; and that after the eight-annas of the patni was returned to the Thakur defendants, the plaintiffs and their other brothers remained in joint possession of the remaining eight-annas share in the taluq through defendant no. 4, Haji Shaikh Majidur Rahman, who alone was the recorded tenant in respect of their moiety share. They further said that by a private family arrangement, their step-brother defendant no. 4, ceased to have any share in the patni taluq and the whole moiety share in the patni was allotted to the plaintiffs and their full brothers, Abdul Wahab, Abdul Samad and others. The plaintiffs said that they and their brothers, and not defendant no. 4, had been in exclusive possession of the said eight-annas share in the patni taluq and had been paying rent in respect thereof. Consequently the plaintiffs said that the certificate should have been issued in their names and notice thereof should have been served upon them and not upon Shaikh Majidur Rahman, who had ceased to have any concern with the patni taluq; and they impugned the

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certificate proceedings and the sale held in execution thereof as having been brought about by the fraud and collusion of defendants nos. 2-5, who were inimically disposed towards them in order to deprive the plaintiffs of their share in the patni. They also said that on account of collusion, the processes were not served in accordance with law and the service returns were fraudulently obtained in collusion with the court peon, and the plaintiffs were kept out of knowledge thereof with the result that the property in dispute was sold for a very inadequate price.

Defendant 1st party, no. 1, Manager, Court of Wards, filed one written statement and defendant no. 5 of the third party filed another written statement. They denied that there was any fraud or collusion in the preparation or issue of the certificate, the service of processes or in the sale in execution of that certificate. They also denied that the plaintiffs had any interest in the patni or that they ever paid any rent in respect of it, or that there was any private partition between the plaintiffs and their co-sharers. They denied any knowledge of the plaintiffs' possession as patnidars or that there was any collusion between them and the other defendants in bringing the property to sale. They asserted that the property was sold at an adequate price and that the notice and other processes were duly served in accordance with law and that the plaintiffs not having been recorded in the office of the zamindar as holders of the patni had no right to the certificate being issued in their names or any process being served upon them, and that they had no status to bring the suit.

The Subordinate Judge dismissed the plaintiffs' suit holding that the certificate was properly drawn up and issued and that the processes including the sale proclamation were duly served and were not fraudulently suppressed as alleged by the plaintiffs inasmuch as their servant, Yusuf, bid at the sale up to Rs. 6,000 and that the price fetched at the sale,

Rs. 7,000 was not, in any way, inadequate. Inasmuch as the plaintiffs did not get their names recorded, the learned Subordinate Judge held that they were not entitled to be made party to the certificate proceeding or any notice served upon them even if they had any interest in the tenure, and that the purchaser at the auction-sale acquired good title.

Khurshaid Husnain and *S. M. Naimtullah* for the appellants.

Sultan Ahmed (with him *Sambhu Saran*), for the respondents.

Cur. adv. vult.

Dec., 18.

JWALA PRASAD, J. (having stated the facts as set out above, proceeded as follows): The principal contention in this appeal of the learned advocate on behalf of the appellants is that the plaintiffs' title to an eight-annas share in the patni taluq has been conclusively established and that their title and interest therein is not affected by the sale of the patni inasmuch as they were not parties to the certificate proceedings. The plaintiffs base their title upon the auction purchase of the patni in 1909 in the name of their step-brother, defendant no. 4, in execution of a certificate sale for arrears of rent. They say that defendant no. 4 at that time was guardian appointed by the District Judge, under the Guardian and Wards Act (VII of 1890), of the person and property of the plaintiffs and their other minor brothers and that subsequently, on the 25th February, 1915, by a private partition, the eight-annas share in the patni taluq was allotted to the share of the plaintiffs and their other brothers. For this they rely upon an inventory or takhtabandi filed with the petition (Exhibit 3), dated the 25th February, 1915, in Miscellaneous case no. 21 of 1907. In that inventory this property has been described as having been allotted to the plaintiffs and their other brothers. Defendant no. 4 was a party to the petition and signed it. In

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paragraph 3 of the petition, referring to the takhtabandi it is stated as follows:—

"The parties shall execute within three months a taksimnama or partition deed of the properties in accordance with the terms of the parties."

Abdul Gaffar, plaintiff no. 1, in his evidence admits that a deed of partition was drawn up but was not registered. As to actual possession over the property he says that he has never had the occasion to go to the Mahals and his servants looked after it and names one Narayan Choudhry as his tahsildar. He also says that the papers showing collections are kept but neither any collection papers have been filed nor has any tahsildar been examined.

The plaintiffs then rely upon the petition, dated the 13th January 1920 (Exhibit 2), filed by defendant no. 4 in the certificate proceedings, stating that the plaintiffs along with their brothers and their mother are in possession of the property and that it belongs to them and that he himself had no concern with it. This petition of disclaimer by defendant no. 4 cannot confer any right upon the plaintiffs. They must prove their title and possession by better evidence. The plaintiff no. 1 became major in the year 1915 and both the plaintiffs were released from the guardianship of their step-brother, defendant no. 4. If they had been in possession of the property they would have been in a position to give better evidence. The only evidence is the oral statement of the plaintiff no. 1 and in my opinion this is not sufficient to establish the plaintiffs' possession over the property in dispute. No doubt the rent receipts and chalans [Exhibits A and 1 to 1(*e*)] show that rents used to be paid by the plaintiffs; but in all these receipts they have been mentioned as marfatdars meaning that the rents were paid through them. The payments were made by them not as tenants of the holding but on behalf of the recorded tenant, Majidur Rahman, whose name is mentioned in the receipts as tenants. Such marfatdari receipts

have been held as not constituting any relationship between the payer and the payee nor any recognition of the payee's right as tenant. These receipts therefore cannot prove any tenancy right of the plaintiffs nor any recognition of such a right by the zamindar. Asgar Ali (D. W. no. 5), the Head Clerk of the Court of Wards, says that the plaintiff never asked him to substitute his name. Plaintiff no. 1 himself admits that he did not file any application for mutation of his name and that he was aware that a fee of Rs. 5 on the jama is paid to the zamindar for effecting mutation. He was certainly conversant with the rules and practice on the subject as is stated by Gowhar Ali, the certificate clerk, that the plaintiff no. 1, Abdul Gaffar, often used to come to the Collectorate. Therefore the plaintiffs for some reason or other knowingly and deliberately did not get their names registered in respect of the share they claim in the patni. The plaintiffs are not clear about the extent of the interest they had in the patni. Plaintiff no. 1 says that the other two brothers are also interested in it and that the plaintiffs' share is only four annas. The petition (Exhibit 2) also shows that not only the plaintiffs but their brothers and step-mother were all interested in the patni.

The plaintiffs have failed to prove satisfactorily the interest claimed by them in the tenure in question and their possession thereof. Even if they acquired any interest by the auction-purchase of defendant no. 4 in 1909 and subsequently by allotment in the partition of family properties, they did not get their names recorded in the zamindar's sarishta and allowed defendant no. 4 to continue as recorded holder of the tenure along with the Thakur defendants nos. 2 and 3. Can they contend that their interest is not affected by the sale of the tenure for arrears of rent held in certificate proceedings under the Bihar and Orissa Public Demands Recovery Act (IV of 1914) against the tenants whose names were recorded in the zamindar's sarishta?

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The tenure in question is admittedly a patni tenure and designated as " patni mahals " in paragraph 1 of the plaint. It is unquestionably governed by the Patni Regulation VIII of 1819 [*Brindabun Chunder Sircar Chowdhry* vs. *Brindabun Chunder Dey Choudhry*(1)]. This is not disputed by the learned Advocate on behalf of the appellants.

By section 3 of the regulation the tenure is

> " capable of being transferred by sale, gift or otherwise at the discretion of the holder as well as answerable for his personal debts and subject to the process of the Court of Judicature in the same manner as other real property."

The transfer, however, is subject to the payment of fees and security to the landlord as required by section 5 and until these conditions are fulfilled, the landlord has a right to

> " refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal responsibility and by accepting engagements of the transferee " (section 5).

The transferee can seek his remedy in the Civil Court to compel the zamindar to give effect to the transfer if the security tendered is not accepted by the landlord (section 6). But until the registration of his name has taken place, the transfer does not affect the zamindar's right and it does not create any relationship of landlord and tenant. In spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rents and other obligations imposed upon the tenure; and if the tenure is sold by the landlord for the arrears of rent due therefor in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting proprietor, his representatives or assignees, the zamindar having an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure. The whole tenure at such a sale passes, and not only the right, title and interest of the recorded tenant, so

(1) (1874) 1 I. A. 178.

that the interest of an unrecorded transferee ceases and he has no right to impugn the sale upon the ground that he was not made a party to the proceedings taken by the landlord in selling up the tenure for the realization of his rent.

The obligations of having his name recorded in the landlord's sarishta are the same in the case of a purchaser in execution of a decree other than a decree for arrears of rent due from the tenure In the latter case the purchaser is not required to pay any fee, though he is liable to be called on to give security under the conditions of the tenure purchased (vide the last portion of section 5).

The zamindar can refuse to accept a tender or any amount of rent from an unregistered transferee of a patni and he is not bound to recognize any deposit of rent made by such a transferee in his own name [*Saibesh Chandra Sarkar* v. *Kumar Bonowari Mukunda Deb*(1)].

The above is the effect of the various provisions in the Regulation and it was put in a nutshell by Sir Comer Petheram, C. J., in *Joykrishna Mukhopadhya* v. *Sarfannessa*(2). His Lordship observed as follows: "The effect of the provisions of those sections (sections 5 and 6) amounts to this, that upon an alienation or transfer by the patnidar the zamindar may exact a fee, which represents his profits, being the portion of his interest in the property whenever a transfer of the tenure is made, the amount of which is regulated by the Regulation itself; and further than that, until that fee has been paid, the zamindar shall not be bound to register the transfer and further than that, until the transfer has been registered, he shall not be bound to recognize the transfer in any way—that is to say, until his demand has been satisfied and registration has been effected, the old tenant remains his tenant, and the relation of landlord and tenant

(1) (1909) 10 Cal. L. J. 453. (2) (1888) I. L. R. 15 Cal. 345.

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has not been created between him and the assignee of the patnidar, whatever the arrangement may be between the patnidar and his assignee." No doubt, as held in that case, an unregistered assignee, though he cannot claim to be a tenant of the landlord and to release his assignor, yet has an interest independently of the Regulation and can impugn a sale held under the Patni Regulations as being no sale at all and as being void against everybody else. He can have the sale set aside on the ground of its being illegal or irregular, or tainted with fraud. And if he succeeds in getting the sale set aside on the above grounds, he will be restored to the position which he had before the sale. But he has no right to have the sale set aside upon the ground that he was not a party to the proceedings taken by the landlord to realise his rent by sale of the holding. This view is supported by a string of cases quoted at the Bar. [*Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha*(1); *Gyananda Kantho Roy Bahadur* v. *Brommoty Dassi*(2), *Surendra Narain Singh* v. *Gopi Sundari Dai*(3), *Lauckhi Narain* v. *Khettro Pal*(4), *Surendranath Pal Choudhury* v. *Tinchowri Dasi*(5), *Rajnarain Mitra* v. *Kristo Lal Chowdhuri*(6), *Rajah Sir Sourindra Mohan Tagore* v. *Moharani Surnamoyee*(7), *Gulam Sattar* v. *Maharaja Sir Prodyat Kumar Tagore Bahadur*(8), *Behari Lal Biswas* v. *Nasimannessa Bibi*(9), *Surendra Narayan Singh* v. *Gopi Sundari Dasi*(10).]

The learned Advocate on behalf of the appellants has also cited a number of authorities, namely, *Kali Kumar Ghose* v. *Bidhu Bhusan Banerji*(11), *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar*(12), *Raja Jagadish Chandra Deo* v. *Dhabel Deb*(13), *Provash*

(1) (1899) I. L. R. 26 Cal. 677.
(2) (1890) I. L. R. 17 Cal. 162.
(3) (1905) I. L. R. 32 Cal. 1031.
(4) (1873) 20 W. R. 380.
(5) (1893) I. L. R. 20 Cal. 247.
(6) (1892) I. L. R. 19 Cal. 703.
(7) (1898-99) 3 Cal. W. N. 38.
(8) (1911) 29 Cal. L. J. 481.
(9) (1923) 73 Ind. Cas. 842.
(10) (1904-5) 9 C. W. N. 224.
(11) (1912) 16 Cal. L. J. 80.
(12) (1896) I. L. R. 24 Cal. 62, F. B.
(13) (1918) 44 Ind. Cas. 26.

Chandra Chatterjee v. *Jahar-ud-din Mondal*(1), *Kali Kumar Ghose* v. *Bindhu Bhushan Banerji*(2) and *Gobinda Sunder Sinha Chowdhury* v. *Srikrishna Chakravarti*(3).

On the strength of these authorities it is contended that a transferee of a tenure is not bound by the sale in execution of a decree to which he was not a party. The authorities relied upon are either cases where the sale was brought about on account of fraud and collusion with a view to deprive the purchaser of his right, or are cases under the Bengal Tenancy Act the provisions whereof relating to the sale or transfer of a permanent tenure and recognition thereof by the landlord are different from those contained in the Patni Regulations. On the other hand, where a transferee, without any sufficient cause, omits to get his name registered, he is bound by the sale held in execution of a decree against the recorded tenant even in a case governed by the Bengal Tenancy Act. For instance, vide *Sham Chand* v. *Brojonath*(4), *Profulla Kumar Sen* v. *Nawab Sir Salimulla Bahadur*(5), *Raja Jagadish Chandra Deo* v. *Dhabel Deb*(6). *Provash Chandra Chatterjee* v. *Jahar-ud-din Mandal*(1) and *Maharaja Sir Rameshwar Singh Bahadur* v. *Mussammat Ryo Choudhrain*(7). In the present case the title set up by the plaintiffs is further affected by the fact that they claim to have obtained only eight-annas share in the patni taluq in question. Section 6 says that the rules of that section and of section 5 do not apply to transfers of any fractional share of a patni taluq nor to any alienations other than transfers of the entire interest unless made under the zamindar's special sanction. The plaintiffs say that by a private partition in the year 1915, Shaikh Majidur Rahman transferred his interest in favour of the plaintiffs. But he had only a fractional share in the taluq and th transfer was not valid so far as the

(1) (1919) 49 Ind. Cas. 49.
(2) (1912) 16 Cal. L. J. 89.
(3) (1909) 10 Cal. L. J. 538.
(4) (1873) 21 W. R. 94, F. B.
(5) (1918-19) 23 Cal. W. N. 590.
(6) (1918) 44 Ind. Cas. 26.
(7) Civ. Rev. 185 of 1924.

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landlord was concerned without his special sanction. No sanction of the landlord is pleaded in this case. Therefore he is not bound to recognize the transfer or to register it. Even the receipt of money or rent from the transferee of a portion of a patni taluq will not have the effect of recognition of the transfer or splitting up of the tenure. Therefore the plaintiffs have no right to question the validity of the sale or to urge that their interest in the tenure, if any, is not affected by the sale in execution of the certificate obtained by the zamindar for realization of his rent.

The learned Subordinate Judge has held that the plaintiffs failed to establish any fraud either in the preparation or issue of the certificate or the processes required by law. There is absolutely no evidence on the record of any enmity between the plaintiffs and any of the defendants. The finding of the learned Subordinate Judge as to fraud has not been seriously challenged in the present case. It is not disputed that the rents for which certificate was issued were due. A certificate no. 318 of 1919-20 (Exhibit J) was prepared and filed on the 27th November, 1918, in the office of the Certificate-Officer under the Bihar and Orissa Public Demands Recovery Act (IV of 1914). The notice of the certificate (Exhibit C) was served upon the certificate-judgment-debtors, defendants nos. 2 or 4, under section 7 of the Act and a notice through post (Exhibit D) was served upon and acknowledged by defendant no. 4, Shaikh Majidur Rahman. On the 13th January, 1920, Shaikh Majidur Rahman, one of the certificate-debtors, filed a petition (Exhibit 2) stating that he had no connection or concern with the patni taluq nor was it in his possession and that the patni taluq belonged to and was in possession of Abdul Gaffar, Abdul Jabbar, Abdul Wahab, Abdul Samad and Mussammat Nasiban and the Thakur defendants. In that petition he prayed that the certificate may be issued in the names of the above persons and that the certificate issued upon him may be cancelled, or that the said mahal be

attached and put to sale. The Manager, Court of Wards, filed a petition consenting to the mahal being sold and did not insist upon proceeding against the person or other property of the judgment-debtors. The Certificate-Officer ordered the sale of the mahal and directed a sale proclamation to issue (vide order sheet, Exhibit 4). After some adjournments, at the instance of the Thakur defendants who made part payments from time to time as noted in the order sheet, ultimately 4th November 1920 was fixed for the sale and a sale proclamation was directed to be issued afresh for the balance of the amount due. The sale proclamation was duly served (vide Exhibits B to B-4) and on the date fixed the sale was held and the property was knocked down in favour of the highest bidder, Sheobhanjan Lal, defendant no. 5, for Rs. 7,000 (vide bid-sheet Exhibit E). No objection was made within the time allowed by law and the sale was confirmed on the 4th January 1921. The purchaser obtained a sale certificate (Exhibit L) on the 22nd January, 1921, and delivery of possession of the property on the 21st February, 1921 (Exhibit K). The processes have been conclusively proved to have been duly served and effected. The plaintiff no. 1 says that Yusuf is his law-agent and the witnesses on behalf of the defendants say that Yusuf was taking keen interest in the sale and the plaintiff used to go to court in connection with the sale. Therefore, the sale far from being fraudulent was held with the knowledge of the plaintiffs and they tried their best to purchase the property. The reason is not far to seek. They wanted to acquire the entire sixteen-annas interest in the property, but they failed. They did not appear in the certificate proceedings nor did they pay the rent due from the tenure, but soon after the sale on the 3rd January lodged their plaint.

It has been strenuously contended on behalf of the plaintiffs that the petition of defendant no. 4, dated the 22nd January, 1921, was not legally disposed of. In the petition the defendant no. 4, the

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certificate-debtor, stated that he had no concern with the property and that the certificate be issued in the names of the persons who possessed the property and that the certificate issued in his name be cancelled. He further said that the mahal might be attached and put to sale. The Manager, Court of Wards, also consented to the mahal being sold. The certificate under section 12 of the Bihar and Orissa Public Demands Recovery Act (Act IV of 1914) could be executed against both the person and property of the judgment-debtors. The objection of defendant no. 4 was allowed in so far as exemption of his personal liability was asked for and the Court directed the property to be sold. Thus the petition was validly disposed of.

The learned Advocate has also contended that the certificate covered rents for the period exceeding one year. Consequently the certificate demand cannot create a charge upon the property. It is difficult to appreciate this contention. His contention, if I have understood it aright, is that the rent due to the zamindar is the first charge upon the property under section 11 of the Regulation only when the periodical steps for realization of rent under the Regulation are taken by the landlord. He says that the landlord has a right to realise his rent by the summary procedure prescribed in the Regulation every six months and therefore if he allows his rent to fall into arrear for a period exceeding one year, he loses the benefit of section 11 which makes the rent the first charge on the property. Thus upon this contention it is urged that the right, title and interest only of the certificate-debtors passed by the sale held in execution of the certificate under the Public Demands Recovery Act and hence the plaintiffs' right in the property is not affected. There does not seem to be any force in this contention. The Patni Regulation gives to the zamindar the right to realise the rent by a summary procedure and that summary procedure is restricted only to periodical rents. But the

zamindar is not bound to realise his rent every six months. He can wait for a longer period, and if he does wait for a longer period he can proceed under the general law for the realisation of his rent. Section 195(*e*) of the Bengal Tenancy Act says that the Bengal Tenancy Act would not apply to enactments relating to patni tenures in so far as it relates to those tenures. Where the patni law is silent, the provisions of the general rent law would apply. This has been settled by authorities. The patni law is silent as to the realisation of rent beyond one year and therefore the zamindar is entitled to bring his suit under the ordinary rent law.

It is noticeable that the decree for the rent due from the patni taluq in the case of *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Chowdhry*(1), was obtained under the then Rent Law (VIII of 1859) and the sale in execution of that decree took place under that law and not under the Patni Regulations. It was held there that the provisions of the Patni Regulation did apply and that the effect of the sale was to destroy all encumbrances including the darpatni created by the patnidar. In the case of *Kumar Satya Sankar Ghosal Bahadur* v. *Mon Mohan Guha Roy*(2) Chatterji, J., held that the Patni Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year. Similar was the view taken in an earlier case of *Durga Prosad Bundopadhya* v. *Brindabun Roy*(3). Therefore this contention is overruled.

It would seem further that the plaintiffs' suit is barred by the provisions of section 46 of the Public Demands Recovery Act. The plaintiffs based their title upon the purchase of the tenure in 1909 at a sale held in execution of a rent decree by their

(1) (1873) 1 I. A. 178. (2) (1918) 43 Ind. Cas. 996.
(3) (1892) I. L. R. 19 Cal. 504.

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step-brother, defendant no. 4, who subsequently gave away eight-annas share of it to the old holders thereof, defendants nos. 2 to 4 and retained the eight-annas in his own name. Defendant no. 4 acquired the property for himself as well as for the plaintiffs. Therefore defendant no. 4 was a benamidar of the tenure to the extent of the interest of the plaintiffs therein. In 1915 the plaintiffs say that defendant no. 4 abandoned his interest and gave the entire eight-annas share to the plaintiffs; in other words, by a private arrangement or exchange in the partition of family properties, the plaintiffs acquired the interest of defendant no. 4. They were thus the representatives of defendant no. 4 and as such their suit is barred under section 46 unless upon the ground of fraud which is not established in the present case; and as representatives they are bound by the decree made against defendant no. 4 [vide *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar*(1)].*Kali Sundari Debi* v. *Dharani Kanta Lahiri*(2) is exactly on all fours with the present case. In that case the purchaser had a money decree, but he did not get his name registered in the landlord's sarishta and he was held to be a representative of the judgment-debtors within the meaning of section 244 of the Code of Civil Procedure and was held to be bound by the subsequent decree for arrears of rent against the registered patnidar and the sale held in execution of such a decree. Again, in the aforesaid Privy Council case of *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Choudhry*(3) at one stage of the litigation it was held by the principal Sadr Ameen that the zamindars were entitled to sue the patnidar whose name was registered ignoring the right of a person claiming to have a beneficial right in the property and the patnidar being only a benamidar. The sale in that case took place in execution of the decree against the recorded tenant and such a sale was held to be valid and proper under the Regulations

(1) (1897) I. L. R. 24 Cal. 62.
(2) (1905) I. L. R. 33 Cal. 279.
(3) (1873) 1 I. A. 178.

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irrespective of whether the recorded patnidar was the benamidar or not. The point, however, did not directly arise in that case, but there is no doubt that the plaintiffs are bound by the sale in execution of the decree against defendant no. 4 who was the recorded tenant, and who represented them so far as the zamindar is concerned, even if he was a benamidar for them. Therefore whether defendant no. 4 is a benamidar of the plaintiffs or he transferred his interest to them by means of a private arrangement the plaintiffs are bound by the sale and their interest, if any, passed by it. In this case the sale having been held properly under the Public Demands Recovery Act, the tenure passed to the purchaser and not the right, title or interest of the judgment-debtors (vide clause 3 of section 26 of the Act). Thus even if the plaintiffs had any interest in the estate it passed by the sale held under the Public Demands Recovery Act.

The result is that the appeal is dismissed with costs to the defendants who have entered appearance in this Court and contested the appeal. The defendants who did not appear in this Court will not get any costs.

The cross-objection has not been pressed at the time of the arguments and is therefore dismissed.

BUCKNILL, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Foster, J.J.

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v.

SHEIKH KADIR.*

Santal Parganas Regulation, 1872 (*Regulation III of* 1872 *as amended by Regulation V of* 1893 *and Regulation III*

* Appeal from Original Decree no. 165 of 1922, from a decision of B. S. S. Day, Subordinate Judge of Dumka, dated the 17th December, 1921.

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of 1908), *section* 6, *effect of—interest, power of court to award, on decretal amount—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 34.

Section 6 of Santal Parganas Regulation, III of 1872, as amended by Regulations V of 1893 and III of 1908, provides, "All courts.....in the Santal Parganas shall observe the following rules, namely (*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than 2 per cent. per mensem notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed; (*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan". "The expression intermediate adjustment of account..... means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when without the passing of fresh consideration the original claim is increased by such renewal" (Explanation to section 6).

Held, that section 6 of the Regulation does not limit the power of a court under section 34, Code of Civil Procedure, 1908, to award interest on the decretal amount until realization.

Sourendra Mohan Sinha v. *Hari Prasad Sinha* (1), followed.

Per FOSTER, J.—Query whether section 6 of the Regulation overrides the law of contracts in the Santal Parganas so as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest and some fresh consideration, for instance, rescission of the previous bond or forbearance to sue, has passed from the mortgagee to his debtor.

Appeal by the plaintiffs.

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

S. M. Das and *Sant Prasad* for the appellants.

Khurshaid Husnain, *Gholam Muhammad* and *S. N. Roy*, for the respondents.

(1) (1926) I. L. R. 5 Pat. 185; I. R. 52 I. A. 418.

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DAS, J.—The suit out of which this appeal has arisen was instituted by the appellants for recovery of Rs. 5,364-3-9 on the foot of a mortgage bond executed by the respondents. The learned Subordinate Judge has given a decree for Rs. 1,530 as against some of the respondents and the plaintiffs appeal to this Court.

It is not disputed that transactions have been going on between the parties since 1289. On the 3rd Sawan 1310, accounts were adjusted between the parties, and it is the plaintiffs' case that Rs. 2,755 was found due to them on the taking of the accounts On that day two mortgage bonds were executed by Sheikh Nagu, Sheikh Kadir (defendant 1) and Sheikh Magru (defendant 2) in favour of the plaintiffs, one for Rs. 2,755, the other for Rs. 995. Sheikh Nagu is now dead, and is represented in this suit by Sheikh Abdul (defendant 3), Mussammat Jumagan, (defendant 4) and Mussammat Ankhar (defendant 5). The plaintiffs' case is that the bond for Rs. 2,755 was executed to secure the sum of money found due to the plaintiffs on the taking of the accounts and that the bond for Rs. 995 was executed to secure an advance made on that day to the executants. Thereafter transactions went on between the parties. Another adjustment of account took place on the 27th Assar, 1314, and on that adjustment Rs. 3,582 was found due to the plaintiffs. Defendants 1, 2 and 3 executed a mortgage bond on that day in favour of the plaintiffs to secure the sum of money found due by them to the plaintiffs, and it is this last mentioned mortgage bond which is the subject-matter of the present suit. I may mention that the plaintiffs' case in regard to the bond for Rs. 995 is that it has been satisfied by payments from time to time made by the defendants.

The parties live in the Santal Parganas and are governed by the special law in force in that pargana as contained in Regulation 3 of 1872, Regulation 5 of 1893 and Regulation 3 of 1908. Section 6 of

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Regulation 3 of 1872 as amended by the later Regulations is as follows:—

"All courts having jurisdiction in the Santal Parganas shall observe the following rules relating to usury, namely—

(a) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed;

(b) the total interest decree on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

EXPLANATION.—The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal."

As may be anticipated, the defendants rest their defence on the terms of the Regulation and they claim that the accounts should be reopened with a view to disallow the plaintiffs compound interest arising from any intermediate adjustment of accounts and they contend that the total interest to be decreed to the plaintiffs should not exceed the principal sum actually advanced to them. They admit that Rs. 2,755 was found due to the plaintiffs on the 3rd Sawan, 1310, but they allege that the sum included interest on which the plaintiffs are not entitled to claim further interest, notwithstanding the terms of the bond. In regard to the bond for Rs. 995, their case is that that sum represented, not a cash advance made on the 3rd Sawan, 1310, but irrecoverable interest, that is to say, interest found due to the plaintiffs on the 3rd Sawan, 1310, in excess of the principal of the original debt or loan. They say that towards the debt due by them, they have paid to the plaintiffs the sum of Rs. 1,285, and they profess their willingness to pay the plaintiffs what is found due to them on the examination of the accounts and in conformity with the special law of Santal Parganas.

The problem in this suit is to ascertain the actual cash advances made by the plaintiffs to the defendants.

By the terms of the Regulation we are bound to ignore all intermediate adjustment of accounts, and we have to be on our guard to see that the plaintiffs do not get compound interest by having recourse to the simple device of procuring mortgage bonds from the defendants. The simple issue therefore is, what were the actual advances made by the plaintiffs to the defendants? I may say that the plaintiffs accept the case of the defendants that they paid Rs. 1,288 to them. They maintain however that they appropriated this sum (which was paid by instalments and on different dates) towards the mortgage bond for Rs. 995 executed by the defendants on 3rd Sawan, 1310. It will be remembered that, according to the plaintiffs' case, there was a cash advance in respect of this bond; whereas, according to the defendants' case, Rs. 995 mentioned in the bond as having been advanced to the defendants, represented irrecoverable interest.

Having regard to the questions involved in the case, the learned Subordinate Judge appointed a commissioner to examine the accounts and to make a report to the Court. The Commissioner made a careful investigation and reported as follows:—

First, on the 3rd Sawan, 1310, the sum of Rs. 2,755 was due to the plaintiffs as principal and that sum (to secure which the mortgage bond of 3rd Sawan, 1310, was executed) did not include interest or compound interest.

Second, Rs. 995 which is the subject-matter of the other bond executed on 3rd Sawan, 1310, represented an actual advance made by the plaintiffs to the defendants and that the bond was satisfied by the payment of Rs. 1,285 by the defendants between 3rd Kartic, 1314 and 27th Asin, 1314.

Third, Rs. 5,036 was due to the plaintiffs for principal and simple interest on the date of the institution of the suit.

When the case came before the learned Subordinate Judge, neither party called the Commissioner to shew that his report was in any way incorrect. The learned Subordinate Judge however speculated to an extent which is not permissible in a judicial officer and came to the conclusion that the sum of Rs. 1,530 only was due to the plaintiffs. A very important

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question in the case is whether there was a cash advance of Rs. 995 on 3rd Sawan, 1310. Now the plaintiffs' books of accounts entirely support the case made by them; but the defendants examined two witnesses to contradict the case of the plaintiffs. Now these witnesses profess to speak to an incident which happened, according to their own testimony, "17 or 18 years ago". It is, in my opinion, quite impossible for any court to place the slightest reliance on the testimony of these witnesses; and I do not think that the learned Subordinate Judge would have placed any reliance on their testimony but for certain circumstances to which he prominently refers. In the first place, the learned Subordinate Judge does not understand why "shrewd business men like the plaintiffs" would make an advance of Rs. 995 to the defendants when a large sum was already due to the plaintiffs. In my opinion, the question is one of sufficiency of security, and, provided the security is ample, even "shrewd business men" may be expected to lend money if they have money to invest. It is not necessary to pursue the subject; for I entirely agree with the Commissioner that Rs. 995 was advanced by the plaintiffs to the defendants on the 3rd Sawan, 1310, and that the sum of Rs. 1,285 paid by the defendants to the plaintiffs between 3rd Kartic, 1314, and 27th Assar, 1314, went to satisfy the bond for Rs. 995 executed by the defendants on 3rd Sawan, 1310.

In dealing with the question of cash advances up to the 3rd Sawan, 1310, the learned Subordinate Judge says as follows:—

> "The only way out of the difficulty is to presume as a moral certainty that all the entries shown as cash advances to the defendants in the plaintiffs' accounts which are not in the handwriting of any of the defendants are really calculated sums of interest and were not really cash advances to the defendants."

Proceeding on the footing of moral certainty and not of legal proof, the learned Subordinate Judge found that six entries in the plaintiffs' account book showing an aggregate cash advance of Rs. 1,885-9-0 were not

in the handwriting of any of the defendants. He accordingly disallowed these items and came to the conclusion that Rs. 962-14-0 out of Rs. 2,755 for which the bond of 3rd Sawan, 1310, was executed represented actual cash advance. Having arrived at this conclusion, he had no difficulty in holding that the plaintiffs were entitled, under the special law in the Santal Parganas, only to double the amount of actual cash advances, namely to Rs. 1,935. But he allowed the plaintiffs Rs. 2,755 as his calculation might not be quite correct. From this sum he deducted Rs. 1,285 and another sum of Rs. 60 admittedly paid by the defendants to the plaintiffs; and he gave a decree to the plaintiffs for Rs. 1,530.

On the findings arrived at by the learned Subordinate Judge, the decree pronounced by him is far too favourable to the plaintiffs. If Rs. 1,935 was all that was due to the plaintiffs before making the deductions, he had no business to allow the plaintiffs Rs. 2,755. He had no right to fly in the face of the statute and show generosity at the expense of the defendants. But I have no doubt whatever that the whole basis of the judgment of the Subordinate Judge is wrong. It was necessary for him to found his judgment, not on moral certainty but on legal proof. Now, on what ground has he disallowed the items showing cash advances of Rs. 1,885-9-0? On the ground that they are not in the handwriting of any of the defendants. But all those entries are signed by the defendants and are as effectual in raising a presumption in favour of the plaintiffs as if the entries were in their handwriting. There is a clear admission in writing by the defendants that they received different sums on different dates as cash advances amounting in all to Rs. 1,885-9-0, and these admissions are binding on the defendants. This being the position, the report of the Commissioner has not been shown to be wrong except in regard to an item of Rs. 60 representing a payment made by the defendants to the plaintiffs. In my opinion, the plaintiffs are entitled to a mortgage decree for Rs. 4,976.

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The next question is whether we should allow the plaintiffs interest on the decree under section 34 of the Code of Civil Procedure. In *Sourendra Mohan Sinha* v. *Hari Prosad Sinha*(1) the learned Chief Justice of this Court thought that there was much to be said for the argument that the Santal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a court under section 34 of the Code of Civil Procedure to award interest on the decretal amount until realization; but he felt bound to follow an earlier decision of this Court which had decided that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself. The case of *Sourendra Mohan Sinha* v. *Hari Prosad Sinha*(1) went up to the Privy Council, and it is clear from the decision of their Lordships(2) that the question rests on the discretion of the court, and not, (as I read the judgment) on the Santal Parganas Regulations. In my opinion, the plaintiffs are entitled to interest at 6 per cent. on the decretal amount from the date thereof until realization.

The last question is whether the plaintiffs are entitled to a decree as against defendants 4 and 5. They are not parties to the bond of 27th Assar, 1314; but Sheikh Nagu (whom they, along with defendant 3, represent) was a party to the bond of 3rd Sawan, 1310. The solution of the question depends on whether the liability under the bond of the 3rd Sawan, 1310, was extinguished by the execution of the bond of the 27th Assar, 1314. There is no indication in the latter bond that liability under the former bond came to an end. That being so, the plaintiffs are clearly entitled to a decree as against defendants 4 and 5; but it is clear that their liability must be limited to the assets of Sheikh Nagu in their hands.

I would allow the appeal, set aside the judgment and decree passed by the court below and give the

(1) (1922) I. L. R. 1 Pat. 506.
(2) (1926) I. L. R. 5 Pat. 135; L. R. 52 I. A. 418.

plaintiffs the usual mortgage decree for Rs. 4,976 as against all the defendants (the decree against defendants 4 and 5 being limited to the assets of Sheikh Nagu in their hands) with costs throughout and interest at 6 per cent. on the decree from the date hereof until realization. Period of redemption, six months.

FOSTER, J.—I agree in the order to be passed, but I wish to make a remark or two on one point. It is not the plaintiffs' case nor is it our finding that the first mortgage bond of 1903 was rescinded by the second mortgage bond of 1907. After studying the terms of section 6 of Regulation III of 1872 I think it quite possible that the question may arise whether by that provision of law so large an inroad on the law of contract has been made in the Santal Parganas as to nullify bona fide contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest; and some fresh consideration, for instance, the rescission of the previous bond or forbearance to sue, has passed from the mortgagee to his debtor. So far as I am aware the matter has not been decided in any case; and I wish to reserve an open mind on the subject.

Appeal allowed.

APPELLATE CIVIL.

Before Adami and Sen, J.J.

MUSSAMMAT BATINA KUER

v.

RAJA RAM PANDEY.*

1925.

June, 24.

Limitation, suspension of, during the lifetime of limited Hindu owner—adverse possession, whether can be pleaded for the first time in appeal.

* Appeal from Appellate Decree no. 1254 of 1922, from a decision of B. Ram Chandra Chaudhuri, Additional Subordinate Judge of Saran, dated the 18th August, 1922, reversing a decision of Maulavi Sayed Muhammad Ibrahim, Additional Munsif of Siwan, dated the 26th November, 1922.

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Limitation having once commenced to run in the life-time of a full Hindu owner, is not suspended on his death and succession by a limited owner.

Lilabati Misrain v. *Bishun Chobey* (1), followed.

A plea of adverse possession may be taken for the first time in appeal if it arises on facts stated in the pleadings and the opposite party is not taken by surprise.

Appeal by the plaintiff.

This appeal arose out of a suit by the plaintiff-appellant for a declaration that a deed of zarpeshgi, dated the 20th December, 1907, executed by Muhammat Inderbaso in favour of the defendant no. 1 was fraudulent and collusive and without legal necessity; that the said mortgagor had no right or title to execute the zarpeshgi deed and that therefore it was not operative on plaintiff who had inherited the land in dispute from her father Sadhu Dubey.

The case of the plaintiff was that one Sheo Dubey had two sons Nakched and Chulhai; that Nakched had a son Dukhi Dubey and Chulhai had a son Sadhu Dubey; that Dukhi and Sadhu were joint; that Dukhi died and Sadhu came into the family property by survivorship; that after Sadhu's death his widow Mussammat Jharo succeeded her and that after Mussammat Jharo the plaintiff inherited the property in suit from her father. The plaintiff alleged that Inderbaso Kuer, the widow of Dukhi, illegally and fraudulently executed a deed of zarpeshgi, dated the 20th December 1907 in favour of her brother, the defendant no. 1, who in turn assigned the mortgage in favour of defendant no. 2. The case for the defence was that the plaintiff was not the daughter of Sadhu and Jharo; that Dukhi and Sadhu were not joint when Dukhi died; that upon Dukhi's death Inderbaso Kuer succeeded to his property and upon her death her daughter Sona Kuer succeeded. The defendant no. 1 alleged that he was the daughter's

(1) (1907) 6 Cal. L. J. 621 (635).

son of Inderbaso, that is the son of Sona Kuer and not the brother of Inderbaso Kuer as alleged by the plaintiff.

The Munsif held that the plaintiff was the daughter of Sadhu Dubey; that the zarpeshgi deed was fraudulent and collusive; that Dukhi died whilst living joint with Sadhu and that defendant no. 1 was the brother of Inderbaso; and he decreed the suit On appeal, the Subordinate Judge affirmed the finding that the plaintiff was the daughter of Sadhu; but he held that, even assuming that Inderbaso, the mortgagor of defendant no. 1, had no title to the land in suit, the defendant no. 1 having got possession of the land in 1907 on the basis of his zarpeshgi and having continued in possession for over 12 years his title was perfected by adverse possession. He there fore allowed the appeal and dismissed the suit.

N. N. Sinha, for the appellant.

H. N. Prasad, for the respondents.

SEN, J. (after stating the facts set out above, proceeded as follows): It is contended before us, first, that the question of adverse possession was not in issue and that the court of appeal was not competent to raise it or pass his decision on it. Secondly, that the question whether Dukhi or Sadhu were joint or separate was not gone into by the court of appeal; that he should have gone into the question fully.

There is no doubt that title by adverse possession does not appear to have been raised in the pleadings, but the principle has often been laid down that a party 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 facts stated in the pleadings and the party is not taken by surprise. The learned Subordinate Judge bases his decision on the following facts: He finds that as early as 1895 in the cadastral survey Inderbaso Kuer's name is recorded in the survey khatian, and he observes that

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this entry must be regarded as a presumptive piece of evidence of possession of Mussammat Inderbaso. He finds that in 1901 there was a zarpeshgi in favour of defendant no 1 granted by Inderbaso Kuer; he finds that in 1907 the zarpeshgi in suit was executed; that the dues of the previous bond were satisfied out of the consideration of the disputed zarpeshgi in favour of defendant no. 1. These two old registered bonds, he observes, executed so long ago as 1901 and 1907, show that Mussammat Inderbaso exercised acts of possession over the disputed land. He also records it as an admitted fact that Sadhu, the father of the plaintiff appellant, "died 7 or 8 years ago", and that the defendant's possession over the land in suit commenced during Sadhu's lifetime and further that admittedly he is still in possession. He also states that the witnesses of the plaintiff had to admit that plaintiff never got possession of the land in suit; that in fact not a single witness examined by the plaintiff spoke a word about the possession of the plaintiff or her predecessor Sadhu over the land in suit. It is also found that at the Revisional Survey of 1919, the name of defendant no. 1 was entered as being in possession as zarpeshgidar of Inderbaso. Now most of the material facts above mentioned were stated in the pleadings and evidence was gone into in detail on all the points. On the principle laid down in the case of *Lilabati Misrain* v. *Bishun Chaudhurain*(1) the learned Subordinate Judge rightly comes to the conclusion that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner. 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

(1) (1907) 6 Cal. L. J. 621 (635).

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.

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The appeal is dismissed with costs.

ADAMI, J. I agree.

SEN, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Foster, J.J.

BIBI UMA HABIBA

v.

MUSSAMMAT RASOOLAN.*

1926.

Jan., 27.

Code of Civil Procedure, 1908 (Act V of 1908), section 73—Court, jurisdiction of, to enquire into bona fides of decree.

An executing court making a rateable distribution under section 73 of the Code of Civil Procedure, 1908, has no power to make enquiries into the bona fides of the decrees of the rival claimants.

Shankar Sarup v. *Mejo Mal* (1), relied on.

Appeal by the decree-holder.

The appellant held a money decree for her dower, her deceased husband being one Manzoorul Haq. In the course of the execution, after realization of certain assets, the respondent Bibi Rasoolan put in a claim for rateable distribution under section 73 of the Code of Civil Procedure. Thereupon the decree-holder, Bibi Uma Habiba, made objection to this intrusion in the course of her execution on the ground that the

* Appeal from Original Order no. 113 of 1925, with Civil Revision no. 182 of 1925, from an order of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 17th April, 1925.

(1) (1901) I. L. R. 23 All. 313, P. C.

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decree of Bibi Rasoolan was obtained in collusion with the judgment-debtors. She therefore asked the Court to hold an enquiry into the matter with a view to a decision whether Bibi Rasoolan was in possession of a bona fide decree, and whether she should not be excluded from the rateable distribution. The Subordinate Judge quoted a number of cases ending in *Shankar Sarup* v. *Mejo Mal* (1). In this last case their Lordships of the Judicial Committee remarked: "The 295th section" (that is the section which corresponds to the present section 73) "while providing that the Judge under whose authority the sale takes place shall distribute the proceeds, provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets * * * * The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seems at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present".

The Subordinate Judge, relying on this and other cases found that the objection could not be made the occasion of a judicial enquiry whether there was a right to rateable distribution by virtue of the decree exhibited.

Khurshaid Husnain, *Syed Ali Khan* and *S. M. Wasi*, for the appellant.

S. M. Mullick and *Rajeswar Prasad*, for the respondents.

FOSTER, J. (after stating the facts set out above, proceeded as follows): It seems to me that the learned Subordinate Judge took a correct attitude in this matter. Section 73 itself specifically states that when there are assets in the court, they may be

(1) (1901) I. L. R. 23 All. 313, 322, P. C.

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rateably distributed between the claimants money-decree-holders; and where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It appears to me therefore that the remedy indicated in the second clause of section 73 is the only remedy. " The expression of one thing is the exclusion of the other."

It was urged that the matter really was under section 47, but it seems to me that the Privy Council decision must be deferred to, and this matter must be regarded as a purely ministerial act which has no element of a judicial decision.

I would therefore dismiss this appeal without costs and the Civil Revision is also dismissed.

DAS, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

1926.

Jan., 27.

BENGALI GOPE

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 37, 190 *and* 529—*Authorization of magistrate with second class powers to entertain complaints, effect of—Complaint of murder, whether magistrate may entertain—prosecution for false complaint of which cognizance is taken without authority—section* 529(*c*), *effect of.*

Section 190(2), Code of Criminal Procedure, provides: " .....the District Magistrate.....may empower any magistrate to take cognizance under sub-section (1),

* Criminal Revision no. 480 of 1925, from an order of P. Mazumdar, Esq., Magistrate, First Class, Patna, dated the 11th of May, 1925.

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clause (*a*) or (*b*), of offences for which he may try or commit for trial". Sub-section (*1*) provides: ".....any other magistrate specially empowered in this behalf may take cognizance of any offence.....(*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a report in writing of such facts made by any police officer". By virtue of the powers conferred by section 190(2) the District Magistrate of Patna authorized the Sub-Deputy Magistrate of Dinapur, a magistrate with second class powers, to entertain complaints during the absence of the Subdivisional Magistrate. A complaint having been made before the Sub-Deputy Magistrate of an offence of murder, he sent it to the police for enquiry. The police reported the case to be false and the magistrate dismissed the complaint under section 203, and then himself made a complaint against the complainant, who was committed to the Court of Session for trial under section 211, Penal Code.

Held, that section 37 and the Fourth Schedule of the Code must be read with section 190 and, therefore, under section 190(2) the District Magistrate can confer upon a subordinate magistrate power to take cognizance of only such offences as such subordinate magistrate is empowered by the Fourth Schedule to try or commit for trial. Consequently the subordinate magistrate in the present case was not competent to entertain the complaint made to him.

Under section 529(*e*), if any magistrate not empowered by law to take cognizance of an offence under section 190, sub-section (*1*), clause (*a*) or (*b*), erroneously in good faith takes such cognizance, his proceedings cannot be set aside merely on the ground of his not being so empowered. *Held*, however, that where a magistrate not empowered to take cognizance of an offence, does so, the complainant is not liable to be prosecuted in respect of the complaint if it proves to be false.

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

G. P. Das, for the petitioner.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

Ross, J.—The petitioner has been committed to the court of session for trial on a charge of having

presented a false complaint before the Sub-Deputy Magistrate of Dinapur. The offence alleged in the complaint was the offence of murder.

The contention on behalf of the petitioner is that the Sub-Deputy Magistrate, who exercised second class powers only, had no authority to take cognizance of the complaint; and that all the proceedings before him were without jurisdiction.

It appears that by an order of the District Magistrate of Patna the Sub-Deputy Magistrate of Dinapur is authorized to entertain complaints during the absence of the Subdivisional Magistrate. The power to make such an order is conferred by section 190, clause (2), and is exerciseable with regard to cases which the Subordinate Magistrate is competent to try or to commit for trial. Section 37 and the Fourth Schedule of the Code, which also deal with this matter, must be read with section 190; and there is nothing in these provisions to extend the powers which the District Magistrate can confer. As the complaint made to the Sub-Deputy Magistrate was a complaint that certain persons were guilty of murder, he was not competent to take cognizance of it; and the proper procedure for him to adopt was that laid down in section 201 which requires him to return the complaint for presentation to the proper court with an endorsement to that effect. Instead of doing that he sent the complaint to the police for enquiry and, on their reporting the case to be false, he dismissed the complaint under section 203 without ever having examined the complainant on oath, and then himself complained against him. The orders were throughout irregular and without jurisdiction. Nor are they protected by section 529(*c*). That section saves proceedings before a magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the magistrate's having taken cognizance of it, without power to do so.

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In my opinion these proceedings were void ab initio; and there is no basis in law for the present prosecution. I would therefore quash the commitment under section 213 of the Code and direct that the petitioner be discharged.

KULWANT SAHAY, J.—I agree.

Commitment quashed.

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Before Ross and Kulwant Sahay, J.J.

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Jan., 27.

AMBIKA SINGH

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 195, *non-compliance with—illegality—Penal Code*, 1860 (*Act XLV of* 1860), *section* 211, *prosecution under—enquiry by magistrate who dismissed the complaint.*

Under section 195(*i*)(*b*) of the Code of Criminal Procedure, 1898. "No court shall take cognizance of any offence punishable under.....section 211 (Penal Code), when such offence is committed in, or in relation to, any proceeding in any court, except on the complaint in writing of such court, or of some other court to which such court is subordinate". *Held*, that when a false complaint is made to a magistrate and the complainant is proceeded against under section 211, Penal Code, with respect to the complaint, the magistrate to whom the complaint was made is not himself competent to inquire into the offence under section 211, Penal Code.

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

S. M. Naim, for the petitioner.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

KULWANT SAHAY, J.—The petitioner lodged a first information before the police at Ghosi on the 12th

* Criminal Revision no. 526 of 1925 from an order of Mr. P. N. Mazumdar, Magistrate, First Class, Patna, dated the 20th October, 1925.

of July, 1925, charging certain persons with an offence under section 302 of the Indian Penal Code. Before the police submitted a report, the petitioner filed a petition before the Subdivisional Magistrate of Jehanabad on the 17th of July, 1925, praying for a local enquiry into the case by the Subdivisional Officer. The Subdivisional Magistrate treated this application as a complaint and proceeded to examine the petitioner on oath. In the meantime the police submitted a final report stating that the case was a false one and prayed for the prosecution of the petitioner under section 211 of the Indian Penal Code. On the 13th of August, 1925, the Subdivisional Magistrate, after receipt of the police report, summoned the petitioner under section 182 of the Indian Penal Code and treated the complaint of the petitioner as a counter case which he proposed to take up after the disposal of the case under section 182. On the 24th of August, 1925, the petitioner prayed that he should be given an opportunity of proving his case before he was tried for an offence under section 182; but the learned Subdivisional Magistrate rejected the application, and also dismissed the petition of complaint under section 203 of the Code of Criminal Procedure. On the 21st of September, 1925, the learned Subdivisional Magistrate converted the trial of the petitioner under section 182 into an enquiry before commitment for an offence under section 211 read with section 302 of the Indian Penal Code, and he has committed the petitioner to the sessions court for trial.

It is clear that the proceedings in this case have been without jurisdiction. The Subdivisional Magistrate could not himself enquire into the case under section 211 read with section 302, Indian Penal Code. The proper procedure to adopt was to make a complaint under section 195 of the Code of Criminal Procedure. The provisions of section 195 not having been complied with, the order of commitment is clearly without jurisdiction and must be set aside and the commitment quashed.

Ross, J.—I agree.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

SHEIKH MOHAMMAD YASIN

v.

KING-EMPEROR.*

1926.

Jan., 28; Feb., 5.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 403, *scope of—trial without jurisdiction for want of sanction—conviction and sentence set aside—retrial on the same facts, whether barred—jurisdiction, meaning of—complainant, examination of, after notice to show cause, whether affects the commitment.*

Section 403(*1*), Code of Criminal Procedure, 1898, provides that " a person who has once been tried by a *court of competent jurisdiction* for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence..... ". *Held*, that section 403(*1*) does not bar a fresh trial on the same facts when the conviction and sentence are set aside on the ground that the trial court had no jurisdiction to try the offence as, for example, where the trial court has tried an offence without a complaint having been made under section 195 in a case where such a complaint is required by law.

Emperor v. *Husain Khan* (1), *Nanakram* v. *Emperor* (2), *Rex* v. *Marsham* (3), *Peter Bradshaw* v. *John Drury* (4) and *Queen* v. *Muthoora Prasad Panday* (5), followed.

K. Ganapathi Bhatta, In re. (6), dissented from.

On the 25th October, 1923, the petitioner, Sheikh Mohammad Yasin, lodged an information before the police charging Abdul Wahid and others with offences under sections 148 and 302, Penal Code, his case being that the said accused persons had committed rioting armed with deadly weapons, causing the death of Mohammad Jan, the father of the petitioner. The

* Criminal Revision no. 529 of 1925, against an order, dated the 21st October, 1925, passed by Mr. N. P. Sinha, Magistrate, First Class, Muzaffarpur.

(1) (1917) I. L. R. 39 All. 203.
(2) (1918) 46 Ind. Cas. 716.
(3) (1912) 2 K. B. 362.
(4) (1849) 18 L. J. (M. C.) 169.
(5) (1865) 2 W. R. 10 (Cr.).
(6) (1913) I. L. R. 36 Mad. 308.

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police held an investigation, but before they had submitted their report, on the 5th of November, 1923, the petitioner filed a petition before the Magistrate complaining against the police investigation and praying that the case should be enquired into, and the persons accused by him should be summoned. Thereafter the police submitted their final report to the effect that the case was intentionally false, and they applied for the prosecution of the petitioner under section 211, Penal Code. Notice was issued upon the petitioner to show cause why he should not be prosecuted for instituting a false case. The petitioner filed a petition showing cause in which he asserted that the case was a true one. The Magistrate, however, ordered that the petitioner Yasin should be summoned under section 211 on the basis of the complaint put in by the sub-inspector of police, and he directed that further proceedings in the case which was started on the information of Yasin before the police should be terminated, and that the order to show cause to be served upon Yasin should be cancelled. Yasin thereupon moved the Sessions Judge who made a reference to the High Court (Criminal Reference no. 27 of 1924) which was heard by Adami, J., on the 14th May 1924. Adami, J., held that the petition of Yasin showing cause impugned the inquiry by the police and amounted to a complaint. The Magistrate should have examined Yasin on oath as a complainant, and either called upon him to prove his case or should have dismissed his complaint under section 203, Criminal Procedure Code. He did neither of these. Adami, J., held that, although it would have been proper to dispose of the complaint of Yasin in the first instance, and then entertain the complaint against him under section 211, yet as the complaint had been made, he directed the proceedings upon the complaint of the sub-inspector under section 211 to proceed. Yasin was accordingly committed to the Sessions on a charge under section 211 and convicted by the Assistant Sessions Judge of Muzaffarpur and sentenced to five years' rigorous imprisonment. Against the conviction, Yasin preferred an appeal to the High Court

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which was heard by Bucknill and Ross, J. J. [Reported as *Shaikh Muhammad Yasin* v. *King-Emperor* (1).] Their Lordships in that case held that the petition of Yasin filed on the 5th of November, 1923, must be treated as a complaint before the Magistrate, and that the offence, if any, committed by the petitioner was an offence which was committed in or in relation to a proceeding in court and, consequently, a complaint in writing by the court or by some other court to which it was subordinate was a condition precedent to cognizance being taken of the offence under section 211. They held that by making the complaint to court, the informant, viz. the present petitioner, had withdrawn the information from the category of mere police proceedings and had raised it to the category of a proceeding in court. This necessitated a complaint by the court if the informant was to be proceeded against. Their Lordships were of opinion, therefore, that the proceedings in which the petitioner had been convicted were wholly without jurisdiction because the bar imposed by section 195 had not been removed, and they directed that the conviction be set aside.

This decision of the High Court was dated the 19th December, 1924. Thereafter, on the 24th of January, 1925, the police inspector made an application before the Sadr Subdivisional Magistrate of Muzaffarpur praying that the petitioner might be re-tried under section 211, Penal Code, in relation to the same offence, after a complaint under section 476, Criminal Procedure Code. Notice was issued on the petitioner to show cause why proceedings should not be taken against him under section 211, Penal Code, and on the 26th February, 1925, the petitioner filed a petition of objection before the Magistrate in which he contended inter alia that the petitioner could not be tried again upon the same facts upon which he had been tried before. The Magistrate, however, examined the petitioner on oath in connection with his original petition of the 5th of November, 1923. The

(1) (1925) I. L. R. 4 Pat. 323.

petitioner examined witnesses in support of his allegation; but on the 21st of April, 1925, the Magistrate found his original complaint to be intentionally false, and eventually on the 14th August, 1925, he made a formal complaint against the petitioner under section 476. The complaint was made over to another Magistrate of the 1st class who committed the petitioner to the Court of Sessions for trial on a charge under section 211, Penal Code, by his order dated the 21st October, 1925.

S. P. Varma (with him *Fazle Ali* and *Syed Ali Khan*), for the petitioner: Section 403, Code of Criminal Procedure, is a bar to the present trial. The High Court which acquitted the petitioner, as also the court which held the trial in the first instance, were courts of competent jurisdiction within the meaning of section 403. Sanction under section 195 was only a condition precedent for the institution of the proceeding before the court and want of sanction did not affect the jurisdiction of the court to try the offence charged. Section 403, when it refers to the competency of the tribunal to try an offence, has reference to the status and character of the court and not to the procedure adopted by the court. See *In re K. Ganapathi Bhatta* (1). In the present case the Assistant Sessions Judge was quite competent to try the petitioner on a commitment by a first class magistrate; and if the conviction and sentence are set aside on a pure question of law, the order is nevertheless one of acquittal on merits.

My second submission is that after the acquittal by the High Court the petitioner was not examined as a complainant. His examination on oath was taken after he was called upon to show cause against prosecution. The Crown was not justified in administering an oath to the petitioner after he was made an accused person. Notice should have been served upon him after the dismissal of his complaint.

(1) (1913) I. L. R. 36 Mad. 308.

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H. L. Nandkeolyar, Assistant Government Advocate, for the Crown:—There has been no previous trial by a court of competent jurisdiction. The High Court set aside the conviction because it considered that in effect there had been no trial of the petitioner.

[Ross, J.—There was a trial but on account of some mistake of the prosecution, the conviction could not be sustained.]

I submit not. A trial void ab initio is no trial.

[Ross, J.—But if the accused was in jeopardy when he was convicted, he cannot be retried.]

The *Illustrations* to section 403 are a complete answer on the question of jeopardy, e.g., the mere choosing of a wrong forum does not debar the prosecution from insisting upon a retrial and relying on additional facts in the second trial.

[Ross, J.—In *Rex* v. *Marsham* (1), it was held that the accused was not in peril because he was not legally convicted in the first trial.]

Yes. If the judgment is an order of acquittal on merits, I am out of court, but if, on the other hand, the effect of the judgment is that the bar imposed by section 195 not having been removed, the whole proceeding was vitiated, I submit there can be no bar to a retrial on merits.

[KULWANT SAHAY, J.—Is not an acquittal on a ground of law an acquittal on merits?]

Not necessarily. In the present case, however, there has been no acquittal. An order setting aside a conviction does not amount to one of acquittal. I rely on *Queen* v. *Muthoora Prasad* (2).

[ROSS, J.—There the trial court had no jurisdiction to try the particular offence.]

Here also the court had no jurisdiction to try the case without having first removed the bar imposed by section 195. The net result of the decision in *In re*

(1) (1912) 2 K. B. 369.

(2) (1865) 2 W. R. 10 (Cr.).

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K. Ganapathi Bhatta (1) is that the bar of section 195 will be a bar to the Crown and not to the court. I submit that it affects the competency of the court also and is not merely a condition precedent for the institution of the proceedings by the Crown. Section 403 covers a case where the proceeding has been void ab initio. The reasoning adopted in *In re K. Ganapathi Bhatta* (1) is untenable and should not be followed. A contrary view, however, is taken in *Emperor* v. *Hussain Khan* (2). These two decisions are discussed in *Nanakram* v. *Emperor* (3) where the correctness of the Madras decision has been doubted. The view expressed by the Allahabad and Nagpur Courts finds support in the earlier cases of the Calcutta High Court. See *Queen* v. *Muthoora Prasad* (4).

With regard to the second point I submit that the petition of complaint was never directed to be enquired into. The complaint was, as a matter of fact, disposed of before the formal complaint under section 476 had been made against the petitioner. The fact that he was examined on oath after he was called upon to show cause against prosecution will not vitiate the proceeding.

S. P. Varma in reply:—In *Emperor* v. *Hussain Khan* (2) no reference was made to *K. Ganapathi Bhatta* (1) and the propriety or otherwise of this decision was not considered. *K. Ganapathi Bhatta* (1) was, however, distinguished in *Nanakram* v. *Emperor* (3) where there was no complaint. The observation must, therefore, be considered as obiter. Section 403 contemplates an acquittal even on a technical point. See *Guggilapu Paddaya of Palakot* (5). An order setting aside a conviction has the effect of setting the accused at liberty which in turn implies acquittal.

S. A. K.

Cur. adv. vult.

(1) (1913) I. L. R. 36 Mad. 308.
(2) (1917) I. L. R. 39 All. 293.
(3) (1918) 46 Ind. Cas. 716.
(4) (1865) 2 W. R. 10 (Cr.).
(5) (1911) I. L. R. 34 Mad. 253.

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KULWANT SAHAY, J.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The petitioner has come up in revision to this Court against this order; and the main ground taken by the learned counsel on his behalf is that the petitioner, having once been tried and acquitted by a court of competent jurisdiction, is not liable to be tried again for the same offence. Reliance has been placed on sub-section 1 of section 403 of the Criminal Procedure Code. It has also been contended that the present proceedings were started against the petitioner before his original complaint had been disposed of and he was called upon to show cause in the present proceedings before the truth or otherwise of his complaint made on the 5th of November, 1923, was enquired into.

The first question depends on the construction of the judgment of this Court in the appeal preferred by the petitioner against his conviction by the Assistant Sessions Judge reported as *Sh. Md. Yasin* v. *King-Emperor* (1). As I have already observed, that conviction was set aside by this Court on the ground that the proceedings were ab initio void and without jurisdiction on account of the bar imposed by section 195 of the Criminal Procedure Code not having been removed. Section 403(1) of that Code provides that

> "a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

The question is whether the judgment of this Court in the appeal from the previous trial was an acquittal of the petitioner after his trial by a court of competent jurisdiction as is contended for by the learned counsel for the petitioner. In my opinion, the first trial of the petitioner cannot be said to be a trial by a court of competent jurisdiction so as to bar a second trial. It has been contended that the court which tried the

(1) (1925) I. L. R. 4 Pat. 828.

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petitioner on the first occasion was a court of competent jurisdiction within the meaning of the section, and the conviction was set aside on a point of law which did not affect the jurisdiction of the court which held the trial; and reliance was placed upon a decision of the Madras High Court in *re. K. Ganapathi Bhatta* (1). This decision to a certain extent lends support to the contention of the learned counsel; but in my view the learned Judges put a too narrow construction upon the provisions of section 403(*1*) of the Code. They observed that sub-section (*1*) of section 403 refers to the character and status of the tribunal when it refers to competency to try the offence. The reasoning adopted in that case was that a sanction under section 195, Criminal Procedure Code, was not a condition of the competency of the tribunal, but it was only a condition precedent for the institution of proceedings before the tribunal, and that the want of sanction under section 195 did not in any way affect the jurisdiction of the court to try the accused of the offence charged. In my view the wording of section 403 is very wide and the jurisdiction of the court does not merely refer to the character and status of the court to try the offence, but also refers to want of jurisdiction on other grounds as shown by *Illustrations* (*f*) and (*g*) to the section. I think it covers cases where the trial is held to be without jurisdiction for want of a sanction under section 195 of the Code. This view was taken by the Allahabad High Court in *Emperor* v. *Husain Khan* (2). In that case the accused persons were tried for an offence under section 82 of the Indian Registration Act without the permission required by section 83 of the Act having been obtained. They were convicted by the Magistrate, but the conviction was set aside by the High Court on the ground of want of permission under section 83 of the Act. A second trial was held after obtaining the permission under section 83 and the accused persons were again convicted. It was held by Knox, J., that the second trial was not barred

(1) (1913) I. L. R. 36 Mad. 308. (2) (1917) I. L. R. 39 All. 293.

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by section 403 of the Criminal Procedure Code, it being held that the court which had tried the case in the first instance was not a court of competent jurisdiction to hold the trial owing to the absence of the sanction under section 83 of the Act. The same view was taken in *Nanakram* v. *Emperor* (1). A similar view was taken in *Rex* v. *Marsham* (2), in *Peter Bradshaw* v. *John Drury* (3) and by the Calcutta High Court in *Queen* v. *Muthoora Pershad Pandey* (4). It is further to be observed that this Court did not make an order of acquittal upon the appeal in the previous conviction but merely directed that the conviction should be set aside. There was no trial of the accused on the merits by this Court, and the conviction was set aside on the ground of want of jurisdiction in the court to try the petitioner. I am, therefore, of opinion that section 403(*1*) does not operate as a bar to the second trial of the petitioner in the present case.

The second ground taken was that the proceedings were initiated against the petitioner before the disposal of his original complaint of the 5th of November, 1923. In my opinion there is no substance in this objection either. This Court did not direct an inquiry into the complaint of the petitioner Yasin. As a matter of fact, the magistrate did examine the petitioner and dismiss his complaint although after the initiation of the inquiry, but the dismissal was before the making of the complaint under section 476. The commitment of the petitioner, therefore, to the Court of Session cannot be quashed.

It has been contended on behalf of the petitioner that the matter is too stale and that the petitioner has already been sufficiently harassed, and a fresh prosecution of the petitioner for the same offence should not be allowed to proceed. It is no doubt true that the complaint was made by the petitioner so long ago as November 1923, and he has been subjected to a good

(1) (1918) 46 Ind. Cas. 716.
(2) (1912) 2 K. B. 362.
(3) (1849) 18 L. J. (M. C.) 189.
(4) (1865) 2 W. R. (Cr.) 10.

deal of harassment on account of the previous prosecution, and it is for the Crown to consider whether the case is a fit one in which the proceedings should be allowed to go on, or whether it is proper to drop the proceedings. It is not competent for us to quash the proceedings on the ground that the original complaint made by the petitioner was more than two years ago.

In the result this application must be dismissed.

ROSS, J.—I agree.

Application dismissed.

PRIVY COUNCIL.*

SOURENDRA MOHAN SINHA

v.

HARI PRASAD SINHA.

1926.

Feb., 16.

Order-in-Council—Execution—Successful party not lodging Order—Power of other party to obtain execution—Petition to vary Order-in-Council—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLV, rule* 15(*1*).

Upon cross-appeals to the Privy Council an Order was passed reducing the sum for which the defendants were liable under the decree appealed from, and extending the time within which, under that decree, they were to pay a large sum into court until the expiry of eight months from the receipt of the Order by the High Court. The Order was issued to the defendants, as the party successful, but they failed to lodge it with the High Court. The plaintiffs petitioned for a variation of the Order so as to enable them to execute that part of the decree which was in their favour and was affirmed.

Held, that the Order-in-Council having been passed, a variation of its terms could be advised only in exceptional circumstances, and that having regard to the plaintiffs' power under Order XLV, rule 15(*1*), to obtain execution by a petition to the High Court accompanied by a certified copy of the Order, no variation could be advised.

It is the duty of the party to an appeal to whom the Order-in-Council made therein is issued to lodge it forthwith with the court appealed from.

* PRESENT:—Viscount Dunedin, Lord Blanesbury and Sir John Edge.

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SOURENDRA MOHAN SINHA v. HARI PRASAD SINHA.

Petition to vary terms of an Order-in-Council made upon an appeal.

The petitioners (the abovenamed appellants) obtained in a suit in the court of the Subordinate Judge of Bhagalpur a decree against the respondents for Rs. 15,27,997 in respect of a mortgage debt, and a personal decree for Rs. 44,164. On appeal to the High Court at Patna the decree for sale was reduced to Rs. 3,88,673 and the personal decree to Rs. 23,181. Both parties appealed to the Privy Council. By the judgment (1) of the Judicial Committee delivered on July 21, 1925, the appeal by the plaintiffs was dismissed, and the appeal by the defendants was allowed to the extent of setting aside the personal decree. Paragraph 4 of the judgment directed as follows:

> "that the time within which the respondents ought to pay into court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the receipt by the High Court of His Majesty's Order-in-Council herein."

On July 24, 1925, an Order-in-Council was signed embodying the above paragraph, but the petitioners alleged that they had not had an opportunity of considering the terms of the judgment until August after the Judicial Committee had risen.

It appeared that the Order had been issued to the respondents and that they had not filed it in the High Court. The petitioners alleged that they were not in a position to execute the decree in their favour until the respondents had filed the Order and eight months had expired from their doing so. They now prayed that paragraph 4 might be varied by providing that the sum named should be paid into court by March 31, 1926, and that the carriage of the Order as amended should be given to them.

Hyam, for the petitioners (appellants).

Sir George Lowndes, K.C., and *E. B. Raikes*, for the respondents.

(1) *Ante*, p. 135; L. R. 52 I. A. 418.

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Reference was made to Order XLV, rule 15(*1*), and to *Hurrish Chandar Chaudhury* v. *Kali Sundari Dabia* (1).

The judgment of their Lordships was delivered by—

LORD DUNEDIN.—This is an application to vary the Order-in-Council. The Order has been already passed, and it could only be under exceptional circumstances that their Lordships could humbly advise that another Order should be passed.

In the suit judgment was given for the plaintiffs against the defendants for a certain sum.

On appeal to the King in Council their Lordships humbly advised His Majesty to reduce substantially the sum for which judgment had been given, and to make the sum still decreed payable eight months after the date of the receipt of the Order by the High Court.

The defendants having been substantially successful in the appeal, the Order-in-Council in accordance with the ordinary practice was issued to them: and in ordinary course ought to have been lodged by them in the High Court. They have not however done so, and the plaintiffs cannot therefore so far get execution. Hence this application. The plaintiffs and petitioners have not sufficiently adverted to Order XLV, rule 15(1) of the first schedule to the Code of Civil Procedure. When they found that the defendants were delaying or refusing to lodge the order they could have applied to the High Court with a certified copy of the order and asked for a summary order on the defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of this Board. This they can still do.

Their Lordships therefore cannot advise His Majesty to grant the prayer of the petitioners: but as

(1) (1882) I. L. R. 9 Cal. 482; L. R. 10 I. A. 4.

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they are clearly of opinion that it was the duty of the defendants in ordinary course to lodge the Order there will be no costs allowed on the petition.

Solicitors for appellants (petitioners): *Barrow, Rogers* and *Nevill.*

Solicitors for respondents: *Watkins* and *Hunter.*

APPELLATE CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

MAKHRU DUSADH

v.

KING-EMPEROR.*

1926.

March, 8.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 380 *and* 457, *separate sentences under, whether bad.*

An accused person convicted of house-breaking followed immediately by theft is liable to punishment under section 457, Penal Code, only.

Queen v. *Tonaokoch* (1), *Queen* v. *Sahrae* (2), *Jogeen Pullee* v. *Nobo Pullee* (3), *In the case of Mussahur Dusadh* (4) and *Queen* v. *Chytun Bowra* (5), followed.

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

W. H. Akbari (for the Assistant Government Advocate), for the Crown.

Ross, J.—The appellant broke into a house at night and stole a box and was caught in the act. He has been convicted under sections 457 and 380 of the Indian Penal Code and has been sentenced to consecutive term of three years' rigorous imprisonment under each of these sections. It has been repeatedly held that separate sentences cannot be passed under

* Criminal Appeal no. 21 of 1926, from a decision of B. Harihar Charan, Assistant Sessions Judge of Purnea, dated the 23rd March 1925.

(1) (1865) 2 W. R. (Cr.) 63.
(2) (1867) 8 W. R. (Cr.) 31.
(3) (1866) 6 W. R. (Cr.) 49.
(4) (1866) 6 W. R. (Cr.) 92.
(5) (1866) 5 W. R. (Cr.) 49.

section 457 and section 380 of the Indian Penal Code: see *Queen* v. *Tonaokoch* (1), *Queen* v. *Sahrae* (2), *Jogeen* v. *Nobo* (3), *Mussahur Dusadh* (4) and *Queen* v. *Chytun Boura* (5), where their Lordships observed: "The point has been frequently ruled. A prisoner convicted of house-breaking followed immediately by theft would be punished under section 457 of the Indian Penal Code only."

The result is that the sentence of three years' rigorous imprisonment passed under section 380 must be set aside. The sentence under section 457, Penal Code, will stand.

KULWANT SAHAY, J.—I agree.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

BENGAL AND NORTH-WESTERN RAILWAY COMPANY

v.

TUPAN DASS.*

1926.

March, 10.

Railways Act, 1890 (*Act IX of* 1890), *section* 75—*contents of parcel, abstraction of—whether "deterioration" within the meaning of section* 75—*Railway Company, liability of.*

Under section 75 of the Railways Act, 1890, "when any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds Rs. 100, the railway administration shall not be responsible for the.....deterioration of the parcel or package..... ".

Plaintiff consigned a parcel for transmission on the defendant's railway. When it was opened it was found that

* Appeal from Appellate Decree no. 1299 of 1922, from a decision of Jadunandan Prasad, Esq., District Judge of Purnea, dated the 17th of July, 1922, modifying a decision of Maulavi Saiyid Mohammad Zarif, Munsif of Katihar, dated the 9th of September, 1921.

(1) (1865) 2 W. R. (Cr.) 63.
(2) (1867) 8 W. R. (Cr.) 31.
(3) (1866) 6 W. R. (Cr.) 49.
(4) (1866) 6 W. R. (Cr.) 92.
(5) (1866) 5 W. R. (Cr.) 49.

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some of the contents had been abstracted. These were articles of silk and other things falling within the Second Schedule to the Railways Act, 1890. Plaintiff brought the present suit for recovery of the value of these articles. The defence was that the company was protected by section 75. The finding of the courts below was that the contents were abstracted while the parcel was in the custody of the defendant company's servants.

Held, that there was " deterioration " of the parcel within the meaning of section 75, and that the defendant company was protected under that section irrespective of whether the articles were abstracted by the company's servants or not.

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

Hasan Jan, for the appellants.

L. K. Jha, for the respondent.

Ross, J.—This appeal must be allowed. The plaintiff respondent sent a parcel for transmission from Hyderabad, Sindh, to Katihar on the railway of the defendant company. The parcel arrived at Katihar; but when it was opened it was found that some of the contents had been abstracted. These were articles of silk and other things falling within the Second Schedule to the Indian Railways Act. The present action was brought for the recovery of the value of these articles. The defence was that the company was protected by section 75 of the Indian Railways Act inasmuch as the parcel sent by the plaintiff contained articles mentioned in the Second Schedule but no declaration of their value was made. The finding of the Munsif was that the articles in question were abstracted while the parcel was in the custody of the defendant company's servants. A decree has been passed in favour of the plaintiff by both the courts below and the defendant company has appealed.

The learned Advocate for the respondent contends that the case does not fall within the terms of section 75, because there has been neither loss, destruction nor

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deterioration of the parcel; and, secondly, that inasmuch as the goods were lost by theft of the company's servants they are not entitled to the protection of this section. Now " deterioration " is not a word of art and it must be taken in its ordinary sense. In the Oxford Dictionary one of the meanings given to the word " deteriorate " is " to become lower or impaired in quality or value ". The parcel was impaired in value by the abstraction of these articles and consequently there was deterioration of the parcel. I think, therefore, that the case falls within the language of section 75. As to the argument that section 75 does not protect the company because the articles were abstracted by the servants of the company, the learned Advocate was compelled to admit that he had no Indian authority for this proposition. He relied upon certain decisions of the English Courts, but these proceeded on the express provision of section 8 of 11 Geo. IV and 1 Will. IV, Chapter 68 (Carriers' Act, 1830), where a proviso is enacted exempting from the liability for loss of or injury to the articles therein referred to imposed by the first section of that Act. The proviso is that

" Nothing in this Act shall be deemed to protect any mail contractor.....stage coach proprietor or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from felonious acts of any coachman, guard, book-keeper, porter or other servant in his or their employ, etc."

There is no such proviso in the Indian Act and, therefore, the English decisions have no application. It was also pointed out by the learned Advocate for the appellant company that there is no evidence that the theft was committed by any of the company's servants and this argument was not met by the learned Advocate for the respondent.

In my opinion, therefore, this case is covered by section 75 of the Indian Railways Act and the appeal must be decreed with costs and the suit dismissed with costs throughout. The cross objection is dismissed.

KULWANT SAHAY, J.—I agree.

Appeal decreed.

1

APPELLATE CIVIL.

Before Bucknill and Foster, J.J.

1926.

April, 19.

ACHUTA RAM

v.

JAINANDAN TEWARY.*

Mortgagor, purchaser from, whether personally liable to pay the debt.

Where a mortgagor executed a mortgage in favour of the plaintiff and subsequently sold the property to a third party, who, in the recitals of the sale-deed, agreed to pay off the mortgage, the plaintiff not being a privy to the contract, *held*, that the plaintiff (mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor, and that the purchaser was not personally liable to pay the debt.

Jamna Das v. *Ram Autar Pande* (1) and *Nanku Prasad Singh* v. *Kamta Prasad Singh* (2), followed.

Khajwa Muhammad Khan v. *Husaini Begum* (3), and *Deb Narain Dutt* v. *Chuni Lal Ghose*(4), distinguished.

Dwarika Nath Ash v. *Priya Nath Malki* (5), not followed.

Tweddle v. *Atkinson* (6), referred to.

Appeal by the plaintiffs.

This was a second appeal from a decision of the District Judge of Shahabad dated the 7th March, 1923, modifying a judgment of the Subordinate Judge of the same place dated the 18th February, 1922. The material facts were as follows: The plaintiffs (who were the appellants) were the mortgagees of

*Appeal from Appellate Decree no. 668 of 1923, from a decision of Jadunandan Prasad, Esq., District Judge of Shahabad, dated the 7th March, 1923, modifying a decision of Babu Phanindra Lal Sen, Subordinate Judge of Shahabad, dated the 18th February, 1922.

(1) (1911) I. L. R. 34 All. 63, L. R. 39, I. A. 7.
(2) (1922) 3 Pat. L. T. 637, P. C.
(3) (1910) I. L. R. 32 All. 410, L. R. 37 I. A. 152.
(4) (1913) I. L. R. 41 Cal. 137.
(5) (1917-18) 22 Cal. W. N. 279.
(6) (1861) 1 B. & S. 393.

certain property from defendants nos. 1 and 4. These mortgages were effected by five deeds. In addition to these five mortgages there were also three other mortgages of which the plaintiffs were not the direct mortgagees but assignees from those who were the original mortgagees. It was only with the five transactions in which the plaintiffs were the direct mortgagees that this appeal was concerned. The plaintiffs brought their suit to enforce the mortgages and, in addition to joining the mortgagors, they also joined certain persons (who were defendants nos. 8 to 13) who had bought from the mortgagors the equities of redemption of the properties hypothecated by virtue of the five mortgage deeds referred to above. In the trial court the plaintiffs succeeded in obtaining a personal decree not only against the mortgagors but also against the purchasers of the equities of redemption. But on appeal the learned District Judge came to the conclusion that the decree, so far as it related to relief against these purchasers of the equities of redemption, could not be in law upheld; he therefore set aside that portion of the judgment of the Subordinate Judge and it was from that part of the decision of the District Judge that the plaintiffs appealed to the High Court.

L. N. Sinha, *R. B. Saran* and *N. C. Sinha*, for the appellants.

P. Dayal and *Jal Gobind Prasad*, for the respondents.

BUCKNILL, J. (after stating the facts set out above, proceeded as follows): The simple point for consideration is whether the plaintiffs could obtain a money decree against the purchasers of the equities of redemption. It must first be pointed out that in the instruments under which the purchasers of the equities of redemption so purchased, they (the purchasers) stipulated that they would pay off the debts due under the mortgages. It is common ground that they did not do so. It is also common ground

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that the plaintiffs had no notice of what had taken place between the mortgagors and the purchasers of the equities of redemption and were not privy to the contract. It is important to observe that some support was lent to the argument which was put forward before us by the learned Advocate who has appeared for the plaintiffs by the ruling in the case of *Dwarika Nath Ash* v. *Priya Nath Malki*(1). In that case the facts were certainly very similar to those which obtain in this appeal now before us. The defendants had borrowed a sum of money from the plaintiff for which they had given a promissory note; they subsequently transferred their property to another party who executed an agreement in their favour expressly undertaking to pay to the lender of the money under the promissory note his dues thereunder. The lender of the money under the promissory note was no party to this contract and had no notice thereof; but, having ascertained the circumstances, he proceeded to sue the borrowers as well as the individual who had purchased the borrower's property: he claimed that, in view of the agreement entered into between the borrowers and the purchasers of the borrowers' property, he (the lender) was entitled to take advantage of that agreement. Mookerjee and Cuming, J.J., of the Calcutta High Court held that the plaintiff was entitled to enforce his claim against the purchaser of the borrowers' property.

Had the matter rested there one might have thought that this case would constitute an authority in favour of the proposition argued in the present instance. There are also other cases which have been quoted by the learned Advocate for the appellant which certainly at first sight appear to support to some extent the learned Advocate's argument. In the case of *Khajwa Muhammad Khan* v. *Husaini Begum*(2) their Lordships of the Privy Council held

(1) (1916) 22 Cal. W. N. 279.
(2) (1910) I. L. R. 32 All. 410, L. R. 37 I. A. 152.

that under certain circumstances (to which I shall refer presently) it was possible for a person who was no party to an agreement to take advantage of the provisions of such an agreement which were in fact beneficial to herself. Their Lordships' decision (which was given by the Right Hon'ble Mr. Ameer Ali) relates the facts at some length. Put very shortly, they were as follows. A minor Muhammadan lady, prior to and in consideration of her marriage with the son of the defendant in the suit, was promised by the defendant under an agreement executed between the defendant and the lady's father to be paid by the defendant the sum of Rs. 500 per mensem from the date of her reception in marriage; the defendant also charged certain specified properties for the purpose of producing the requisite funds. The lady, as I have stated, was a minor; but eventually, after the marriage, lived with her husband for sometime; owing, however, to disagreement she, at the end of some 12 or 13 years, ceased so to do. The defendant then refused to continue to pay the allowance and the lady accordingly brought the suit against him basing her claim upon the document of agreement which had been entered into between the defendant and her (the plaintiff's) father. It was maintained on behalf of the defence on the line of reasoning adopted in the well-known English case, *Tweddle* v. *Atkinson*(1), that as the plaintiff was in no way an actual party to the agreement made between her father and the defendant, she had no locus standi and was unable to sue thereunder. Mr. Ameer Ali, however, pointed out that the case of *Tweddle* v. *Atkinson*(1) was one decided under the common law of England and was not in their Lordships' opinion applicable to the facts which were disclosed in the case before their Lordships. Their Lordships were of opinion that although no party to the agreement (and it must be remembered that the lady was then a minor and the document was executed by her father)

(1) (1861) 1 B. & S. 393.

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she was clearly in equity entitled to enforce her claim against the defendant. The case, however, appears to me to be distinguishable from the present case in view of the fact that the benefit which was to accrue to the plaintiff was one for which the consideration was the marriage to take place between herself and the defendant's son. Then there is another case which was cited on behalf of the plaintiffs, *Deb Narain Dutt* v. *Chuni Lal Ghose*(1). In that case Jenkins, C.J. and Mookerjee, J., held that where the transferee of a debtor's liability acknowledged in the provisions of the registered instrument which conveyed to him all the original debtor's properties, his obligation to the creditor for the debt to be paid by him and where the acknowledgment was communicated to the creditor and accepted by him, the creditor could sue the transferee on the registered instrument. Here again their Lordships based their decision upon the equitable principle which had operated upon the minds of their Lordships of the Privy Council in the case which I have just quoted. Here in this case of *Deb Narain Dutt* v. *Chuni Lal Ghose*(1) it may indeed be said that the facts disclosed that the creditor was actually privy to and concerned in the transaction which took place between the transferee and the debtor. In fact in the judgment of Jenkins, C. J., it is expressly stated that there was an arrangement between the plaintiff and defendant no. 5 by which the liability of defendant no. 5 under the transfer was acknowledged and accepted and it may also be observed that (although under a mistaken idea of their true legal effect) certain title-deeds were actually handed over at that time by the purchaser to the plaintiff. Although, therefore, the last two cases quoted seem to be based upon considerations somewhat different from those which have to be regarded in the present appeal, there is no doubt, as I have said before, that *Dwarika Nath Ash* v. *Priya Nath Malki*(2) does constitute some authority to support

(1) (1913) I. L. R. 41 Cal. 137. (2) (1917-18) 22 Cal. W. N. 279.

the argument which has been addressed to us by the learned Advocate who has appeared for the appellants. There are however, on the other hand, two cases which appear to be conclusive authority upon the point which has been argued in this appeal. The first of these is *Jamna Das* v. *Ram Autar Pande*(1). It is a decision of their Lordships of the Privy Council and although the facts are not set out at any great length in the report they can be found fully reported in I. L. R. 31 Allahabad, 352 (1909). It will be seen, from a perusal of the facts as given in that report, that the circumstances were almost the same as those which obtain in the present appeal. The judgment of their Lordships of the Privy Council delivered by Lord Macnaghten is very short and very much in point here. His Lordship observes—"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor."

I may pause here to observe that the undertaking referred to was to the effect that the purchaser would pay off the debt due to the mortgagee by the person from whom the purchaser had purchased the property. His Lordship continues—"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage debt."

There is still a later case in which the same proposition has been similarly set forth in another decision of their Lordships of the Privy Council. In that case, *Nanku Prasad Singh* v. *Kamta Prasad Singh*(2), the facts again are in that report but very shortly set out. We have had the advantage, however, of seeing what the facts were from the record of this court, the case having been tried on

(1) (1911) I. L. R. 34 All. 63, L. R. 39 I. A. 7.

(2) (1922) 3 Pat. L. T. 637, P. C.

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appeal on the 7th June 1918 before Roe and Coutts, JJ. The facts were substantially identical with those which exist in the present appeal. A mortgagor having executed a mortgage in favour of the plaintiff sold the property to a third party who, in the recitals of this sale-deed, agreed to pay off the mortgage with a portion of the purchase money which was for that purpose left in his hands. The mortgagee sued upon his mortgage not only the mortgagor but also the purchaser; but this court refused to grant any personal decree against the purchaser, holding that he (the mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor. Their Lordships of the Privy Council upheld the decision of this court, Lord Atkinson, in a very short judgment, stating: "Their Lordships have considered this case and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant failed." It may be observed that in the judgment given by this court on the 7th June 1918, the cases to which I have referred above were mentioned and quoted. It seems therefore that we are clearly bound by the authority of these two decisions of the Privy Council which are so directly in point.

The appeal therefore must be dismissed with costs. I should mention that there was a cross-objection which, however, is not pressed and has not been argued and that cross-objection also must be dismissed with costs.

It is said by the learned Advocate who has appeared for the appellants (and it may be mentioned that the question is referred to in ground no. 7 of the appellant's grounds of appeal to this court) that there has been some arithmetical or other mistake with regard to the amount of costs which have been awarded to the defendants nos. 8 to 13. It was suggested

that, as this question had been made a ground of appeal, it might be dealt with in this court. We have, however, no materials whatever before us which would enable us to discuss or consider this point. If there has been any mistake in regard to the quantum of costs, that matter should be referred to and dealt with by the lower appellate court.

FOSTER, J.—I agree. The difference between *Dev. Narain Dutt* v. *Chuni Lal Ghose*(1) and the last cases quoted by my learned brother, *Jamna Das* v. *Ram Autar* (2) and *Nanku Prasad* v. *Kamta Prasad*(3), appears to me to be very important in connection with the facts of the present case. It is to be borne in mind that in the present case there was no notice to the plaintiff at the time of the contract. In the judgment of *Dev Narain Dutt* v. *Chuni Lal Ghose*(1) we see that the promisee, that is to say the plaintiff, had a proposal made to him by the promisor, that is to say defendant no. 5, and he accepted it. So in that case the promisee was in the position indicated in section 2 of the Indian Contract Act. He held the benefit of a contract for consideration. In the present case the plaintiff, who claims to be the promisee, has never had a proposal made to him by the defendants against whom he is seeking a money decree: and he certainly never accepted any such proposal. Therefore section 2 does not bring him into the position of a person who can sue a promisor upon a contract for consideration. That is the distinction between the two classes of cases, and I think the present case falls within the class indicated in the Privy Council cases which have been quoted. There may be a third class of cases in the judgments which we have been studying, namely, the class in which minors or other third parties sue under family or marriage settlements. In such cases as those the plaintiff can hardly be regarded as a promisee who

(1) (1913) I. L. R. 41 Cal. 137.
(2) (1911) I. L. R. 34 All. 63, L. R. 39 I. A. 7.
(3) (1922) 3 Pat. L. T. 637, P. C.

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FOSTER, J.

has accepted any proposal or promise and such cases are probably decided on the traditional principles governing the English Courts of Equity rather by any application of the terms of section 2 of the Indian Contract Act. If I am correct, this third class would I think be exemplified by the case of *Khajwa Muhammad Khan* v. *Husaini Begum*(1).

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

CHAIRMAN, DISTRICT BOARD, MONGHYR,

v.

SHEODUTT SINGH.*

1926.

April, 19.

Provincial Insolvency Act, 1920 (*Act V of* 1920), *section* 2(*1*) (*d*)—*Receiver, right of to sell son's share to liquidate father's debt—son's pious obligation—Hindu Law.*

A Receiver in insolvency in whom Hindu joint family property has vested has the right to sell the share of the son to liquidate the father's debt, not incurred for immoral purposes, and the pious obligation of the son prevents him from asserting that the family estate, so far as his interest is concerned, is not liable for that debt.

Amolak Chand v. *Mansukh Rai Mangan Lal* (2), *Brij Narain* v. *Mangal Prasad* (3), *Bihari Lal Jamna Das* v. *Sat Narain*(4), followed.

Sant Prasad Singh v. *Sheo Dutt Singh* (5), referred to.

*Appeal from Original Order no. 184 of 1925, from an order of Ananta Nath Mitter, Esq., District Judge of Saran, dated the 16th of March, 1925.

(1) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(2) (1924) I. L. R. 3 Pat. 857.
(3) (1924) I. L. R. 46 All. 95, P. C
(4) (1922) I. L. R. 3 Lah. 329, F. B.
(5) (1923) I. L. R. 2 Pat. 724.

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CHAIRMAN, DISTRICT BOARD, MONGHYR v. SHEODUTT SINGH.

ROSS, J.

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

Harnarayan Prasad, for the appellant.

Sambhu Saran and *Bankey Behari Sahay*, for the respondents.

Ross, J.—In 1918 Sheodutt Singh filed a petition in insolvency and on the 7th of January, 1919, a receiver was appointed to take charge of his property. On the 7th of September, 1921, the wife of the insolvent, on behalf of her minor children, filed a petition claiming that three-fourths of the properties should be exempted from liability. The District Judge referred the matter to the receiver; and, accepting his report, exonerated the share of the minor children from sale. The matter came before the High Court and the case was remanded in order that the District Judge should deal with the question himself. The District Judge has now given his decision; and, overruling the objection of one of the creditors, the Chairman of the District Board of Monghyr, he has accepted the evidence on behalf of the minors that Sheodutt Singh was a man of immoral habits and has held that there is nothing to show that there was any enquiry regarding the necessity for the loan; and that it had not been established that the loan was raised for the benefit of the minors. He has consequently directed that three-fourths share of the property, being the share of the three minor sons of the insolvent, should be exempted from sale.

The Chairman of the District Board of Monghyr has appealed against this decision; and it is contended on his behalf that as it is the pious duty of the sons to pay their father's debt the whole of the estate is assets in the hands of the receiver. It is further contended that there is no evidence of the immorality of the debt in question in this case; that a general charge of immorality is not sufficient; and that there must be something to connect the immorality of the debtor with the debt. The debt is a decree for money

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obtained by the District Board against Sheodutt Singh. There is nothing to show what the nature of the debt was.

The learned Advocate for the respondents relies upon the definition of "property" contained in section 2(*1*) (*d*) of the Provincial Insolvency Act:

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

and he contends that although a Mitakshara father can dispose of the property of the family for necessity or for antecedent debt, his powers extend no further; and as there is nothing to show in the present case that the debt had been contracted for family necessity or to pay off an antecedent debt, the family property is not liable. It is pointed out that the decision in *Amolak Chand* v. *Mansukh Rai Mangal Lal*(1) upon which the appellant relied, was a decision in a case of antecedent debt. Now there is no doubt that the District Board could have executed their decree against the family property: *Brij Narain v. Mangar Prasad*(2) where it was laid down by the Judicial Committee that if the managing coparcener is the father and the reversioners are his 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. The principle underlying this rule is thus stated in that decision: "Then there comes in the further doctrine that the debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father, or it may become liable by being mortgaged by the father to pay the debt for which otherwise

(1) (1924) I. L. R. 3 Pat. 857. (2) (1924) I. L. R. 46 All. 95, P. C.

decree might be taken and execution be sought." If their pious duty prevents the sons from asserting that the family estate is not liable to be taken in execution, I do not see in principle how the sons can dispute the right of the receiver in insolvency to sell the property in order to liquidate the father's debt. If the debt was recoverable by execution before insolvency it is not easy to see why the creditor should be deprived of his relief merely because the estate has vested in the receiver. And it has been so held by the Full Bench of the Lahore High Court in *Bihari Lal Jamna Das* v. *Sat Narain*(1), where the learned Chief Justice said: "It has, however, been repeatedly held.....that the joint family property can be attached and sold in execution of a decree for money passed against the father, and that the sale affects the interest of the son as well as that of the father, and in principle I see no real difference between an individual creditor realizing his debt from the coparcenary property and an official assignee, who represents the general body of the creditors, seizing it for the satisfaction of their debts." It has not been proved that this debt was incurred for immoral purposes; and there is in my opinion no obstacle to the sale of the family property by the receiver in order that the debt may be discharged.

It was further contended on behalf of the respondents that the case was remanded by the High Court [*Sant Prasad Singh* v. *Sheodutt Singh*(2)] for a decision on the allegations in the petition filed on behalf of the minors and that the District Judge has come to a decision on these allegations and has found that the debt was not contracted for the benefit of the family; and that consequently the position taken up by the minors has been established; and it must be taken, under the decision of the High Court, that nothing has vested in the receiver. But the legal consequences of the findings of the District Judge

(1) (1922) I. L. R. 3 Lah. 329, F. B. (2) (1923) I. L. R. 2 Pat. 724.

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cannot be taken to have been determined before these findings had been arrived at; and, moreover, the view of the law expressed in *Sant Prasad Singh* v. *Sheodutt Singh*(1) which rested on the decision in *Sahu Ram Chandra's case*(2) has been held to require reconsideration in view of the later decision of the Judicial Committee which has been referred to above [vide *Amolak Chand* v. *Mansukh Rai*(3)].

It follows that this appeal must be allowed and the order of the District Judge exempting three-fourths of the property from sale must be set aside. There will be no orders as to costs.

KULWANT SAHAY, J.—I agree.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Foster, J.

DANGAL RAM

v.

JAIMANGAL SARAN.*

1926.

May, 6.

Hindu Law—family arrangement and partition—minors, suit by, to set aside—legal necessity, proof of, whether necessary—tests to be applied.

H and his brother *K* were at one time joint in estate but the only joint property which they held was the house in which they lived. Although the brothers had separated in estate the house had not been divided by metes and bounds. *K* had four sons who were also living with him in the same house. Owing to dissension between *H* and *K* there was a likelihood of the value of the property depreciating for want of repairs, and of the house being sold in execution of a rent

*Appeal from Appellate Decree no. 1212 of 1923, from a decision of Babu Phanindra Lal Sen, Additional Subordinate Judge of Shahabad, dated the 11th September, 1923, reversing a decision of Babu Kamini Kumar Banerji, Munsif of Arrah, dated the 18th September, 1922.

(1) (1923) I. L. R. 2 Pat. 724.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.
(3) (1924) I. L. R. 3 Pat. 857.

decree. The house was practically incapable of division into two equal parts. By an agreement between *H* and *K*, however, the latter, in lieu of his moiety of the house, took from *H* a sum of Rs. 1,000 and gave up the entire house to *H*. The present suit was instituted by the two minor sons of *K* claiming to recover back their share in the house on the ground that the transfer by their father was not for their benefit and was not justified by any legal necessity.

Held, (*i*) that the transaction was really in the nature of a family arrangement and partition; (*ii*) that it was not necessary, in order to support a transaction of this sort, to show that there was any actual legal necessity for such a course; (*iii*) that in order to assail the transaction it must be made out that the course adopted was so detrimental to the interests of those who were interested as minors that it would be inequitable to allow the transaction to stand.

Per *Foster, J.*—In the absence of proof of mistake, inequality of position, undue influence, coercion or like ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable when some of the members of the family are minors or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner.

Kusum Kumari Dasi v. *Dasrathi Sinha* (1), followed.

Query.—Whether the equities of the parties in a case of a family settlement are identical with the equities in a question of legal necessity having regard to the elaborate discussion of the legal weight of a family settlement in the judgment in *Keramatullah Meah* v. *Keramatullah Meah* (2).

Appeal by defendant no. 5.

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

D. N. Varma, for the appellant.

B. N. Mitter, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the defendant no. 5 from a decree of the

(1) (1921) 34 Cal. L. J. 323. (2) (1918-19) 23 Cal. W. N. 118.

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DAWSON MILLER, C.J.

Additional Subordinate Judge of Shahabad reversing a decision of the Munsif of Arrah. The suit was instituted on behalf of two brothers, the sons of Kishun Chand, who are minors, in order to recover back from the defendant Haricharan, their father's brother, and from the present appellant their share in a house situated in Arrah town. It appears that Haricharan, the defendant no. 1, and Kishun Chand, his brother, the defendant no. 2, were at one time joint in estate but the only joint property which they held was the house in question in Arrah town which had previously belonged to their father. The evidence shows, and it is not disputed, that these two brothers were by no means on friendly terms. They had separated in estate but the house had not been divided by metes and bounds. The younger brother Kishun Chand had four sons who were also living with him in the same house. Kishun Chand and his brother being upon the terms which I have described, difficulties arose both as to the payment of rent and as to the payment of the municipal taxes and as to the carrying out of repairs to the house, the result being that the property was likely to depreciate in value owing to dilapidation without any repairs being carried out, and there was a further source of danger that in the strained relationship which existed between these two brothers no rent at all might be paid and the house might be sold up under a rent decree.

In these circumstances it was obviously necessary that some sort of arrangement should be made so that each brother should have a separate portion of the house divided by metes and bounds for which he alone would be responsible. When I say each brother, I include with Kishun Chand his sons, because Haricharan was entitled to one-half and Kishun Chand and his sons were entitled to the other. Now it so happened that the house, which apparently was not a very large one, was practically incapable of division into two equal parts and the question which then arose was what sort of arrangement should be

come to. There can be no doubt that if it were a question of partition by metes and bounds and if it was found that the property was of such a nature that it could not be conveniently partitioned into equal shares, then the proper course would be that one party or the other should in lieu of his half-share receive compensation from the other co-sharer. Now that is in effect what actually happened in this case. The younger brother Kishun Chand, in lieu of his moiety of the house, took from Haricharan a sum of Rs. 1,000 in satisfaction of his share and gave up the entire house to Haricharan. It is not contended that the sum of Rs. 1,000 was not adequate for the half-interest in the house. There is no dispute about that. When Haricharan got possession he, according to his case although there is no direct finding upon this matter, effected some improvements in the house thereby increasing its value. He also sold to the defendant no. 5, the present appellant, certain rooms in the house, and so matters continued for some time until the present suit was instituted on the 25th February, 1922, by Jaimangal and Ajodhya Prasad, the two minor sons of Kishun Chand, claiming to recover back their one-fifth share in the house on the ground that the transfer by their father to Haricharan was not for their benefit and was not justified by any legal necessity and was not in fact binding upon them.

The learned Munsif before whom the case came for trial considered that the arrangement which is now in question in the suit had been brought about with the help of the panches and might be looked upon as a partition between the two brothers. He also found that it was not practicable to partition the house as there was not room for two exit doors one for each party. It was also stated in the evidence, according to the Munsif, that the transaction was one which arose out of a desire for partition. The actual transfer by Kishun Chand to Haricharan was made by a sale-deed, but the learned Munsif considered that this was in fact tantamount to

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DAWSON MILLER, C.J.

partition. He found also that the transaction was for the benefit of both parties concerned including the plaintiffs and he dismissed the plaintiffs' suit.

On appeal the learned Subordinate Judge, although he does not question the facts found by the Munsif in so far as they were pure findings of fact and not inferences, dealt with the question purely from one point of view, namely, whether in fact Kishun Chand, the father of the plaintiffs, acting on their behalf in the transaction which I have mentioned, had done something which was really for the benefit of the plaintiffs, then minors, and the conclusion he came to was that Kishun Chand had not done the best he could have done in the circumstances and, therefore, he thought that he had not acted like a prudent guardian in selling away this house which was the only ancestral property remaining in the family merely in order to avoid family quarrels.

Now, perhaps I ought to point out that the learned Subordinate Judge appears to accept the view presented by certain of the witnesses that without disposing of the property there did not appear to be any way of escape from the daily quarrels that took place between the brothers, and in order to put an end to what was an intolerable state of affairs involving almost certain deterioration to the property, it was agreed that the elder brother should purchase the house paying adequate remuneration to the others for their share. With great respect to the learned Subordinate Judge it appears to me that he entirely failed to take into consideration the fact which to my mind was the essential element in this case, namely that this is not an ordinary case of transfer of property by the karta of the family involving the interest of the minors who not being of age were unable to give their consent. Had that been so and had the transferee failed to show that there was either any justifying necessity of the sale or any benefit to the estate, then no doubt the minors might

have had the sale set aside; but that was not really the transaction in this case. The transaction was really one in the nature of a family arrangement and further it was one certainly in the nature of a partition. Both these brothers were entitled to a half share in the house and for that purpose to have it partitioned by metes and bounds; but it having been found that in the circumstances, the house could not be partitioned in equal shares without a great deal of inconvenience, the only other course to adopt was that one party should take compensation for his share from the other. In such circumstances it seems to me that it is not necessary, in order to support a transaction of that sort, to show that there was any actual legal necessity for such a course. On the other hand, it seems to me that it must be made out that the course adopted was so detrimental to the interests of those who are interested as minors that it would be inequitable to allow the transactions to stand. Undoubtedly to my mind a partition in the circumstances was the proper thing. If that partition could not be effected in the ordinary way by dividing up the house by metes and bounds then the only other course to adopt was that which was in fact taken on the advice of the panches.

For these reasons, although the learned Subordinate Judge has arrived at a conclusion that it is not sufficiently proved that the course adopted was the best in the interest of the minors, still I think that the transaction, in the particular circumstances of the case, is unassailable and the decision must be set aside and the decree of the Munsif restored. The appellants are entitled to their costs here and in the lower appellate court.

FOSTER, J.—I agree. It appears to me also that the legal justification of the sale made by the plaintiffs-respondents' father Kishun Chand has been measured by too narrow a standard. The actual conclusion of the learned Subordinate Judge in the court of appeal has been that the transaction was not

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for the benefit of the minors, nor was it a prudent measure. Judged by itself, this would at first sight appear to be a final finding of fact; although, even so, the judgment would be open to the criticism that after quoting the case of *Hanooman Prasad Pandey* v. *Moonraj Koonweree*(1) it would have been a more satisfactory discussion of the case if the court had contemplated the question whether there were damages to be averted by the sale.

However, as I have said, it appears to me that the case can and should be discussed on a much wider legal ground. We can take it that the sale of the moiety of the house, made by the defendants 2 and 3, Kishun Chand and his elder son Nathuni Lal, was for a fair price. There is no doubt of this and it has not been disputed. We know that the price was settled by the panches appointed to settle the dispute between the parties in this matter. We also know that there were constant quarrels, and that those quarrels were such as would necessarily arise between two people who were not disposed to take the same view as to their enjoyment of a common property. The two brothers were certainly beset with difficulties as to the mode of enjoyment of their patrimony. They had already separated, but the house was still undivided. They each had a right to partition arising out of their legal status. Had they gone to court what would have happened? There is no doubt that their right of partition would have been declared; but it appears to me extremely likely that the provisions of Act IV of 1893 would have been invoked. In section 2 powers are given to a court to order sale instead of division in partition suits where the nature of the property to which the suit relates makes the division unreasonable or inconvenient; and in section 3 facilities are given to a shareholder in the property to acquire the property at a valuation by way of sale. The order so made will have under section 8 the force of a decree.

(1) (1854-57) 6 M. I. A. 393.

It may be noted that this method of dealing with the property is treated as a substitute for partition "whenever a decree for partition might have been made, it appears to the Court....." So perhaps the procedure may not amount precisely to a partition. In view of the facts proved in this particular case, the transaction may be regarded as a family settlement. A family settlement is (inter alia) an arrangement by which the method of enjoying the ancestral property comes to be settled between the parties. We know that to family arrangements great importance is attached by the courts.

Now reverting to the findings of fact, I have already mentioned that the price was a fair one; and I might also mention that though in the plaint there is a suggestion of a fraudulent and collusive transaction, yet in the judgments showing upon what lines the contest between the parties proceeded there is no suggestion of fraud or coercion or misrepresentation or undue influence or mutual mistake. If, therefore, the transaction was a partition or a family arrangement (whichever we may choose to call it), then it would seem that the case of *Kusum Kumari Dasi* v. *Dasarathi Sinha*(1) will be applicable. The rule there is very clearly stated, that in the absence of proof of mistake, inequality of position, undue influence, coercion or like ground, a partition or family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner.

The question might arise whether the equities of parties in case of a family settlement are identical with the equities in a question of legal necessity; having regard to the elaborate discussion of the legal

(1) (1921) 34 Cal. L. J. 323.

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FOSTER, J.

weight of a family settlement in the judgment in *Keramatullah Meah* v. *Keramatullah Meah*(1). In that judgment it is suggested that the doctrine of legal benefit is applicable, though it is at the same time stated that the court should not be disposed to scan with too much nicety the quantum of consideration. What appears to me, however, to be quite clear is the point with which I began, namely, that what my Lord has called the legal justification of the transaction should be tested on much wider grounds in the cases where there is a family arrangement in existence. If the learned Subordinate Judge had taken into his view the fact that there was a partition and a family arrangement, there can be little doubt that his judgment would have been more complete and more correct.

There is only one point to add. It appears to me that as this family arrangement has been acted upon by the defendant Haricharan's act in improving the house, and by the sale to the present appellant Dangal Ram, the court should be inclined not to upset the existing arrangement, especially as there is really no case made out sufficient to raise the apprehension that the respondents have been unfairly treated.

Appeal decreed.

APPELLATE CIVIL.

Over-rul. 28 Pat. 178 (P.C.)

Before Ross and Kulwant Sahay, J.J.

1926.

April, 23.

EAST INDIAN RAILWAY CO.

v.

BHIMRAJ SRILAL.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 77 *and* 140—*notice to the Traffic Manager, whether sufficient*—

*Appeal from Appellate Decree no. 756 of 1923, from a decision of P. T. Mansfield, Esq., I.C.S., District Judge of Gaya, dated the 2nd May, 1925, confirming a decision of M. Shah Mahammad Khalilur Rahman, Subordinate Judge of Gaya, dated the 11th February, 1923.

(1) (1918-19) 23 Cal. W. N. 118.

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Agent, actual receipt of notice by, effect of—appointment of officer to settle claims, whether amounts to delegation of power—Railway receipt, condition on the back of, that notice must be given to Traffic Manager, effect of—limitation—terminus a quo.

Section 77 of the Railways Act, 1890, provides that a person shall not be entitled to compensation for the loss, etc., of goods delivered to a railway for carriage unless a claim has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the goods for carriage by railway. Under section 140 a notice of claim for loss of goods despatched by rail must be given to the " Agent " of the company before a suit for compensation for loss can be entertained.

Held, therefore, that the service of notice of the claim on the Traffic Manager is not a sufficient compliance with the requirements of section 140.

Agent, East Indian Railway Co. v. *Ajodhya Prasad* (1), *Janki Das* v. *The Bengal-Nagpur Railway Co.* (2), *Assam Bengal Railway Co., Ltd.*, v. *Radhica Mohan Nath* (3), *Great Indian Peninsula Railway Co., Ltd.*, v. *Chandu Lal Sheopratap* (4), *Cawnpore Cotton Mills Co., Ltd.*, v. *Great Indian Peninsula Railway Co.* (5), *Paras Das* v. *East Indian Railway Co.* (6) and *Bombay, Baroda and Central India Railway Co.* v. *Manohar Lal Parwin Chand* (7), followed.

Held, further, that if it can be shown by the plaintiff that the notice, although addressed to a subordinate officer of the railway administration, did actually reach the Agent within the prescribed time, it would be a sufficient compliance with the requirements of the law.

Mahadeva Aiyar v. *The South Indian Railway Co.* (8), *The South Indian Railway Co.* v. *Narayan Aiyar* (9) and *Durga Prasad* v. *Great Indian Peninsula Railway* (10), followed.

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(1) (1919) Pat. 150.
(2) (1911-12) 16 Cal. W. N. 856.
(3) (1923) 72 Ind. Cas. 714.
(4) (1926) I. L. R. 50 Bom. 84.
(5) (1923) I. L. R. 45 All. 353.
(6) (1924) All. I. R. Lah. 504.
(7) (1923) I. L. R. 4 Lah. 46.
(8) (1922) 69 Ind. Cas. 59, F. B
(9) (1923) 77 Ind. Cas. 511.
(10) (1923) Pat. 284.

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A condition on the back of a railway receipt that notice of loss, etc., must be given to the Divisional Traffic Manager does not amount to a delegation of the power of the Agent to receive the notice prescribed by section 77 to the Traffic Manager. Likewise, the fact that a particular officer is appointed by the Agent to investigate and settle claims for loss of goods does not imply that the Agent has delegated his power to receive notice to that officer.

The notice required by section 77 of the Act must be given within six months from the date of delivery of the goods for carriage by railway and not from the date on which the goods ought, in ordinary course, to be delivered to the consignee.

Appeal by the defendant.

This appeal arose out of a suit for compensation for non-delivery of a bale of cotton goods consigned to the defendant, East Indian Railway Company, at Howrah for carriage to Rafigunj, a station on the line of the said company. Both the courts below decreed the suit and the railway company appealled to the High Court.

The only point for consideration was whether the suit was incompetent for want of notice as prescribed by section 77 of the Indian Railways Act.

The facts found were that the bale was consigned on the 9th of July, 1920; that several letters were sent by the plaintiff, who was the consignee, to the Divisional Traffic Manager, making a claim for compensation for non-delivery of the goods; all these letters were within six months from the date of consignment, and they were replied to by the Traffic Manager. On the 20th of January, 1921, the plaintiff sent a registered notice to the Agent through his pleader claiming compensation for the loss of the goods. The suit was brought on the 21st of May, 1921, and in the plaint the cause of action was alleged to have accrued on the 24th of July, 1920, when the bale ought to have been delivered at Rafiganj.

The Munsif found that the notice to the Agent was within six months from the date when the cause of action accrued to the plaintiff, and that the cause of action arose when the goods were not delivered to the plaintiff. He further found that letters claiming compensation had been sent to the Divisional Traffic Manager and he, apparently, was of opinion that such letters amounted to a notice as prescribed by law. The District Judge on appeal did not base his decision upon the first ground taken by the Munsif. He held, however, that the notice to the Traffic Manager was a good notice to the Agent within the meaning of sections 77 and 140 of the Indian Railways Act. He relied for this purpose upon *East Indian Railway Company* v. *Kalicharan Ram Prasad*(1). He further referred to the fact that in the railway receipt (Exhibit 7) granted by the railway company on receipt of the goods, there were certain conditions printed on the back, one of which was that notice was to be given to the Divisional Traffic Manager in case of loss, otherwise the railway would not hold itself responsible, and the learned District Judge concluded from this that the railway would be responsible if notice was given to the Divisional Traffic Manager. He further referred to the fact that the replies sent by the Traffic Manager showed that he had power to settle claims and he, therefore, considered that powers had been delegated to him by the Traffic Manager and held that the notice given to the Traffic Manager was a sufficient notice according to law.

N. C. Sinha, *N. C. Ghosh* and *B. B. Ghosh*, for the appellant.

S. M. Mullick and *B. C. Sinha* for the respondents.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): It is clear on reference to sections 77 and 140 of the Indian Railways Act that a notice must be given to the Agent of the

(1) (1922) 8 Pat. L. T. 215.

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company before a suit for compensation for loss can be entertained. It is settled law that notice to a subordinate officer of the railway company is not a sufficient compliance with the provisions of the law, and the learned District Judge does not base his decision on such ground, nor has it been argued before us on behalf of the plaintiff-respondent that a notice to the Traffic Manager was a sufficient notice as required by law.

The question, however, is whether a notice to the Traffic Manager can be considered to be a notice to the Agent. The decisions of the various High Courts on this point are almost uniform. In *The Agent, East Indian Railway Company* v. *Ajodhya Prasad*(1) a Division Bench of this court held that a notice under section 77 of the Indian Railways Act, to be a valid notice, must be served upon the Agent or Manager of the company and not upon a subordinate official of the railway company, and that any communication addressed to the District Traffic Manager is not a notice in accordance with the requirements of section 77 read with section 140 of the Indian Railways Act. In *Janki Das* v. *The Bengal-Nagpur Railway Company* (2) Sir Lawrence Jenkins held that a notice of claim for loss of goods despatched by rail given to the Goods Superintendent did not comply with the requirements of sections 77 and 140 of the Railways Act. In *The Assam Bengal Railway Company, Limited,* v. *Radhika Mohan Nath* (3) a Division Bench of the Calcutta High Court held that a service of notice on the Traffic Manager was not a sufficient compliance with the Act and the notice must be given to the Agent of the company. The Bombay High Court has taken the same view in *The Great Indian Peninsula Railway Company, Limited,* v. *Chandulal Sheopratap*(4). The same view was taken by the Allahabad High Court—[see *Cawnpore*

(1) (1919) C. W. N. (Pat.) 150.
(2) (1911-12) 16 Cal. W. N. 356.
(3) (1923) 72 Ind. Cas. 714.
(4) (1926) I. L. R. 50 Bom. 84.

Cotton Mills Company, Limited, v. *The Great Indian Peninsula Railway Company*(1) and the cases cited therein], and by the Lahore High Court [see *Paras Das* v. *The East Indian Railway*(2) and *Bombay, Baroda and Central India Railway Company* v. *Manohar Lal Parwin Chand* (3)]. In *Mahadeva Aiyar* v. *The South Indian Railway Company*(4) a Full Bench of the Madras High Court considered the question of notice, and two of the learned Judges composing the Full Bench held that where the notice under section 77 read with section 140 of the Railways Act is sent to the District Traffic Superintendent and there is nothing to show that the power of the Agent to receive such notices had been delegated to that official, or that the railway company by its rules or course of conduct had held out to the public that the notices might be sent to that officer instead of the Agent, and it is not proved that the Agent became aware of the notice within the prescribed time, a suit for damages for short delivery of goods against the railway company would not be maintainable. Kumaraswami Sastri, J., however, held that section 140 was only an enabling provision and that its object was to see that the notice provided for by it somehow reaches the Agent, and that in cases where a subordinate railway official sends on the notice to the Agent or informs him of its contents within six months, there is a substantial compliance with the requirements of the Act, and that an Agent can depute a subordinate officer of the company to receive the notice. In *The South Indian Railway Company* v. *Narayana Aiyar*(5) a similar view was expressed by the Madras High Court where it was held that if it is found that the notice required by section 77 of the Act has not been given to the Agent of the railway, but was sent to some subordinate officer of the railway, the plaintiff in order to

(1) (1923) I. L. R. 45 All. 353.
(2) (1924) A. I. R. (Lah.) 504.
(3) (1923) I. L. R. 4 Lah. 46.
(4) (1922) 69 Ind. Cas. 59, F. B.
(5) (1923) 77 Ind. Cas. 511.

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succeed must prove either that the power of the Agent to receive notice under section 140 of the Act had been delegated to the subordinate officer who had actually received the notice or that the company by its rules or course of business had held out to the public that notices ought to be given to such officer instead of to the Agent.

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These Madras decisions, therefore, proceed on the principle that the notice has to be given to the Agent, and although the notice might be addressed to a subordinate officer of the railway company, yet if that notice actually reaches the Agent within the prescribed time, it would amount to a sufficient compliance with the requirements of the law. A similar view appears to have been expressed by this court in *Durga Prasad* v. *Great Indian Peninsula Railway* (1) where a claimant who had failed to comply with clause (*c*) to section 140 of the Railways Act was held entitled to prove that the notice was in fact delivered to the Agent under clause (*a*) to the section. In that case the notice was addressed to the Agent, East Indian Railway, at Howrah, but the office of the Agent was not at Howrah but at Fairlie Place, Calcutta. The notice was received by the General Traffic Manager of the East Indian Railway at Howrah who then sent the letter to the Divisional Traffic Manager who, after carrying on a correspondence with the plaintiff for sometime, finally wrote to him denying liability of the railway company. It was held that although the notice was not served in accordance with clause (*c*) of section 140, yet, if, in fact the notice reached the Agent as contended for by the plaintiff in that suit, it was a good service under clause (*a*) of section 140. In my opinion this is a sound view of the law, and if it can be shown by the plaintiff that a notice of claim for loss of goods, although addressed to a subordinate officer of the railway administration, did actually reach the Agent within the time prescribed by law it would be a

(1) (1923) Cal. W. N. (Pat.) 284.

sufficient compliance with the requirements of the law. All the High Courts, however, agree in holding that a notice must be actually given to the Agent. In the present case it has not been shown that the notice sent to the Divisional Traffic Manager reached the Agent. In fact the plaintiff himself did not consider the notice to the Divisional Traffic Manager to be a sufficient compliance with the law inasmuch as he himself sent a duly registered notice to the Agent on the 20th of January, 1921. This was, however, beyond six months from the date of delivery of the goods to the railway company, and was not a compliance with the requirements of section 77 of the Act.

As regards the observation of the learned District Judge that there was a delegation of power to the Traffic Manager and that therefore the notice to the Traffic Manager was a valid notice, I am of opinion that this contention is not sound. In the first place no such plea was taken by the plaintiff. No issue was raised on the question of fact as to whether there was a delegation of the powers of the Agent to the Traffic Manager. There is absolutely no evidence on the point except the printed conditions on the back of the receipt given by the railway company to the consignor when the goods were delivered to the company. One of the conditions on the back of the receipt was that notice must be given to the Divisional Traffic Manager before a claim can be entertained. That did not in any way amount to a delegation of the power of the Agent to receive notices prescribed by section 77 of the Act to the Traffic Manager. It was simply a condition prescribed for speedy investigation into claims. No doubt, it had been held in the Madras High Court and also in some of the other High Courts that a delegation of authority will be presumed from rules framed by the railway company or from the course of conduct of the railway company which might lead the public to believe that notice given to a particular officer of the company

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would be a valid notice under section 77 of the Act. But in the present case there is no such allegation and no such proof. The fact that a particular officer is appointed by the Agent to investigate into and settle claims for loss of goods does not show that the Agent delegated his powers to receive notice to such officer. I am clearly of opinion that in the present case it has not been shown that the Divisional Traffic Manager had any delegated powers to receive the notice, and that the notice given to the Traffic Manager was not a sufficient compliance with the requirements of law.

Under the circumstances it is clear that the present suit cannot be maintained for want of notice to the Agent within six months of the date of delivery of the goods and the claim of the plaintiff must therefore be dismissed. This appeal is decreed and the plaintiff's suit dismissed. The ground of dismissal, however, is a technical ground and the plaintiff has actually suffered loss on account of the non-delivery of the goods to him: I am, therefore, of opinion that although the suit is dismissed he is not liable to pay costs, therefore, although the appeal is decreed, no costs are allowed to the appellant in any court.

Ross, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

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March, 24

KHIRI CHAND MAHTON

v.

MUSSAMMAT MEGHNI.*

Court-fees Act, 1870 (Act VII of 1870), section 7(iv) (c) —suit for separate and essential declarations—ad valorem court-fee payable—test to be applied.

*In the matter of court-fee in Second Appeal no. 1388 of 1925.

A relief which is unnecessary and follows as a matter of course from the decision in favour of the plaintiff on the other reliefs is not a consequential relief.

But where, in a suit, the first relief related to a declaration as to the general title of the plaintiff to all the properties inherited by her from her husband and the second relief related to a particular deed of transfer executed by defendant no. 1 in favour of defendant no. 2 with respect to a particular part of the estate inherited by the plaintiff from her husband, *held*, that the two reliefs were not co-extensive but separate and necessary and, therefore, that the suit was one for a declaration and consequential relief, an ad valorem court-fee being payable under section 7(*iv*) (*c*), Court-fees Act, 1870.

Shaikh Rafiquddin v. *Haji Shaikh Asgar Ali* (1), *Mahabir Prasad* v. *Shyam Bihari Singh* (2), and *Ram Ekbal Singh* v. *Sarjug Prasad Misser* (3), approved.

Mussammat Noowooagar Ojain v. *Shidhar Jha* (4), *Parvatibai* v. *Vishvanath Ganesh* (5) and *Jhumak Kamti* v. *Debu Lal Singh* (6), distinguished.

Appeal by defendant no. 2.

The facts of the case material to this report are stated in the Order of the Court.

Sant Prasad, for the appellant.

Shadhi Shaikher Prasad Singh and *Lachmi Narain Sinha*, Government Pleader, for the respondents.

JWALA PRASAD AND BUCKNILL, JJ.—The question is: what court-fee is payable upon the plaint in the present case filed in the court of the Munsif of Bihar and upon the memorandum of appeal filed by the defendant in the court of the District Judge of Patna?

In the plaint the reliefs sought are as follows:

(*i*) It may be held by the court that the disputed properties form portion of the properties left by the husband of the plaintiff; that defendant no. 1 has no title thereto and that she has no right to transfer the same.

(1) (1921) 63 Ind. Cas. 38.
(2) (1924) I. L. R. 3 Pat. 795.
(3) M. J. C. 49 of 1921.
(4) (1918) 3 Pat. L. J. 194.
(5) (1905) I. L. R. 29 Bom. 207.
(6) (1910) 22 Cal. L. J. 415.

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(2) On determination of relief no. 1 it may be held that defendant no. 1 had no right to execute the sale-deed, dated the 3rd August 1920 and that neither it has affected the title of the plaintiff nor has defendant no. 2 acquired any right thereby.

(3) If during the pendency of this suit the plaintiff be dispossessed of the disputed properties, then on court-fee being taken she may be awarded a decree for recovery of possession of the disputed properties.

(4) The costs in court with interest up to the date of realization may be awarded to the plaintiff against the defendants.

(5) Such other reliefs as be deemed equitable by the court may be decreed in favour of the plaintiff.

The plaintiff's case as laid in the plaint is based upon the following facts:—

It is said that one Tarni Mahton had two sons Puran Mahton and Budhan Mahton. He died while joint with his sons, and after his death the two sons continued to be members of a joint Mitakshara family. Defendant no. 1 Mussammat Jogia is wife of Puran Mahton. The plaintiff is the wife of Budhan Mahton. Puran is dead. It is said that when he died he was joint with Budhan Mahton and consequently the latter succeeded to the properties by right of survivorship as the sole surviving male member. Budhan died in 1909. The plaintiff's case is that she has succeeded to the property as his widow under the Hindu Law and that the defendant no. 1 Mussammat Jogia, wife of Puran, is entitled only to maintenance. Continuing, the plaint states that the plaintiff obtained possession of the property and has been enjoying it; and that the defendant no. 1 has not acquired any right to it nor any right to transfer or encumber the family property....In the record-of-rights, however, Mussammat Jogia defendant no. 1 got her name recorded as in possession and occupation of the family property along with the plaintiff, and the names of both the plaintiff and defendant no. 1 were recorded in the khatian with respect to the raiyati kasht lands of the family.

Defendant no. 1 though she had no right of any sort in the property nor had she possession thereof,

executed a sale-deed, on the 3rd of August, 1920, in respect of half of the properties left by the husband of the plaintiff, in the farzi name of defendant no. 2. It is also stated in the plaint that the defendant no. 3 for self and on behalf of other properties got a kabuliat and kishtbandi bond executed by the plaintiff in respect of the area and made defendant no. 2 also join in the execution of the said deed on the ground that her name was already entered in the survey khatian.

The aforesaid transactions, namely, the entry in the record-of-rights and the kabuliat are attacked by the plaintiff. She says that

> " although the sale-deed in question has not affected her title, yet the existence thereof is apprehended to cause dispute hereafter and a cloud is thereby cast over the title of the plaintiff in respect of the disputed properties; hence this suit ".

The cause of action is said to have arisen on the 3rd of August, 1920, the date of the execution of the aforesaid sale-deed.

The plaint was stamped with a court-fee of Rs. 15 under Article 17 of the Court-fees Act. The defendant in his written statement took a distinct plea as to insufficiency of the court-fee, and upon that plea issue no. 3 was raised in the trial court:

> " Is the court-fee paid sufficient?".

But at the actual hearing of the case this issue was not pressed. The suit, therefore, was determined by the Munsif upon the aforesaid court-fee.

The defendant no. 2, the transferee, appealed to the District Judge and paid a court-fee of Rs. 15 upon the memorandum of appeal; and upon an objection raised by the District Judge an additional court-fee of Rs. 15 was paid upon the ground that reliefs (1) and (2) constituted two separate declarations. The appeal was dismissed in the court below, and hence the defendant has filed a second appeal in this court.

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Under the orders of the Taxing Officer of this court, dated the 9th November, 1925, the appellant has paid the additional court-fee, as according to the Taxing Officer, an ad valorem court-fee was chargeable under section 7, clause (4) (*c*) of the Court-fees Act. If this view of the Taxing Officer is correct, the court-fees paid upon the plaint and the memorandum of appeal in the court below were insufficient, and the plaintiff and the defendant both have to make good their respective deficiencies.

The question as to the sufficiency or otherwise of the court-fee payable in the courts below does not lie within the province of the Taxing Officer; but it has to be determined by the court under section 12 of the Court-fees Act. Accordingly, this being the preliminary question before the appeal can be allowed to proceed, it has been placed before this Bench for a decision as to whether ad valorem court-fee should be charged upon the plaint and the memorandum of appeal in the court below under section 7, clause (4) (*c*) of the Court-fees Act.

The Taxing Officer in his order directing ad valorem court-fee to be paid upon the memorandum of appeal has relied upon a decision of mine as Taxing Judge in the case of *Ram Ekbal Singh* v. *Sarjug Prasad Misser*(1). The second relief in that case quoted by me in my judgment was similar to the second relief in this case. It sought to have an adjudication by way of a declaration that certain sales and transfers made by the defendants in that case were without any valid necessity and without any consideration and were not binding upon the plaintiff after the death of the limited owner who was a Hindu lady. I held that that relief clearly came under section 42 of the Specific Relief Act and was chargeable with a fixed court-fee of Rs. 10 which under the then provisions of the Court-fees Act was

(1) M. J. C. 49 of 1921.

chargeable. The first relief sought in that case was as follows:—

"That it may be held by the court that the plaintiff is a near gotia and reversionary heir of Mangal Prasad Singh."

That relief related to the title of the plaintiff in that case to the property in dispute and his locus standi to question the validity of the transfer made by the widow of the late holder of the property. The plaintiff in the present case is the widow of Budhan Mahton and claims to have succeeded to the properties on account of Budhan's brother, husband of defendant no. 1, having died in a state of jointness. This is the title claimed by her to the property and upon that title her right to question the validity of the transfer made by defendant no. 1 in favour of the defendant no. 2 rests. If that title was not at all disputed nor was there any reason for any apprehension on the part of the plaintiff of the title being seriously denied by the defendant, then the mere asking for a declaration by the court to declare her title in order to enable her to seek the principal and the second relief would not make the relief essential, and would not require any additional court-fee to be paid. In that case relief no. 1 would have been deemed simply a surplusage or as an ornamental relief. This is the view taken by me in the Miscellaneous Judicial case referred to above. I do not think that the other reliefs in the present case demand any serious consideration for they do not seem to affect the real character of the suit. The third relief was only a contingent one depending upon the finding of the court that the plaintiff was not in possession of the property and in that event she offered to pay court-fee for getting the relief for recovery of possession. That contingency has not arisen and the courts below have held that the plaintiff has been all along in possession of the property. Therefore that relief has become unnecessary and the occasion for calling for additional court-fee has not arisen.

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The fourth relief obviously is immaterial relating to costs. Depending upon the adjudication in her favour of the other reliefs, the fifth relief is what is often said to be an omnibus relief which does not in itself ask for a specific relief so as to make the plaintiff liable to pay court-fee upon it.

A number of authorities have been cited to us at the Bar, one of which is of our own court: *Mussammat Noowooagar Ojain* v. *Shidhar Jha*(1), in which Roe, J., held that a suit for avoidance of a registered deed of gift was chargeable with ad valorem court-fee upon the ground that the court was bound, upon deciding the suit in the plaintiff's favour, to send a copy of the decree to the office in whose book the deed was registered. The report of the case does not show the details of the reliefs sought in the case. The decision was entirely based upon certain previous authorities cited therein. One of these cases is *Parvatibai* v. *Vishvanath Ganesh*(2). In that case, however, there was a specific relief sought for sending a copy of the decision noted in the book containing a copy of the document with a view to have the cancellation of the deed noted in the register of documents kept in the Sub-registrar's office. In this case there is no prayer for sending a copy of the decision to the Sub-registrar and we cannot import a relief into the plaint in order to make the relief consequential and thus to charge court-fee thereon. If the court is bound to send a copy of the decree to the office of the Registrar it is no business of the party to ask for it, but it is the duty of the court to send it of its own accord.

The next case relied upon is *Jhumak Kamti* v. *Debu Lal Singh*(3). In that case it was held that a relief for a declaration coupled with a relief for confirmation of possession makes the suit one for a declaration and consequential relief. In that case

(1) (1918) 3 Pat. L. J. 194.
(2) (1905) I. L. R. 29 Bom. 207.
(3) (1916) 22 Cal. L. J. 415.

also there was a specific prayer made by the plaintiff for confirmation of possession. No such prayer has been made in the present case, and upon the principle already stated we cannot add that prayer to the reliefs sought by the plaintiff and make the relief a consequential one.

The decision of this court in *Sheikh Rafiq-ud-din* v. *Haji Shaikh Asgar Ali*(1) (Das and Adami, J.J.) has been cited to show that two declarations do not necessarily make a suit for a declaration and a consequential relief. Similarly, the case of *Mahabir Prasad* v. *Shyam Bihari Singh*(2), has been cited to show that a relief which is unnecessary and follows as a matter of course from the decision in favour of the plaintiff on the other reliefs, is not a consequential relief. In that case the principal relief asked for a declaration that a certain transfer made by a judgment-debtor of the plaintiff was with a view to defeat the decree of the plaintiff and an additional relief was asked that the plaintiff be declared entitled to realise the decree from the estate of the defendant judgment-debtor. It was held that the last relief was a surplusage, for the plaintiff would be entitled to execute the decree and attach the property without any declaration by the court upon the decision obtained on other reliefs in his favour.

In the case of *Shaikh Rafiq-ud-din* v. *Haji Shaikh Asgar Ali*(1), the two reliefs asked for, as a matter of fact constituted one relief, and the declaration of the first relief rendered unnecessary the declaration with respect to the second relief.

Upon the principles of the aforesaid decisions the question is whether the two principal reliefs claimed by the plaintiffs in the present case are separate and necessary, or the decision of one of them renders the decision of the other relief unnecessary, or the other is obtainable without any further declaration by the court and merely upon the strength of the decision of

(1) (1921) 63 Ind. Cas. 38. (2) (1924) I. L. R. 3 Pat. 795.

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one of the reliefs. The first relief in the present case relates to a declaration as to the general title of the plaintiff to all the properties inherited by her from husband. The second relief relates to the particular deed of transfer executed by defendant no. 1 in favour of defendant no. 2 with respect to a particular property as part of the estate inherited by her from her husband. The second relief is admittedly essential; the first relief will be essential only when upon the plaint it would appear that it is necessary for the plaintiff to have any doubt or cloud cast upon the estate inherited by her, removed. The two astounding facts stated in the plaint: the entry of the name of defendant no. 1 in the record-of-rights and in the kabuliat in favour of the proprietor, would go to show that the plaintiff is apprehensive of the claim of defendant no. 1 not only to the property in suit but to a moiety of the entire estate in question and that the deed in question was only a first move in the matter, with a view to have it established that the husband of defendant no. 1 died while separate from that of defendant no. 2. The plaintiff, on the other hand, claims the entire property on the ground that the husband of defendant no. 1 pre-deceased her husband and died while joint with him, the whole estate having passed by survivorship to the husband of the plaintiff.

Therefore, in the present case we are not prepared to hold that the two reliefs are co-extensive or that one of them is surplusage. We are prepared to give the plaintiff an option to state which of the aforesaid reliefs she would wish to be deleted as being superfluous and not required by her. If she does not intimate her intention within three days it will be presumed that both the aforesaid reliefs are essential, which will render the plaintiff liable to pay ad valorem court-fee on her plaint as estimated by the Stamp-Reporter.

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The learned Vakil on behalf of the plaintiff states to-day that the plaintiff is not willing to strike

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off any of the reliefs. For the reasons already given in the aforesaid order, ad valorem court-fee must, therefore, be paid on the plaint as well as on the memorandum of appeal in the lower appellate court. The defendant, who was appellant in the lower appellate court, has already paid the deficit court-fee; and the learned Vakil for the plaintiff says that he is ready to deposit the court-fee payable upon the plaint. Let him do so.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

MAHANTH RUKMIN DAS

v.

DEVA SINGH.*

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Suits Valuation Act, 1887 (*Act VII of* 1887), *section* 11, *meaning of—under-valuation, appeal to the District Judge by reason of—Second Appeal to High Court—Valuation increased beyond the pecuniary jurisdiction of District Judge—order of District Judge, whether without jurisdiction.*

The plaintiff valued the present suit, for the purposes of jurisdiction, at Rs. 2,550. The defendants in their written statement contended that the suit was under-valued and the court-fee paid was insufficient. Upon this plea the Subordinate Judge framed an issue which, however, was not pressed at the trial and was accordingly decided in favour of the plaintiff. The suit was decreed and on appeal to the District Judge by the defendant the plaintiff did not object to the valuation of the appeal or to the jurisdiction of the District Judge to entertain the appeal. The decree of the first court was reversed and the plaintiff preferred a second appeal to the High Court which, however, held that the valuation of the suit, and, therefore, of the appeal, should have been Rs. 8,000. The appellant made

* In the matter of appeal from Appellate Decree no. 666 of 1923, from a decision of Rai Bahadur J. Chatterjee, Additional District Judge of Patna, dated the 9th April, 1923, reversing a decision of Maulavi Saiyid Ghalib Hussain, Additional Subordinate Judge of Patna, dated the 21st February, 1922.

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good the deficiency in the court-fee, but on the strength of this order contended that the appeal to the District Judge was incompetent and his order without jurisdiction.

Held, that the under-valuation prejudicially affected the disposal of the appeal on the merits within the meaning of section 11(*1*) (*b*) of the Suits Valuation Act, 1887, and, therefore, that the order of the District Judge was without jurisdiction. The High Court treated the appeal as an appeal from an original decree, disregarding the appellate decree passed by the District Judge.

Mohini Mohan Misser v. *Gour Chandra Rai* (1) and *Sah Radha Krishna* v. *Babu Mahadeo Lal* (2), followed.

Kelu Achan v. *Cheriya Parvathi Kethiar* (3) and *Vettekatte Veetil Charatto* v. *K. A. Krishna Nair* (4), dissented from.

Maharaja Bahadur Kesho Prasad Singh v. *Lakhu Rai* (5), distinguished.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of the court.

Manuk (with him *S. Dayal* and *N. C. Sinha*), for the appellant:

Sir Ali Imam (with him *S. N. Bose*), for the respondents.

JWALA PRASAD and BUCKNILL, J.J.—Mr. Manuk on behalf of the appellant contends that the decree made by the court below must be set aside upon the sole ground that the appeal filed by the defendants in that court was wholly incompetent. The ground for this contention urged is that the value of the subject-matter of the suit was over Rs. 5,000 and hence the appeal from the decision of the Subordinate Judge who tried the case lay directly to the High Court, and not to the District Judge.

The plaintiff, who is the appellant before us, valued the suit for the purpose of jurisdiction at

(1) (1921) 5 Pat. L. J 397.
(2) (S. A. 1204 of 1922.)
(3) (1924) I. L. R. 46 Mad. 631, F. B.
(4) (1921) 62 Ind. Cas. 715.
(5) (1923) 4 Pat. L. T. 525.

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Rs. 2,550. The defendants in their written statement stated that the properties in the suit were under-valued and the court-fee paid was insufficient. Upon this plea the Subordinate Judge raised an issue as to the sufficiency of valuation and the court-fee paid by the plaintiff, that is, issue no. 1. At the hearing this issue was not pressed, and the court held.

"The court-fee paid according to law is all right."

The suit was decreed.

The defendants appealed to the District Judge, and valued their memorandum of appeal according to the valuation thereof mentioned by the plaintiff in his plaint, and they paid the same amount of court-fee as was paid by the plaintiff on his plaint. The plaintiff, who was respondent before the learned District Judge, did not object to the valuation of the appeal or the jurisdiction of the District Judge to entertain the appeal. The District Judge set aside the decree of the Subordinate Judge and dismissed the plaintiff's suit. The plaintiff has come to this court.

In this court the Stamp-Reporter discovered that the subject-matter of the litigation was under-valued and, according to him, the proper valuation should have been over Rs. 8,000. The plaintiff made up the deficiency in the court-fee paid by him on the plaint and on the memorandum of appeal in this court. Yesterday, the defendants-respondents objected to the valuation of the Stamp-Reporter and the question came before us under sections 10 to 12 of the Court-fees Act and we by our order passed yesterday upheld the valuation fixed by the Stamp-Reporter and directed the defendants-respondents to make up the deficiency, or else the matter would be dealt with under sections 10 to 12 of the Court-fees Act.

It is now contended on behalf of the appellant that the value of the subject-matter of the litigation having been now finally settled to be over Rs. 5,000,

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the court below had no jurisdiction to entertain the appeal filed by the defendants. In support of this contention two rulings of this court have been cited [*Mohini Mohan Misser* v. *Gour Chandra Rai*(1) and an unreported decision in the case of *Sah Radha Krishna* v. *Babu Mahadeo Lall Goenka*(2), decided on the 22nd June, 1925]. The defendants, on the other hand, rely upon the decision of this court in *Maharaja Bahadur Kesho Prasad Singh* v. *Lakhu Rai*(3) and two other decisions: one a Full Bench decision of the Madras High Court in *Kelu Achan* v. *Cheriya Parvathi Nethiar*(4) and the other in *Vattekatte Veetil Chorotto Amma's daughter Ammalu Ammal* v. *K. A. Krishna Nair*(5).

The Suits Valuation Act (Act VII of 1887) has laid down the rules as to how a case of this kind should be dealt with. Section 11, clause (*1*), says—

"An objection that by reason of the over-valuation or under-valuation of a suit or appeal, a court of first instance or lower appellate court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto, shall not be entertained by an appellate court unless

(*a*) the objection was taken in the court of first instance at or before the hearing at which issues were framed and recorded, or in the lower appellate court in the memorandum of appeal to that court, or

(*b*) the appellate court is satisfied for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and, that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

Clause (2) says—

"If the objection was taken in the manner mentioned in clause (*a*) of sub-section (*1*), but the appellate court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the court of first instance or lower appellate court."

In this case an objection was taken as to the valuation by the defendants themselves in their written statement in the court of the first instance. Therefore,

(1) (1921) 5 Pat. L. J. 397.
(2) S. A. no. 1204 of 1922.
(3) (1923) 4 Pat. L. T. 525.
(4) (1924) I. L. R. 46 Mad. 631, F. B.
(5) (1921) 62 Ind. Cas. 715.

clause (*a*) of sub-section (*1*) applies to this case. It is now concluded by the decision of this court that the suit as well as the appeal in the court below were under-valued and that the proper value was such as took the matter out of the jurisdiction of the lower appellate court. Therefore, the first part of clause (*b*) is also satisfied. In accordance with this section it is not enough to set aside the decree of the court below unless under the second part of clause (*b*) the under-valuation prejudicially affected the disposal of the suit or the appeal on its merits. There is no question as to the valuation not having affected the disposal of the suit by the court of the first instance on account of its valuation where the suit was tried by the Subordinate Judge of Patna, who had local jurisdiction over the subject-matter in suit and his pecuniary jurisdiction was unlimited. Therefore, it did not matter whether the value of the suit was mentioned in the plaint to be Rs. 2,550 or over Rs. 5,000 or Rs. 10,000. The Subordinate Judge in question would in any case have tried the suit. Therefore, the under-valuation did not affect the disposal of the suit on its merits in the trial court

The matter is, however, different so far as the lower appellate court is concerned. If the appeal were properly valued, then the lower appellate court would have no jurisdiction to entertain the appeal or dispose of it on its merits. The appeal then would have come directly to the High Court where it could have been heard and disposed of by a Bench consisting of two Judges. No doubt, it has ultimately come to a Bench of this court consisting of two Judges but it has come as a second appeal and the power of the court is limited to points of law only. In other words, the court cannot enter into the merits of the case, whereas if it had come as a first appeal it would have entered into the merits of the case. Therefore, literally speaking, the disposal of the appeal on its merits has been affected on account of the under-valuation. The view taken by the Madras High

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Court does not commend itself to us, and with great respect to the decision of that court, which is a decision of a Full Bench, we do not find ourselves in agreement with the view of that court. We think that the decision is not in accordance with the true interpretation of section 11 of the Suits Valuation Act. It does not seem to have taken into consideration the import and effect of the words in that section " the disposal of the suit or appeal on its merits ". The decision of this court in *Maharaja Bahadur Kesho Prasad Singh* v. *Lakhu Rai*(1), is fully in accordance with the provisions in the section; but it is a decision with respect to the circumstances and facts which were before the court in that case. The court however, ultimately found it equitable to enter into the merits of the case and to treat the second appeal as a first appeal. The other two cases of this court, particularly the unreported case, are on all fours with the present case.

We think the order which will meet with the requirements of the section and the ends of justice should be to treat this second appeal as a first appeal, ignoring the judgment of the court below and allowing the parties to go into the merits of the case, that is, into the evidence, etc., just as in a first appeal.

The appellant has consented to supply typed copies of the evidence for the use of the court and also for the use of the respondents.

According to the order which has just been passed it would seem that the appellant here becomes the respondent and the respondents become the appellants. The memorandum of appeal which was filed in the court below by the defendants will be treated as the grounds of appeal to this court. It will be open to the appellants to add to the grounds already mentioned in the memorandum of appeal in the court below. The question of cost of the paper-

(1) (1923) 4 Pat. L. T. 525.

books will depend upon the result of the final hearing of the case.

Mr. N. C. Sinha on behalf of the appellant says that he will print paper-books of the oral and documentary evidence, for he considers that it will be less costly and inconvenient than to get the paper-books typed. He must do so in consultation with the Deputy Registrar of the Court.

APPELLATE CIVIL.

Before Das and Ross, J.J.

MALIK FAZLUL RAHMAN

v.

MUSSAMMAT KOKILA.*

1926.

April, 8.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 16—*Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 69—*Application for execution of order under, by transferee of the land—Person claiming adversely to the decree-holder, whether entitled to execute the decree.*

F instituted proceedings under section 69 of the Bengal Tenancy Act, 1885, against the tenants of certain land and obtained an order appointing an officer to appraise or divide the produce of the land. The land in respect of which the decree had been obtained passed into the hands of *K* who had obtained a decree against *F* in the civil court. *K* sought to execute the order obtained by *F* against the tenants on the ground that she was the representative-in-interest of *F*. Order XXI, rule 16, Code of Civil Procedure, provides: "Where a decree.....is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder."

*Appeal from appellate order nos. 192, 301 to 328 of 1925, from an order of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 19th of May, 1925, confirming an order of Babu Sadhu Charan Mahanti, Munsif of Gaya, dated the 25th February, 1925.

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Held, (*i*) that there was no transfer of the order to *K* by operation of law within the meaning of Order XXI, rule 16; (*ii*) that *K* was not the representative-in-interest of *F* and that, therefore, she was not entitled to execute the order.

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

S. Dayal (for *Kailashpati*), *Janak Kishor* and *Sarju Prasad*, for the appellants.

Hasan Jan and *Sultanuddin Hussain*, for the respondents.

DAS, J.—The question involved in these analogous appeals turns on the construction of Order XXI, rule 16, of the Code of Civil Procedure. The facts are these: One Fazlur Rahman instituted certain proceedings under the provisions of section 69 of the Bengal Tenancy Act and obtained decrees as against tenants. It appears that the land in respect of which the decrees had been obtained passed into the possession of Mussammat Kokila, who appears to have got a decree against Fazlur Rahman in the Civil Court. Mussammat Kokila now claims to execute the decrees obtained by Fazlur Rahman and she contends that her right to execute the decrees is conceded to her by Order XXI, rule 16, of the Code.

The learned Advocate appearing on behalf of the respondent concedes that there is no transfer or assignment in writing in this case; but he contends that there is a transfer by operation of law. I am wholly unable to accept this contention. Mussammat Kokila is in no sense the representative-in-interest of Fazlur Rahman. She claimed as against Fazlur Rahman and obtained a decree as against Fazlur Rahman. It is difficult to understand how it can be said that because she has obtained a decree in respect of the disputed land against Fazlur Rahman, therefore it must be held that there is a transfer by operation of law of the decrees under section 69 which had been obtained by Fazlur Rahman as against the tenants.

The decision of the lower appellate court is, in my opinion, erroneous. I would allow these appeals, set aside the orders passed by the courts below and dismiss the application of Mussammat Kokila. The respondents must pay the costs of these proceedings in all the courts.

Ross, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

MUSSAMMAT RAMJHARI KOER

v.

LALA KASHI NATH SAHAI.*

1925-1926.

Oct., 26, 27.
March, 11.

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 132 *and* 148—*Prior mortgagee, suit by—non-joinder of second mortgagee, effect of—decree and sale, whether affects the second mortgagee's right to redeem—second mortgagee, suit for redemption by—Article* 148, *applicability of.*

A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgagee and is not bound either by the decree in the prior mortgagee's suit or by the sale held in execution thereof.

The second mortgagee not having been made a party to a suit by the prior mortgagee, who obtained a decree and in execution thereof got the mortgaged property sold, subsequently brought a suit to redeem the prior mortgage.

The defendant pleaded that the suit was barred by Article 132 of the Limitation Act, 1908, which provides a period of 12 years for a suit " to enforce payment of money

*Appeal from Appellate Decree no. 398 of 1923, from a decision of Babu Akhauri Nityanand Singh, Subordinate Judge of Saran, dated the 18th January, 1923, reversing a decision of Rai Krishna Bihari Sharan, Munsif of Chapra, dated the 21st December, 1921.

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charged upon immoveable property". Plaintiff contended that the suit was governed by Article 148 which provides a period of 60 years for a suit "against a mortgagee to redeem or to recover possession of immoveable property mortgaged".

Held, that whatever right the second mortgagee had before the sale remained intact, and the suit brought by him to redeem the prior mortgage was governed by Article 148.

Basant v. *Inder Singh*(1), *Priya Lal* v. *Bhora Champa Ram*(2) and *Harprasad Lal* v. *Dal Mardan Singh*(3), followed.

Bidhi Ram Bandhopadhya v. *Sarveshwar Biswas*(4), *Bitraguntа Appayya* v. *Addanki Venkataramanayya*(5) and *Lakshmanan Chettiar* v. *Sella Muthu Naicker*(6), dissented from.

Appeal by the plaintiff.

This appeal arose out of a suit for redemption of a mortgage which had been dismissed by the learned Subordinate Judge on the ground of limitation.

In Mouza Sarai Srikant, Tauzi no. 10752, a 5-annas 4-pies share belonged to Lala Fatah Bahadur and Lala Lal Bahadur. On the 11th of December, 1886, they executed a zarpeshgi in respect of a 4-annas share to the plaintiff's mother and the defendants 11 to 13. On the 28th of March, 1892, they mortgaged a 6-pies share to the defendant no. 5 and it appeared to have been the case of both parties that this 6-pies was out of the 4-annas given in the zarpeshgi. On the 16th of February, 1893, they executed a second mortgage to the plaintiff's mother and the defendants 11 to 13 in respect of the 4-annas share which had already been given in zarpeshgi in the year 1886, and which included the 6-pies already mortgaged to defendant no. 5. It appeared that the remaining 1-anna 4-pies out of 5-annas 4-pies had passed to defendants nos. 8 to 10. Defendant no. 5 instituted a suit to enforce his mortgage, which was Suit no. 50

(1) (1920) 2 Lah. L. J. 419.
(2) (1923) I. L. R. 45 All. 268.
(3) (1905) I. L. R. 32 Cal. 891
(4) (1909-10) 14 Cal. W. N. 439.
(5) (1924) 82 Ind. Cas. 864.
(6) (1924) 84 Ind. Cas. 801.

of 1894. In this suit the subsequent mortgagees were not made parties. A decree was obtained and the mortgaged property, viz. 6-pies share, was sold on the 26th October, 1895, and purchased by the defendants 1 to 3 in the farzi name of the defendant no. 4. Subsequently the second mortgagees, namely, the plaintiff's mother and the defendants 11 to 13, instituted a suit to enforce their mortgage of the 16th of February, 1893. In this suit neither the first mortgagee nor the purchasers in execution of his decree were made parties. A decree was obtained on the 26th February, 1896, and in execution of the decree the 4-annas share was sold on the 8th January, 1897, and purchased by the decree-holders themselves. The plaintiff's mother being dead, the plaintiff now claimed the 4-annas share as her heiress on the allegation that by a private partition she had been allotted the entire 4-annas share and the defendants 11 to 13 had no interest therein.

The present suit for redemption was instituted on the 17th of January, 1919. The contesting defendants, namely defendants 1 to 3, pleaded inter alia that the suit was barred by limitation, they having been in possession for more than 20 years and the claim of the plaintiff to enforce her second mortgage having been barred by lapse of time.

The learned Munsif held that the suit was governed by Article 148 of the Schedule to the Indian Limitation Act; and that the plaintiff had therefore 60 years to bring the suit from the date when the right to redeem accrued to her. He further held that as the plaintiff's predecessors in interest were not made parties in the suit of the first mortgagee, the plaintiff had still the right to redeem. He accordingly made a decree for redemption in favour of the plaintiff.

On appeal the learned Subordinate Judge set aside the decree of the Munsif on the ground that, although the plaintiff had got the right of redemption

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as her predecessors in interest were not made parties to the suit of the prior mortgagee, her right was barred by limitation, as in his opinion the Article applicable to the present suit was not Article 148, but Article 132 of the Indian Limitation Act, and he relied upon the decision of the Calcutta High Court in the case of *Nidhi Ram Bandhopadhya* v *Sarveshwar Biswas*(1). He accordingly dismissed the suit on the ground of limitation.

Against this decision of the Subordinate Judge the plaintiff appealed to the High Court; and the only question for consideration in this Second Appeal was as to the period of limitation for the suit.

K. P. Jayaswal, B. N. Mitter and *Sunder Lal*, for the appellant.

P. Dayal, for *Jadubans Sahay*, for the respondents.

Cur. adv. vult:

March, 11.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): It is clear that a second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof. It has been contended on behalf of the respondents that after the sale in execution of the decree of the prior mortgagee, the mortgage was extinguished and the purchasers remained in possession not as representatives of the prior mortgagee but as representatives of the mortgagor; and that, therefore, Article 148 has no application inasmuch as it provides for a suit against a mortgagee to redeem or to recover possession of the mortgaged property.

In my opinion this contention is not sound. So far as the second mortgagee is concerned, he is not bound by the decree or the sale in enforcement of the

(1) (1909-10) 14 Cal. W. N. 439.

prior mortgage. His position as a second mortgagee remains unaffected by the decree and the sale. He was a necessary party in the suit brought by the prior mortgagee and a decree obtained in his absence on the basis of the prior mortgage did not affect his right to redeem the prior mortgage. The fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more than 20 years does not, in my opinion, affect the right of the second mortgagee to redeem the first mortgage.

The question, however, remains as to whether Article 132 or Article 148 of the Indian Limitation Act applies to the present case. In my opinion Article 132 has no application to the present suit. In the case of *Nidhi Ram Bandhopadhya*(1) mentioned above, the reasoning adopted was that the second mortgagee by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption which he had not as mortgagee. With very great respect to the learned Judges, I am unable to follow this reasoning. The right to redeem the prior mortgage was vested in the second mortgagee by virtue of his being a second mortgagee. This right was not acquired by him by his purchase at the sale in satisfaction of his mortgage debt. The learned Judges observed that " the omission of the prior mortgagee to include the second mortgagee in his suit has been held by this court not to deprive the second mortgagee of his right to redeem the prior mortgage; but it cannot be held that this interpretation of the law which is intended merely to save his right as second mortgagee gives him any additional right or extends the period during which under the law he can sue to enforce his rights. The right to redeem was held not to be lost. It was not held and in our opinion it was not intended to hold that a fresh period to enforce his right to redeem under his mortgage was given to him from the date of the purchase. We hold

(1) (1909-10) 14 Cal. W. N. 439.

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that Articles 134 and 148 of Schedule II of the Indian Limitation Act have no application in this case. The Article that applies is Article 132 of that Schedule under which limitation begins to run from the date when the mortgage debt became due ". I regret I am unable to agree with this reasoning. Once it is conceded that the second mortgagee had still the right to redeem and was not affected by the sale in execution of the prior mortgage, it must necessarily follow that whatever right the second mortgagee had before the sale in execution of the decree on the prior mortgage remained intact. Under Article 148 the second mortgagee had 60 years to redeem the first mortgage and this right was consequently not affected by the sale in execution of the decree upon the prior mortgage. Article 132 provides for enforcement of payment of money charged upon immoveable property. The second mortgagee's right of redemption cannot, in my opinion, be considered to be a right to enforce payment of money charged upon immoveable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. This Article has, therefore, no application to a suit for redemption brought by the second mortgagee.

I am, therefore, unable to accept the view taken in the case of *Nidhi Ram Bandhopadhya*(1). This case was followed in two cases in the Madras High Court in *Bitragunta Appayya* v *Addanki Venkataramanayya*(2) and *Lakshmanan Chettiar* v *Sella Muthu Naicker*(3), and the reasoning adopted in these cases is similar to the reasoning adopted by the learned Judges in *Nidhi Ram's* case(1). The Lahore High Court has, however, differred from the view taken in *Nidhi Ram's* case(1) in *Basant* v *Inder Singh*(4). That Article 148 of the Schedule to the Limitation Act applies to the present case is

(1) (1909-10) 14 Cal. W. N. 439.
(2) (1924) 82 Ind. Cas. 864.
(3) (1924) 84 Ind. Cas. 301.
(4) (1920) 2 Lah. L. J. 419.

supported by the view taken by the Allahabad High Court in *Priya Lal* v. *Bhora Champa Ram*(1) and by the Calcutta High Court in *Harprasad Lal* v. *Dal Mardan Singh*(2).

I would therefore hold that the present suit was not barred by limitation and that the plaintiff was entitled to a decree for redemption.

The question remains what should be the form of the decree. The learned Munsif has ordered that the plaintiff will be entitled to redeem on payment of Rs. 50 together with interest thereon at the rate of 12 per cent. per annum from the date of sale, that is, 26th October, 1895, to the defendants nos. 1-3. This sum of Rs. 50 represents the price of the property fetched at the sale in execution of the decree upon the first mortgage. This is not a correct principle upon which redemption should be allowed. The puisne mortgagee is held to be entitled to redeem the prior mortgage on the hypothesis that so far as he is concerned the mortgage has not been extinguished and is still in existence. He must, therefore, pay to the prior mortgagee the entire amount due upon the prior mortgage on an account being taken less the sum of Rs. 50, being the purchase money at the first sale already paid to him. Upon such payment being made the plaintiff will acquire the right of the prior mortgagee, because what he redeems is not the premises but the prior encumbrance and he is entitled not to a conveyance of the premises, but to an assignment of the security.

This would necessitate a remand for the taking of the account and also directions declaring the rights of the parties to redeem each other and relating to other matters which would create complications. The parties have, however, come to terms and desire that a decree be made in the following terms: that the plaintiff's right to redeem be declared, that it be

(1) (1923) I. L. R. 45 All. 268. (2) (1905) I. L. R. 32 Cal. 891.

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declared that she will be entitled to redeem on payment to the defendants 1-3 of a sum of Rs. 100 only within three months from this date, that on her failure to do so, the suit will stand dismissed with costs. Each party is to bear its own costs throughout in the event of payment being made by plaintiff within the three months. It is represented that the plaintiff has deposited in the trial court a sum of money in accordance with the decree of that court. If so, and if there be no other objection to her doing so, she will be entitled to take the sum back from the court.

The appeal be decreed by consent on the above terms. The decrees of the courts below will be set aside and the suit decreed as directed above.

MULLICK, J.—I agree.

Appeal decreed.

APPELLATE CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

FARMAN KHAN

v.

KING-EMPEROR.*

1926.

March, 15, 16, 17, 18, 23.

Penal Code, 1860 (*Act XLV of* 1860), *section* 96, et seq—*Right of private defence, when open.*

Where the parties to a dispute collect and arm men to vindicate their rights or supposed rights and a conflict ensues, no question of the right of self-defence of the person arises.

Queen v. *Jeolal*(1), *Kalee Baparee*, In the matter of (2), *Kabiruddin* v. *Emperor*(3) and *Queen-Empress* v. *Prag Dat*(4), referred to.

* Criminal Appeal no. 25 of 1926, from a decision of Damodar Prasad, Esq., Sessions Judge of Purnea, dated the 1st of February, 1926.

(1) (1867) 7 W. R. 34.
(2) (1878) 1 Cal. L. R. 521.
(3) (1908) I. L. R. 35 Cal. 368.
(4) (1898) I. L. R. 20 All. 459.

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Circumstances in which homicide caused in the exercise of the right of private defence is justifiable, discussed.

When a person charged with causing injury to another pleads the right of private defence of property the onus lies on him to show that the property was his. It is not enough to show that neither he nor the injured party was in peaceful possession.

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

Manuk (with him *Md. Yunus*, *S. P. Varma* and *Bhagwat Prasad*), for the appellants.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

March, 23.

Ross, J.—This case had an unfortunate course, largely the result of an order passed by the District Magistrate of Purnea directing the Public Prosecutor to appear on behalf of the Government before the committing Magistrate and that his fees should be paid by the parties and he should receive instructions from the Court Inspector. This order is to be deprecated. It has resulted in a trial in which forty-seven witnesses were examined for the prosecution and which lasted for thirty-six days. Day after day the prosecution presented to the court evidence which was false, evidence which has been rejected by the assessors and the Sessions Judge, and which the learned Assistant Government Advocate has not attempted to support here. The case which the trial court found to be proved and which rests on a first information given by Lodhi chaukidar, is supported by the evidence of a dafadar and three chaukidars only. It differs from the official case of the prosecution in every respect and there can be no question that this trial has involved a great waste of public time and money.

The three appellants have been sentenced to three years' rigorous imprisonment under section 304 read with section 149 of the Indian Penal Code and to concurrent terms of one year under each of the sections

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ROSS, J.

148 and 324. I do not propose to discuss the case upon which the prosecution relied and which has been found to be false. I shall confine myself to the case upon which the appellants have been convicted.

The occurrence took place at 7.30 A.M. on the 22nd of May, 1925. Information was given at the police station, six miles distant, at 9.30 A.M. on the same day by Lodhi chaukidar to the effect that the morning about 6 A.M. two or three Muhammadans whom Gour Babu zamindar's men had brought from Bengal for cutting lac and forty or forty-two peons on behalf of Gour Babu were getting lac gathered. At about 7 A.M. twenty or twenty-five peons on behalf of Muhammad Bukhsh Chowdhry, zamindar, came from the direction of Manshahi Kothi armed with lathis, spears and axes. The peons of Gour Babu were similarly armed. Durga Singh, the jamadar of Chowdhry, said to Mahadeo Singh, the jamadar of Gour Babu:

"Why do you cut lac"?

On this Mahadeo Singh said:

"The bankar belongs to my master Gour Babu, I will cut the lac".

When this talk was going on, Durga Singh was trying to appease them saying that

"There is no need of quarrelling; give up gathering lac; the landlords will settle among themselves."

In the meantime three peons of Gour Babu began to shout.

"Beat, beat"

and came forward jumping and the peons of both sides closed and began to use lathis, axes and spears. The dafadar and three chaukidars tried to stop the fight, but without success. When a peon of Gour Babu fell, the mob dispersed and a man was found to be dead. This was Misri Gope; and later it was found that Mahadeo Singh had also been killed. There was some discussion about the side to which Misri Gope belonged. The question is immaterial; but, in my

opinion, the evidence that he was a peon of Gour Babu ought to be believed. The only reason for doubting it is that no one was able to identify the man; but as the peons were collected from the outlying villages, there was nothing necessarily suspicious in this.

The accused were charged under section 302 read with section 149, the common object of the unlawful assembly being to beat the men of Gour Babu. There was also a charge under section 148 and minor charges against the individual accused under section 324.

The defence was that the lac of mauza Narainpur had been settled on behalf of Chowdhry Sahib with Sheikh Kalu; and on the day of the occurrence peons of Gour Babu were getting this lac cut without any right or possession and that a riot occurred in which Gour Babu's men were the aggressors. It thus appears that the appellants raised a plea of private defence both of property and of person; and that is the defence that has been urged in this court. There was also a general argument on behalf of the appellants that the common object of assaulting the peons of Gour Babu alleged by the prosecution arose out of a dispute over the cutting of trees; that this was the case which the prosecution put forward as true and which the accused were called upon to meet; and that when that case broke down, the prosecution were not entitled to substitute what was really a different intention, though included within the same words, of assaulting the peons of Gour Babu over a dispute about lac. In my opinion there is no substance in this argument. The whole case was presented against the accused—both the allegation about the tree cutting and its sequel and the allegation about the lac cutting and its sequel. There was no embarrassment or prejudice to the accused as is shown by their written defence; and the fact that they were able to destroy the case for the prosecution about the tree cutting is no reason for acquitting them of rioting in connection with the lac cutting.

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(On the plea of private defence of property, the burden of proof is on the accused. If they assert that they injured the deceased in the defence of their property, they must show that it was their property. Learned Counsel relied on the finding of the Sessions Judge that it was not proved that either side had peaceful possession; but this is a finding which is fatal to the defence. It was also argued that the defence on the question of possession of the lac had been prejudiced by the fact that the prosecution had set up as their substantive case an occurrence arising out of tree cutting, and that the cutting of lac was only a subsidiary element. But the evidence was there and there was no question of prejudice. The accused had ample notice (as their written statement shows) and if they had any proof of possession of the lac they ought to have given it. Learned Counsel admitted that the proof of possession on behalf of the defence was meagre; and on the evidence it must be held that the possession of the party of the accused has not been proved.)

The evidence is chiefly documentary. The dispute is between Muhammad Bukhsh Chowdhry who purchased three or four years ago the Manshahi concern from Mr. Shillingford and who claims the right to settle the trees in mauza Narainpur for the growing of lac on them; and Gour Chandra Roy, who has a 14-annas interest in the Bankar mahal of this and other villages, the remaining 2-annas being in the zamindar. The title deeds to the bankar are Exhibits A and B, leases of the year 1868, which demise to the predecessor of Gour Chandra Roy

" Bankar ", that is, " all sorts of kukatha and all sorts of jalkar jangli and grass and kharhi and trees used for fuel and pasturage and honey mahal ".

In the deed the following passage occurs:

" Let it be known that after excluding all the rights, only pasturage mahal, and bankar mahal and fuel wood in Taraf Mansahi and Taraf Narayanpur.....have been given in patni settlement."

As Mr. Shillingford's name was in the record-of-rights, a suit was brought by Gour Chandra Roy for declaration of his bankar rights and for correction of the record; and in that suit he was successful (Exhibits 26 and 27). This litigation terminated in 1917, but there was no decision as to the meaning of bankar; as the learned Subordinate Judge pointed out,

> "No issue was raised as to what bankar includes. So I cannot in this suit decide the question. It certainly includes kukatha which is used as fuel. It may also be remarked that the plaintiff's pleader says that they do not claim 'mango, jamun and seesam tress."

In 1924 there was a criminal case about the cutting of two jamun trees in which the accused were convicted by the trial court but were acquitted on appeal on the ground that it was not shown that they were the men of Gour Babu or that they knew of the admission that jamun was not claimed as bankar. This judgment was delivered on the 5th of February, 1925, and it is argued that it shows that Gour Babu was gradually extending his claim under his bankar lease. With regard to the settlement of lac there is Exhibit 2, a petition dated the 2nd of Jeth, 1331 (16th of May, 1924), in which one Haro whom the prosecution has set up as the lessee of the lac, applied to Gour Chandra Roy for settlement of the lac mahal from 1331 to 1333. This settlement was sanctioned. This document is on an ordinary piece of country paper and is not registered. Exhibit 3 is the hukumnama following upon this order for settlement and is dated the 13th of Jeth, 1331 (27th of May, 1924). On the 27th of March 1925, comes Exhibit 4, the first registered document in this connection, a kabuliat executed by Haro in favour of Gour Chandra Roy taking settlement of the lac mahal from 1331 to 1333. Exhibit 5 purports to be a rent receipt granted on the 31st of Chait 1331; but the learned Sessions Judge has doubted the genuineness of this document on the ground that there was no 31st of Chait in 1331. Then there are documents showing settlements with Haro by tenants, of trees on tenants' lands. Thus Exhibit 9

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is a kabuliat executed by Ala Bux, who is set up as Haro's partner, in favour of Phuhi Khan and Nasiruddin on the 12th of Kartick 1329 Mulki which would correspond to the 29th of October 1921. Doubt has been thrown upon this document by reason of the fact that it bears a postage stamp of a chocolate colour which was not issued before August 1922. Similarly Exhibits 7 and 8 were kabuliats by Ala Bux in favour of Phuhi Khan and Nasiruddin. Exhibit 10 is a receipt granted by Nasiruddin to Ala Bux, while Exhibit 14 is a receipt granted by Jaykishun Mandal to Haro on the 28th of Chait 1332. It appears that the settlements made by the tenants are of two kinds—individual settlements such as were made by Phuhi Khan and Nasiruddin; and what are called dastgarda or collective settlements on behalf of numerous tenants, such as that made by Jaykishun Mandal. The lac which was being cut on the day of occurrence was lac on trees standing on the ridges of plots nos. 102, 103 and 108 belonging to Phuhi Khan, Babulal and Munsahi Gope. On the side of the defence there is a petition (Exhibit J) by Kalu and Haro, dated the 29th of March, 1918, to Mr. Shillingford, asking for settlement of the " Jhuri Mahal " from 1326 to 1328, and the settlement was ordered on deposit of Rs. 10 as rent. Exhibit Q is a petition by Sheikh Ismail and Kalu, dated the 24th of June, 1918, for settlement from 1326 to 1328 of other villages in Taraf Mansahi. Exhibit P is a registered kabuliat executed by Kalu on the 6th of June, 1922, taking settlement from 1330 to 1332 from Chowdhry Muhammad Bux. Exhibit K is a registered kabuliat for the years 1333 to 1337. This document was not registered until after the occurrence, but it was presented for registration on the 14th of April 1925.

Besides this documentary evidence there is some oral evidence and in particular the evidence of Haro who is prosecution witness no. 2, but his evidence does little to strengthen the case for the prosecution.

He deposes as having taken settlement both from Gour Chandra Roy and from tenants, but he seems to be concealing the fact of his partnership with Kalu in the time of the factory and his evidence of present possession is vague. Thus he says:

"I cannot say whether I grafted lac in 100, 500 or 1,000 trees."

Last year he and Ala Bux divided the lac in their home in Murshidabad district, but he could not say how much lac was produced nor to whom he sold nor for how much. His evidence as to the tenants from whom he had taken settlement is confused and contradictory. Thus in one place he says

"On Friday morning I was cutting lac of Phuhi Khan, Musahi Gope, Babulal Singh and none else"

Again he says:

"On Friday morning I was cutting lac of the trees taken in settlement from the above persons", namely Karamchand, Srilal and Jaykishun Mandal and others.

It can hardly be said that Haro is a satisfactory witness. Debiprasad Singh, Patwari, also speaks about Haro's possession; but his evidence is unreliable and has been generally disbelieved. On the other hand Lodhi chaukidar says that Haro was formerly a labourer under Kalu who is the thikadar of lac on behalf of Chowdhry; and Abdul, prosecution witness no. 42, admits that he knows Kalu who works in lac at Marungi from the time of Mr. Alexander Shillingford and takes thika of lac.

Now there seems little doubt on this evidence that the tenants had settled their trees with Haro and that Gour Chandra Roy had also settled his lac mahal, so far as it appertained to the bankar right, with him. A settlement had also been taken by Kalu from Chowdhry; but the evidence does not, in my opinion, prove which of these lessees had actually grown the lac, though so far as the tenants' trees are concerned, there is no reason to doubt that the lac was grown by Haro, because the landlord has no right in the tenants'

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trees. At one time the factory had claimed this right, but the claim was abandoned at the time of the non-co-operation, as appears from Exhibit 21 and the deposition of Jaykishun Mandal. There are no rent receipts nor factory papers to show that Kalu had actually been growing lac and there is a total absence of evidence of his present possession. All that can be concluded from the evidence is that rival claims were being made by Gour Chandra Roy and the tenants, who were in league with him, on one side, through their lessee Haro, and by Chowdhry Muhammad Bux, the proprietor of the village, on the other side, through his lessee Kalu. But it is not proved that Kalu was in possession or that the accused were defending his property. The plea of private defence of property therefore fails.

I now turn to the plea of defence of person. It was strongly contended on behalf of the appellants that the prosecution evidence, from the first information onwards, proves that the accused had the right of private defence of person and that this is clear when the sequence of events is closely examined. The learned Assistant Government Advocate contended that the evidence of the dafadar and the chaukidars is partial to the accused because these witnesses are tenants of Chowdhry. I have considered the evidence of these witnesses at the different stages at which it was given; and, in my opinion, it is fairly consistent throughout and makes the sequence of events sufficiently plain. I have already given the substance of the first information; and from that document it would appear that the sequence of events was this. Lac cutting was going on from about 6 A.M. At 7 A.M. Chowdhry's men came armed from the direction of the factory. Some of the men of Gour Babu went near the door of Phuhi Khan and some hid themselves in the jungle. Then there was a conversation between the leaders, Durga Singh, the jamadar of Chowdhry, and Mahadeo Singh, the jamadar of

Gour Babu, in which Durga Singh took up a pacific attitude; but the peons of Gour Babu shouted "Beat, beat" and then a conflict ensued. In his statement before the committing Magistrate Lodhi made a few additions to his statement. He then said that he asked Chowdhry's men not to riot. He also said that Chowdhry's men rushed towards Gour Babu's men. That apparently was before the conversation between the leaders. With regard to the conversation he then stated that he did not hear what was said. Then he added that Rupan Singh, peon of Gour Babu, was beaten and thereafter there was intervention by the chaukidars and dafadar after which both sides dispersed. Then Debi Singh taunted Gour Babu's men and the riot ensued. Some parts of this statement are apparently untrue in points that bear against the defence, especially, that Chowdhry's men rushed towards Gour Babu's men at an early stage and that Rupan Singh was beaten. In the Session Court he returned to his original statement, giving slightly fuller details. Thus after the talk between the leaders he says that half an hour elapsed before the dafadar came. He changes his statement with regard to Rupan Singh and says that he with others shouted "Maro". He speaks of the intervention of the chaukidars and dafadar and the incitement by Debi Singh. Behari is a more common-place witness. He agrees with Lodhi about the arrival of the two parties and then he was sent to fetch the dafadar. On his return he says that the men of Gour Babu abused the men of Chowdhry Sahib and began to fight them. This was before the committing Magistrate. He amplifies this statement in the Court of Sessions and says that Gour Babu's men raised the alarm "Mar, mar" and the chaukidars and dafadar entreated Gour Babu's men not to commit rioting, but they did not listen. He also adds that Debi Singh instigated and that Mahadeo Singh struck the first blow. The evidence of Jalil dafadar is to the same effect and his statement has not varied. He also speaks about the

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intervention of the chaukidars and himself and the withdrawal of both sides thereafter and the instigation by Debi Singh.

The argument on behalf of the appellants based on this evidence is that the appellants did not fight until they were compelled to; that they adopted a pacific attitude; that Gour Babu's men were the first to attack; and that they acted in self-defence. The learned Assistant Government Advocate on the other hand in his very able argument contended, and I think rightly, that this is not a case of the private defence of person at all. Both parties went out armed on account of the dispute about the right to cut lac. Apparently the peons of Gour Babu had been collecting for some days though they may not have arrived on the scene till the morning of the 22nd; the chaukidar says that they had not arrived the previous evening; and the twenty or thirty men who were on the side of Chowdhry were not collected in a moment either. There was therefore ample time to have recourse to the authorities, the police-station being only six miles distant; and it was the clear duty of Muhammad Bukhsh Chowdhry when he heard that armed peons were being collected on behalf of Gour Chandra Roy, to inform the authorities instead of raising an armed force on his own account.

"Homicide upon chance medley (or chaude mêllée) borders very nearly upon manslaughter, and in fact and experience, the boundaries in some instances are scarcely perceivable, though in consideration of law they have been fixed.....In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could to avoid the violence of the assault before he turned upon his assailant; and that

not fictitiously, or in order to watch his opportunity but from a real tenderness of shedding his brother's blood.....The party assaulted must therefore flee, as far as he conveniently can, either until prevented by reason of some wall, ditch or other impediment or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, and then, in his defence he may kill his assailant instantly. Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it and that it was necessary to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified " (Russell on Crimes, Eighth Edition, pages 769-770). " And it may be further observed that a man cannot, in any case, justify killing another by pretence of necessity unless he were wholly without fault in bringing that necessity upon himself " (ibid, page 777). This statement of the law is based upon authority [1 Hale, 440, 441, 481, 483; *R.* v. *Smith* (1)] which is as valid in India as in England. Now the accused in this case had no notion of retreating. They actually advanced to meet the attack. There can be no doubt that this was a free fight for which both sides had come prepared. In *Queen* v. *Jeolal*(2) it was said, " In such a case there could be no private defence either to one side or the other. Both sides were evidently aware of what was likely to happen, for they both turned out in force and were armed with deadly weapons ". In *Kalee Baparee*(3), where the appellants had been concerned in an affray in which a man was killed, their Lordships observed as follows :

(1) (1837) 8 C. & P. 160. (2) (1867) 7 W. R. 34.
(3) (1878) 1 Cal. L. R. 521.

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"There is good reason to believe that on both sides there was irritation and also determination to resort to force to support the rights and wishes of the parties; and the Judge expressly says that it appears from the evidence (and it must be taken therefore that he believes it in that respect) that there had been preparation on both sides for an armed encounter." It was held that under these circumstances it made no difference who was the attacking party where both parties were armed and prepared for battle. The leading case in *Kabiruddin* v. *Emperor*(1) where it was laid down that according to the Penal Code no right of private defence arises in circumstances such as those of that case when both parties armed themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle. And in *Queen Empress* v. *Prag Dat*(2) the opinion of Sir John Edge was quoted with approval "That when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other".

There can be no doubt in the present case that if Chowdhry's men had wanted to get away from the fight, they could have done so. The evidence of the chaukidar makes it clear that after the leaders had had their discussion both parties continued to stand their ground for a considerable time and it was in these circumstances that the fight took place. No right of private defence, therefore, arose; and, in my opinion, the appellants were rightly convicted.

The appeal must be dismissed and the appellants will surrender to their bail to undergo their sentences.

KULWANT SAHAY, J.—I agree.

(1) (1908) I. L. R. 35 Cal. 368. (2) (1898) I. L. R. 20 All. 459.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, J.J

KISHUN MANDAR

v.

KING-EMPEROR.*

1926.

March, 24, 29.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 54 and 56—police constable, arrest by—command certificate, failure to give substance of, effect of—Statutory power to arrest.

Section 54 of the Code of Criminal Procedure, 1898, empowers any police officer, without an order from a magistrate and without a warrant, to arrest, inter alia, "any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned". Under section 56, when an officer in charge of a police-station, or an officer making an investigation, requires a subordinate officer to arrest without a warrant any person who may lawfully be arrested without a warrant, "he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence or other cause for which the arrest is to be made. The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order, and, if so required by such a person, shall show him the order". *Held*, that the issue of a written order under section 56 does not limit the power conferred by section 54.

Three persons were charged before the police with the theft of a bullock, and the sub-inspector directed a constable to arrest the accused persons. The constable, without explaining the substance of the order as required by section 56, arrested one of them. The petitioners assaulted the constable and rescued the person arrested. They were convicted under section 147, Penal Code. It was contended that the provisions of section 56 not having been complied with the conviction was

*Criminal Revision no. 156 of 1926, from an order of J. H. Reid, Esq., I.C.S., Sessions Judge of Bhagalpur, dated the 20th of January, 1926, modifying an order of Maulavi Muhammad Chaudhry Nazir Alum, Subdivisional Magistrate of Bhagalpur, dated the 5th December, 1925.

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illegal. *Held*, upholding the convictions, that the arrest was legally effected under section 54 of the Code of Criminal Procedure.

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

S. P. Varma, for the petitioners.

Sultan Ahmed, Government Advocate, for the Crown.

March, 29.

Ross, J.—The first petitioner has been sentenced to six months' rigorous imprisonment under section 147 of the Indian Penal Code and to four months' rigorous imprisonment under section 332. Petitioners nos. 2, 3 and 4 have been sentenced to six months' rigorous imprisonment under section 147 and petitioner no. 5 has been dealt with under section 562 of the Code of Criminal Procedure on conviction under section 147 of the Penal Code.

It appears that three persons, Dipu, Kishun and Bawan had been charged before the police with the theft of a bullock. On the 3rd of June, 1925, the Sub-Inspector deputed a constable Harihar Singh to arrest them. Harihar Singh, accompanied by the complainant in that case, went to the house of Dipu in the early morning and found him asleep and arrested him and took him away. He had gone some distance when he was attacked by the petitioners and Dipu was rescued, injuries being inflicted upon the constable.

The ground upon which the conviction is attacked is that the constable did not comply with the provisions of section 56 of the Code of Criminal Procedure in making the arrest inasmuch as he did not, before making the arrest, notify to the person to be arrested the substance of the order. This provision has been added to section 56 by the recent amendment of the Code of Criminal Procedure; and it is contended that the effect of that amendment is to bring in the decisions on section 80 of the Code to the effect that if the police officer executing a warrant of arrest does

not notify the substance thereof to the person to be arrested, he is not acting in the discharge of his public functions in the manner authorized by law.

The learned Government Advocate who appeared in support of the conviction did not contend that the provisions of section 56 had been complied with; but he argued that independently of section 56 the constable was entitled to arrest Dipu without a warrant under section 54. The terms of section 54 are very wide and authorize any police officer without an order from a Magistrate and without a warrant to arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Now there can be no doubt in the present case that Dipu was such a person. The fact that he was eventually acquitted is of no consequence. A complaint had been made which the police believed to be true and his arrest had been ordered. The fact that a command certificate had been given to the constable under section 56 is immaterial, as the constable, independently of any such command certificate, was entitled to make the arrest.

It was contended on behalf of the petitioners that section 56 lays down the procedure to be followed in the cases to which it applies and that that procedure has not been followed in the present case; and that the section applies to constables equally with chaukidars. But the fact that section 56 applies to constables does not deprive them of their statutory powers conferred independently of that section.

In my opinion, therefore, this arrest was perfectly legal and the petitioners were rightly convicted. The application must be dismissed and the petitioners will surrender to their bail to undergo the rest of their sentences.

KULWANT SAHAY, J.—I agree.

Rule discharged.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

NANHAK SAO

v.

KING-EMPEROR.*

1926.

March, 10.

Penal Code, 1860 (*Act XLV of* 1860), *section* 363—*kidnapping, whether a continuing wrong.*

The offence of kidnapping is not a continuing offence : it is complete the moment the minor is removed from the keeping of the lawful guardian.

Rakhal Nikari v. *Queen-Empress*(1), *Nemai Chattoraj* v. *Queen-Empress*(2), and *Chekutty* v. *Emperor*(3), followed.

But the question whether the act of kidnapping was complete is a question of fact which must be decided on the evidence of each particular case.

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

Khurshaid Husnain and *I. Hussain*, for the petitioner.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

KULWANT SAHAY, J.—The petitioner was convicted by a first class Magistrate of Patna for an offence under section 363/114 of the Indian Penal Code and sentenced to nine months' rigorous imprisonment. The conviction and sentence have been upheld by the learned Sessions Judge on appeal.

The only question of law raised in the case is as to whether the accused abetted the commission of the offence or whether he was merely an accessory after

* Criminal Revision no. 143 of 1926, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, dated the 2nd of February, 1926, dismissing an appeal against an order of Babu Mangla Nand Pandey, Magistrate, first class at Patna, dated the 9th of December, 1925.

(1) (1897-98) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.
(3) (1903) I. L. R. 26 Mad. 454.

the act. The girl Sudamia, a minor of eleven years of age, was kidnapped from the lawful custody of Bazari Sao, who was appointed her guardian by the District Judge, on the 29th of June 1925 at about 5 A.M. The actual kidnapping of the girl was made by Sri Bhagawan, a nephew of Bazari Sao, who took the girl from Bazari's house. Sri Bhagawan was tried for an offence under section 363, Indian Penal Code and convicted and sentenced to one year's rigorous imprisonment. In the course of the trial it appeared from the evidence that the present petitioner Nanhak also took part in the removal of the girl. He was, therefore, placed upon his trial and convicted and sentenced as stated above.

The evidence as found by the learned Sessions Judge is that Sri Bhagawan, who was a nephew of Bazari Sao, took the girl out of the house of Bazari Sao. They went to a place near the house of the petitioner where an ekka was standing. Nanhak and Sri Bhagawan helped the girl on the ekka and Sri Bhagawan took her away. The petitioner Nanhak followed them some time after on a bicycle. The petitioner was found near the Patna Junction railway station at the time when Sri Bhagawan and the girl were getting down from the ekka. The learned Sessions Judge finds upon the evidence that the ekka was kept at Nanhak's door, that Nanhak was standing near the ekka from before the arrival of Sri Bhagawan and Sudamia, that he helped Sudamia on to the ekka, that he followed on a bicycle, and that he was seen with the eloping party near the Patna Junction railway station. The question is whether the act of kidnapping was complete the moment the girl was brought out of the house of Sri Bhagawan, or, it was continuing when the petitioner helped the girl on to the ekka. A number of cases have been cited by the learned Advocate for the petitioner to show that the offence of kidnapping is not a continuing offence and that it is complete the moment the minor is removed

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KULWANT SAHAY, J.

from the keeping of the lawful guardian. In *Rakhal Nikari* v. *Queen-Empress*(1) it was held that the offence of kidnapping a person is complete when he is actually taken out of the custody of the lawful guardian. In *Nemai Chattoraj* v. *Queen-Empress*(2) the Full Bench of the Calcutta High Court held that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the lawful guardianship. It is not an offence continuing so long as he is kept out of such guardianship. The same view was taken in *Cheekutty* v. *Emperor*(3). There can therefore be no doubt that the act of kidnapping would be complete as soon as the minor was taken out of the keeping of the lawful guardianship. The question is whether the act of taking the girl Sudamia out of the keeping of her lawful guardian was complete before she was taken to the place where the ekka was standing in front of the petitioner's house. In the case of *Nemai Chattoraj*(2) just referred to, the learned Chief Justice observed that the question is one of fact and must in each case be decided upon the particular evidence of each particular case. In all the cases cited on behalf of the petitioner there was an interval of time and distance, so far as the place was concerned, between the actual removal of the girl and the abetment by the accused persons, or taking part in the offence by the accused persons in those cases. In the present case the finding is that the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian. It appears from the evidence that the place where the ekka was standing was a short distance from the house of Bazari Sao, only a few houses intervening between that place and Bazari's house. As I have said, the question is one of fact; and the learned Sessions Judge as well as the Magistrate have both come to the finding, on a consideration of the evidence, that the act of

(1) (1897-98) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.
(3) (1903) I. L. R. 26 Mad. 454.

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kidnapping was not complete at the time when the petitioner helped the girl on to the ekka. Under these circumstances, the conviction under section 363/114, Indian Penal Code, appears to be correct.

The question, however, remains as to whether a sentence of nine months' rigorous imprisonment is appropriate sentence. The actual culprit, Sri Bhagawan, was given one year's rigorous imprisonment. The present petitioner Nanhak does not appear to have any sinister motive so far as the girl was concerned. It appears from the evidence that Bazari Sao wanted to give the girl in marriage to a certain person which was objected to by the near relations of the girl. Nanhak appears to be one of the party who objected to the marriage proposed by Bazari Sao. Under the circumstances, I think a sentence of three months' rigorous imprisonment would meet the ends of justice.

The conviction is therefore upheld and the sentence passed on the petitioner is reduced to one of three months' rigorous imprisonment.

Ross, J.—I agree.

Conviction affirmed.
Sentence reduced.

APPELLATE CIVIL.

Before Das and Ross, JJ.

1925-26.

July, 6, 7, 13, 14, 15, 16; Jan., 4; Feb., 9.

MUSSAMMAT KHURSAIDI BEGUM

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Muhammadan Law—Shia dying without heirs—estate, in whom vests—escheat, law of—trust in favour of poor Shias, whether exists—Shia community, right of, to have trust declared—trustee, whether can appeal to lapse of time—Limitation Act, 1908 (*Act IX of* 1908), *section* 10—*Secretary*

*Title Suit no. 1 of 1923.

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of State, liability of, to be sued—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 92, *Order 1, Rule* 8—*Suit for declaration of trust—Representative Suit.*

By the personal law of the Shias a Shia cannot die heirless; as, in the event of his dying without natural heirs, his property vests in the Imam as the ultimate heir, to be distributed among the poor and indigent; and in the absence of the Imam the property goes to his representative, the Mujtahid (deputy), to be distributed equitably and properly among the poor and indigent. But there being no person in the nature of an heir capable of succeeding and holding the property the right of the Crown to take by escheat intervenes and prevails.

Collector of Masulipatam v. *Cavaly Vencata Narrainapah*(1), followed.

The personal law of the Shias cannot be applied in derogation of the general right of the British sovereignty.

While it is clearly the intention of the Shia law that the property of a Shia dying without natural heirs should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited.

The mere fact that the Imam could give directions, and has by law given directions to his deputy to distribute the estate, which is in the nature of spoils, does not establish the relation of trustee and cestui que trustent between the deputy and the poor; and the law does not create a trust enforceable by the court for the benefit of the poor.

Alfred Kinloch v. *Secretary of State for India in Council* (1), referred to.

Held, therefore, that where the Secretary of State takes the property of a Shia dying without heirs on behalf of the Imam, the property is not impressed with a trust in favour of the poor and indigent, which is capable of being enforced against the Secretary of State.

Section 92, Code of Civil Procedure, regulates suits where there is a breach of an express or constructive trust created for public purposes of a charitable and religious nature; but where the suit is to establish the existence of the trust itself and the whole question involved is whether such a trust exists or not, section 92 is inapplicable.

(1) (1859-61) 8 M. I. A. 500. (2) (1881-82) 7 A. C. 619.

The Secretary of State for India is capable of being a trustee.

Secretary of State for India in Council v. *Guru Prashad Dhur*(1), and *The Secretary of State for India in Council* v. *Pandit Radhika Prasad Bapuli*(2), followed.

Under section 32, Government of India Act, 1919, every person has the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Acts of 1858 and 1919 had not been passed.

Peninsular and Oriental Steam Navigation Company v. *The Secretary of State for India in Council*(3), *Bank of Bengal* v. *The United Company*(4), *Moodaley* v. *The East India Company* (5), *Secretary of State in Council of India* v. *Kamachee Boye Sahara*(6), *Forester* v. *Secretary of State for India in Council*(7), and *Sirdar Bhagwan Singh* v. *Secretary of State for India in Council*(8), referred to.

If, therefore, the Secretary of State takes property by an act of Sovereignty, no suit will lie against him in respect thereof but if, on the other hand, he takes it under a decree of court he takes it under the colour of a legal title and is amenable to the jurisdiction of the courts.

Where there is a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent.

Duke of Bedford v. *Ellis*(9), referred to.

An order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity.

Wilkinson v. *Blades*, *In re Lart* (10), referred to.

(1) (1893) I.L.R. 20 Cal 51 (65), F.B.
(2) (1923) I.L.R. 46 Mad. 259.
(3) (1861) 5 B. H.C.R. App. A.
(4) (1831) Bignell Rep. 89; 1 I.D.O.S., 439.
(5) (1785) 1 Bro. C.C. 469; 28 E. R. 1245.
(6) (1857-60) 7 M. I.A. 476.
(7) 1872) L.R.I.A. Supp. 10.
(8) (1874) L.R. 2 Ind. A. 38.
(9) (1901) A.C. 1.
(10) (1890) 2 Ch. D. 788.

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Where, however, a suit was brought by the plaintiffs representing the whole Shia community for a declaration of a trust in favour of the poor and indigent Shias, *held*, that the entire Shia community was interested to have the trust declared even if it was a trust in favour of the Shia poor as there is no conflicting interest between those who are actually poor and those who are only potentially so.

Where a definite trust is impressed on certain property and the duty of the persons in possession is to receive the property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appeal to lapse of time; and it does not make any difference whether the duty arises from contract or is connected with some previous request or whether it is self-imposed or undertaken without any authority whatever.

Budrik v. *Garrick* (1), and *Lyell* v. *Kennedy* (2) referred to.

The first plaintiff was the President of the Anjuman Imamia of the town of Gaya. After his death his widow was substituted for him. The second plaintiff was the moofti of the said Anjuman. The plaintiffs sued on their own behalf and on behalf of the Shia community. The defendant was the Secretary of State for India in Council.

The case of the plaintiffs was that one Raja Mode Narayan Singh of Tikari, in the district of Gaya, had a Muhammadan mistress named Barati Begum to whom he granted large moveable and immoveable properties. Barati Begum had four children, Mirza Himmat Bahadur, Mirza Ekbal Bahadur, Bismillah Begum and Sharafunnissa Begum. She died on the 16th of February, 1860, leaving her surviving the first three of the aforesaid children who belonged to the Shia sect of Muhammadans and succeeded to her property. In respect of one mahal called taluka Belkhara she had executed a deed of taksimnama in favour of her children. Mirza Ekbal Bahadur was in possession of properties yielding an income of more than a lakh of rupees. He married

(1) (1869-70) 5 Ch. App. Cases, 243. (2) (1889) L. R. 14 A. C. 437.

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Sahebzadi Begum, a lady of Benares, and died childless in 1867, his properties passing to his widow. He had brought up as his own son the son of his sister named Mirza Jalaluddin Bakht Bahadur, and Sahebzadi Begum executed a deed of gift of all her properties in his favour in 1872. She died in Karbala in 1875. In 1878 a suit was instituted by the Secretary of State for India in Council against Mirza Jalaluddin Bakht Bahadur in the court of the Subordinate Judge of Gaya for the recovery of the entire estate of Mirza Ekbal Bahadur and of Sahebzadi Begum on the ground that Mirza Ekbal Bahadur being the son of a Hindu Raja could not succeed under the Shia law to the estate of his mother Barati Begum; and that, as he died childless, under the Shia law his widow could not succeed to his estate; and, therefore, the deed of gift in favour of Mirza Jalaluddin Bakht Bahadur was invalid. On the 7th of May, 1879, the suit was decreed for possession of the immoveable properties and dismissed as regards the moveables. The plaintiff in that suit obtained possession of the immoveable properties. The judgment in that suit was made part of the plaint in the present case[1] and it was pleaded that no regard had been paid to the finding recited in the plaint. Immediately after the decision of the case the Secretary of State got possession over all the immoveable properties. The plaintiffs contended that, while they had no objection to the right of the Government to hold possession of the estate, the escheated estate was a trust property for the benefit of the Shia community and that the Government was bound to apply the income to pious and religious purposes as enjoined by the Shia law. It was alleged that under the Muhammadan law of the Shia sect no Shia dies heirless, for the last Imam named Hazrat Imam Mehdi is the heir when there is no natural heir, and that this position was admitted by the Secretary of State for India in

(1) The material portion of the judgment is reproduced at p. 569, post.

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the aforesaid litigation. It was further alleged that the Anjuman Imamia of Gaya existed from 1892 and represented the whole Shia community in the district and the Anjuman and the plaintiffs were beneficiaries under the trust. It was also stated that a memorial was submitted to the Governor of Bihar and Orissa in Council for a grant for religious purposes out of the income of the trust estate and that the memorial was rejected; and that at a meeting of the Anjuman Imamia held on the 10th of December, 1922, the plaintiffs had been authorized to institute this suit. The cause of action was the disregard of the defendant to spend the income of the trust estate according to the Shia law and it was a recurring cause of action. The date of the refusal of the Government to entertain the memorial of the Anjuman, namely, the 12th of August, 1922, was stated as the date of the cause of action. The bulk of the trust estate namely. the mahal Belkhara was situated in the district of Gaya. The plaintiffs prayed for a declaration that the escheated estate described in the schedules to the plaint was a trust property for the benefit of the Shias in general and of the Shia community of Gaya in particular; for an injunction restraining the defendant and his Government from using the income of the trust estate for any purpose other than that enjoined by the Shia law: for costs and for general relief.

The defence was that the plaint was insufficiently stamped; that the suit was barred by limitation; that the defendant had been in possession of the properties in suit as full owner for upwards of forty years; and that no Shia ever put forth any claim on any ground to the same. It was denied that the estate was a trust estate and that the plaintiffs or other Shias had any interest of any sort in the properties in suit or had any cause of action against the defendant. It was alleged that the defendant was not a trustee and was incapable of being a trustee; that he did not get the properties in suit under the Shia law, but under

the law of escheat and that he had been in possession of the escheated estate as absolute owner and not as trustee; that Barati Begum, Sharfunnissa Begum and Mirza Ekbal Bahadur died heirless and their properties escheated to the Crown; that the properties were claimed in 1878 in suits against Jalaluddin Bakht Bahadur and Bismilla Begum and Mirza Himmat Bahadur not on the strength of the Shia law but on the law of escheat and that the title of the Crown under the law of escheat was declared and possession was decreed and that the Court rejected the plea that the Imam Mehdi was the heir and that the Mujtahids were entitled to possession. It was pleaded that the plaintiffs' interpretation of the judgment was not correct. It was further pleaded that the religious and moral injunctions and directions of the Shia law were not binding on and enforceable against the defendant; that the income of the properties could not be spent according to the Shia law; and that the Anjuman and the plaintiffs and other Shias were not beneficiaries and were not interested in the properties in suit. In a supplementary written statement it was pleaded that the suit was not maintainable without compliance with the provision of section 92 of the Code of Civil Procedure and that it was barred as res judicata. In a further supplementary written statement it was pleaded that five properties specified therein had been transferred to other persons who were necessary parties and that the defendant had no interest in them and the suit was barred in respect thereof by general and special limitation.

The following issues were framed:—

1. Has the claim been undervalued? Is the court-fee insufficient?
2. Is the cause of action recurrent? If so, to what extent? Is the suit barred by limitation?
3. Is the suit barred by the principle of res judicata?
4. Are the plaintiffs entitled to maintain the suit?

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5. Does the suit lie against the Secretary of State for India in Council as agent of the Sovereign?

6. Does the suit infringe the provisions of section 92 of the Civil Proceduro Code?

7. Is the Imam Mehdi the legal heir, under the Shia law, of a Shia dying without natural heirs? Was this not found in the judgment of the 7th May 1879 annexed to the plaint? Was this not admitted by the plaintiff in the suit?

8. If so, does the defendant hold the property in suit to the use of the Shia community until the Imam Mehdi appears?

9. Has the defendant obtained the said property under the general law of escheat, free from the restrictions of the Shia law, by the aforesaid judgment or otherwise?

10. Is the defendant capable of being a trustee? If not, is the suit maintainable against him?

11. To what relief are the plaintiffs entitled?

By an order, dated the 16th of January 1924, an application under Order I, rule 8, for permission to sue on behalf of the Shias generally who were interested in the subject-matter of the suit, and also for notice of the institution of the suit being given to all the persons interested, was granted, and notice was duly given in the usual way.

Issue no. 1 was decided in favour of the plaintiffs by order, dated the 6th February, 1924.

Sir Ali Imam (with him *Hasan Imam*, *Khurshaid Husnain*, *Hasan Jan*, *Sibeshwar Dayal*, *Siva Narayan Bose*, *S. Husain*, *Syed Ali Khan* and *S. Nooruddin*), for the plaintiffs:—Shia jurisprudence excludes the application of the law of escheat. Under that law, when a Shia dies without natural heirs, the Imam is the ultimate heir. Shia Divines (Mujtahids) hold the property on behalf of the Imam. The law of escheat is applicable only on failure of heirs. Therefore the property of a Shia dying without natural heirs cannot escheat to the Crown.

[DAS, J.—The question is whether the Secretary of State, when he took the property, did accept the responsibility of the Shia law.]

The case brought by the Secretary of State was decided under the implications of the Shia law. Whoever holds the property in the absence of the Imam, who is the rightful owner, holds it subject to a trust in favour of the Shia community.

[DAS, J.—What is that specific trust which you want the Secretary of State to execute. We cannot create a trust.]

If, by operation of law, a trust is created, it will be a resulting trust and that has to be enforced. The whole decision in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) shows that the law of escheat was not upheld. On the contrary the Hindu law in its conception and implications was applied to the case according to the Sastras and the constitutional law of the country. The sub-judge in the present case clearly purported to decide that the property was to be protected by the Secretary of State in the absence of the Imam and any Mujtahid, in the way enjoined by the Shia law. Moreover, the case of the Brahmin dying without heirs, stands on a different footing. In that case there is a failure of heirs, while in the case of a Shia there is never such a failure. Secondly in the case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1), either the Sastras were applicable or the general law of escheat. In both cases the Secretary of State was to take the property—under the Sastras he was to take with the obligations to the Brahmins. When the property is vested in the heir, the legal estate remains in him though he may not exercise the acts of possession for the time being. When there is no heir the reversion to the Crown is complete. But when there is an heir and the legal title is vested in him, the deficiency caused by the absence of the heir may be made up by the Crown. His absence or failure to assert his possessory right will not affect his title to the legal estate. The observation at page 526,

(1) (1859-61) 8 M. I. A. 500.

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"In the present case, if the Hindu law had expressly provided..... .....succeeding", draws a fine line of distinction between the case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) and the present case governed by the Shia law. Their Lordships clearly purported to lay down that it was the personal law that was the determining factor. Two principles are deducible from *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1): the general law of escheat does not override the personal law of the people; and if the personal law of the Shias presents an heir, the legal estate vests in him alone. Vide Ameer Ali's Muhammadan Law, Vol. II, Fourth Edition, page 132.

[DAS, J.—In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1), it seems to have been held that in both cases the Crown takes by escheat. In one case under the general law of escheat, and in another under the express provisions of the Hindu Law.]

If their Lordships had kept out of their mind the provisions of the Hindu Law and if they had completely ruled out the personal law of the Hindus, applying the general rule of escheat, then how does the question of "Subject or not subject to trust" arise. The British law of escheat admits of no reservation. If that law had been applied there could have been no question of trust at all. Whether the Crown took under the general law of escheat or under the provisions of Hindu Law, they took it subject to a trust.

The ratio of that ruling does not give us anything more than this, that it is possible to apply the English law of escheat. In earlier times escheat to the Crown used to be free of encumbrances, but later on this came to be re-considered by the English jurists and the old law was altered. [Stephen's Commentary on the Laws of England, Vol. II, 17th Edition, page 163.]

(1) (1859-61) 8 M. I. A. 500.

So far as the Shia law is concerned, the principle of the English law of escheat "by defunction" cannot apply to the present case, as there is no failure of heirs. So far as the physical possession was concerned there was undoubtedly a default, but nevertheless the law of England will not be applicable as there is still the heir, although invisible. There is not a failure of title by the invisibility of the Imam but there is a failure of the right to possession.

[DAS, J.—Who are you? The Secretary of State might be a trustee for the Imam or his representatives.]

The Secretary of State represents the Imam who will appear one day. When a member of the Shia Community dies without heirs, his property goes to the Imam, who being infallible distributes the same, and the public has an interest in the benefit accruing therefrom. According to the Shia law the Imam has to deal with such property in a certain manner. In his absence the Mujtahid is to administer the estate and as a beneficiary I am interested in the due and proper management of the property. If the Secretary of State has held the property as the best qualified person in the absence of the Imam and the Mujtahid, can he shirk the responsibilities which the Shia law enjoins? The Secretary of State holding the property under the Shia law must discharge the same duties that the Mujtahid or Imam would have done. Your Lordships have got absolute powers to frame a scheme for the proper administration of the trust.

With regard to issue no. 3 I submit that the present case is governed by sections 10 and 23 of the Limitation Act.

[DAS, J.—On the authority of Mr. Ameer Ali the Shia Divines must assert their title within twelve years.]

The title is not extinguished under section 28, Limitation Act. The right to possession, or the

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remedy may have gone, but the title still remains. Assuming, however, that the right is extinguished, it is still good against trespassers The trespassers having disappeared the title revives. With regard to issue no. 5, my submission is that if there is a trust, we are undoubtedly the beneficiaries and as such are entitled to maintain the suit. See Ameer Ali's Muhammadan Law, Vol. II. 4th Edition, page 130.

[DAS, J.—The beneficiaries are the poor and indigent persons, so the suit can only be maintained by the members of that class.]

Every Shia has a living interest. There is no clash of interest between the opulent Shias and those who are not parties in respect of the reliefs claimed.

Manuk (with him *Lachmi Narayan Sinha*, Government Pleader, *Nurul Hosain* and *A. Sen*), for the defendant:—In paragraph 11 of the plaint there is no mention of the trust; in the previous suit we referred to the Shia law for the narrow purpose of agitating the question of legitimacy or otherwise of the holder, and its effect on heritance. The decree imposed no obligation by way of declaring any direct or indirect, perfect or imperfect trust attached to the property.

[DAS, J.—The distinction which you want to draw is that in such cases the whole matter rested on the discretion of the Imam; as a matter of fact the Imam did distribute the property among the poor; but there can be no obligation on the Imam which can be enforced.]

Yes. It is not suggested in any of the books that the Imam is to hold the property in trust for the people.

[DAS, J.—The authorities are conflicting on the question as to who are the ultimate cesti que trustent.]

Yes, hence the trust, if at all, will be imperfect. There is absolutely nothing to show that the so-called

deputy of the Imam is to hold the property with the compulsion or obligation of dealing with it in a particular manner.

The Crown cannot constitutionally be a trustee.

[DAS, J.—Is there anything to prevent the Crown from utilising the whole income absolutely for its own use?]

The Government of India Act says that the income of escheated property must be applied for the purposes of the Government of India.

The first relief with regard to the trust must fail on account of vagueness and indefiniteness. The second relief should also fail, as the granting of an injunction is purely discretionary. In case the injunction is granted the Secretary of State might say that he would refrain from spending the income or any item in the manner enjoined by the Shia law but he would go on accumulating the income.

[DAS, J.—You can as well contend that it is a class-action and the essence of a class-action is that there must be a benefit to the class. No material benefit can however be achieved by the granting of the injunction prayed for.]

Yes. If the framing of a scheme is intended by the last relief asked for, section 92, Civil Procedure Code, becomes applicable and the whole suit must fail. The case of the Secretary of State in the previous suit was founded on the general law of escheat or royal prerogative coupled with the Shia law for the narrow purpose of asserting the bar of legitimacy.

[DAS, J.—The paramount preservation of the estate demands that the Secretary of State should get the property as against trespassers provided it is proved that there was a complete failure of natural heirs.]

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The Imam is not in the strict sense of the term an "heir". Under the Shia law the Imam will take not strictly as the last heir but by a process of devolution or succession. See Baillie's Imamia Law, pages 301, 323, 361.

The vesting of the property in the Imam is in the nature of an escheat. [Wilson's Anglo-Muhammadan Law, 5th Edition, pages 437, 439, 461. Ameer Ali, 3rd Edition, pages 10 and 11.] Therefore there is no question of heirship.

[Ross, J.—The meaning of the judgment in the escheat case seems to be that although the Secretary of State could not come under the general law of escheat as there was an ultimate heir he was the only person who could properly represent the Imam. The Secretary of State certainly came in his own title as representing the Imam and not on behalf of a third person.]

But the title of the Imam was not proved as the old theological doctrine of the Shias was not applied. In the absence of the Imam and the Mujtahid the sub-judge, on the analogy of the Shia law, found the Queen-Empress to be the best-fitted person to hold the property.

[DAS, J.—The sub-judge practically followed *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1) which lays down that there might be rightful persons entitled to the property but, as against a trespasser, the Secretary of State's title is good.]

Yes. The Shia law was never applied in the present case, but the finding of the sub-judge only proceeded upon the analogy of the Shia law. He never intended the Queen-Empress to take the property tramelled by the obligations arising out of the Shia law. He referred to *Collector of Masulipatam* v.

(1) (1859-61) 8 M. I. A. 500.

Cavaly Vencata Narrainapah(1) to fortify the finding that the Crown was not bound by the Shia books or the personal law of the Shias.

[DAS. J.—It is conceded by Sir Ali Imam that no trust arises from the terms of the judgment; but it is contended that by operation of law a trust is created.]

There is no such thing as a trust by operation of law in the Muhammadan Law.

Creation of a public or private trust, save by making a wakf, was unknown to Muhammadan Law. [*Bhagwan Das* v. *Karam Hosain* (2)]. Such trust, if at all, is incapable of being enforced in this country. There is no more than a pious hoping that the Imam would do such and such thing.

[DAS, J.—If there is the principle under the Muhammadan Law that the Mujtahid is to hold the property and administer it for the benefit and use of the poor and indigent, we have absolute powers to enforce that obligation.]

The principle, if there is any, is to distribute the property forthwith and not to hold it in trust for generations and generations. Even assuming that the Imam could give specific directions to the Mujtahid or his deputy to distribute the property it will not constitute the relationship of trustee and cesti qui trustent between the deputy and the people, although there might be such a relationship between the Imam and the people. The deputy is simply the agent of the Imam for distributing the property. Even if the general law of trust is applied the property cannot be treated as a trust property in the language of the Muhammadan Law. [*Freke* v. *Calmady*(3).]

(1) (1859-61) 8 M. I. A. 500.

(2) (1911) 11 I. C. 145, F. B. (3) (1886) 32 Ch. Div. 408.

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The old theological view of the Shia law is now obsolete. I rely on *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1). The same view is expressed by Wilson and Tyubji. As in the Sunni Laws the Baitul Mal has become obsolete, so under the Shia law, according to Chamier, J., the heirship of Imam has become obsolete. It is only on the possibility of the personal law that the question of trust comes in. But the personal law ceases to exist when it is found that there is a total failure of natural heirs. The law does not recognise heirship in a shadowy person.

In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1) it was clearly held that in similar circumstances the Crown could take under the general law of escheat.

My next point is that the trust, if at all, cannot be enforced against the Secretary of State. Until the Petition of Rights in 1860 a trust could not be enforced against the Crown in England.

[Ross, J.—The position of the Secretary of State is different in India from the position of the Crown in England. If the East India Company could be sued the Secretary of State can be sued.]

Acts of State and Acts of Sovereignty cannot be impeached by Municipal courts. Escheat is a prerogative of the Crown and, therefore, an act of Sovereignty.

[Ross, J.—The Secretary of State took the property by a decree of the Court. That is not a prerogative or an act of State.]

Regulation XIX of 1810 which deals with the administration of escheated properties gives no right of suit.

[DAS, J.—There is no specific right given in the sections of the Regulation for a suit against the Secretary of State.]

(1) (1859-61) 8 M. I. A. 500.

Under the Government of India Act the plaintiffs must show that they have a right of suit against the Secretary of State in the same way as they would have had against the East India Company.

[DAS, J.—If a thing was done by the East India Company as such a suit was maintainable, but if it was done in the exercise of its sovereign rights it could not be sued.]

The Secretary of State took the property by way of escheat. It is an act of State because the Secretary of State administers it on behalf of the public revenues. [*Charles Palmer* v. *Mark Hutchinson* (1).]

The Municipal courts cannot pass any decree in respect of the "Revenue" of India as defined in section 20, Government of India Act, 1915.

My next submission is that in a representative action there must be a community of interest between the plaintiffs and the class which they represent. In the present case the beneficiaries according to the Shia theory, being the poor and indigent Shias, cannot be represented in this suit by the plaintiffs who do not belong to that class. [*Wilkinson* v. *Blades*(2), *Hira Lall* v. *Bhairon*(3).]

With regard to the maintainability of the suit I submit that under the Specific Relief Act the declaration and injunction prayed for cannot be granted. A declaratory decree which is calculated to produce no result is contrary to the principles governing the proper exercise of discretion. The consequential relief here is a negative injunction. I rely on *Mufti Jafar* v. *Fazal Hosain Khan*(4).

The suit is also barred by limitation. Section 10, Limitation Act, is applicable to cases of *express*

(1) (1880-81) L. R. 6 A. C. 619 (625). (2) (1896) 2 Ch. D. 793.
(3) (1883) I. L. R. 5 All. 602, F. B. (4) (1922) 67 Ind. Cas. 659.

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trustees only. Express trust is in contradistinction to trust by operation of law, or a constructive or resulting trust.

Where I am dealing with the property without notice of the trust and my actings only constitute me a trustee, I cannot be held accountable, section 10 does not apply.

Section 23 also is inapplicable. It applies to contracts and torts.

S. A. K.

Cur. adv. vult.

Feb., 9.

Ross, J. (after stating the facts set out above, proceeded as follows):

Issue no. 2.—From the plaint in the present suit it would appear that taluka Belkhara was the subject of a deed of taksimnama executed by Barati Begum. This is stated in paragraph 4. In paragraph 18 of the written statement while certain of the allegations of paragraph 4 of the plaint were traversed, there was no denial of this taksimnama; and for the purposes of this suit the allegation in the plaint must be accepted, although no document has been produced and, so far as I can discover, in the litigation of 1878 there was no reference to any such instrument. Barati Begum died in 1860. As no trust was set up, time began to run from that date; and, as regards the estate other than taluka Belkhara which was the subject of the taksimnama, the title of the Shia community, if any, became barred long before the suits of 1878 gave the property to the Secretary of State. As regards taluka Belkhara time began to run as to the share of Ekbal Bahadur from the 15th of August, 1867, when he died. The property became vested in the Secretary of State on the 7th of May, 1879. It was stated in the argument by the learned Vakil for the defendant that possession was not taken until the year 1881, but this does not appear to be correct. On the contrary the

plaintiffs said in their present plaint that immediately after the decision of the case the decree was executed and the Secretary of State for India in Council got possession over all the immoveable properties claimed by him. The original record has been sent for from the record-room of the Calcutta High Court and it appears from the petition of compromise filed in the appeal from the decree of the Subordinate Judge, dated the 8th of June, 1880, that the Secretary of State had already executed the decree and obtained possession. There is therefore no material for holding that possession was not obtained until more than twelve years had expired from the date of the death of Ekbal Bahadur; and as regards the interests of Himmat Bahadur and Bismilla Begum in the taksimnama properties it is clear that, as they were alive when the suits of 1878 were decided, time had not begun to run in respect of their interests when the Secretary of State entered into possession. With regard to the taksimnama properties therefore the question of limitation must be decided with reference to section 10 of the Limitation Act. The argument of the plaintiffs is that as to this part of the property they are protected by section 10 of the Limitation Act: (section 23 was also referred to, but that has obviously no application). Now by pleading limitation the defendant admits that the Shias once had title, but it has been lost by lapse of time. The plea therefore is in this form that the property was trust property but not property held in trust for a specific purpose. In *Burdick v. Garrick*(1), Giffard, L.J., said, "I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it". In *Lyell* v. *Kennedy*(2) Lord Macnaghten, in

(1) (1869-70) 5 Ch. A. C. 243. (2) (1889) L. R. 14 A. C. 437, 463.

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adopting that dictum, said, " Nor do I think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow ". The determination of this question will therefore depend upon (1) whether the Shia law impressed a definite trust upon this property; and, (2) whether under the judgment of 1879 the Secretary of State took the property with notice of that trust. The result therefore is that with regard to the property in suit except taluka Belkhara the suit is barred by limitation; and, whether as regards taluka Belkhara it is also barred, will depend upon the decision of the issues on the merits.

Issue no. 3.—The suit is not barred by the principle of res judicata as it is not between the same parties as the suit of 1878.

Issue no. 4.—The plaintiffs sue on behalf of the entire Shia community. In order to conduct the action the plaintiffs must represent the class. They have been permitted to sue as representing the class. They must also give an opportunity to the class to say whether the class wants to be represented by them. This has been done by the notice under Order I, rule 8. But learned Counsel for the defendant contends that as representing the entire Shia community the plaintiffs cannot be said to represent the Shia poor in particular (who are the true cestui que trustent) and that the Shia poor have a hostile right to the general Shia community. It is contended that a claim on behalf of the Shias in general cannot be joined with a claim on behalf of the Shia poor because their interests are necessarily conflicting. The principle governing representative actions is thus stated by

Lord Macnaghten in *Duke of Bedford* v. *Ellis* (1). "Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent." Now while it is true that community of interest is the essence of a representative action, and an order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity [*In Re Lart*(2); and Daniel's Chancery Practice, Eighth Edition, 869], yet it seems to me that so far as the present suit is concerned it is a suit for a declaration of trust and in this matter the interests of all Shias are identical. It may be that if there is a trust it is the poor Shias who are the beneficiaries, but the entire Shia community is interested to have the trust declared even if it be a trust in favour of the Shia poor; and in this matter it seems to me impossible to distinguish, or to infer a conflicting interest, between those who are actually poor and those who are only potentially so. I would therefore decide this issue in favour of the plaintiffs.

Issue no. 5.—The statutory provisions relevant to this issue are section 79 of the Code of Civil Procedure and section 32 of the Government of India Act. Section 32 provides that every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed; and that the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed. The question of the liability of the Secretary of State for India in Council to an action in the municipal courts was discussed in the

(1) (1901) A. C. 1. (2) (1896) 2 Ch. D. 788.

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Peninsular and Oriental Steam Navigation Company v. *Secretary of State for India*(1) where Barnes Peacock, C.J., said, "In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of *The Bank of Bengal* v. *The East India Company*(2) which was cited in the argument, that the fact of the company's having been invested with powers usually called sovereign powers did not constitute them Sovereigns.....We are further of opinion that the East India Company were not Sovereigns, and, therefore, could not claim all the exemptions of a Sovereign; and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of the Government and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them [*Moodaley* v. *East India Company*, and *Moodaley* v. *Morton* (3)]. But the Master of the Rolls, afterwards Lord Kenyon, said, "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think the East India Company

(1) (1861) 5 B. H. C. R. (Ap. A).

(2) (1831) Bignell's Rep. 89; 1 I. D. O. S. 439.

(3) (1785) 1 Bro. C. C. 469; 28 E. R. 1245.

is within the rule. They have rights as a sovereign power; they have also duties as individuals.....But where the act is done or a contract is entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by Sovereign or private individuals delegated by a Sovereign to exercise them, no action will lie." The same principle was laid down in the *Raja of Tanjore's case* (1) where the question was put thus: "The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of Crown of Great Britain of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law? Or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor?" Similarly in *Forester* v. *Secretary of State for India in Council*(2) it was held that the resumption was not an act of State. It was the "resumption of land previously held from the Government under a particular tenure upon the alleged determination of the tenure. The possession was taken under the colour of a legal title; that being the undoubted right of the Sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would prima facie be cognizable by the municipal courts in India." *Sirdar Bhagwan Singh* v. *Secretary of State for India in Council*(3) was a case where the act of Government was done in accordance with the

(1) (1857-60) 7 Moo. I. A. 476 (2) (1872) L. R. I. A. Supp., 10.
(3) (1874) L. R. 2 I. A. 38.

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notions of the Government of what was just and reasonable and not according to any rules of law to be enforced against them by their own courts.

These decisions make it clear that if the Secretary of State took the property in suit in this case by an act of sovereignty, then no suit will lie; but if, on the other hand, he took it under the colour of a legal title, then his acts will be within the jurisdiction of the courts. As the property came to the Secretary of State by a decree of the court it would seem that it was not taken by an act of sovereignty, but under the colour of a legal title. It was said, however, that the property came by escheat; that is, by the prerogative of the Crown and, therefore, by an act of sovereignty. This argument, however, involves the question which arises on the merits as to the nature of the estate taken by the Secretary of State under the judgment of 1879. It was further contended on behalf of the defendant that no suit could have been brought against the East India Company in respect of property taken by escheat and reference was made to Regulation 19 of 1810 which deals with the custody and disposal of escheats. By that Regulation a right of suit is reserved in respect of lands and buildings of the nature described therein and it is said that no right of suit is reserved with regard to escheats. But this merely repeats the former argument and the answer to this contention depends upon the merits of the case. Reference was also made on behalf of the defence to section 20 of the Government of India Act which provides that the revenues of India shall be received for and in the name of His Majesty and shall be applied for the purposes of the Government of India alone; and the expression " revenues of India " is defined as including all moveable and immoveable properties of British India escheating or lapsing for want of an heir or successor and of property in British India devolving as bona vacantia for want of a rightful owner. This argument does not

advance the matter further as its validity also involves the question of the nature of the estate taken by the Secretary of State in the property in suit. The answer to this issue therefore depends upon the decision on the merits of the case.

Issue no. 6.—In my opinion section 92 of the Civil Procedure Code is not applicable to the present suit. Section 92 regulates suits where there is a breach of an express or constructive trust created for public purposes of a charitable and religious nature; but here the suit is to establish the existence of the trust itself and the whole question involved is whether such a trust exists or not. In my opinion, a suit of this nature is not within the purview of section 92 of the Code. This is decided in favour of the plaintiffs.

Issue nos. 7, 8 and 9.—In dealing with these issues it will be convenient in the first place to ascertain what the law of the Shias is with regard to the heirship of the Imam. The principal modern authorities are as follows: In Baillie's Digest of Moohummudan Law, Imameea, at page 261, the scheme of inheritance under the Shia law is set forth;

"Inheritance is founded on nusub or consanguinity and on subub or special connection."

One of the forms of subub is wula or dominion and the last form of wula is the wula of Imamut or headship of the Musalman community. At page 301 the rule is laid down that,

"Where there is no surety for offences (that is the second form of wula) the Imam is the heir of a person who has no other heirs; and this is the third kind of wula. If then the Imam be present, the property belongs to him to do with it as he pleases. Aly, on whom be peace, was accustomed in such cases to give the property to the poor and indigent of the deceased's city and the weak and infirm among his neighbours gratuitously. And if the Imam is absent, the property is to be divided among the poor and indigent, and not be given up or surrendered to any other but a righteous Sultan or ruler, except under fear or actual compulsion."

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It may be explained here that by all the followers of the twelve Imams, Imam Mehdi their twelfth and last spiritual as well as temporal leader, is believed to be still living, but to have retired from human observation since his last appearance on earth (*Ib.* page 272, foot-note). The wula of the Imam "or Doctrine of escheats to the Public Treasury" is more fully explained at pages 362 and 363, where the authorities are cited which prescribed the partition of the property among the poor and indigent of the Shia sect in the same manner as they enjoy the fifth of the spoils taken in battle. Mr. Shamma Churun Sircar, in his Tagore Law Lectures, 1874, at page 264, discusses the wula of Imamat and lays down quoting the authorities, that if the Imam be present the property goes to him to do with it as he pleases and that the most approved opinion is that the property thus vested in the Imam should, while he is absent, be distributed among the Sayyids who are his descendants, preference, nevertheless, being given to such of them as are poor and indigent. Several authorities are quoted, including the Sharaya-ul-Islam, to show that the property should be distributed among the poor and indigent.. Mr. Ameer Ali, in Volume II of his Mahommedan Law, Fourth Edition, at pages 132 to 134; discusses the Wala-ul-Imam. In his view the right of the Imam is not in the nature of an escheat to the Sovereign; but the property goes to him as the spiritual head of the Shia Commonwealth to be distributed among the poor and indigent of the locality where the intestate lived, or where he was born; and in the absence of the Imam the property goes to his representative the Mujtahid, the chief expounder of the law, to be distributed by him equitably and properly among the poor and indigent of the place where the intestate lived or for such charitable and religious purposes as may seem consonant to his last wishes. The right of the Imam is not qua Sovereign, but qua spiritual leader, and is, therefore, subject to the ordinary bar of the Statute of Limitation. The learned author, after quoting a

fatwa pronounced by a leading mujtahid of Iran, goes on to say,

"In Shia countries not subject to foreign control the mujtahid who is the chief expounder of the law, is also frequently vested with the power of the kazi. When this is the case no difficulty occurs in the application of the principle of Shia law. But in India, where the Shias are subject to a non-Moslem power, the question may arise, under whose direction the distribution contemplated by the Shia law should take place? These questions it seems to me are answered by the dictum quoted from the Jama-ush Shittat. The Civil Court, representing the hakim mentioned in the fatwa, would assume the charge of the property and make it over to the mujtahid, if there be any, to be distributed among the poor and indigent of the deceased's village, or native city, under the court's own control and supervision so to leave no room for doubt as to its proper application. If there be no mujtahid, some Shia officer should be appointed for the purpose of distribution. It must also be remembered that the law does not necessarily contemplate application of the proceeds in the shape of alms. If the object of the law, which has in view the benefit of the poor and the indigent, who are always in need of help, can be attained by establishing an institution by which regular assistance can be rendered to them, it would be valid."

Sir Roland Wilson, in his Anglo-Muhammadan Law (1st Edition, page 378), deals with the difference in the Shia law of inheritance from the Hanifi law by which the property of a Muhammadan dying without heirs devolves upon the Government and says,

"The surplus does not return to the wife even where there are no other heirs but passes by escheat, in Shia theory to the Imam, and, according to Anglo-Muhammadan law, to the British Government."

It is noteworthy, however, that in the last edition (that is, the fifth edition) of this work, which has been revised by Mr. Yusuf Ali, this qualification is omitted. It is simply stated at page 451 that

"There is no final escheat to a bait-ul-mal. Where a deceased person leaves no possible heir, his property is liquidated by the mujtahid as representing the Imam, the proceeds to be distributed among the poor of the city in which the deceased was born (or presumably, where that is impracticable, where he died).

The learned Subordinate Judge of Gaya in his judgment in the suit of 1878 cited numerous original authorities: Shurra-al-Islam, Mustanid-ul-Sheea, Mansubood, Mussalik-ul-efham and Zainul-ul-ehakam; and on a review of these authorities he came

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to the conclusion that the majority of the traditions concur and agree that the property of a Shia should be received by Sayuds, the poor and the indigent especially of the Shia sect.

Learned Counsel for the plaintiffs cited also the following passages from texts of authority: (1) Mustanad'sh-Shia, on Jurisprudence by Ahmad b. Muhammad b. Mahdi b. Abi Darr. Volume II Juzv. 26, the Book of Inheritance, Chapter IV. Edited in Tehran Rajab. A. H. 1273. (2) Sharaiul-Islam page 267 by Abul'l Qasim Najmud Din afar b. Muhammad b. Yahya b. Saidal Hilli, also known as al-Muhaqqiq (the Scholar), who died in A.H. 676-A.D. 1275. (3) Jawahirul-Kalam fi Sharh-i-Sharai-ul-Islam, by Muhammad Hasan b. Baqir an-Najafi. Book of Inheritance, Volume VI. (4) Najatul-Ibad, page 404 on the heirship of the Imam; and (1) Copy of an 'Istifa (Precept) in connection with the property of one who has no heir, taken from the book entitled Jami'n Shattah, by Abdul-Qasim Alib. Abdul-Hamid al Quami. (2) Jawahirul-Kalam, Volume VI. The Book of Inheritance. (3) Najatul-Ibad by the author of Jawahirul-Kalam. Edition of A. H. 1318, page 404. (4) Ar-Rahdatul-Bahiyah by Zainud-Din b. Ali Al-Amili, who died, A.H. 966-A.D.1558 and (5) Mustanadush-Shia, Volume II, on the mode of dealing with property left without heirs.

These authorities make it clear that the last heir of a Shia leaving no other heirs is the Imam; and that the Imam being infallible could dispose of the property as he pleased. But the practice of the Imams had established a rule which was binding upon the mujtahids who took the property during the absence of the Imam Mehdi on his behalf; and under that practice the property was to be distributed among the poor and indigent. There is some difference of opinion as to whether the beneficiaries were to be Sayyids, especially poor Sayyids, or whether they were to be the poor and indigent, whether Sayyids or not, and whether they were to be the poor of the native

town of the deceased or the poor of the place where he resided or the poor of the place where he died, or of all these places, or whether they were to be poor Shias generally. While therefore it is clearly the intention of the Shia law that the property should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited; and in some of the authorities the matter is left to the discretion of the vicegerent of the Imam.

I now turn to consider the judgment of the Subordinate Judge of Gaya in the suits of 1878; and, in order to ascertain the effect of his decision on issue no. 2 in these suits, it will be convenient first to deal with the decision of the Judicial Committee in the *Collector of Masulipatam* v. *Cavely Vencata Narrainapah*(1). That was a case dealing with the estate of a Brahmin dying without heirs and the matter which called for consideration was the effect of the prohibition in the Hindu Law,

"If there be no heir of a Brahman's wealth, on his demise, it must be given to a Brahman, otherwise the king is tainted with sin."

The Judicial Committee first of all discussed the question as one to be determined merely by Hindu Law; and it was held that according to Hindu Law the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who could not show a better title, and that the only question that arose upon the authorities was whether Brahmanical property, so taken, was, in the hands of the King, subject to a trust in favour of Brahmins. Their Lordships then proceeded to say that they were not satisfied that the Suddar Court was not in error when it treated the appellant's claim as wholly or merely determinable by Hindu Law. They conceived that the title which he set up might rest upon grounds of general or universal law. They pointed out that any question touching inheritance is determinable in a manner personal to the last owner; but when it is

(1) (1859-61) 8 Moo. I. A. 500.

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made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases, they apprehend, to be subject to any such personal law. And as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails and is adopted generally in all the courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord.

Their Lordships, further, held that the Suddar Court was in error in applying the actual or supposed Hindu law (which negatives the King's right to Brahmanical property) in derogation of the general right of the British Sovereignty, and they came to the conclusion in favour of the general right to the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs and they thought that the claim of the appellant to the zamindari in question (subject or not subject to a trust) ought to prevail.

There are therefore three grounds for the decision: in the first place, supposing the case to be governed by Hindu Law, then the King must take as, at least, intermediate holder of the property; in the second place, where there is no heir under the personal law, the personal law ceases to govern the case and the King takes by the general law of escheat; and, in the third place, the personal law cannot be applied in derogation of the general right of the British Sovereignty.

Now it seems to me that the learned Subordinate Judge has followed closely the line of reasoning in that case. He first of all sets forth the Shia law on the heirship of the Imam. During the absence of the Imam the property is to be held by his Deputy, the Mujtahid. There is no mujtahid in British India with the powers required.

"On the contrary, as regards this estate, in the absence of the Imam the most influential, honest and faithful person is the

Sovereign for the time being, that is, the Queen-Empress. It is most likely that she on receipt of possession of this estate, shall use it for good purposes in the way that she thinks best."

This line of reasoning seems to correspond with the first part of the decision of the Privy Council. Then he goes on to say that this line of reasoning is inapplicable because the defendants in these suits were not entitled to raise objections for or on behalf of the Imam or Mujtahid and they, at all events, had no title. He then holds that, apart from this, in this matter the plaintiff, that is, the Secretary of State, is not bound by the religious books of the Shia sect. When the defendants had no right, there was no heir to the estate. That being so the Sovereign for the time being is under the general law of escheat entitled to take possession. He then points out the analogy between this case and the case of a Brahmin dying without heirs; and as the principle of the Hindu Law could not prevent the Government for the time being from taking the estate under the general law of escheat, in like manner the doctrine of the Muhammadan law could not bar the plaintiff's claim.

"In this age the Government should, in my opinion, be held as the last heir just in the same way as the Imam has been declared the last heir in the Shurra."

That this is the scheme of the judgment is apparent also from the form of the issue framed:

"According to the general law and the law of the Shias (Kanunan-o-Sharan) who is entitled to take the estate of a Musalman of the Shia sect who has no issue nor relation entitled to the estate?"

The argument of the learned Counsel for the plaintiffs is that the Subordinate Judge found title to be in the Imam. He then looked for some one to hold the property and that must mean some one to hold it with the obligation of a mujtahid. The Crown was selected because it was honest and the Crown must therefore take the property with the conditions of the Shia law attached and has freedom only within the ambit of Shia purposes. The estate had vested in a heir who could not take possession; he was not present to perform his obligations, the deficiency was to be made up by the Sovereign. The Subordinate Judge

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did not hold that title went to the Secretary of State, but he got the estate in accordance with the principles of the Shia law. The Secretary of State in the plaint had based his claim to the property explicitly on the Shia law, and that in two respects:

"By the Imamia Code of Muhammadan law an illegitimate child has no nusub or parentage and is not an heir of his mother. By this law therefore neither Himut Bahadur, Ekbal Bahadur or Bismilla Begum were the heirs of Barratee and as Barratee Begum left no other heirs her surviving the properties possessed by her at the time of her death passed in default of other heirs by escheat to the Crown" (paragraph 8).

"Under the Imamia Code of Muhammadan law by which the family of Ekbal Bahadur was governed, Sahebzadee Begum being a childless widow was not entitled to inherit any portion of the immoveable property of her late husband and as Ekbal Bahadur was himself an illegitimate child and had no issue of his body the whole of his immoveable property and 12 annas of his moveable property escheated on his death to the Crown" (paragraph 12).

It is clear that whatever claim the Secretary of State may have had on principles of general or universal law to the property other than the taksimnama property, he had no such claim to the taksimnama property and his claim to that property so far as Ekbal Bahadur's share was concerned was based wholly on the peculiar provision of the Shia law that a childless widow is not an heir. There is therefore great force in the argument of the plaintiffs that inasmuch as the Secretary of State took the property, or at least the taksimnama property, under the peculiar provisions of the Shia law, he should hold it under that law. But the argument is not conclusive. By the personal law governing the parties the estate was strictly heirless (apart from the claim of the Imam): the persons holding it had no title to it. The Crown was therefore entitled to come in under the general law and to hold the estate. As regards the heirship of the Imam, there was, in the words of the Privy Council no "person in the nature of an heir capable of succeeding"; and on this ground also the Crown was entitled to come in. It is clear that no trust was imposed upon the Secretary of State by the judgment of the Subordinate Judge. The question of the heirship of the Imam was discussed only as a

theoretical question, because it was definitely held that the defendants in these suits were not entitled to raise it. No trust therefore could have been imposed by the judgment because there was no one to set up any trust.

It was also argued that the second ground of decision in the *Masulipatam case*(1) cannot apply to the present case because in fact there is an heir and consequently there can be no escheat under the general law. But the question is whether there was anyone in the nature of an heir capable of holding the property; and the answer to this question must be in the negative. And the analogy with the *Masulipatam case*(1) is complete because in the case of a Brahmin dying without heirs the Mitakshara repeatedly describes the other Brahmins as his "heirs". Consequently a Brahmin dying without natural heirs is no more heirless than a Shia.

Then apart from the judgment, does the Secretary of State hold this property impressed with a trust? This raises the questions, who is the trustee? And who is the cestui que trustent? If there is substance in the plaintiffs' contention then the Secretary of State occupies the position of the mujtahid. But the mujtahid is not a trustee for the poor and indigent; he is agent of the Imam. If it be assumed that the Imam could give directions, and by law has given directions, to his Deputy to distribute the estate, which is in the nature of spoils, this would not establish the relation of trustee and cestui que trustent between the Deputy and the poor. The law binding upon the Deputy would not create a trust enforceable by the court for the benefit of the poor [see *Kinloch* v. *Secretary of State for India in Council* (2)]. There was no means of enforcing the law against the mujtahid and there is in my opinion no ground in the Shia law for holding that the present claim can be enforced against the Secretary of State. On these grounds therefore I think that these issues

(1) (1859-61) 8 Moo. I. A. 500. (2) 7 App. Cas., 619.

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must be decided against the plaintiffs: (1) the trust set up is, on the texts, vague and not enforceable; (2) no trust was imposed by the judgment and decree of the Subordinate Judge awarding possession of the property to the Secretary of State; and (3) no relation of trustee and cestui que trustent exists between the parties.

Reference was made in the argument to the practice of the Crown in England in the matter of regranting escheated lands.

> "Property which has escheated to the Crown may in certain cases be granted to the family of, or to persons adopted as part of the family of, the person whose estates the same have been" (Halsbury, Laws of England, Volume II, page 27).

This is a matter, however, which rests in the discretion of the Government alone.

Issue no. 10.—That the Secretary of State is capable of being a trustee is indisputable. In the *Secretary of State for India in Council* v. *Guru Prosad Dhur*(1) Piggot, J., said, "It need not be discussed whether or not the East India Company could be a trustee. It is certain it could be and often was". See also *The Secretary of State for India in Council* v. *Pandit Radhika Prosad Bapali*(2). This issue is decided in favour of the plaintiffs.

Issue no. 11.—No injunction could in any view be granted as the effect would merely be to hold up the property without imposing any duty. On the findings on the above issues nos. 7 to 9 the plaintiffs are not entitled to any declaration and therefore to no relief.

The suit must therefore be dismissed; but, in view of the importance of the question that has been raised and of the fact that the plaintiffs did not raise it for their own benefit, I think that the costs of both parties should come out of the estate: hearing fee Rs. 1,000 per diem for seven days.

DAS, J.—I agree.

(1) (1893) I. L. R. 20 Cal. 51, 65, F. B.
(1) (1923) I. L. R. 46 Mad. 259.

JURY REFERENCE.

Before Ross and Kulwant Sahay, J.J.

EMPEROR

v

GOBIND SINGH.*

1926.

March, 2.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 467 *and* 471—*antedating a document, whether amounts to forgery—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 307, *reference under—interference by the High Court.*

The antedating of a document is not forgery, unless it has or could have operated to the prejudice of anyone.

Reg v. *Ritson*(1) and *Salway* v *Wale*(2), referred to

Where, therefore, a certain handnote, dated 20th Chait, 1329, F. S., bore the genuine thumb impression of the executant, but it was found in fact to have been executed subsequently, and there was absence of evidence that the antedating by the creditor was done with the object of making any wrongful gain to himself or causing wrongful loss to the executant, *held*, that the necessary element of fraud or dishonesty was wanting in the case and that therefore the offence of forgery was not committed.

Held, further, that the High Court will not interfere in a reference under section 307, Code of Criminal Procedure, with the verdict of the jury unless it considers that the verdict cannot be supported by the evidence on the record.

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

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

Hasan Imam, with him *R. N. Prasad*, for the accused person.

KULWANT SAHAY, J.—This is a reference made by the Sessions Judge of Patna under section 307 of the

*Jury Reference no. 2 of 1926. Reference made by J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, by his letter no. 157/XI-1, dated the 20th of January, 1926.

(1) (1869) 1 C. C. R. 200; 39 M. J. M. C. 10.

(2) (1519-1621) Moo. K. B. 655; 72 E. R. 819.

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Code of Criminal Procedure on a disagreement with the verdict of the majority of the jury finding the accused not guilty.

The charge against the accused was of using a forged document in a civil litigation under section 471 read with section 467 of the Indian Penal Code. The document alleged to have been forged was a hand-note executed by one Umrao Singh in favour of the accused Gobind Singh for a sum of Rs. 500 bearing date the 20th of Chait, 1329, which corresponds with the 2nd of April, 1922. Gobind Singh instituted a suit on the basis of this hand-note in the court of the Munsif at Barh on the 17th of May, 1924, and the hand-note was filed along with the plaint. The defendant Umrao Singh filed a written statement wherein he denied his liability under the hand-note, and denied the execution thereof. It appears that upon an application of the defendant, Umrao Singh, the hand-note was sent to the stamp office at Calcutta for information as to whether the paper upon which the hand-note was executed had been issued on or before the 2nd of April, 1922. The stamp office gave a reply saying that the paper upon which the hand-note was written had not been issued on that date. The plaintiff, however, appears to have taken no steps in the suit, and the suit was dismissed for default on the 11th of May, 1925. The learned Munsif, on the same day, made a complaint against the plaintiff, Gobind Singh, under section 476 of the Code of Criminal Procedure. After the dismissal of the suit, Gobind Singh filed a petition for restoration of the suit on the allegation that there had been a compromise between him and Umrao Singh; and, in accordance with that compromise, Umrao Singh had executed a fresh hand-note for a sum of Rs. 696-8-0, and the agreement between the parties was that none of them would take any steps in the suit and allow it to be dismissed for default. Gobind Singh produced this second hand-note alleged to have been executed by

Umrao Singh. An expert was examined and his evidence was that the thumb impression upon the second hand-note as well as that upon the original hand-note of the 20th Chait, 1329, were both the thumb impressions of Umrao Singh. The learned Munsif, however, dismissed the application for restoration, and Gobind Singh was prosecuted for an offence under section 471 read with section 467 of the Indian Penal Code.

At the trial the only evidence given was that of the head-assistant of the stamp office, who proved that the paper upon which the hand-note had been written had not been issued in April, 1922; of the pleader, Babu Kandji Sahai, who filed the plaint and application for restoration of the suit on behalf of Gobind Singh; and of Gouri Dayal, a clerk of the pleader Kandji Sahai, who proved that he had written the plaint. The prosecution story is that the hand-note bears the genuine thumb-mark of Umrao Singh but that the paper was a blank paper upon which Umrao Singh had put his thumb impression and had made it over to Kashi Singh in order to obtain from him settlement of certain diara lands. Kashi Singh is the karpardaz of Gobind Singh; and Gobind Singh's case is that the loan was advanced to Umrao on the intervention of Kashi Singh and that the money was actually advanced on the 20th of Chait, 1329, but that the hand-note was executed on a subsequent date as Umrao Singh failed to repay the loan of Rs. 500 which had been advanced to him; and that although the hand-note was executed on a subsequent date, yet the date of the original loan was entered therein so that he might not lose the interest on his money.

Now there is absolutely no evidence to show that a blank paper bearing the thumb impression of Umrao Singh had been made over by him to Kashi Singh. There is evidence in the case to show that the hand-note in question bears the genuine thumb impression of

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Umrao Singh. The presumption must therefore be that the hand-note was a hand-note executed by Umrao Singh. The only thing that is certain upon the evidence is that the document had been antedated; but this antedating of the document would not necessarily make it a false document. There is a total want of evidence in the present case to show that the antedating was done by Gobind Singh with the object of making any wrongful gain to himself or causing wrongful loss to Umrao Singh. The element of dishonesty is wanting in the present case. Moveover the fact of the second hand-note having been given by Umrao Singh goes to show that the previous hand-note had been executed by him. In any event, upon the evidence as it stands, it cannot be said that the view taken by the majority of the jury was a view which was incompatible with the evidence in the case; and it is clear that this court will not interfere in a reference under section 307 of the Code of Criminal Procedure against the verdict of the jury, unless, this court is of opinion that the verdict of the jury could not be supported by the evidence on the record. In the present case the evidence is, as I have said, such that the view taken by the jury cannot be said to be an unreasonable view of the case.

In these circumstances, I am unable to accept the reference, which must be discharged; the verdict of the jury will be accepted, and the accused must be acquitted and released.

ROSS, J.—I agree that this reference should be discharged. It is admitted that the document bears the thumb impression of Umrao Singh, the debtor, and, therefore, in the absence of evidence to explain this fact, the hand-note must be taken to have been executed by him. It bears date the 20th of Chait, 1329, that is, the 2nd of April, 1922. It is proved that the paper on which it was written was not in existence then; and it follows that the creditor antedated this hand-note. The question is, whether this

is forgery. In my opinion, it is not. The conditions under which the antedating of a document by its executant will be forgery are discussed in *Reg* v. *Ritson*(1). There the Judges referred to the definition of forgery in Bacon's Abridgment where it was said

"The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or, at least, to make a man's own act appear to be done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and in justice it ought not to have."

That was a case where a conveyance executed subsequently to an equitable mortgage and an assignment of the same property was made to bear a date anterior to these transactions in order to give it priority over them. This was held to be forgery on the ground that by this antedating of the document a false operation was given to it. Blackburn, J., in his judgment said, "In this case the false statement is in the date which, in ordinary cases, would not be material; but here, by extrinsic evidence, the false date was shown to be very material, and the forged deed would have passed the estate to another person than the prosecutor if the deed had been executed on the day it bears date". Their Lordships relied upon an old decision, *Salway* v. *Wale* (2), which was a similar case; but in that decision it was added that antedating is not forgery if there is not a mesne interest in any third person who is prejudiced thereby. In the present case there is nothing to show that the antedating of this document had, or could have had, any operation to the prejudice of any one. The necessary element of fraud or dishonesty is therefore wanting.

I therefore think that the decision of the jury was correct and that the prisoner must be acquitted and released.

Reference discharged.

(1) (1869) 1 C. C. R. 200; 39 M. J. M. C. 10.
(2) (1519-1621) Moo. K. B. 655; 72 E. R. 819.

APPELLATE CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

CHANDRA PRASAD

v.

KING-EMPEROR.*

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Feb., 23, 24; March, 3.

Penal Code, 1860 (*Act XLV of* 1860), *section* 409—*wilful detention of money by servant where there is a duty cast to account, whether amounts to embezzlement—proof, what amounts to.*

Where it is a servant's duty to account for and pay over the monies received by him at stated times, his not doing so, wilfully, amounts to embezzlement.

Rex v. *Jackson*(1), followed.

Rex v. *Jones*(2), not followed

Kupplili Prakasarow, In re (3), *Mathura Prasad* v. *Emperor*(4), *Rambyas Rai* v. *Emperor*(5) and *Queen-Empress* v. *Ganpat Tapidas*(6), distinguished.

C a sub-postmaster, and *D* a parcels' clerk, were charged with criminal breach of trust in their capacities of public servants under section 409, Penal Code, in respect of three sums of money received for value-payable articles on 23rd May, 1925, 27th May, 1925, and 30th May, 1925, respectively, these sums not being accounted for until the 9th of June, 1925. The defence of *C* was that the articles were all along in the exclusive custody of *D*, that the money realized for them was never made over to him and that until the 9th June, 1925, he did not know that it had been realized. The defence of *D* was that the articles were not delivered to the addressees on the 23rd, 27th and 30th of May, but on the 9th of June. The facts found were that the sums of money were paid to the post office on the dates specified in the charges, and were received by *D* in the usual course and entered by him in the register of

*Criminal Appeals nos. 216 and 223 of 1925, from a decision of J. Chattarji, Esq., Sessions Judge of Darbhanga, dated the 9th of December, 1925.

(1) (1844) 1 C. & K. 384.
(2) (1838) 7 C. & P. 833.
(3) (1915) 26 Ind. Cas. 807.
(4) (1917) 40 Ind. Cas. 303.
(5) (1918) 47 Ind. Cas. 667.
(6) (1886) I. L. R. 10 Bom. 256.

value-payable articles received. It was also found that *C* had made some entries in the register of value-payable articles received and had also initialled the balance of articles undisposed of. Under the rules the appellants as servants of the post office, were bound to send money received for value-payable articles to the sender on the date of receipt or at the latest on the next day. The prosecution failed to prove that *C* was ever entrusted with the money received by *D* or that he had any knowledge of the receipt of money in the post office.

Held, on the facts found, (*i*) that *D* was guilty of criminal breach of trust in the capacity of a public servant; (*ii*) that the mere fact that *C* had made some of the entries in the register and had initialled the daily balance of articles undisposed of, or the fact of his failure to check the register with the articles actually in hand, did not take the place of proof that he knew the monies to have been paid or that they were at any time entrusted to his care, and that, therefore, he was not guilty of an offence under section 409, Penal Code.

These were two appeals, one by Chandra Prasad who was Sub-Postmaster of Roserah Sub-Post Office, and the other by Debendra Nath Ganguly who was a clerk in the same office, against their conviction under section 409 of the Indian Penal Code. The appellants were charged with criminal breach of trust in their capacities of public servants in respect of three sums of money, namely, Rs. 307-15-0, which was paid for value-payable letter no. 641 on the 30th of May, 1925, Rs. 119-7-0 which was paid for value-payable letter no. 3 on the 27th of May, 1925, and Rs. 303 which was paid on account of insured value-payable parcel no. 738 on the 23rd of May, 1925, these sums not being accounted for until the 9th of June 1925.

The defence of the Sub-Postmaster was that the value-payable articles referred to in the charges were all along in the exclusive custody of Debendranath Ganguly and that the money realized for them was never made over to him and he did not know that it was realized before the 9th of June. The defence of Debendranath Ganguly was that the letters and parcel were not delivered to the addressee on the 23rd, 27th and 30th of May, but on the 9th of June.

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This latter defence was found to be untrue at the trial where it was conclusively shown that the sums of money referred to in the charges had been paid to the Post Office on the dates specified therein; and, in the appeal, this defence was abandoned.

The facts as found by the Sessions Judge were no longer disputed in appeal. These facts were that value-payable letter no. 641 was sent by Messrs. H. D. Nandi and Company of Taltola to a firm in Roserah called Friends and Company of which the sole proprietor was Lachminarain Purvey. The letter contained the railway receipt for a bicycle consigned to sender. The letter was despatched on the 25th and arrived at Roserah on the 27th. It was received by Debendranath Ganguly in the usual course and entered by him in the register of value-payable articles received. He also issued a receipt form on the 27th of May. The money was paid to Debendranath Ganguly by Lachminarain Purvey on the 30th of May, 1925; but the value-payable letter appeared in the register in an entry made by Debendranath Ganguly as still undelivered on the 4th of June, and the money order in respect of this receipt was not issued until the 9th of June.

Value-payable letter no. 3 was sent by Jhallu Sahu Bijadhar Ram of Benares to Bhailal Gobind Lal of Roserah on the 19th of May. It contained the railway receipt for a bag of German Silver Lotas. The letter was received on the 21st of May and was registered by Debendranath Ganguly, who also issued the usual receipt form. On the 27th of May Badrilal, the proprietor of the firm, paid Rs. 119-7-0 to Debendranath Ganguly and got delivery of the letter. In this case also the money was not remitted to the sender by Debendranath Ganguly until the 9th of June.

The insured parcel no. 728 which was said to contain gold-leaf was depatched by S. C. Singh from Strand Road, Calcutta, to Bhailal Gobind Lal at

Roserah on the 22nd of May and was received at Roserah on the 23rd and entered as an ordinary value-payable article in the register by Debendranath Ganguly on that date. He also issued the usual receipt form. The money Rs. 303 was paid by Badrilal on the date of receipt, namely, the 23rd of May, to Debendranath Ganguly and the parcel was delivered to him. The parcel was still shown as undelivered on the 1st of June and on the 4th of June by Debendranath Ganguly in his register and the money was not remitted to the sender until the 9th of June.

D. P. Sinha, *B. P. Varma* and *R. S. Lal*, for the postmaster.

S. P. Varma, *B. N. Mitra*, *B. Prasad* and *K. Moitra*, for the parcels clerk.

H. L. Nandkeolyar (Assistant Government Advocate) for the Crown.

Cur. adv. vult.

Ross, J. (after stating the facts as set out above, proceeded as follows): The contention on behalf of the Sub-Postmaster Chandra Prasad is that as the money was never entrusted to him, he cannot be held guilty of criminal breach of trust. The learned Assistant Government Advocate contended that both the appellants are Post Office servants and both are bound by the terms of their appointment to dispose of the property entrusted to them in accordance with the contract which is implied under the rules. If they are bound by the rules to send money received on account of value-payable articles to the sender on the date of receipt or at the latest on the next day, as the rules provide, they violate the contract if they dishonestly retain the money. The duties of the parcels clerk are to receive parcels and deliver them and make over the money received for them to the postmaster. The duty of the postmaster is, as soon as he receives the money, to send it to the cash office at

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Samastipur. It is admitted by the learned Assistant Government Advocate that the prosecution has not proved that the money was received by the postmaster; but it is contended that the postmaster wilfully suffered the parcels clerk to dispose of the money in a manner contrary to his legal obligations. He knew of the receipt of the money in the Post Office; and, if he dishonestly omitted to send off the money, he is guilty of criminal breach of trust. It is argued that once the money comes into the Post Office to the knowledge of the postmaster, it is entrusted to him. He has made some of the entries in the register of value-payable articles received and has also initialled the balance of articles undisposed of. Now it seems to me that on the facts found no charge is proved against the postmaster. He may have been negligent in supervision; and from the fact that the parcels clerk, who was in receipt of a salary of Rs. 74 a month, must have been of almost the same standing in the service as himself, his pay being Rs. 78 a month, it is not unlikely that he exercised insufficient control. But from the mere fact that he made some of the entries in the register and initialled the daily balance of articles undisposed of, it cannot be inferred that he knew that these monies had been paid. If he had checked the register with the articles actually in hand, the fraud must have been discovered; but his failure to do this cannot take the place of proof that the money received on account of these articles was entrusted to his care. In the case of the insured article Article 393 of the Post Office Manual requires that in sub-post offices where the pay of the sub-postmaster is less than Rs. 100 a month, the duty of examining the insured parcels must be performed by the sub-postmaster and the undelivered insured parcels must be kept under lock and key in his personal custody. But this rule is not available to the prosecution for two reasons—first, the insured article was entered in the register as an ordinary value-payable article; and, secondly, it was delivered to the addressee on the date of receipt.

There is, in my opinion, no case against Chandra Prasad; and his appeal must be allowed.

The case of Debendranath Ganguly stands on a different footing. Learned Counsel argued on his behalf that accepting the findings, the facts do not amount to an offence under section 409. They prove that certain sums of money were received on the 23rd, 27th and 30th May and were not transmitted until the 9th of June. But this only amounts to detention of the money and the prosecution must prove that within this period of detention the money was converted to the appellant's own use; but there is no such finding and there is no evidence to show that the money ever left the post office; and the period of detention was so short that it was not safe to presume that the appellant intended to cause wrongful loss or gain. The following decisions were referred to: *Rex* v. *Jones*(1) where it was held that the mere fact of not entering the sum of money received was insufficient to support an indictment for embezzlement; although it was observed that had the prisoner denied the receipt of the money, the case might have been different. Archbold, in his Criminal Pleadings and Practice (26th Edition, page 618), refers to this decision and says that it must be taken to be overruled by the contrary decision in *R.* v. *Jackson*(2) where it was held by Coleridge, J., that where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he does not actually deny the receipt of them. The next case was *In Re Kuppili Prakasarow*(3). The head-note to that case says that where the only evidence against the accused charged with misappropriating a telegraphic money order is that the postal account contained entries of delivery on dates different from those on which the actual deliveries were made, that merely creates a suspicion and is not sufficient proof of misappropriation. The finding was that there was no evidence to

(1) (1838) 7 C. & P. 833. (2) (1844) 1 C. & K. 384.
(3) (1913) 26 Ind. Cas. 807.

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show that the sum was misappropriated by the accused and not by the postman. The decision, therefore, went on the facts which are entirely different from the facts of the present case. The next case was *Mathura Prasad* v. *Emperor*(1) where it was held that the detention of money by a servant or clerk for fifteen months after its receipt raises a very serious doubt of bona fides against him, but the detention is not conclusive proof of criminal misappropriation or criminal breach of trust. The decision in that case, however, proceeded on the absence of any rules regarding the paying in of money realized, as well as on facts showing that the accused had attempted on various occasions to pay the money, but it had been refused by the treasurer. Knox, J., observed, " In the present case the estate is a private estate. No attempt has been made on the part of the prosecution to prove that any rule of the estate, or any contract, express or implied, lay between the estate and Mathura Prasad regarding the time and the manner in which all such monies were to be deposited. It is easy to say that they should be deposited without delay, but that must be a matter of proof as much as any other matter of fact in the case ". This observation clearly differentiates that case from the present where the rules of the post office are definite that the money must be remitted on the day of receipt or at the latest on the following day. Reference was also made to *Rambyas Rai* v. *Emperor*(2), but that decision proceeded entirely on the facts which negatived any dishonesty on the part of the accused in retaining certain documents. The last case was *Queen-Empress* v. *Ganpat Tapidas*(3). There money received on account of the Government had been detained for some time by a revenue patel. He had, however, taken formal receipts for the money from the payees and it was found that the reason for his not immediately

(1) (1917) 40 Ind. Cas. 303. (2) (1918) 47 Ind. Cas. 667.
(3) (1886) I. L. R. 10 Bom. 256.

paying the money to them was that they were willing to trust him with the money. That decision has therefore no application to the present case. The accused Debendranath Ganguly kept these monies which were entrusted to him as a public servant for periods of seventeen, thirteen and ten days in violation of the rules by which he was bound. This in itself raises a case which he has to answer. He gave a false explanation that the monies had not been received until the 9th of June. He also made entries in his register showing that the articles were still undelivered in the post office long after they had been delivered and the money for them had been received. This amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust. In my opinion, therefore, Debendranath Ganguly was properly found guilty of the charges framed against him.

The result is that the appeal of Chandra Prasad is allowed and his conviction and sentence are set aside and he is ordered to be acquitted and released from bail. His fine, if paid, will be refunded. The appeal of Debendranath Ganguly is dismissed; and he will surrender to his bail to undergo the rest of his sentence.

KULWANT SAHAY, J.—I agree.

PRIVY COUNCIL.

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March, 23.

GANESH LAL PANDIT

v.

KHETRAMOHAN MAHAPATRA.*

Limitation Act, 1877 (*Act XV of* 1877), *Schedule II, Articles* 66, 132—*Mortgage—personal covenant—decree for sale—deficiency—Hindu Law—Hindu widow—alienation—necessity—decree by co-sharers for contribution.*

*Present: Viscount Dunedin, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

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A suit to enforce a personal covenant in a mortgage deed is not one " to enforce payment of money charged upon immoveable property " within the Indian Limitation Act, 1877, Schedule 2, Article 132.

Where upon a sale under a mortgage decree, which includes no personal decree against the mortgagor, there is deficiency, a claim to recover the balance under a personal covenant in the mortgage is barred by Article 66 unless it is made within a period of three years from the date when the debt became payable; the period does not begin to run only from the date when the deficiency is ascertained by the sale.

Ramdin v. *Kalka Pershad* (1), applied.

Miller v. *Runga Nath Moulick* (2), approved.

Where a Hindu widow has failed to pay her share of revenue on a mauza, a share in which forms part of the estate of her deceased husband, and the co-sharers have attached part of the estate under a decree for contribution, an alienation by the widow of part of the estate for the purpose of discharging the decree is for necessity, and is binding upon the reversionary heirs.

Upendra Lal Mukerji v. *Grindra Nath Mukerji*(3), distinguished.

Judgment of the High Court varied.

Appeal by the defendants.

Appeal (no. 96 of 1923) from a decree of the High Court at Patna (January 16, 1922) varying a decree of the Subordinate Judge of Cuttack (January 30th, 1919).

The plaintiff, upon whose death the respondents (her sons) had been substituted, claimed as reversionary heir of her deceased father, a Hindu, to set aside certain alienations of his estate made by her mother Suryamani, deceased. The alienations consisted of a mortgage and sale both made in 1884, and certain conveyances made in 1899.

(1) (1884) I. L. R. 7 All. 502; L. R. 12 I. A. 12.
(2) (1885) I. L. R. 12 Cal. 389.
(3) (1898) 2 Cal. W. N. 425.

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

The Subordinate Judge dismissed the suit. Upon appeal the High Court (Das and Adami, JJ.) varied the decree by declaring that the conveyances made in 1899 were invalid. The reasons for the decisions are stated in the judgment upon the present appeal.

DeGruyther, *K. C.* and *Dube* for the appellants.

The respondents did not appear.

The judgment of their Lordships was delivered by— *March, 23.*

MR. AMEER ALI.—Their Lordships are relieved of the necessity of narrating at length the facts of this complicated litigation, as the judgment under appeal summarises very clearly the history of the transactions in debate.

This is an ex parte appeal from the judgment and decree of the High Court of Patna which partly affirmed and partly reversed the order of the court of first instance.

A Hindu lady of the name of Suryamani, who died in 1904 or 1905, conveyed by mortgage and sale to one Behari Lal Pandit the father of the defendant no. 1, almost the whole of the property which had devolved on her as the widow of one Banamali Mahapatra, a native of Orissa, subject to the Mitakshara law. Banamali appears to have died in the year 1863, leaving him surviving his widow, Suryamani, and two daughters, one of whom died not long after, childless; the other Satyabhama, survived her mother, and was the original plaintiff in the present suit, which was instituted in the court of the Subordinate Judge of Cuttack on the 17th September, 1916. Satyabhama challenged in the action the validity of the transactions entered into between Suryamani and Behari Lal Pandit in respect of the

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properties conveyed to him by the widow. On Satyabhama's death her sons, the present respondents, were substituted in her place.

It is not disputed that Suryamani, on coming into possession of the properties left by her husband, had to meet heavy expenses connected with the litigation in which Banamali was involved The High Court, in its judgment, refers to the circumstances which compelled her to alienate many of the properties which formed the subject of controversy in the present case.

In respect of the others the learned Judges of the High Court, differing from the trial Judge, have held firstly that the documents which purported to create the alienations were not properly explained to the lady, that she was an ignorant pardanashin woman and had no independent advice; and secondly, that some of the alienations challenged by the plaintiffs were either for debts that were barred or not binding on the reversioners. They have also held that the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani.

It is with regard to these findings that the present appeal before the Board is concerned.

On the defendants' side it is alleged that on the 23rd July, 1884, Suryamani entered into two transactions with Behari Lal Pandit: one was a mortgage for Rs. 30,500, the other a sale to him of certain properties for Rs. 8,000. The sale-deed is marked in the proceedings as Exhibit Q. 6, and the deed of mortgage as Exhibit M.

In 1896 Behari Lal Pandit instituted a suit against Suryamani and her daughter Satyabhama for enforcement of the mortgage On the 28th August, 1896, Behari Lal Pandit obtained an ex parte decree.

Their Lordships do not think it necessary to refer to the steps taken by the ladies to set aside the ex parte

decree; it is enough to say that they failed in those proceedings and on the 25th and 26th August, 1897, the mortgage decree was executed, and the mortgaged properties were put up for sale and purchased by Behari Lal himself for Rs. 33,000 odd. At the time of the sale the mortgage debt amounted to something like Rs. 80,000. In order to pay the balance of the mortgage debt Suryamani entered into a razinama or deed of compromise by which she agreed to transfer to Behari Lal her remaining properties in her hands belonging to the estate of her husband. In pursuance of this razinama she appears to have executed in 1899 a number of conveyances which are marked in the proceedings as Q., Q. 1, Q. 2, Q. 3 and Q. 4. Q. 5, executed about the same time, stands in a different category.

As already stated Satyabhama, and after her death, the plaintiffs, as reversioners to Banamali's estate, challenged the sale-deed of the 23rd July, 1884, by which Behari Lal purchased some of the property on the 23rd July, 1884. They also challenged the mortgage deed of the same date and the transactions of 1899, evidenced by Exhibit Q., Q.1, Q.2, Q.3, Q.4 and Q. 5.

The learned Judges of the High Court have held that the defendants had established legal necessity in respect of the mortgage of the 23rd July, 1884, and that consequently the sale under the mortgage decree was valid, but that they had failed to satisfy that the sale of the 23rd July, 1884, Q. 6, was for justifiable necessity, or that she had in fact executed the sale-deed, or that it was read over and explained to Suryamani, and that apart from that she had no independent advice. They also held that the kabalas executed by the widow in 1899 were not binding on the reversioners.

In their Lordships' opinion the evidence fully justifies the conclusions of the learned Judges. The

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deed of sale (Q. 6) was executed for Suryamani by a person of the name of Lakhan Mahanty, under a power-of-attorney which bears date the 29th of July, 1884, six days after the sale in question. The substance of the powers entrusted to Lakhan are set out in the Register of Powers of Attorney for 1884 as follows:—

"General Powers—To execute and register a mortgage bond of Rs. 33,500 and a deed of sale of Rs. 8,000 in favour of Babu Behari Lal Pandit."

It will be noticed that this power was registered on the 29th of July, whilst the sale was effected on the 23rd. Neither of the two witnesses to the execution of the power was examined. Under the Registration Act of 1877 the same provisions are made as under the Act now in force for safeguarding the interests of absent executants of documents when presented for registration by a person claiming to act by and under their alleged authority. Section 32 provides that

"every document to be registered under the Act whether such a registration be compulsory or optional, shall be presented by such person executing or claiming under the same.....or by the representative or assignee of such person or by the agent of such person represented or assignee *duly authorised* by power-of-attorney duly executed and authenticated in the manner hereinafter mentioned."

Their Lordships concur with the High Court in holding that the sale-deed of the 23rd July, 1884, which purported to be executed by Lakhan Mahanty for Suryamani was not validly executed and that the sale thereunder could not bind either Suryamani or the reversioners.

As regards the kabalas by which Suryamani purported to transfer her remaining properties to Behari Lal Pandit in discharge of the balance remaining over after the sale under the mortgage decree, their Lordships also agree with the High Court that the claim on the personal covenant for the balance of the mortgage-debt was barred by the Indian Limitation Act (XV of 1877), long before the execution of the rasinama and the conveyances thereunder. It will be noticed that the mortgage of the 23rd July, 1884, by

which Suryamani borrowed Rs. 33,500 from Behari Lal Pandit on interest at the rate of 1 per cent. per mensem was repayable by her within six months from the date of the execution of the document. The covenant on her failure to repay is as follows :—

" If I fail to pay the whole of the principal and interest within the aforesaid term the creditor is competent to sue me in the court and realise the principal with interest thereon at the rate of Re. 1 per cent. per mensem from this day till the date of realisation and costs of the suit from me and from the mortgaged properties, and, if insufficient, from my other movable and immovable properties."

The decree on this mortgage, Exhibit T. (1), made on the 28th August, 1896, was in the following terms :—

" This suit is for recovery of the principal of Rs. 33,500-0-0 and the balance of interest of Rs. 47,228-8-0 in all Rs. 80,728-8-0 and the interest which will accrue from the date of institution of the suit till that of realisation and the costs of the suit from the defendant and if not fully realised from her then from the mortgage properties, except those exempted from mortgage liability at the request of the defendant no. 1 by putting them up for sale and if insufficient the balance be realised from the surety defendant no. 2 and her properties."

The suit on the mortgage bond was not instituted until ten years after the debt became repayable. The decree for the balance, if the sale of the mortgaged properties proved insufficient, was against Satyabhama, who had stood as surety on the mortgage. Satyabhama was afterwards absolved from all liability as surety in the High Court. In the case of *Ramdin* v. *Kalka Pershad*(1), it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgaged properties, the claim would be barred in three years. That case arose under the Limitation Act of 1871 (IX of 1871), and the same argument which has been advanced in the present case was submitted to the Board. Their Lordships in that case held as follows :—

" The second schedule places simple money demands generally under the three years' limitation,

(1) (1884) L. R. 12 I. A. 12; I. L. R. 5 All. 502.

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and under no. 65 the same limitation is applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraced suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immovable property, though it also applies to judgments and recognizances in India. But the counsel for the appellant relied upon the language of the 132nd article of the second schedule: 'For money charged upon immovable property, twelve years.' His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property."

The Judicial Committee expressly over-ruled the contention that a claim for the balance of the mortgage debt based on the personal covenant came under Article 132 of Schedule II applicable to claims for money "charged on immovable property."

That case was followed by the High Court of Calcutta in *Miller* v. *Runga Nath Moulick*(1) which arose under Act XV of 1877. There the learned Judges held as follows:—

"We are of opinion that the decision of the lower court upon the question of limitation is correct. The contention of the learned counsel for the appellant that Article 132 of Schedule II of the Limitation Act of 1877 refers to a claim to recover money charged upon immovable property quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin* v. *Kalka Pershad*(2). That decision was passed with reference to the corresponding article of

(1) (1885) I. L. R. 12 Cal. 389.
(2) (1884) L. R. 12 I. A. 12; I. L. R. 5 All. 502.

the Limitation Act of 1871. That article provides a period of twelve years for suits of money charged upon immovable property. The Legislature in the present Limitation Act has used a different phraseology, viz., ' to enforce payment of money charged upon immovable property.' The language of the present Act, viz., ' to *enforce*, etc.,' is more in favour of the contention that the article in question refers only to suits ' to enforce payment of money charged upon immovable property ' *by the sale of the said property*. This construction was put by the Judicial Committee of the Privy Council upon Article 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

Article 65 of the second Schedule (Act IX of 1871) is reproduced in Act XV of 1877 as Article 66.

Their Lordships are of opinion that the view taken by the High Court on the question of limitation is well founded. The cause of action on the personal covenant accrued to Behari Lal Pandit when Suryamani failed to pay the mortgage debt, viz., within six months from the date of the mortgage. And the claim had become barred under Article 66 long before the execution of the razinama and the conveyances thereunder. Consequently it is not necessary to consider whether a decree under section 90 of the Transfer of Property Act of 1882, is requisite in case of deficiency in the realisation from the mortgaged property. Admittedly no decree was asked for or made. Section 90 is now Order XXXIV, rule 6, of the Civil Procedure Code, 1908.

As regards the consideration for Exhibit Q. 5, which was a conveyance executed by Suryamani in favour of Behari Lal Pandit on the 25th November,

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1899, it appears that Suryamani became liable for her arrears of Government revenue under Act XI of 1859 in respect of a mouzah which she held in her husband's estate with other co-sharers. To save the property from sale under the Act the co-sharers paid the revenue due from her and sued her for contribution. They obtained a decree and attached her dwelling house for the satisfaction of the debt. This is recited in Exhibit Q. 5, the kabala by which she conveyed the property now claimed by the reversioners.

The learned Judges of the High Court relying on the case of *Upendra Lal Mukherji* v. *Grindra Nath Mukherji*(1), have held that where the Hindu widow fails to pay her share of the Government revenue and after her death her co-sharer brings a suit for contribution, the reversionary heirs of her husband's estate were not bound to satisfy the debt. But in the present case it has been found as a fact by the Subordinate Judge that the co-sharers had, in execution of their decrees for contribution, attached Suryamani's dwelling-house, and that in consequence thereof she was compelled to raise money by executing the kabala Exhibit Q. 5.

Their Lordships are of opinion that sufficient evidence has thus been given by the defendants to show that there was a compelling necessity on the part of the widow for entering into this transaction. They accordingly vary the decree of the High Court by deleting the transaction covered by the deed of sale, Exhibit Q. 5. In other respects the decree and judgment appealed against will be confirmed and the appeal will be dismissed. As there is no appearance on behalf of the respondents it will be without costs.

Their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellants: *Wakins and Hunter.*

(1) (1898) 2 Cal. W. N 425.

FULL BENCH.

Before Dawson Miller, C.J., Jwala Prasad and Bucknill, J.J.

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v. *April, 22, 23, 27.*

HIS EXCELLENCY THE GOVERNOR OF BIHAR AND ORISSA.*

Government of India Act, 1919 (9 & 10 *Geo. V. Ch.* 101), *section* 72D (3) *and* (4)—*tour and travelling allowances, whether "non-voted" items—Government of India (Civil Services) Act*, 1925 (15 & 16 *Geo. V, Ch.* 83) *section* 1(3)—*decision of Governor, finality of—appropriation of revenue by Governor—legal sanction—delegation of authority by Secretary of State—Writ of mandamus, power to issue on Governor—section* 110—*Specific Relief Act*, 1877 (*Act I of* 1877), *sections* 45 *and* 50.

Section 72D, Government of India Act, 1919, provides "... .....(2) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year and the proposals of the local Government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the Council in the form of demands for grants. The Council may assent, or refuse its assent to a demand, or may reduce the amount therein referred to..... " Sub-section (3) of the section, as it existed before the amending Act of 1925 (15 & 16 Geo. V., Ch. 83), provided : " Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure : ..... (*iv*) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council : ..... ". Sub-section (4) provides : " If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final. " Section 1(3) of the amending Act of 1925 enacts that the following provision shall be added at the end of sub-section (3) of section 72D of the Act of 1919 : " For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration,

*Miscellaneous Judicial Case no. 55 of 1926.

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allowances, gratuities.....and any other payments or emoluments payable to or on account of a person in respect of his office."

In consequence of this amendment the tour and travelling allowances of Government officers were treated by the Local Government in the budget as heads of expenditure which need not be submitted to the Legislative Council. The petitioner, a member of the provincial Legislative Council, therefore moved the High Court to issue a writ of mandamus to His Excellency the Governor requiring him under section 72D, Government of India Act, 1919, to submit to the vote of the provincial Legislative Council, in the form of demands for grants, proposals for the appropriation of certain items of the provincial revenues forming part of the civil budget estimate for the current year. The items in question related to the estimated tour expenses of the Governor and his staff, and the estimated travelling allowance of the members of the Governor's Executive Council and of the Inspector-General of Police. The petitioner also prayed (*1*) for a writ of mandamus to the said officers directing them to secure "such legal sanction and authority for the proposed appropriation as might under the law be deemed necessary," and (*2*) for a writ of injunction restraining the same parties from using any portion of the revenues of the province for the purpose aforesaid until proper legal sanction and authority had been obtained therefor.

Held, (*i*) that the Governor's tour allowance and the travelling allowances of the officers in question were covered by the amending Act and were included in "salaries and pensions" within the meaning of section 72D, sub-section 3(*iv*);

(*ii*) that the decision of the Governor to withdraw the items in question from the vote of the Legislative Council and to treat them as "non-voted" items was final and could not be questioned in any court of law;

(*iii*) that the Council had no right to require the items in question to be submitted to its vote and that, therefore, there had been no infringement of the right claimed by the petitioner;

(*iv*) that the disbursement by the Governor of the tour and travelling allowances had a legal sanction by virtue of the rules and resolutions passed by the Secretary of State in Council under sections 19A and 21, Government of India Act, 1919, by which the Secretary of State had delegated authority

to the Governor in Council to sanction expenditure upon "Reserved" provincial subjects within certain limitations;

(v) that section 110, Government of India Act, was a bar to the exercise of any original jurisdiction by the High Court over the Governor or the Executive Councillors in connection with any thing counselled, ordered, or done by them in their public capacity.

Per *Dawson Miller, C.J.*: (i) The scheme of the Government of India Act appears to be that, except as otherwise provided in the Act and the rules made thereunder, the control of the revenues of India shall rest with the Secretary of State or the Secretary of State in Council who has the right to delegate in certain cases to various officers or bodies the powers so conferred;

(ii) Section 110, Government of India Act, not only takes away the jurisdiction of the court with regard to acts already done but also deprives the court of the right to restrain acts in contemplation. It would be contrary to the spirit and intention of the enactment to hold that the court has power to prevent the doing of an act which, when done, it would have no power to call in question.

Per *Jwala Prasad, J.*—(i) No municipal court has any jurisdiction to question, control or interfere with the appropriation of the revenues of India by the Local Government provided it is for the purposes of the Government of India. The appropriation is an act of state which essentially concerns the exercise of sovereign power.

Salaman v. *Secretary of State in Council of India* (1), referred to.

(ii) No injunction can be granted independently of a suit instituted in court.

Per *Bucknill, J.*—Even under section 45, Specific Relief Act, none of the High Courts therein mentioned can make any order binding on a Governor.

The facts of the case material to this report are stated in the judgment of the Chief Justice.

Devaki Prasad Sinha (with him *Anant Prasad* and *D. L. Nandkeolyar*) for the petitioner: The

(1)(1906) 1 K. B. 613.

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disputed items—the tour and travelling expenses—should have been put to the vote of the Council under section 72D(2), Government of India Act, 1919. I do not dispute the authority of the Governor to treat any item as a non-votable item but I do dispute the right of any one not to place before the Legislative Council for its vote any item which is directed by the Government of India Act to be placed before the Council for its vote. The effect of the inclusion of these items as non-votable is that they have not been put to the vote of the Council.

[BUCKNILL, J.—How far will the decision of the Governor that the disputed items are non-voted items be final under sub-section (4) of section 72D? The remedy which you seek will have the effect of making the decision not final.]

It is final for the purposes of the Council's business. This court can see and determine the propriety of the decision under section 72D(4). On the merits, I submit that "travelling allowances" and "tour expenses" cannot be described as a payment or allowance in respect of the office so as to be covered by sub-section (3) as amended by section 1(3), Government of India Amendment Act, 1925. "Travelling allowance" is defined at page 253, Article 995. It is in no sense an incident of the office.

[CHIEF JUSTICE.—If the Governor undertakes a tour on duties connected with his office he does so at some expense, and if the Government recoups him in the shape of an allowance, that will surely be an allowance connected with his office.]

It is not meant for the officer.

[CHIEF JUSTICE.—If he had not been an officer, the allowance would not have been paid to him.]

He is not bound to travel; he will not cease to be an officer if he does not travel.

[BUCKNILL, J.—If these items come under sub-section (*3*) of the amended Act, then the Governor is as much empowered to disburse it as he is in respect of other non-voted items.]

The Act does not give the Governor any power to deal with the items, even if they are non-votable, without the vote of the Council. There must, therefore be some legal sanction for the disbursement of these items by the Governor.

[CHIEF JUSTICE.—But before we can interfere you have to convince us that the Governor is exceeding what should be considered reasonable.]

The right to vote supplies is a right of the subject. If that is infringed without legal sanction, surely your Lordships ought to interfere.

[CHIEF JUSTICE.—The only sanction that he can have is from Parliament, and if he has no such power under any Act of the Parliament no other sanction will avail.]

My justification in coming to this court is: firstly, if the items in question are wrongly treated as non-voted items, no remedy is open to me except petitioning this court for the exercise of its extraordinary powers; secondly, if these items are covered by the amending Act of Parliament, then, because the money is sought to be used for purposes not authorized by the Act, the only remedy is by way of the issue of a mandamus under section 45, Specific Relief Act.

[CHIEF JUSTICE.—But section 46 of that Act is a bar to the issue of a writ of mandamus.]

I am invoking your Lordship's power of issuing prerogative mandamus and not the common law mandamus which is of much more recent time. Right to a mandamus, being an unwritten law, is protected under the India Councils Act, and the provisions of the Specific Relief Act, in so far as they contravene the provisions of the India Councils Act, are ultra vires.

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[BUCKNILL, J.—Only those unwritten laws are protected by the India Councils Act which relate to allegiance and no more.]

I take my stand on section 55 of the Specific Relief Act. Moreover the Act is not exhaustive as the preamble shows and it does not include all the remedies open to me. Before this Act was passed the courts in England were issuing writs of mandamus for the enforcement of private rights. [*Smith* v. *Charley District Council* (1).]

The prerogative writ of mandamus has not been abolished and could not be abolished. It is only the statutory writ of mandamus that has been abolished by Statute. The Crown had the power to issue prerogative writs of mandamus which it transferred to Indian High Courts by Letters Patent. It is the Crown that could take it away and not any act of the Indian Legislature. Section 9, Indian High Courts Act, 1861, therefore remains untouched.

[CHIEF JUSTICE.—Section 50, Specific Relief Act, which speaks of writs of mandamus, includes prerogative mandamus.]

Powers conferred by an Act of Parliament cannot be taken away by an Indian Statute. Section 50 does not affect the power that was inherent in the King's Bench Division of the High Court and which was recognized by His Majesty in the Letters Patent.

[CHIEF JUSTICE.—Do you contend that this High Court has inherited this power independently of the powers given to the Calcutta High Court?].

Yes. It is within the power of the Indian Legislature to take away something out of the jurisdiction of the High Court but once the jurisdiction is fixed the Indian Legislature cannot take away the powers within its jurisdiction. [*Parmeshar Ahir* v. *Emperor* (2), *Sheonandan Prasad Singh* v. *King-Emperor* (3).]

(1) (1897) 1 Q. B. D. 532.
(2) (1918) 3 Pat. L. J 537, F. B.
(3) (1918) 3 Pat. L. J. 581, F. B.

The powers of the High Court to issue writs of mandamus are not restricted to section 45, Specific Relief Act. [*Kumar Shankar Roy Chowdhuri* v. *The Hon'ble Mr. H. E. A. Cotton* (1), *Rash Behary Dey* v. *Bhowani Charan Bhose* (2).]

[CHIEF JUSTICE.—How can this court enforce the order? Under section 110, Government of India Act, the Governor is not subject to the jurisdiction of any High Court in respect of anything done in his public capacity.]

If it is once done, my remedy is gone. The section is inapplicable as the act is not yet done.

Section 85, Government of India Act, which fixes the maximum salaries for the Governor and other officers does not include "travelling allowances". These officers cannot therefore spend more than the maxima fixed.

Sultan Ahmad, Government Advocate (with him *H. L. Nandkeolyar*, Assistant Government Advocate), for the opposite party:—By reference to section 2 of the Government of India Act it would appear that the Secretary of State is the highest and final authority to disburse the revenues of India. Under section 19A, the Secretary of State in Council may restrict the power of superintendence by regulation and rules. Under section 21 as it stood under the Act of 1915 no grant or appropriation of any part of the revenues could be made without the concurrence of the majority of the votes of the council. But by a proviso that was inserted in the section by an Act of 1916 the Secretary of State, with the concurrence of the majority of votes of members of his council could issue rules and regulations by which the appropriation or the grant of any part of the revenues of India could be made and there was no necessity for each item to be placed before the council. The power of delegation which was doubted in 1915 was established in 1916. *Vide*

(1) (1924) 40 Cal. L. J. 515 (2) (1907) I. L. R. 34 Cal. 97.

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Gauntlets "Introduction to the Indian Government Audit" which gives a history of the enactment of these various sections. In pursuance of the authority so vested in the Secretary of State in Council rules have as a matter of fact been framed delegating powers in certain cases to the Provincial Governors. The most recent resolution is to be found in the *Gazette of India*, Part I, 1922, at page 1216. That resolution incorporates the rules relating to expenditure by a Governor in Council on reserved provincial subjects. The position then is that the only items for which the sanction of the Secretary of State is required are now given in the rules framed by the Secretary of State which are appended to that resolution. Barring these items the powers of expenditure out of the revenues of India by the Governor in Council are absolute, subject of course to those which have to be placed before the Council for its vote. [The Court intimated that they did not desire to hear the Government Advocate on other points.]

Devaki Prasad Sinha, replied.

Cur. adv. vult.

April, 27. DAWSON MILLER, C.J.—In this case the Court is moved on behalf of Mr. Krishnaballabh Sahay, a member of the Bihar and Orissa Legislative Council, to issue a writ of mandamus to His Excellency the Governor of Bihar and Orissa requiring him under section 72D of the Government of India Act, 1919, to submit to the vote of the Legislative Council of Bihar and Orissa, in the form of demands for grants, proposals for the appropriation of certain items of the provincial revenues forming part of the civil budget estimate for the current year. The items in question are three in number, namely, (*a*) a sum of Rs. 65,000 the estimated tour expenses of the Governor and his staff, (*b*) a sum of Rs. 10,000 the estimated travelling allowance of the members of the Governor's Executive Council, and, (*c*) a sum of Rs. 10,000 the estimated travelling allowance of the Inspector-General of Police. We are further asked to issue a

writ of mandamus to the Governor of Bihar and Orissa, the two members of his Executive Council and the Inspector-General of Police, directing them to secure

"such legal sanctions and authority for the proposed appropriations as may under the law be deemed necessary."

We are further moved to issue a writ of injunction restraining the same parties from using any portion of the revenues of the province for the purposes aforesaid "until proper legal sanction and authority deemed necessary under the law have been obtained therefor."

It appears from the petition of the applicant that in submitting the budget estimate for the current year the Local Government has treated the items in question as "non-voted," that is to say items the appropriation of which is not subject to the control or sanction of the Legislative Council. The case made on behalf of the petitioner is twofold. First he contends that the items of expenditure mentioned are of the class commonly described as "voted" items, that is to say, items the expenditure of which can only be sanctioned by the vote of the Legislative Council of the province, and not "non-voted" as they are described in the budget estimate. By reason of these items being withheld from the vote of the Legislative Council the petitioner complains that his right as a member of the Council to exercise control over the proposed appropriation of this part of the revenue has been infringed. In the second place he contends that even if the Local Government is right in treating the items in question as "non-voted," neither the Governor nor the other parties named have obtained the necessary sanction which would authorise them to appropriate the sums in question to the purposes proposed. We are not told what the necessary legal sanction is and, as I understand the argument, it follows that if the items in question have in fact been properly treated as "non-voted," still neither the Governor nor anybody else has obtained any authority under the

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Government of India Act to appropriate and spend the same.

A preliminary objection was taken by the Government Advocate, who appears for the opposite party, that this Court has no power to issue a writ of mandamus; and although I am by no means satisfied that we have such power, it is not necessary definitely to determine the question, for assuming, without deciding, that we can issue in proper cases a writ of mandamus I think the application fails on the merits.

Under the Government of India Act the province of Bihar and Orissa, as in the case of other presidencies and provinces, is governed, in relation to reserved subjects, by the Governor in Council; and in relation to transferred subjects, save as otherwise provided, by the Governor acting with ministers appointed under the Act, and all orders and other proceedings of a Governor's province shall be expressed to be made by the Governor of the province, and shall be authenticated as the Governor may, by rule, direct, and orders and proceedings so authenticated shall not be called in question in any legal proceedings on the ground that they were not duly made by the Government of the province. This will appear from a perusal of sections 46 and 49 of the Act.

Under section 72D of the Act proposals for the appropriation of the revenues of the province can only be made on the recommendation of the Governor communicated to the Legislative Council. That section contains provisions which shall have effect with respect to business and procedure in Governors' Legislative Councils. Sub-section (2) provides as follows:—

"(2) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year, and the proposals of the local government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the council in the form of demands for grants. The council may assent, or refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant, or by the omission, or reduction, of any of the items of expenditure of which the grant is composed."

Then follow certain provisos which are not material to the present case except the last which provides, as already stated, that no proposal for the appropriation of revenue shall be made except on the recommendation of the Governor. Sub-section (*3*) sets out certain heads of expenditure which are exceptions to the general provisions of sub-section (*2*) and need not be submitted to the council. This sub-section, as it existed before the amending Act of 1925 (15 and 16 Geo. V, c. 83), provided as follows:—

"(*3*) Nothing in the foregoing sub-section shall require proposals to be submitted to the council relating to the following heads of expenditure:—

(*i*) contributions payable by the local government to the Governor General in Council and

(*ii*) interest and sinking fund charges on loans; and

(*iii*) expenditure of which the amount is prescribed by or under any law; and

(*iv*) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(*v*) salaries of judges of the high court of the province and of the advocate-general."

The only clause of the above sub-section which is material to the present discussion is clause (*iv*).

Sub-section (*4*) is also of importance. It provides as follows:—

"(*4*) If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the governor shall be final."

In addition to the salaries and pensions mentioned in sub-section (*3*) (*iv*) allowances are given to the Governor and other Government officers to cover the actual travelling expenses incurred by them in travelling in the interests of the public service. These are provided for under the Civil Service Regulations and the Fundamental Rules which have statutory sanction. In so far as they are payable out of the provincial budget such allowances have always hitherto been submitted to the vote of the Legislative Council of the

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province since the reforms came into existence in 1919 for they are not included in the term "salaries" or any other of the exempted heads of expenditure mentioned in sub-section (3) of section 72D. By the amending Act of 1925, however, sub-section (3) of section 72D of the principal Act has been amended. Section 1(3) of the amending Act of 1925 enacts that the following provision shall be added at the end of sub-section (3) of section 72D of the Act of 1919 :—

DAWSON MILLER, C.J.

"For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund and any other payments or emoluments payable to or on account of a person in respect of his office."

In consequence of this amendment the tour and travelling allowances of the Government officers named have been treated by the local Government in the budget of the current year as heads of expenditure which need not be submitted to the Legislative Council.

The first question then is whether the Governor's tour allowance and the travelling allowances of the other officers named come within the amendment. In my opinion they are clearly covered by the words of the amending Act and the local Government was justified in withdrawing them from the vote of the Legislative Council and treating them as "non-voted" items. It was argued that the tour allowance of the Governor and the travelling allowances of the other officers were not payments to or on account of a person in respect of his office but I am unable to accede to this argument. The allowances are payable to Government officers only to cover the actual travelling expenses incurred by them when travelling in the interests of the public service, in other words in performing a part of the duties incumbent upon them by reason of their office. But in any case, if any question arises whether any proposed appropriation of moneys does or does not relate to the heads of expenditure mentioned in sub-section (3) the Governor's decision on the matter is final as provided

under sub-section (4) and cannot be called in question. Even if we thought, which is by no means the case, that the Governor's decision on the matter was erroneous, I consider that it cannot be questioned in a court of law. It was argued that his decision was only to be considered final for the purposes of the business and procedure in the Legislative Council and that it was not final for all purposes, but the business and procedure of the Legislative Council is the only question with which we are concerned in this matter and if the items in question were, by the decision of the Governor, withdrawn from the vote of the Legislative Council the Council can have no right to require them to be submitted and there has been no infringement of the right claimed by the petitioner. The first point raised by the applicant therefore fails.

The second point raises a question whether the local Government has legal sanction to appropriate these items of revenue for the purposes of tour and travelling expenses. To determine this question it is necessary to consider certain sections of the Act in some detail. The scheme of the Government of India Act appears to be that, except as otherwise provided in the Act and the rules made thereunder, the control of the revenues of India shall rest with the Secretary of State or the Secretary of State in Council who have the right to delegate, in certain cases, to various officers or bodies the powers so conferred.

Section 2(1) vests in the Secretary of State subject to the provisions of the Act, all the powers and duties relating to the Government of India and the revenues of India formerly exercised or performed by the East India Company or the Court of Directors or Court of Proprietors before 1858 and sub-section (2) provides as follows:—

"(2) In particular, the Secretary of State may, subject to the provisions of this Act or rules made thereunder, superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India."

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This control may be relaxed by rules properly framed for the purpose; and a grant or appropriation of revenue may be made in accordance with the provisions and restrictions prescribed by the Secretary of State in Council. Sections 19A and 21 are in this connection important and the material portions may be quoted. They are as follows:—

"19A. The Secretary of State in Council may, notwithstanding anything in this Act, by rule regulate and restrict the exercise of the powers of superintendence, direction and control, vested in the Secretary of State and the Secretary of State in Council by this Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919."

The rest of the section provides for obtaining the sanction of both Houses of Parliament to proposed rules relating to subjects other than transferred subjects and for giving either House of Parliament an opportunity of annulling rules when made relating to transferred subjects.

Section 21 reads as follows:—

"21. Subject to the provisions of this Act, and rules made thereunder, the expenditure of the revenues of India, both in British India and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues, or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or this Act, shall be made without the concurrence of a majority of votes at a meeting of the Council of India:

Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes."

From these sections it seems clear that, subject to the provisions of the Act, which in certain cases require the vote of the provincial Legislative Council in provincial subjects before an appropriation of revenue can legally be made, the Secretary of State in Council may by a majority of votes prescribe the manner in which the grants and appropriations may be made by local Governments and, when made, they shall be deemed to be made with the sanction of the

Secretary of State in Council. The object of these provisions was no doubt to facilitate the expenditure of the revenue by avoiding the cumbersome procedure of applying for sanction for appropriation of the revenues in ordinary matters of routine in carrying on the government of the different presidencies and provinces of India.

Various resolutions have from time to time been passed and various rules have been formulated by the Secretary of State in Council under these and other sections of the Act with a view to facilitating the routine work of the appropriation of the revenue, and careful restrictions in all important matters have been imposed upon the powers delegated to the Governor in Council. The only resolution on the subject which I need refer to is no. 1449-E.A., dated the 29th September, 1922, published in the *Gazette of India* of the 7th October, 1922. The first clause of the Resolution runs as follows:—

"His Majesty's Secretary of State for India in Council has been pleased to make the rules appended to this Resolution, defining the classes of expenditure on reserved provincial subjects which a Governor in Council may not sanction without the previous consent of the Secretary of State in Council. These rules supersede all previous rules of a similar nature and, subject to their observance, orders regarding specific cases of expenditure passed by the Secretary of State in Council or the Governor General in Council under regulations previously in force will no longer be binding."

It should be pointed out that the subjects now under discussion are reserved provincial subjects. The second and third clauses of the resolution are not material. Clause 4 is as follows:—

"Subject to the observance of these rules and to the provisions of section 72D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon reserved provincial subjects and, with the previous consent of his Finance Department, to delegate such power upon such conditions as he may think fit to any officer subordinate to him. Any sanction given under this rule will remain valid for the specified period for which it is given, subject, in the case of voted expenditure, to the voting of supply in each year."

Then follow certain rules enumerating the cases in which a Governor in Council must obtain the previous

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sanction of the Secretary of State in Council before incurring expenditure on reserved provincial subjects out of the revenues of India. These rules need not be referred to in detail. It is sufficient to say that they in no way limit the powers of the Governor in Council to sanction the expenditure which is now called in question. It is clear, in my opinion, upon a perusal of the statute and the resolution and rules referred to that the action of the opposite party which is called in question in the present proceedings is regular and constitutional, and no cause has been shewn why the Court should exercise its powers of mandamus assuming such powers are within its competence.

Moreover I am of opinion that even if this Court possesses the power which it is asked to exercise, section 110 of the Government of India Act is a complete bar to the exercise of such power in the present instance. The section provides that, amongst other persons, each Governor and each of the members of the Executive Council of a Governor shall not—

"(a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony."

It was argued that although section 110 might take away the jurisdiction of the Court with regard to acts already done it did not deprive the Court of the right to restrain acts in contemplation, namely, the future expenditure of the items of revenue in question. The future expenditure, however, is a matter already counselled or ordered by the Governor and it would be contrary to the spirit and intention of the enactment to hold that the Court had power to prevent the doing of an act which, when done, it would have no power to call in question.

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In my opinion this application should be dismissed with costs.

JWALA PRASAD, J.—This is an application purporting to have been made in the " extraordinary and ordinary jurisdictions " of this Court. The applicant is a tax-payer from the municipal area of the town of Hazaribagh and is a non-official member of the Bihar and Orissa Legislative Council and is aggrieved by the omission of the Local Government to submit to the vote of the aforesaid Legislative Council under the form of " demands for grants " their proposals for the appropriation of the provincial revenues towards certain expenditures mentioned in the Civil Budget Estimate for the year 1926-27. These items are: (*1*) Tour expenditure of His Excellency the Governor of Bihar and Orissa, opposite party no. 1, (*2*) travelling allowances of the Hon'ble Members of the Executive Council of the Government of Bihar and Orissa, opposite party nos. 2 and 3 and (*3*) the travelling allowances of the Inspector-General of Police, opposite party no. 4. The detailed amounts are mentioned in the application.

It is said that these items of expenditure are illegally described in the Budget Estimate as " non-voted " and that without any legal or lawful justification they were excluded from the vote of the Council; as a result of this the petitioner complains that he has been deprived of his right as a member of the Legislative Council of exercising such rights and control over the revenues of the province of Bihar and Orissa and over expenditures on account of the administration of the province of Bihar and Orissa as he is entitled under the law to exercise, and that he is in duty bound to claim the same for his constituency. He further complains that he has suffered an injury to his rights as a tax-paying citizen of this province of getting all proposals for the expenditure of the revenues of this province

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scrutinised by the elected representatives of the people. He says that on discovering that the aforesaid items were described as "non-voted" items, he sent, on the 15th February, 1926, notice of a motion for a nominal reduction in the amount of provision for the tour expenses of the opposite party no. 1 with a view to test whether the said omissions were deliberate or due to inadvertence, but that his motion was disallowed on the ground that it related to a non-voted item of expenditure. He apprehends that the opposite party would appropriate the aforesaid sums, as the entries in the Budget Estimate show, "without any legal sanction or authority." Upon these allegations he asks this Court—

(1) to issue a writ of mandamus to the opposite party no. 1, the Governor of the Province, to submit or cause to be submitted under section 72D of the Government of India Act, 1919, the proposals of the Government for the appropriation of the provincial revenues for the "tour expenses" and the "travelling allowances" of the opposite party nos. 1 to 4 to the vote of the Bihar and Orissa Legislative Council in the form of demands for grants;

(2) to issue a writ of mandamus on the opposite party nos. 1 to 4 to secure such 'legal sanctions and authority' for the appropriation of the aforesaid sums as may, under the law, be deemed necessary; and

(3) to issue a writ of injunction restraining the opposite party from using any portion of the revenues of the province for the aforesaid purposes until such legal sanction or authority deemed necessary under the law has been obtained therefor.

The question is to be decided entirely upon the construction of the Government of India Act (9 & 10 Geo. V, Ch. 101) as amended in 1925 by Act 15 and 16 Geo. V, Ch. 83.

The Government of India Act has made provision for the classification of subjects, in relation to the functions of government as "central" and "provincial" subjects, and for the transfer from among the "provincial" subjects of subjects to the administration of the Governor of the Province acting with Ministers appointed under the Act, and the subjects not so transferred are called "reserved subjects." The three presidencies and the several provinces including the province of Bihar and Orissa

are to be governed in relation to "reserved subjects" by a Governor in Council and in relation to "transferred subjects" by the Governor acting with the Ministers appointed under the Act (section 46). Provision has also been made under the Act for the allocation of revenues or other moneys to the provincial Governments: section 45(*a*)(*b*). Under section 72D(2) the estimated annual expenditure and revenue of the province "shall be laid" in the form of a statement before the Council in each year, and the proposals of the local Government for the appropriation of provincial revenues and other moneys in any year "shall be submitted to the vote of the Council in the form of demands for grants." The Council "may assent, or refuse its assent" to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed. Under the first part of this clause the entire estimate of the annual expenditure of revenue called the Civil Budget Estimate is to be laid before the Council. But all the items of expenditure are not subject to the assent of the Council and are, therefore, not liable to be submitted to its vote. Such items are called "non-votable" items. They are governed by the rules laid down by the Secretary of State in Council in whom vests the superintendence, direction and control of all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India (section 2, clause 2). The revenues of India are received for and in the name of His Majesty and are to be applied for the purpose of the Government of India (section 20). The Secretary of State has and performs all the powers and duties relating to the government or revenues of India as used to be exercised or performed by the East India Company, the Court of Directors, etc., mentioned in section 2. In order to facilitate the government

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of India, the powers of the Secretary of State have, by rules of devolution, being delegated to the Governor General in India and to the several Governors in Council of the presidencies and the provinces, and these Local Governments have also control over the revenues and other moneys allocated to them. Clause (*3*) of section 72D exempts certain proposals for the appropriation of provincial revenues from having to be submitted to the vote of the Council. That clause runs as follows:—

> "Nothing in the foregoing sub-section shall require proposals to be submitted to the Councils relating to the following heads of expenditure."

Among those heads are "salaries and pensions" of persons appointed by and with the approval of His Majesty in Council or by the Secretary of State in Council. This is what was originally contained in the Government of India Act, 1919. The tour expenses and the travelling allowances of the Governor of the Province and other officers were not included in the items which were not to be submitted to the Legislative Council and hence such items used to be included in the proposals of the Local Government and used to be submitted to the vote of the Council in the form of demands for grants.

Clause (*3*) has, however, been amended now by the Government of India (Civil Services) Act, 1925 (15 & 16 Geo. V, Ch 83), and to sub-section 3 the following proviso has been added:—

> "For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office."

The words "payments or emoluments payable to or on account of a person in respect of his office" would certainly include the tour expenses and the travelling allowances of the Governor and the Members of his Council and the Inspector-General of Police,

The original section 3 has undergone a further important amendment and that is, that not only "salaries and pensions" of officers [mentioned in clauses 4 and 5 of the original sub-section (3)] but also "salaries and pensions" payable to the dependants of these officers will not be required to be submitted to the Council.

It was, however, urged that the items in question would increase the amount which they are entitled to get under section 85 of the Act read with the 2nd schedule and consequently these items are not "lawful expenditures" and they are not entitled to appropriate the same from the provincial revenues. No doubt, under section 85 these officers are only entitled to be paid out of the revenues of India such salaries, not exceeding in any case the maximum, as are specified in that behalf in Schedule II of the Act. Sub-section 3 of that section says—

"The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein."

The proviso to the section makes sub-section 3 inapplicable to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council. In other words, the travelling allowance and other advantages would be over and above the salary fixed by section 85 read with Schedule II of the Act.

There is, therefore, no force in this contention.

Assuming for the sake of argument that the "tour expenses" and the "travelling allowances," the items in dispute in the present case, were not exempted from being submitted to the vote of the Council, even then the question cannot be raised before us. It appertains exclusively to the jurisdiction of the Governor. Clause (4) of section 72D runs as follows:—

"If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final."

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The question with respect to the disputed items was before the Governor on two occasions: first, when the Civil Budget Estimate was prepared and laid before the Council and these items were not included in the proposals for the appropriation of public revenues to be submitted to the vote of the Council, and, secondly, when the petitioner sent notice of motion for a nominal reduction in the amount of the provision for the tour expenses of the Governor. The Governor then disallowed the motion upon the ground that it related to non-voted items of expenditure. Thus, the petitioner directly raised the dispute as to whether the disputed items would be exempted from the vote of the Council under clause (*3*) of section 72D. This dispute became the subject-matter of the decision of the Governor and under clause (*4*) of this section his decision has become final and it cannot now be re-opened.

The petitioner further submits that the decision was final only " with respect to business and procedure in Governors' Legislative Councils " as stated in clause (*1*) of section 72D and its finality is gone when the matter has come to this Court But his prayer is to set aside that decision with a view that the disputed items be submitted to the vote of the Council. Hence the question raised relates to the business and procedure in the Council. This Court, therefore, has no jurisdiction to destroy the finality of the decision of the Governor.

Again, the act of the Governor in the matter in question is not subject to the jurisdiction of the High Court under section 110(A) of the Act. This provision in section 110 dates back to the time of the Supreme Court of Judicature at Fort William in Bengal (vide sections 1 and 2 of the East India Company, 1780, 21 Geo III, Ch. 70) under which the Governor General in Council of Bengal was not

" Subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity and acting as Governor General and Council."

This provision remained unaffected under the subsequent statutes and was extended to apply to the acts and orders of Governors and Lieutenant-Governors and Members of their Councils. It has been re-affirmed in the present Government of India Act, 1919.

The first prayer asking for a writ of mandamus upon the Governor for submitting the proposals for the appropriation of the items in question to the Council must, therefore, be disallowed.

The second relief seeking for a writ of mandamus on the opposite party to secure a legal sanction and authority for the proposed appropriation seems to be equally barred by the provisions under the Government of India Act. The tour expenses and the travelling allowances of the opposite party relating to the reserved subjects and being excluded from the jurisdiction of the Legislative Council must be controlled by the Secretary of State in India and governed by the rules framed by him. It has not been at all shewn that the appropriation of these items has, in any way, infringed the rules laid down by the Secretary of State in Council or is beyond the authority of the Local Government under the powers vested in them by the rules of devolution; for aught we know the appropriation in question is within the power of the Local Government under the rules framed by the Secretary of State for India in Council, and it is not within our province to examine these items and to say whether or not they are within the authority vested in the Local Government. It may be mentioned that no municipal court has any jurisdiction to question, control or interfere with the appropriation of the revenue of India by the Local Government provided it is for the purpose of the government of India. The appropriation will be an act of State which essentially concerns the exercise of Sovereign power: *Salaman* v. *The Secretary of State for India in Council*(1).

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The last prayer is to issue a writ of injunction restraining the opposite party from using any portion of the revenue of the province for the aforesaid purposes until legal sanction and authority is obtained. But no injunction can be granted independently of any suit having been brought. Therefore, this prayer is also not within the jurisdiction of the Court to grant.

The application, therefore, must fail with respect to all the reliefs sought. Hence it is not necessary to decide as to whether this Court has power to issue a writ of mandamus.

It may, however, be mentioned that mandamus or a command is a high prerogative writ of a most extensive remedial nature. In form it is a command issued in the King's name from the King's Bench Division of the High Court only, and addressed to any person, corporation or inferior Court of Judicature requiring them to do something therein specified which appertains to their office and which the Court holds to be consonant to right and justice. It is used principally for public purposes and to enforce the performance of public rights or duties. It enforces, however, some private rights when they are withheld by public officers. The issuing of this writ being part of the original jurisdiction of the Court of the King's Bench is a matter within the exclusive cognizance of and is assigned to the King's Bench Division of the High Court (Jud. Act, 1873, s. 34). It is a general rule that this writ is only to be issued where a party has no other specific remedy. The jurisdiction is altogether in the discretion of the Court.

Section 40 of the East India Company Act, 1772 (13 Geo. III, Ch. 63) empowered His Majesty's Court of the King's Bench to

"award a writ or writs of mandamus, requiring the chief justice and judges of the Supreme Court of judicature at the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require and are hereby respectively authorised and required accordingly, to hold a court with all convenient speed for

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the examination of witnesses and receiving such proofs concerning the matters charged in such indictments or informations respectively laid or exhibited in the said Court of King's Bench for misdemeanour or offences committed in India.

Similarly, section 44 empowered His Majesty's Courts at Westminster to award writs of mandamus to the Supreme Court of Judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen for the examination of witnesses in respect of civil suits filed in the said Mayor's Courts at Westminster (vide also section 3, 42 Geo. III Ch 85 to the same effect).

The Indian High Courts Act of 1861 empowered the Crown to establish, by Letters Patent, High Courts at Calcutta, Madras and Bombay in which the Supreme Courts as well as the Sadar Diwani Adalat and the Sadar Nizamat Adalat were all merged, the jurisdiction and powers of the abolished Courts being transferred to the new High Courts. Later, other High Courts were established, such as, Allahabad, Patna and Lahore. These High Courts have appellate jurisdiction over the subordinate courts and extraordinary original jurisdiction in certain matters; but they have not got the ordinary original jurisdiction of the Supreme Courts, which was inherited by the High Courts of Calcutta, Madras and Bombay. The right to issue or award writ of mandamus, which might have existed in the Supreme Courts, was therefore not inherited by the High Courts other than Calcutta, Madras and Bombay, inasmuch as that right appertains exclusively to the original side of the King's Bench. This is the reason why section 45 of the Specific Relief Act gives power only to the High Courts of Calcutta, Bombay and Madras (and Rangoon has since been added) in their original jurisdiction, to issue writs of mandamus upon public officers and corporations with respect to their public duties when there is no specific remedy available to the injured person. Section 50 expressly lays down that the High Court shall not have power to issue a writ of mandamus. Therefore, there is

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nothing to show that the power to award a writ of mandamus as the prerogative right of the Crown, which was conferred upon the King's Bench, was in its entirety conferred upon the Indian High Courts except in the form and to the extent provided for in section 45 of the Specific Relief Act. There is no case showing that a writ of mandamus was ever awarded by any High Court, except as provided for in section 45 which does not apply to the Patna High Court established in 1916 or the Allahabad High Court established in 1866. It is noticeable that the latter Court had come into existence long before the Specific Relief Act was enacted; still it is not included in section 45 of the Act as having the power to issue writs of mandamus. These later High Courts have not inherited all the powers of the Supreme Courts on their original side: vide their respective Letters Patent. The point, however, need not be pursued further for, as already observed, no definite decision on this point is necessary in this case.

Another reason why the application must fail is that even if this Court were to issue any writ of mandamus or injunction, there is no power in the Court to enforce it, and it seems to me that it is meaningless to have a power and to pass an order without having the power to enforce it. As against opposite party nos. 1 to 3 there is the statutory bar to the High Court having jurisdiction over them with respect to acts done by them in their official capacity. This bar is in existence from the earliest time.

For these reasons I agree with the order proposed by the learned Chief Justice.

BUCKNILL, J.—This was an application made to this Court by Mr. Krishna Ballabh Sahay of Hazaribagh. It is of a very unusual character. It is directed against His Excellency the Governor of this Province; the Hon'ble Mr. Sachchidananda Sinha, a Member of the Executive Council of this Province; the Hon'ble Mr. E. L. L. Hammond, also a member

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of the Executive Council of this Province, and the Inspector-General of Police of this Province; they all are stated to be resident at Patna.

The circumstances under which this application is made may shortly be explained as follows:—they are set out at length in the petition. The petitioner is represented as being a law-abiding subject of His Majesty the King-Emperor, a tax-payer in the municipal area of the town of Hazaribagh and a non-official member of the Bihar and Orissa Legislative Council. In the first capacity he claims all privileges belonging to a subject of His Majesty and such protection as he may be entitled to by law. In his second capacity he claims to enjoy the right of representation in the Legislative Council of this Province as constituted under the Government of India Act, 1919. In his third capacity he claims to have the power of exercising certain rights of control over the revenues of the Province and over their expenditure. He recites that, under the provisions of the Government of India Act, 1919, the first three respondents are charged with the duty and responsibilities of carrying on the administration of what are known as the "Reserved" departments of the Government of this Province and that the 4th respondent is the administrative head of one of the "Reserved" departments known as the Police Department. He further recites that on the 15th of February of this year the 2nd respondent, who is the Finance Member of the Government of this Province, presented the "Civil Budget Estimate" for the year 1926-27 to the Legislative Council of the Province. His complaint is that in this Budget, instead of including certain sums to be submitted to the vote of the Legislative Council, these sums were included as non-votable (the phrase used is non-voted) and in consequence were thus not submitted to the Legislative Council for its vote, approval or grant. The specific items to which the applicant draws attention are (*a*) a sum of Rs. 65,000 on account of the tour expenses of the 1st respondent; (*b*) a sum of

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Rs. 10,000 for the travelling allowances of the 2nd and the 3rd respondents and (c) the sum of Rs. 10,000 for the travelling allowances of the 4th respondent and certain other persons in his department. The applicant maintains that he has suffered by this exclusion of these sums from the category of monies as to the grant of which the Legislative Council is entitled to vote: that he has suffered an injury to his right as a member of the Legislative Council of the Province to exercise control over the proposed appropriation of these sums from the revenues of the Province and that he has also as a tax-paying citizen suffered injury to his right to have the expenditure of these monies scrutinized and voted upon by the members of the Legislative Council. The applicant states that on the 26th February last he gave notice to the proper authority that he would move for a reduction in the amount of the provision made for the tour expenses of the 1st respondent with a view to testing whether the placing of these sums in the non-votable category was permissible; but that this motion was disallowed on the ground that it related to a non-votable item of expenditure. That the petitioner maintains that he has no other remedy and has therefore applied to this Court for the following relief:—

(1) A writ of mandamus against the 1st respondent ordering the 1st respondent to submit to the vote of the Provincial Council the question of the appropriation of the monies to which I have above referred;

(2) for a writ of mandamus on the four respondents ordering them to secure such legal sanctions and authority for the proposed appropriation as under the law may be necessary;

(3) for a writ of injunction restraining the respondents from using any part of the revenues for the purposes of the abovenamed appropriations until proper sanction has been obtained.

The applicant also prayed for an interim injunction to the same effect as detailed in his third prayer from the date of his application up till the final hearing and disposal thereof.

Since the institution of the Reforms under the Government of India Act, 1919 and up till the Budget

of this year, items of expenditure such as the three to which specific reference has been made above were, we are informed, as a matter of fact included in the votable portion of the budget which was submitted to the vote of the Provincial Legislative Council. This year, however, these and other items of similar character were placed in the non-votable portion of the budget and this was done because, as the result of recommendations of what is known as the Lee Commission, the law relative to what parts of the revenues were votable or non-votable was altered.

By section 72D of the Government of India Act, 1919, it was provided that in Governors' Legislative Councils the estimated annual expenditure and revenue of the Province should be laid in the form of a statement before the Council in each year and that the proposals of the local Government for the appropriation of provincial revenues and other monies in any year should be submitted to the vote of the Council in the form of demands for grants. The Council might assent or refuse its assent to a demand or might reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant was composed. Under the Scheme of the Government of India Act, 1919, certain subjects of administration were handed over to the control of the Governors and Ministers; these were called "Transferred" subjects. Other subjects rested under the control of the Governor and Executive Councillors. These were called "Reserved" subjects. If assent of a demand relating to a "Reserved" subject was refused by the Legislative Council, the Governor could certify that the expenditure was essential for the discharge of his responsibilities in connection with the subject. No proposal for the appropriation of any revenue could in any case be made except on the recommendation of the Governor. Presumably with regard to refusal of a demand for a grant in connection with a "Transferred" subject the decision of the Council was

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(subject to certain emergency powers of the Governor) substantially final. But, in addition to the distinction which was drawn between the effective powers of the Legislative Council relative to "Transferred" and "Reserved" subjects, there were also, by sub-section (3) of section 72D of the Government of India Act, 1919, certain heads of expenditure in connection with which no proposals need be submitted at all to the Council; that is to say that upon these heads of expenditure the Council has no power to vote; these items were consequently termed non-voted. In the Government of India Act, 1919, they consisted of several heads, namely,

(*i*) contributions payable by the local Government to the Governor General in Council;

(*ii*) interest and sinking fund charges on loans;

(*iii*) expenditure of which the amount is prescribed by or under any law;

(*iv*) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(*v*) salaries of Judges of the High Court in the Province and of the Advocate General.

Now this sub-section was materially altered by the provisions of section 1 of the Government of India (Civil Services) Act, 1925 Sub-clauses (*iv*) and (*v*) were deleted and in their place was substituted a sub-clause (*iv*) reading thus:—

Salaries and pensions payable to or to the dependants of—

(*a*) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council;

(*b*) judges of the High Court of the Province;

(*c*) the Advocate-General;

(*d*) persons appointed before the first day of April, 1924, by the Governor General in Council or by a local Government to services or posts classified by rules under this Act as superior services or posts; and

(*e*) sums payable to any person who is or has been in the civil service of the Crown in India under any order of the Secretary of

State in Council or the Governor General in Council or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.

This sub-section (*3*) then had added to it the following provision of definition:—

"For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office."

It is by virtue of this provision of definition that the items of tour and travelling allowances have been placed in this year's budget in the non-votable list. In the Government of India Act, 1919 (and not in any way altered by the amendment of 1925), sub-section (*4*) of section 72D reads thus:—

"If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final."

Now the learned Vakil who has appeared for the applicant has suggested that these tour and travelling allowances do not fall within this provision of definition. It is difficult to understand how it can seriously be suggested that these items of tour and travelling allowances to these respondents are not payments payable to them or on their account in respect of their offices. In any case, even if that was not so, by sub-section (*4*) of section 72D (just quoted above) the decision of the Governor on this question must be regarded as final; and again, apart even from the provisions of sub-section (*4*) of section 72D, the provisions of clause (*a*) of section 110, sub-section (*1*) of the Government of India Act, 1919, would appear effectually to prevent the High Court from making any order against the Governor in respect of his having thought fit to place these tour and travelling allowances in the non-votable portion of the budget. The material parts of sub-section (*1*) of section 110 of the Government of India Act, 1919, read thus:—

"The Governor General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the Executive Council

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of the Governor General or of a Governor or Lieutenant-Governor and a Minister appointed under this Act shall not—

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only;"

There is no doubt that it was in his public capacity as Governor that the 1st respondent ordered these tour and travelling expenses to be placed in the non-votable portion of the budget and it would not appear to me that he is in any way amenable to this Court in respect of such action.

Now it is quite true that this application is declared to be made to this Court in its extraordinary civil jurisdiction but it is admitted by the learned Vakil who has appeared for the applicant that the issue of a writ of mandamus or an order prohibiting any one from doing anything, if such could be effected at all are done by this Court in its ordinary original civil jurisdiction.

The learned Vakil, however, further contends that, even assuming that this Court is of the opinion that these tour and travelling allowances rightly fall within the provision of definition added to section 72D by the Act of 1925 or that, whether right or wrong, the Governor has power to take such a step without this Court being able to exercise any control over such action, still, he (the Governor) has no power to order the disbursement of any such sums as the law at present stands. It is not made very clear to me by the learned Vakil who appeared for the applicant in what way he proposes that the Governor should obtain this authority to disburse these sums; but he suggests that a vote of the Legislature would be effective to enable him to do so or that possibly a further Act of the Imperial Parliament might be necessary. The learned Vakil has put forward two reasons why he contends that the Governor has no authority to make any disbursement of these tour and travelling allowances. In the first place with regard to the Rs. 65,000 appropriated to the tour and travelling allowances of the Governor himself, the learned Vakil

points to section 85 of the Government of India Act, 1919. He contends that under that section there are fixed as payable to, amongst other persons, the Governor of this Province a salary not exceeding the maximum specified (which in this case amounts to Rs. 1,00,000 per annum) and that, if the tour and travelling expenses are to be included in the expression "salaries and pensions" in the provision of definition added to section 72D of the Act of 1919 by the Act of 1925, then the maximum salary payable under section 85 of the Act is exceeded by Rs. 65,000; or in other words the Rs. 65,000 must be paid out of the salary of Rs 1,00,000 the maximum payable by way of salary to the Governor under section 85 of the Act. There are two fallacies in this argument: in the first place the word "includes" in the provision of definition contained in the Act of 1925 does not mean (as I read it) more than to indicate what for the purposes of the section (that is to say whether the sums can be included in the non-votable portion of the budget) is comprised in the meaning of the words "Salaries and pensions". It does not exclude the operation of the other portions of the Act upon the incidents connected with "salaries and pensions". It is necessary to look at sub-section (*3*) of section 85 with its proviso. This sub-section reads:—

> "The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein: provided that nothing in this sub-section shall apply to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council."

In my view travelling allowances clearly fall within this proviso. The argument therefore that section 85 operates in such a manner that travelling allowances of a Governor must come out of his salary as fixed by section 85 falls to the ground; if it did not the position would indeed be an absurdity.

The second reason which the learned Vakil puts forward for his contention that the Governor cannot

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order disbursement of any of these tour and travelling allowances appropriated for himself is that no such tour and travelling allowances have been sanctioned by the Secretary of State in Council. I think that it may be convenient here to state that the Court is informed at the Bar that the procedure adopted with regard to the fixation of the quantum of travelling allowance is somewhat as follows. The Governor's staff and the heads of different departments put forward, when preparing their annual estimates of what they contemplate will be the expenses of administering their departments, an approximate estimate of what would be required for their travelling expenses. These are considered by the Governor in Council and, if passed, entered in the budget. Then when an official travels he submits to the Accountant-General through the head of his department a bill for his travelling expenses and if passed by the Accountant-General an order is given to him to receive the sum from the Treasury. It is clear that under the various provisions of the section of the Act quoted by my Lord the Chief Justice that it is within the power of the Secretary of State in Council to prescribe payment of expenses of the nature under discussion by rule or regulation or in other expedient manner.

Now in notification no. 1449-E.A., dated Simla, the 29th September 1922 (vide *Gazette of India*, October 7th, 1922, page 1216) it is stated that His Majesty's Secretary of State for India in Council had been pleased to make certain Resolutions and Rules with regard to expenditure by a Governor in Council on Reserved provincial subjects. The rules set out numerous instances in which a previous sanction of the Secretary of State in Council has to be obtained by a Governor before he can authorise expenditure upon various subjects. The 4th section of the Resolution states that subject to the observance of these rules and of the provisions of section 72D of the Government of India Act, the Governor in Council has full power to sanction expenditure upon Reserved

provincial subjects with the previous consent of his Finance Department and to delegate such power upon such conditions that he may think fit to any officers subordinate to him. Now, if, as has already been expressed in my view to be the case, these tour and travelling expenses can properly be placed in the category of the non-votable portion of the budget, this Resolution (which was ordered to be published and which was published in the *Gazette of India*) obviously gives the Governor in Council power to sanction the disbursement as occasion may arise of these sums which are appropriated for these tour and travelling necessities. In practice, of course, to each head of department is delegated the putting forward for sanction by the Accountant-General of the travelling expenses of the officers of the department as occasion arises and as and when travel actually takes place.

The whole application would, therefore, appear to have been dealt with and concluded by the above observations.

It is true that upon the assumption that this Court might have agreed with the contentions put forward by the applicant, an interesting but now purely academic discussion was initiated as to whether this Court has any power to issue a mandamus. I do not think that it would be profitable or desirable now to express any final view upon this question. I am not sure that prior to the Indian Specific Relief Act (Act I of 1877) the High Court of Calcutta had itself power to issue a mandamus but at any rate by Chapter 8 of that Act the position with regard thereto appears to have been very materially altered. Section 50 of the Act declares that neither the High Court nor any Judge thereof is hereafter to issue any writ of mandamus and by sections 45 and 55 procedure which may be in lieu of mandamus and by way of prohibition or injunction is provided. As a matter of fact section 45 of the Act only refers to the High Courts of Judicature of Calcutta, Madras and Bombay (and by a later addition Rangoon) all of which Courts possessed consi-

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derable original jurisdiction. As is, of course, well known, the Letters Patent constituting the High Court of Judicature at Patna were only issued on the 9th of February 1916.

It was suggested by the learned Vakil for the applicant that this High Court had inherited from the Calcutta High Court much of its inherent jurisdiction including a right to issue a mandamus. In the circumstances of the present application I am content to leave the matter there. When the occasion arises the question can perhaps be further discussed with advantage; but it is noticeable to observe that even by section 45 of the Specific Relief Act none of the High Courts therein mentioned can make any order binding on a Governor. It would be rather curious if the High Court of Patna was in law endowed with greater powers than the High Court of Calcutta from which it was in 1916 territorially separated.

Summarising, therefore, my conclusions; I am of the opinion (*a*) that the tour and travelling allowances mentioned in the applicant's petition are rightly capable of inclusion in the non-votable portion of the budget, (*b*) that the Governor's decision on such a question is final, (*c*) that the High Court has no jurisdiction over the Governor in connection with such a matter or any original jurisdiction over the Governor or the Executive Councillors in connection with anything counselled, ordered or done by any of them in their public capacity, (*d*) that the maximum salary fixed by section 85 of the Government of India Act for the Governor of the Province does not include tour and travelling allowances, (*e*) that the Secretary of State in Council has sanctioned the disbursement by the Governor (and by officers to whom he has delegated his authority) tour and travelling allowances subject, of course, to the consent of his Finance Department. I recognize, however, that the withdrawal from the control or vote of the Legislative Council of such large sums as in the aggregate these tour, travelling and

other allowances make up is a matter upon which members of the Council and the member of the tax-paying community also may feel that they have a grievance; but that is not a question with which this Court is in any way concerned. The law with regard to the matter is in my view perfectly clear and the only duty of this Court is to interpret it.

I agree therefore that this application should be rejected.

BUCKNILL, J.

Application rejected.

REVISIONAL CIVIL.

Before Ross and Kulwant Sahay, J.J.

MUSSAMMAT BARKATUNNISA BEGUM

v.

MUSSAMMAT KANIZA FATMA.*

1926.

April, 28.

Court-fees Act, 1870 (*Act VII of* 1870), *section* 7(*iv*)(*c*) *and* (*v*)—*suit for ejectment—subject-matter of the suit, court-fee payable on the market value of—subject-matter, what constitutes.*

Plaintiff brought a suit in relation to a house on the allegation that it belonged to her, that she had allowed the defendant no. 1, who was her daughter, and defendant no. 2, who was the husband of defendant no. 1, to live in a portion of the house, that on account of the behaviour of the defendants towards her she was not willing to allow them to remain in the house any longer and that she had served notice upon them to quit but they refused to do so. She further stated in the plaint that the defendant no. 1 had set up a title to the house under an oral gift from the plaintiff. The prayer portion in the plaint ran thus :

" (*i*) On the determination of the plaintiff's proprietary interest as also on the determination of the fact.....that the position of the defendants

*Civil Revision no. 58 of 1926, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 16th January 1926, affirming a decision of Babu P. Dayal, Munsif, 3rd Court, Gaya, dated the 27th October 1925.

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is that of a licensee-tenant-at-will, the defendants may be ordered to vacate the house and garden in suit....."

The plaintiff valued the suit at Rs. 400 which was much less than the value of the house. One of the objections on behalf of the defendants was that the suit had been undervalued and that the Munsif had no jurisdiction to entertain the suit. An issue was framed on the subject and the Munsif, who proceeded to determine this issue in the first instance, held that the suit was for a declaratory decree and consequential relief and, therefore, that the suit ought to be valued according to the valuation of the subject-matter of the suit, namely, the house in dispute, under section 7(*iv*)(*c*) of the Court-fees Act. The plaint was therefore returned for presentation to the proper court. On appeal the District Judge affirmed the order.

Held, in revision, (*i*) that the suit as framed was a suit for ejectment and that court-fee was payable under section 7(*v*), Court-fees Act, according to the market-value of the subject-matter of the suit;

(*ii*) that the subject-matter of the suit was the right to eject the defendants and the value of that right was the value to defendants of the right to remain in the house under the license of the plaintiff;

(*iii*) that the valuation of a suit is determined not upon the plea taken in the written statement, but upon the allegations made in the plaint.

Ramraj Tewari v. *Girnandan Bhagat*(1) was referred to.

Where, therefore, a suit was valued at Rs 400 and the trial court did not find the valuation to be unreasonable the High Court held that the suit was properly valued and remanded the case for disposal according to law.

Application by the plaintiff.

The facts of the case material to this report are stated in the headnote, supra.

Hasan Jan, *Kailas Pati* and *Sarjoo Prasad*, for the petitioner.

Md. Yunus (with him *Manohar Lal*), for the opposite party.

(1)(1893) I. L. R. 15, All. 63.

KULWANT SAHAY, J. (after stating the facts of the case, proceeded as follows):

The whole question is whether the suit as framed asks for a declaratory decree and for consequential relief. In my opinion the suit as framed is a suit for ejectment. The prayer for determination of the plaintiff's title was only incidentally made in the plaint. It is not denied on behalf of the defendants that at the time they entered the house the plaintiff was the owner of the house. They set up a subsequent gift from the plaintiff. The plaintiff denies that she made any gift to the defendants. If the defendants can succeed in proving the oral gift, the suit will certainly be dismissed: but the valuation of the suit is to be determined not upon the plea taken in the written statement but upon the allegations as made in the plaint. The plaint merely asks for a decree for ejectment of the defendants. The case comes, in my opinion, under section 7, clause (*v*), of the Court-fees Act and the court-fee payable is according to the market-value of the subject-matter of the suit. The subject-matter of the suit is the right to eject the defendants and the value of that right is the value at which the defendants' right to remain in the house under the license of the plaintiff may be valued [See *Ramraj Tewari* v. *Girnandan Bhagat*(1)]. The plaintiff has valued it at Rs. 400. The Court does not say that this valuation is an unreasonable one. The plaintiff, however, has put in a petition for leave to amend the plaint in order to make her position clear. In my opinion she ought to be given an opportunity to amend the plaint.

The order of the Munsif returning the plaint will therefore be set aside and the case remanded to him for consideration of the application for amendment of the plaint and for disposal of the suit according to law.

ROSS, J.—I agree.

Case remanded.

(1)(1893) I. L. R. 15 All., 63.

PRIVY COUNCIL.

BINDESHWARI PRASAD SINGH

v.

MAHARAJA KESHO PRASAD SINGH.

J. C.* 1926.

April, 29.

Bengal Tenancy Act (VIII of 1885), section 120, sub-section 2(a)—Occupancy Right—Zirait—Admission in kabuliyat after March 2, 1883—Admissibility of Evidence—"Any agreement or compromise".

Where a proprietor has let land as zirait, or proprietor's private land, after March 2, 1883, an admission in the kabuliyat that the land is of that character, is not prevented by section 120 of the Bengal Tenancy Act, 1885, as amended by Bengal Act I of 1907, from being evidence as to the character of the land. The weight of the evidence depends upon the circumstances and may be slight.

The words "any agreement or compromise" in sub-section 2(*a*) added to section 120 by Bengal Act I of 1907 refer only to an agreement or compromise of a question in discussion as to the character of the land at the date of the agreement or compromise.

Judgment of the High Court (1), affirmed.

Appeal by the defendant.

Appeal (no. 35 of 1924) from a decree of the High Court at Patna (January 9, 1923) reversing a decree of the Subordinate Judge of Arrah in the district of Shahabad.

The suit was brought by the respondent to evict the present appellant and his brother, a minor since deceased, from certain agricultural lands in the district of Shahabad, appertaining to the estate of the respondent known as the Dumraon Raj. The question in the litigation was whether the defendants had occupancy rights in the land.

* PRESENT,—Viscount Dunedin, Lord Blanesburgh and Sir John Edge.

(1) (1922) I. L. R. 2 Pat. 414.

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The facts appear from the judgment of the Judicial Committee.

The trial judge dismissed the suit. Upon appeal the decision was reversed, the learned Judges (Das and Kulwant Sahay, JJ.) holding that the land was zirait, or private land of the proprietor; and that the fact that the proprietor had let the land after March 2, 1883, as zirait not being excluded from being evidence by section 120 of the Bengal Tenancy Act, 1885, as amended by Bengal Act I of 1907. The appeal is reported at I. L. R. 2 Pat. 414.

1926. Feb., 25, 26. Dunne, K. C. and *Hyam*, for the appellant.

DeGruyther, K. C. and *E. B. Raikes*, for the respondent.

Reference was made to the series of decisions of the High Court at Calcutta mentioned in the judgment of the Judicial Committee, also (for the respondent) to *Gour Pershad Doss* v. *Sookdeb Ram Deb*(1) and *Shaikh Ashruf* v. *Ram Kishore Ghose*(2).

April, 29.

The judgment of their Lordships was delivered by—

SIR JOHN EDGE.—The suit in which this appeal has arisen was instituted on 22nd December 1917, in the Second Court of the Subordinate Judge of Arrah by the Maharaja of Dumraon for possession of lands in mauzas Majharia and Khutaha in the district of Shahabad by the ejectment of the defendants. It was alleged in the plaint that the milkiat interest of the Dumraon Raj in the 16 annas of each of the mauzas belongs to the plaintiff, and that his name stands recorded in respect thereof. The suit was brought against the two defendants Babu Parmeshwari Prasad Singh and his younger brother, Babu Bindeshri Prasad Singh, minors, zamindars, sons of Babu Kesho Prasad Singh, deceased, under the guardianship of their mother, Mussammat Radha

(1) (1860) 12 W. R. 279. (2) (1875) 23 W. R. 288.

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Kuar. Kesho Prasad Singh and the defendants constituted until he died a joint Hindu Mitakshara family. The second defendant died a minor and without issue after the suit was brought.

The defence is that the defendants had a right of occupancy in the lands from which it was sought to eject them. If that right of occupancy existed, it was acquired under the Bengal Tenancy Act, 1885 (Act VIII of 1885). The defendants were in possession, and under the circumstances of the case it was for the plaintiff to prove that he was entitled to eject them. Seven issues were framed: the third was the material issue. It was: "Have the defendants occupancy rights in the land in suit?" That issue practically depended on whether the plaintiff should succeed in proving that the lands in question were his zirait, private lands, as the proprietor. The Subordinate Judge found that the lands were not zirait land, and that the defendants had a right of occupancy in them, and made his decree dismissing the suit. From that decree the plaintiff appealed to the High Court at Patna, and the High Court finding that the defendants had no right of occupancy in the lands, reversed the decree of the Subordinate Judge, and gave the plaintiff the decree for ejectment and mesne profits which he claimed. From that decree of the High Court this appeal has been brought.

Before considering section 120 of the Bengal Tenancy Act, 1885, which appears to their Lordships to be the section upon the true construction of which the fate of this appeal mainly depends, they will state, as briefly as may be, the history of the lands in question so far as that history is known to them.

All the lands in suit were in the bed of the river Ganges until shortly before 1843, but whether their position in the bed of the Ganges was owing to erosion or not their Lordships do not know. The lands to which the suit relates consist of 228 bighas, 11 kathas and 12 dhurs of land, which emerged from the Ganges

shortly before 1843, and in 1843 became suitable for cultivation, and of 25 bighas, 14 kathas and 17 dhurs of land which in or shortly before 1902 emerged from the Ganges, and in 1904 were suitable for cultivation. The lands are contiguous, and were in the plaint alleged to be zirait of the plaintiff.

In 1843 the Government, which was carrying on a stud farm, got possession of all the lands which had then emerged from the Ganges, and thenceforward for about 30 years cultivated them for the purposes of supplying food and fodder for the horses at the stud farm. It does not appear whether the Government held the lands under a written lease or under an oral agreement. The Government surrendered the lands to the Maharaja of Dumraon in 1873, and quitted possession of them. It is not suggested that the Government on or after quitting possession of the lands made any claim to any interest in them.

After the Government quitted possession the Maharaja of Dumraon let the lands which the Government had held to a Mr. Fox for a term of years, and in 1883 let them to Mr. Fox for a further term of nine years. The kabuliyat which Mr. Fox executed in 1883 is dated 21st June 1883, and in that kabuliyat Mr. Fox stated that he could

> " in no circumstances acquire occupancy right in the lands, and that at the expiration of the term the proprietor (the Maharaja) shall have full power to keep the said land as his (sir) zirait or to settle it with me or any other person."

It is stated in the plaint that

> " after some time Mr. Fox was granted occupancy rights "

in the lands by the Maharaja. That statement was not traversed in the written statement, and must be treated as admitted. The grant or gift of such right of occupancy appears to have been, as stated in the judgment of Das, J., in 1891, for valuable services rendered to the Raj by Mr. Fox. A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. However that may be, Mr. Fox became in arrear for three years in the payment of the

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rent of the lands, and in 1895 the then Maharaja brought a suit against him for the arrears of the rent, and obtained in that suit a decree. In execution of that decree Mr. Fox's right and title to the lands were, on 2nd March, 1896, sold by auction, and were purchased by the Maharaja of Dumraon, and then such rights of occupancy, if any, as Mr. Fox had in the lands were extinguished.

After 2nd March, 1896, the Maharaja of Dumraon let the lands to one Akhauri Ram Udanaj Singh in shikmi right for a term of five years, who cultivated them himself or by his shikmi tenants. Akhauri obtained no right of occupancy in the lands, and in any case the defendants are not his representatives by assignment or otherwise.

By 1902 the 25 bighas, 14 kathas and 17 dhurs of land had emerged from the Ganges and had become suitable for cultivation, and on the 25th November, 1902, all the lands in suit were let by Maharani Beni Prasad Kuari, proprietress and heiress, widow and executrix of Maharaja Sir Radha Prasad Singh of Dumraon, to Babu Kesho Prasad, the father of the defendants, for a term of seven years from 1309 to 1315 Fasli. A patta and a kabuliyat were exchanged between the parties. In each of those documents the lands which were let were described as zirait lands, and it was expressly agreed in each of them that no right of occupancy in favour of the tenant should accrue, that Kesho Prasad Singh was not entitled to transfer his interest in the lands to any other person, and that on the expiration of the tenancy the Maharani should be entitled to keep the land in her direct possession as zirait, or to let it to any person. In the specification at the end of each document the land let was described as jaiwala zirait land. Kesho Prasad Singh remained in possession of the lands in suit under the patta and kabuliyat of 25th November 1902, until he died. Upon the death of Kesho Prasad Singh, his sons, the defendants, under the guardianship of their

mother, Musammat Radha Kuar, continued in possession of the lands as cultivating tenants, except during a temporary dispossession from some of them by trespassers who had no title, until the expiration of the term of seven years for which the lands had been let to their father, Kesho Prasad Singh, in 1902.

In 1908 the lands in suit were in the charge, custody and management of the Court of Wards, and on the 8th December, 1908, Musammat Radha Kuar, the mother of the defendants, in her own name, but, in fact, on behalf of and in the interest of the defendants, took the lands in suit in temporary shikmi settlement for a term of nine years from 1316 to 1324 Fasli, and executed and gave to the manager of the Court of Wards a kabuliyat dated the 8th December 1908 in which she declared that she made of her own free will and accord the declarations contained in it after fully understanding everything without any pressure brought to bear upon her by anybody. The kabuliyat contained several declarations. It is only necessary to refer to the fifth, seventh, ninth and tenth declarations. The fifth declaration, so far as it is now material in this suit, was as follows:—

"It is incumbent on me that I should keep the aforesaid newly accreted sir zirait land as it is at present and maintain the boundaries thereof. I neither have nor shall have any right whatsoever to make any alteration in connection therewith. I shall not allow anybody to encroach upon the aforesaid newly accreted sir zirait land and shall give timely information to the manager."

"7. I have taken the aforesaid land in temporary shikmi settlement for the purposes of cultivation. I have no right either to plant or to get planted any tree or to construct a house, temple, mosque, dharamsala, or any other building and gola, etc. I shall not in any way change the status of the land whereby damage may be caused to the land and its productive power may be reduced and altered.

"I neither have nor shall have any right to give either the whole or a portion of the land to anybody in shikmi settlement or to transfer it in favour of any person without the manager's sanction in writing.

"9. I have no right to the said land other than that of cultivation during the period of settlement, and I neither have nor shall acquire in future, occupancy or other rights to the same. After the expiry of the term of the lease, the manager of the estate shall have the right either to take it in sir possession, or to settle it with any other person, or to make such other management as he may think proper, and I neither have nor shall have any objection to the same.

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"10. After the expiry of the term I shall surrender the aforesaid sir zirait newly accreted land. Should I fail to do so, I shall be considered a trespasser for the period it will remain in my illegal possession, and I shall be liable for the payment of damages and compensation for that period."

On the expiration of the term of nine years the defendants refused to give up possession, and hence this suit.

The position in which Musammat Radha Kuar was when she executed the kabulivat in 1908 was a difficult one as she must well have known. The trespassers who had taken unlawful and forcible possession of some of the lands in 1906 were still in possession. In executing that kabuliyat of 1908 Musammat Radha Kuar must herself have understood the difficulties as to her own title and that of her sons, the defendants to the lands in suit, or have had independent advice as to them and as to the kabuliyat which she should give to the manager of the Court of Wards.

As has been mentioned, in 1906, after the death of Kesho Prasad Singh, several persons who were mere trespassers and had no title to any of the lands in suit took forcible and wrongful possession of some of the lands in question in the suit, and ousted Musammat Radha Kuar and her sons, the defendants, and it became necessary for these defendants and their mother to obtain decrees in ejectment against the trespassers. In 1910 these defendants, under the guardianship of their mother, and their mother brought two suits in ejectment against the trespassers. In the plaints in each of those suits the lands are described as lands, the milkiat interest in which belonged to the Dumraon Raj, and the lands were stated to be zirait lands, and to have been recognized as such by village custom. The Subordinate Judge who tried those suits found that the cases of all the defendants to those suits were false, that the defendants were mere trespassers, and that the lands were zirait lands of the Dumraon Raj in the time of the Government stud farm, that Mr. Fox had no occupancy right in the lands and was in possession of them

by cultivating them and subletting them for short periods, and that Akhauri and the plaintiffs' father were in possession in the same way, and gave the plaintiffs decrees for possession. These decrees were obviously not collusive or obtained by fraud.

In 1885 the Bengal Tenancy Act, 1885 (Act VIII of 1885) was passed. It has been amended by the Bengal Tenancy (Amendment) Act, 1907 (Ben. Act I of 1907), by which sub-section 2(*a*) became part of section 120.

The lands in suit were an estate within the meaning of the Act, and the Maharaja of Dumraon is the proprietor of the estate within the meaning of the Act. Section 120, as amended, is as follows:—

"(1) The Revenue officer shall record as a proprietor's private land—

(*a*) Land which is proved to have been cultivated as khamar (zirat, sir) nij, nijjot (or kamat) by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(*b*) cultivated land which is recognized by village usage as proprietor's khamar (zirat, sir) nij, nijjot (or kamat).

"(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

"(2*a*) Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue officer shall not record any land as a proprietor's private land unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2).

"(3) If any question arises in a civil court as to whether land is or is not a proprietor's private land, the court shall have regard to the rules laid down in this section for the guidance of Revenue officers."

Previous to that amendment sub-sections 2 and 3 had been variously construed by different Benches of the High Court at Calcutta, none of which seem to have considered themselves bound by any previous decision on the subject by a Bench of that Court, and

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had not followed the constitutional principle of referring the question on which they differed from a previous decision of their own Court to a Full Bench to decide what, so far as the High Court was concerned, would be a binding decision on all the Benches of that Court. If such a question had been referred to a Full Bench, the Chief Justice would no doubt have appointed a Full Bench to consider such an important reference and to decide the question referred.

It is necessary for their Lordships to refer to these various decisions so far as they have been brought to their attention. They will now briefly do so.

In 1890, in *Nilmoni Chuckerbutti* v. *Bykant Bera*(1) Prinsep and Bannerjee, JJ., held that "any other evidence that may be produced" in sub-section (2) of section 120 to show an assertion of any title on the part of the proprietor as to land as his private land must be an assertion communicated to the tenant before the 2nd March, 1883.

In 1892, in *Sher Bahadur Sahu* v. *M. H. Mackenzie*(2) Bannerjee and Pratt, JJ., held that the mere fact that the land having been taken in lease on the 23rd August, 1888, as zirait would not give to that fact any probative value, as the lease was not before the 2nd March 1883.

In *Sobhab Koeri and others* v. *Mahabir Prasad* (Special Appeal 2129 of 1901), an unreported case. Mitra, J., appears to have taken a different view of the scope of section 120.

In 1905 *Masudan Singh* v. *Gobda Nath Panday*(3), which came before Harington and Mookerjee, JJ., in January and February, 1905, and was a suit in ejectment brought by a zamindar against a raiyat, and in which the defendant alleged that he had a right of occupancy in the lands, it was proved that he had admitted that the lands were kamat lands

(1) (1890) I. L. R. 17 Cal. 466. (2) (1892) 7 Cal. W. N. 400.
(3) (1905) 1 Cal. L. J. 455.

of the plaintiff. The trial court had dismissed the suit, but the lower appellate court, whose findings of fact, but not of law, had to be accepted as final by the High Court in second appeal, had found, on an admission made by the defendant that the lands were kamat lands, and had given the plaintiff a decree in ejectment. In that case Harington, J., referring to sections 116, 120 and 178 of the Act, pointed out that the court of first instance had found that the plaintiff had failed to prove that the defendant had held for a term or under a lease from year to year before the kabuliyat was made, in which was the admission that the lands were kamat lands, and held that the suit must be dismissed. Mookerjee, J., treating kamat and zirait as synonymous terms, and referring to *Nilmoni* v. *Bykant*(1), *Sher Bahadur* v. *Mackenzie*(2) and *Sobhab Koeri* v. *Mahabir Prasad*(3), observed that the question raised in the appeal before them, that is, that the admission made by the defendant in the kabuliyat was not admissible in evidence, was not free from doubt, and that it was not necessary to discuss it, as the appellant, the defendant, was entitled to succeed on another ground, and agreed that the suit should be dismissed. The other ground need not be discussed by their Lordships, as it does not arise in this suit.

In 1908, in *Bhagtu Singh* v. *Raghunath Sahai*(4), which came before Mitra and Ball, JJ., on the 3rd July 1908, in second appeal, the lower appellate court had found that the land then in question was zirait land, on an admission made by the tenant in a kabuliyat which was dated after the 2nd March, 1883. Mitra and Ball, JJ., held that the admission in the kabuliyat as to the character of the land was relevant evidence and admissible, and the question of its probative force was a question of fact for the lower appellate court, and dismissed the appeal.

(1) (1890) I. L. R. 17 Cal. 466.
(2) (1872) 7 Cal. W. N. 400.
(3) S. A. 2129 of 1901.
(4) (1908) 13 Cal. W. N. 135.

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In 1914, in *Ganpat Mahton* v. *Rishal Singh*(1), Mookerjee and Beachcroft, JJ., held that a statement made in a kabuliyat executed after the 19th September, 1902, being after the 2nd March, 1883, that the land was zirait, was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that when the Legislature expressly made evidence of letting before the 2nd March, 1883, in proof of the character of the land, admissible, the Legislature must have intended to exclude evidence of letting after the 2nd March, 1883, and they held that the defendants in that case must consequently be regarded as settled raiyats, as, in fact, they had been recorded.

Their Lordships agree with the construction of section 120, before it was amended in 1907 by Bengal Act no. 1 of 1907, as adopted in 1908 by Mitra and Ball, JJ., in *Bhagtu Singh* v. *Raghunath Sahai*(2). Did the addition of 2(*a*) by the amending Act make any and what difference so far as this appeal is concerned?

Sub-section 2 of section 120, as their Lordships construe it, does not exclude as inadmissible evidence that subsequent to the 2nd March, 1883, the tenant admitted that the lands let to him were zirait lands of the landlord; such an admission is relevant and admissible evidence, but it is probative evidence only, which, like any other relevant fact, has to be considered, and such weight given to it as under the circumstances of the case it is entitled to have. For instance, to put an extreme case, if it should appear to the Judge trying such a case that the admission was made contrary to the fact by a person anxious to obtain a lease of the lands from the landowner refusing to let unless the admission was made, its probative value would be worthless and might be disregarded; but if the admission were made in a case in which it was doubtful on the evidence whether the

(1) (1914) 20 Cal. W. N. 14. (2) (1908) 13 Cal. W. N. 135.

lands were the zirait or sir lands of the proprietor, the admission might in the opinion of the Judge hearing evidence be valuable as enabling him to arrive at a conclusion on contradictory evidence of fact.

The question is: What does (2*a*) of section 120 mean? It is clear that land cannot be recorded as a proprietor's private land by reason of its having been recited to be such private land by a decree which was proved to the satisfaction of the Revenue officer to have been obtained from the court by collusion or fraud. And it is also clear that nothing in such a decree can affect the character of the land if it is proved to the satisfaction of the court in a suit of ejectment that the decree was obtained by collusion or fraud. But what is the meaning of " any agreement or compromise " in (2*a*)? In their Lordships' opinion " any agreement or compromise " in (2*a*) must refer only to an agreement or compromise of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, it is difficult for their Lordships to understand why the agreement for letting of the land, lease, patta, or kabuliyat which contains a statement of the character of the land, should not be admissible in evidence against a party to it. It does not therefore appear to their Lordships that sub-section (2*a*) displaces the view taken in the case of *Bhagtu Singh* v. *Raghunath Sahai*(1), which their Lordships have approved.

But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of section 120, the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the patta of 1902 and the kabuliyats of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government

(1) (1908) 13 Cal. W. N. 135.

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for similar purposes as they would have been used by the Maharaja of Dumraon if he had been the owner of a stud farm, that no one claimed any right in any of them as settled raiyat or, except trespassers without any title, as having an occupancy right in any of them, and to the statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were plaintiffs in the suits against trespassers to which their Lordships have referred, and to the kabuliyat given in 1908 by Musammat Radha Kuar to the Manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were zirait of the Dumraon Raj, and that the defendants had no right of occupancy in them.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

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

Solicitors for respondent: *Watkins and Hunter.*

APPELLATE CIVIL.

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Dec., 9, 10, 11, 14, 15, 16, 17, 18, 21, 22; Jan., 13; May, 3.

Before Jwala Prasad and Bucknill, JJ.

RAM SUMRAN PRASAD

v.

GOBIND DAS.*

Hindu law—sonless widow, power of, to alienate property inherited from husband—gift in favour of son-in-law, whether valid—bride's parents, nuptial gift by, to bridegroom, in consideration of consent, whether opposed to public policy—property gifted, whether can be recovered after marriage solemnized—Contract Act, 1872 (*Act IX of* 1872), *section* 23—*Registration Act,* 1908 (*Act XVI of* 1908),

* Appeal from Original Decree no. 189 of 1922, from a decision of Ashutosh Chatterji, Esq., District Judge of Darbhanga, dated the 29th March, 1921.

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section 28, *scope of, elements essential to confer jurisdiction— fraud, absence of.*

Section 28 of the Registration Act, 1908, indicates the place at which certain documents relating to land shall be registered, and provides that such documents "shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate."

Held, that the section requires only that the whole or a portion of the property to which the document relates shall in fact be in existence, shall be the property of the transferor and shall be situate within the jurisdiction of the sub-registrar where the registration is sought to be effected.

The question whether the donee under the registered deed of gift has exercised his rights under the deed is not material in considering the validity of the deed.

Harendra Lal Roy v. *Hari Das Devi* (1) and *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (2), distinguished.

The registration of a document by the registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if, in fact, the property in question does exist.

Brojo Gopal Mukherjee v. *Abhilash Chandra Biswas* (3); *Durga Prasad Sahu* v. *Rameshar Prasad* (4), *Muhammad Abdul Hasan* v. *Fida Husain* (5), *Taraju Garu* v. *Sri Rajah Dantuluri Pada Venkata Jagannadharaju Garu* (6), *Mussammat Ram Dai* v. *Ram Chandrabala Debi* (7), *Mussammat Jasoda Kuer* v. *Janak Missir*(8), and *Birthi Din* v. *Ram Lal* (9), followed.

Where a pardahnashin executes a document without taking independent advice, the document is not invalid unless it is shown that independent advice would have affected the execution of the document by the executant.

Coomber v. *Coomber* (10), *Santi Bala* v. *Dharadundari* (11) and *Satish Chandra Ghosh* v. *Kalidasi* (12), referred to.

(1) (1914) L. R. 41 I. A. 110.
(2) (1921) L. R. 48 I. A. 127.
(3) (1910) 14 Cal. W. N. 532.
(4) (1925) I. L. R. 46 All. 754.
(5) (1924) 82 Ind. Cas. 736.
(6) (1923) 77 Ind. Cas. 464.
(7) (1919) 4 Pat. L. J. 433.
(8) (1925) I. L. R. 4 Pat. 394.
(9) (1926) A. I. R. (Oudh) 136.
(10) (1911) 1 Ch. 174.
(11) (1919) L. R. 46 Ind. A. 272.
(12) (1921) 34 Cal. L. J. 527.

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In practice the receiving of gifts by a bride's parents or relations at any time in connection with the marriage is not permissible; but a nuptial gift by the bride's parents to the bridegroom and his relations is not considered to be bad and is in vogue.

Bakshi Das v. *Nandu Das* (1), *Umed Kika* v. *Nagindas Narotamdas* (2), *Mulji Thakersay* v. *Gomti and Kastur* (3) and *Rani Lallun Monee Dossee* v. *Nobin Mohun Singh* (4), referred to.

Scott v. *Tylor* (5), distinguished.

Such a gift may include not only money but also land and the like.

Section 23, Indian Contract Act, 1872, which renders unlawful the consideration of an agreement which is opposed to public policy, does not sanction the recovery of the property which forms such consideration after the object of the agreement has been fulfilled.

Therefore, although a suit may not lie to enforce against a bride's parents an agreement to make a gift to the bride or to the bridegroom or the latter's father, if a gift is actually made, whether to the bride, the bridegroom or the father of the bridegroom, by the bride's parents, it cannot be recovered by the donor when once the marriage has been solemnized.

Kalavagunta Venkata Krishnayya v. *Kalavagunta Lakshmi Narayan* (6), and *Jagdishwar Prasad* v. *Sheo Buksh Rai* (7), followed.

A sonless Hindu widow succeeds to the entire estate of her husband and takes possession of it as an absolute owner; only her power of disposition is a qualified one and is analogous to the power of disposition of a male co-parcener in a joint Mitakshara family.

(1) (1905) 1 Cal. L. J. 261.
(2) (1870) 7 Bom. H. C. Reports, O. C. J. 122.
(3) (1887) I. L. R. 11 Bom. 412.
(4) (1875) 25 W. R. 32.
(5) (1787) 1 Wh. & T. L. C. 573.
(6) (1908) I. L. R. 32 Mad. 185.
(7) (1919) 51 Ind. Cas. 656.

The performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which a sonless widow takes the estate of her husband.

When she sells or gives away a portion of the property which is only a small proportion of the estate inherited, and the occasion of the disposition or expenditure is reasonable and proper according to the notions prevalent among Hindus, the transfer is justifiable and cannot be impeached by the reversioners.

Held, therefore, on a review of the following cases :— *Cossinaut Bysack* v. *Hurroosoondry Dossee* (1), *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2), *Bhugwandeen Doobey* v. *Myna Baee* (3), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (4), *Rao Kurun Singh* v. *Nawab Mahamed Fyzali Khan* (5), *Sham Sunder Lal* v. *Achhan Kunwar* (6), *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank, Limited* (7), *Munshi Karimuddin* v. *Kunwar Gobind Krishna Narain* (8), *Janaki Ammal* v. *Narayanasami Aiyar* (9), *Sadasi Koer* v. *Ramgobind Singh* (10), *Khub Lal Singh* v. *Ajodhya Misser* (11), *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (12), *Chowdhry Junmekoy Mullick* v. *Sreemutty Russomoyee Dossee* (13), *Jumoona Dassya Chowdhrain* v. *Bamasoondarai Dassya Chowdhrain* (14), *Churaman Sahu* v. *Gopi Sahu* (15), *Venkatacharyalu* v. *Rangacharyalu* (16), *Devulapalli Kamoswara Sastri* v. *Polavarapu Veeracharlu* (17), *G. Gopala Krishnam Razu* v. *Venkatanarasa Razu* (18), *D. Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (19), *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (20), *Ganpat* v. *Tulsiram Ukha Dhangar* (21), *Bhagirathi* v. *Jokhu Ram Upadhia* (22), *Kasturi* v. *Panna Lal* (23), *Damoodar Misser* v. *Senabutty Misrain* (24), *Gobinda Rani Dasi* v. *Radha*

(1) (1820) 2 Morley Digest, 198.
(2) (1859-61) 8 Moo. I. A. 500(551).
(3) (1866-67) 11 Moo. I. A. 487.
(4) (1869-70) 13 Moo. I. A. 209.
(5) (1871-72) 14 Moo. I. A. 187.
(6) (1897-98) L. R. 25 I. A. 183.
(7) (1902-03) L. R. 30 I. A. 209.
(8) (1908-09) L. R. 36 I. A. 136.
(9) (1915-16) L. R. 43 I. A. 207.
(10) (1910-11) 15 Cal. W. N. 857.
(11) (1916) I. L. R. 43 Cal. 574.
(12) (1911) I. L. R. 34 Mad. 288.
(13) (1868) 11 Ben. L. R. 418 (421).
(14) (1875-76) L. R. 3 I. A. 72 (78).
(15) (1916) I. L. R. 37 Cal. 1.
(16) (1891) I. L. R. 14 Mad. 316.
(17) (1911) I. L. R. 34 Mad. 422.
(18) (1914) I. L. R. 37 Mad. 273.
(19) (1915) I. L. R. 38 Mad. 556.
(20) (1908) I. L. R. 32 Bom. 81.
(21) (1912) I. L. R. 36 Bom. 88.
(22) (1915) I. L. R. 32 All. 575.
(23) (1916) I. L. R. 38 All. 520.
(24) (1882) I. L. R. 8 Cal. 587.

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Ballabh Das (1), *Ramaswami Ayyar* v. *Vengidusami Ayyar* (2), *Sundaram Ayyar* v. *Krishnasami Aiyar* (3), *Kudutamma* v. *Narasimha Charyalu* (4), *Pugulia Vettoram-mal* v. *Vetter Goundon* (5), *Subba Naiker*, In re. (6), *A. Sundararamayya* v. *C. Sitamma* (7), *Jowala Pan* v. *Hari Kishen Singh* (8), *Bachoo Harkisondas* v. *Mankorebai* (9), *Abhesang Tirabhai* v. *Raisang Fatesang* (10), *Rustom Singh* v. *Moti Singh* (11), *Bhagwati Shukul* v. *Ram Jatan Tewari* (12), *Madhusudan Prasad Singh* v. *Ramji Das* (13), *Mussammat Narainbati Kumari* v. *Ramdhari Singh* (14), *Khub Lal Singh* v. *Ajodhya Misser* (15) and *Gopalji Sah* v. *Manbirti Kuer* (16), that a gift by a sonless Hindu widow of a reasonable portion of landed property to her son-in-law, out of the estate inherited from her husband, is permissible under the Hindu law as a part of the religious ceremony of marriage of the daughter and as being conducive to the spiritual welfare of the husband.

Per *Bucknill, J.*—It is generally contrary to public policy for a father to be paid money in consideration of giving his son or daughter in marriage, and a contract to that effect cannot be enforced in a court of law; but an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where, therefore, a contract provides that when a marriage has been arranged and performed the parents of the bride shall pay a certain sum of money, the contract is not void ab initio as being opposed to public policy.

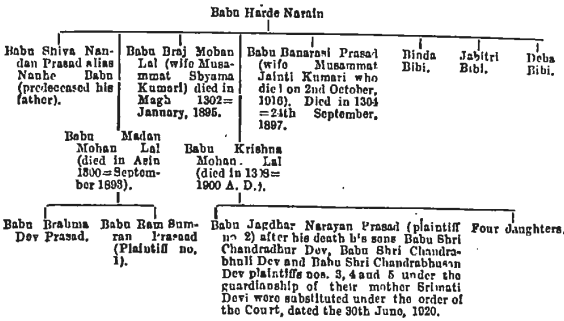
Appeal by the plaintiffs.

This was an appeal by the plaintiffs, and it arose out of a suit brought by them to recover possession of the property in dispute as reversioners to the estate of one Banarsi Prasad, a wealthy banker and zamindar of Olao in the district of Monghyr.

(1) (1910) 12 Cal. L. J. 173; 15 Cal. W. N. 205.
(2) (1899) I. L. R. 22 Mad. 113.
(3) (1915) 28 Ind. Cas. 992.
(4) (1907) 17 Mad. L. J. 528.
(5) (1912) 13 Ind. Cas. 475.
(6) (1915) 30 Ind. Cas. 781.
(7) (1912) I. L. R. 35 Mad. 628.
(8) (1924) I. L. R. 5 Lah. 70.
(9) (1907) I. L. R. 31 Bom. 373, P.C.
(10) (1912) 14 Bom. L. R. 602.
(11) (1896) I. L. R. 18 All. 474.
(12) (1923) I. L. R. 45 All. 297.
(13) (1920) 5 Pat. L. J. 516.
(14) (1916) 1 Pat. L. J. 81.
(15) (1916) I. L. R. 43 Cal. 574.
(16) (1918) 52 Ind. Cas. 996.

The case turned upon the validity or otherwise of a deed of gift [Exhibit I(1)], executed by the widow of Banarsi Prasad, dated the 28th July, 1901, conveying the property to the defendant Gobind Das on the occasion of a certain ceremony connected with the marriage of her daughter.

The genealogy given in the plaint was not disputed and is reproduced hereunder, along with the dates of death of some of the persons, for reference.



In 1925 Fasli (1888) Banarsi Prasad and his three brothers Madan Mohan Lal, Braj Mohan Lal and Krishna Mohan Lal separated from each other in all respects: in mess, business and property. Banarsi Prasad died in 1304 Fasli (24th September, 1897), leaving him surviving his widow Musammat Jainti Kumari and an unmarried daughter named Chhotan Bibi. He left considerable properties, both moveable and immoveable. The annual income from landed properties alone was over half a lakh of rupees, besides money-lending business of Rs. 20,000 to Rs. 30,000 and Government Promissory Notes of the nominal value of over two lakhs. Musammat Jainti Kumari as the widow of Banarsi Prasad inherited the properties and remained in possession thereof till her death.

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Chhotan Bibi, daughter of Banarsi Prasad, at the time of his death was about 10 years of age, and her marriage appeared to have occupied her mother's attention from the time of the death of Banarsi Prasad, and she (Musammat Jainti Kumari) broached the subject to her sister's husband Sheo Shankar Das (examined on commission) when he came to Olao to offer condolence upon the death of her husband. Negotiations for marriage were started, and ultimately Chhotan Bibi was married in the year 1306 (1899) to defendant Gobind Das, nephew of Sheo Shankar Das. It appeared that when the negotiations were going on, a year before the marriage, Ram Krishna Das, brother of Musammat Jainti Kumari, was also consulted by Sheo Shankar Das and he appeared to have approved of it as the horoscopes of the bride and the bridegroom agreed.

The marriage was performed at a very moderate expense, considering the position of the families, the wealth which Musammat Jainti Kumari possessed and the fact that she had only a daughter and no other child, male or female. Witness no. 2 for the plaintiffs, Hari Narayan, gave the details of the expenses which amounted to about Rs. 600 or Rs. 700 in ornaments and very small sums at different ceremonies covering Rs. 200 to Rs. 250 in all. This expense appeared to be very much below the average expense incurred on the occasion of the marriage of the daughters of the family to which Banarsi Prasad belonged. The marriage of the first daughter of Krishna Mohan Lal, brother of Banarsi Prasad, cost Rs. 40,000 to 50,000 and that of his other daughters Rs. 30,000 each. Although Musammat Jainti Kumari spent such a trifling amount as mentioned above in connection with the various ceremonies of the marriage she paid Rs. 50 a month to her son-in-law, the defendant, from the time of the marriage until she executed the deed of gift, Exhibit I(1), dated the 28th July, 1901, in his favour, by which she made a gift of the property in dispute, namely, eight-

annas of her pokhta share in Mahal Barsaon in the district of Darbhanga and one bigha of land situate in Olao, valued at Rs. 50,000, reciting that the defendant Gobind Das (son-in-law) and his father Bishwambhar Das agreed to the marriage on the condition that the said property would be given to the defendant on the occasion of the marriage and that in pursuance whereof she had verbally declared the gift at the time of the Gantha Pakrai (catching hold of the skirt of the mother-in-law) performed during the marriage. In accordance with this gift the defendant acquired possession of the property and remained in possession during the lifetime of Musammat Jainti Kumari and was still in possession of the same at the date of suit.

Chhotan Bibi had two sons born to her; the eldest died when 8 months old (when he was born was not disclosed), and the second died at the age of two and a half years in 1313-14 (1906-07). Musammat Chhotan Bibi died soon after the birth of the second son in 1904. Therefore at the time when the deed of gift was executed in 1901 Chhotan Bibi was alive and the second son was born to her two or three years after. There was nothing to show whether the first son was in existence at the time of the execution of the deed of gift.

Musammat Jainti Kumari died in Asin 1324 (2nd October, 1916), about 16 years after the execution of the deed of gift. During her lifetime the lady appeared to have increased the family wealth and also executed certain works of charity at a large cost but not disproportionate to her means or the extent of the property she possessed. She constructed a thakurbari, according to plaintiff Ram Sumran Prasad witness no. 1, at a cost of Rs. 50,000 to Rs. 60,000, and dedicated property yielding an income of Rs. 18,000 a year. The plaintiffs did not impugn this expenditure by her and alleged that it was with their consent. It was also admitted that she purchased several properties from 1906 to 1911 worth

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Rs. 20,000 to Rs. 30,000 a year. This indicated that she managed the property frugally and economically and whatever she spent was expended on charitable purposes. The income of Barsaon, the village in question given to the son-in-law, was about Rs. 2,500 including revenue and cesses, as stated by Ram Sumran Prasad, and there was a net profit of Rs. 1,200 to Rs. 1,300 a year.

After the death of the lady, the plaintiffs as reversioners came into possession of all the properties, moveable and immoveable, and each of the plaintiffs acquired a very substantial portion of the same. Ram Sumran Prasad, plaintiff no. 1, stated that he obtained immoveable property yielding Rs. 12,000 to Rs. 13,000, plus Rs. 25,000 of the debts due to the lady, and Government Promissory Notes of the nominal value of Rs. 75,000. The other plaintiffs also must have inherited large properties both moveable and immoveable. The plaintiffs, however, did not get possession of the property covered by the deed of gift, which was in the possession of the defendant, the son-in-law of the lady. Accordingly, they instituted the present suit in the court of the Subordinate Judge of Darbhanga, for ejecting the defendant and for recovering possession of the property in dispute, upon the ground that the deed of gift executed by the lady was not valid. The suit was tried by the District Judge of Darbhanga who dismissed the plaintiffs' claim; hence this appeal.

K. P. Jayaswal (with him *S. M. Gupta* and *L. K. Jha*), for the appellants.

N. C. Sinha and *A. P. Upadhya*, for the respondent.

Cur. adv. vult.

JWALA PRASAD, J. (after stating the facts set out above, proceeded as follows):

The plaintiffs undoubtedly are the reversioners to the estate of Banarsi Prasad and are entitled to recover possession of the property in dispute unless

the deed of gift Exhibit I(1) executed by Musammat Jainti Kumari, widow of Banarsi Prasad, whereby her son-in-law the defendant is in possession of the property in dispute, is a complete transfer of the property so as to be binding upon the plaintiffs. The plaintiffs, therefore attack this deed as being invalid on various grounds.

In the court below the parties went to trial on various issues as set forth in the judgment of the court below; most of these issues have been set at rest by the decision of the trial court and have not been raised in this court. We are concerned only with the issues which relate to the validity or otherwise of the deed of gift. These are issues nos. 6 to 11 of the court below.

Some of these issues again attack the validity of the gift on some technical grounds and may be dealt with in the first instance. It is said that the deed is inoperative, inasmuch as it was not validly registered under section 28 of the Indian Registration Act (Act XVI of 1908) by the Sub-Registrar of Beguserai, he having no jurisdiction to register it.

Now, the deed of gift in question deals with two properties: (*1*) eight-annas pokhta share out of sixteen-annas of Mahal Barsaon, old tauzi no. 1404 and present tauzi no. 6507, and (*2*) one bigha of jote land situate in mauza Semaris, otherwise known as Olao. The first property, Mahal Barsaon, which in fact is the bulk of the gifted properties, is situate in pargana Havi in the district of Darbhanga within the jurisdiction of the Sub-Registrar of Bahera; the second which consists only of one bigha of jote land, is situate within the jurisdiction of the Registrar of Beguserai in the district of Monghyr. The plaintiffs' case is that this one bigha of land did not belong to Musammat Jainti Kumari and that it was falsely alleged in the deed in question that it was purchased by her and was her property, with a view to give jurisdiction to the Sub-Registrar of Beguserai to register it.

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Reliance is placed for this contention upon the survey khatian, Exhibit F(2), wherein the land is shown as the qaimi land of Sukhan Barhai, with a note that the produce rent of it is paid to Musammat Jainti Kumari as malik thereof. Sukan Barhai has not been examined. His son, Ram Lal Barhai, witness no. 3, examined on behalf of the plaintiffs, admits that Musammat Jainti Kumari is the malik of this land and that he used to pay the manhundi rent for the land to her and after her to Jagdhar Babu plaintiff no. 2. He admits that the land

> "was formerly in the khas cultivation of Musammat Jainti Kumari."

Now the deed of gift was executed on the 28th July, 1901, whereas the survey record-of-rights was published on the 9th November 1902. The plaintiffs, therefore, have failed to prove that the land was not in the khas possession of Musammat Jainti Kumari when the deed of gift was executed. Musammat Jainti Kumari had two-fold rights over the land; she was admittedly the proprietress of it and it was in her khas cultivation (probably at the time when the deed of gift was executed) as admitted by the aforesaid plaintiffs' witness Ram Lal Barhai. The fact that she was not in khas possession subsequent to the deed of gift does not in any way affect the validity of the registration of the document. It is immaterial how she had obtained whas possession over the land, whether by purchase as stated in the deed of gift or otherwise. The recital in the deed of gift about the lady's title to the land in question far from being in any way disproved finds support from the aforesaid evidence. The plaintiffs rely upon the fact that the defendant was not in khas possession of the land. He has given a reasonable explanation of it. He says that the land was at a great distance from Benares where he resides and he did not care to retain possession of it. It must be remembered that the land was given, as stated in the deed, probably with a view that the defendant might plant a garden on it. It is

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enough for the purpose of registration that the donor had a good title to the property and intended to part with that property in favour of the donee. Whether the donee really exercised his right conferred by the deed is not at all essential. He might change his mind, and in fact in this case it seems that the defendant did change his mind as to his retaining his possession over the property. Section 28 of the Registration Act does not require anything more than the existence of the property within the jurisdiction of the Sub-Registrar where it is sought to be registered.

The learned Counsel on behalf of the appellants has relied upon the decisions of their Lordships of the Judicial Committee in the cases of *Harendra Lal Roy* v. *Hari Das Devi*(1) and *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2). In the former case the property sought to be dealt with in the deed in question was a fictitious property and had no existence. In the latter case it was found that to the knowledge of both the parties the transferor had no title to the property and that he never intended to part with it. These decisions do not affect the present case, inasmuch as the property dealt with in the deed of gift admittedly does exist and it belonged to the donor, Musammat Jainti Kumari, as proprietress thereof and at one time she was in possession of it, probably at the time the deed of gift was executed, and that she bona fide intended to make a gift of it to the defendant. Far from denying the title of Musammat Jainti Kumari to the land in question the plaintiffs are said to have taken possession of it after her death as reversioners to her husband. It is possible that the lady transferred the small piece of land in Olao in order to save herself the trouble of going to the Sub-Registrar's office at Bahera in the district of Darbhanga far off from her residence at Olao within the jurisdiction of the Sub-Registrar of Beguserai, she being a pardahnashin lady. This in itself is not

(1) (1914) I. L. R. 41 Cal. 972; L. R. 41 I. A. 110.
(2) (1921) I. L. R. 48 Cal. 509; L. R. 48 I. A. 127.

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a bad motive, and in fact nowhere has it been suggested that there was any fraud or collusion practised by the parties in the matter of getting the deed registered by the Sub-Registrar of Beguserai by including in it the land in question situated within his jurisdiction. It was pointed out in the case of *Brojo Gopal Mukerjee* v. *Abilash Chandra Biswas*(1) that the registration of a document by the Registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if in fact the property in question does exist. Similar is the view taken by all the High Courts in India [vide *Durgaprasad Sahu* v. *Tameshar Prasad*(2), *Muhammad Abdul Hasan* v. *Fida Husain*(3), *Taraju Garu* v. *Sri Rajah Dantuluri Pada Venkata Jagannadharaju Garu*(4), *Musammat Ram Dai* v. *Ram Chandrabala Debi*(5), *Musammat Jasoda Kuer* v. *Janak Missir*(6) and *Pirthi Din* v. *Ram Lal*(7)].

The two recent cases decided by this Court to one of which I was a party seem to be on all fours with the present case. In those cases the registration was held to be valid. The learned District Judge has found, and we agree with his finding, that the land dealt with by the deed of gift in the present case did exist and that the lady had good title to it and in fact intended bona fide to make a gift of it to the defendant and that there was no fraud or collusion practised by her or any of the parties to the deed in including the property in the deed in order to give jurisdiction to the Sub-Registrar of Beguserai.

I, therefore, in agreement with the learned District Judge hold that the registration of the document in question was valid under section 28 of the Indian Registration Act. The contention of the

(1) (1910) 14 Cal. W. N. 532.
(2) (1925) I. L. R. 46 All. 754.
(3) (1924) 82 Ind. Cas. 736.
(4) (1923) 77 Ind. Cas. (Mad.) 464.
(5) (1919) 4 Pat. L. J. 433.
(6) (1925) I. L. R. 4 Pat. 894.
(7) (1926) A. I. R. (Oudh) 136.

appellants must, therefore, be overruled. This disposes of the second part of issue no. 6 framed by the court below.

The first part of that issue is

"Did Musammat Jainti Kumari sign the deed of gift after understanding its contents and after independent advice?"

There is the positive evidence of Bansidhar (witness no. 4 for the defendant), one of the marginal witnesses to the deed, that the document was read out to the musammat and she understood the contents thereof and then signed the deed and thereafter the witnesses to the deed attested it. The witness was in the service of the musammat at that time and was in charge of the bahis or account books which used to be written at her deorhi. He says that the musammat used to understand business and look after her affairs. There is no suggestion that the musammat was like other pardahnashin ladies ignorant of her affairs and in fact her able management of such a large estate is not disputed. According to the evidence of the witnesses on behalf of the plaintiffs Ram Sumran Prasad and others she so diligently managed her business that she augmented the income of the property during her management. Bansidhar also proves the identification of the lady by Sheo Karan Upadhyaya (plaintiffs' witness no. 9) before the Sub-Registrar, and that when asked by the Sub-Registrar she said to him that she had understood the document. The endorsement of the Sub-Registrar on the document supports this witness. Sheo Karan Upadhyaya (witness no. 9 examined on behalf of the plaintiffs) does not deny the admission of the execution of the document by the musammat before the Sub-Registrar nor does he say that the musammat did not understand the document or that the Sub-Registrar did not satisfy himself as to her having executed it after understanding it, although he was examined on the 21st of March long after Bansidhar who was examined on the 5th of March, 1921. Curiously enough, he is silent as regards the circumstances

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under which the document was executed, admitted and registered. In cross-examination he admits that he identified the musammat at the time of registration.

The other attesting witnesses to the deed Ram Krishna Das (P. W. 5), Sri Narayan (P. W. 8) and Parmeshwari Prasad (P. W. 10), scribe of the document, want to make out that the document was written and attested at Monghyr, and not at Olao where the musammat is said to have executed it. The first two say that they signed the document as witnesses without the signature of the musammat thereon as they were told to do so by Bishwambhar Das, father of the defendant. This evidence is obviously false, inasmuch as the witnesses described themselves in the document as residing at that time at Olao, and the position of their signatures in the document indicates that they attested it after it was executed by the musammat. Ram Krishna Das is the brother of the musammat; it is not likely that he would attest it when it was not executed by the musammat in his presence and was executed at Monghyr where the musammat was not living, simply because he was told to do so by Bishwambhar Das.

The scribe was the karpardaz of Banarsi Prasad, husband of the musammat, and continued to be so after his death during the time of the lady. He says that he came to Olao 10 or 12 days after he wrote the document on stamp-paper, but he did not tell the fact of his having written the document to the musammat. It is absurd.

These witnesses are self-condemned for on their own showing they falsely described themselves in the document as residing at Olao at the time and attested the document without having seen its execution by the musammat. None of these witnesses for the plaintiffs proves that the document was not read out to the lady or that she did not understand it or that no independent advice was given to her, for,

according to their own showing, the document was not signed by the musammat in their presence. Agreeing with the court below I disbelieve them, and would prefer the straightforward evidence of the defendant's witness Bansidhar who was an accredited servant of the musammat and was her mukhtear-am, getting a decent salary of Rs. 50 a month.

It is suggested by the plaintiffs that the document was executed on account of the undue influence of Bishwambhar Das; but Bishwambhar Das at that time was not the manager of the musammat. He was appointed manager subsequently by managernamah (Exhibit A), dated the 5th October, 1901. It may be that he used to be consulted in important matters and probably he was consulted with respect to the execution of this document. But it seems that the persons employed by the musammat in connection with the transaction in question were the accredited servants of her from the time of her husband.

The learned District Judge was, therefore, right in holding that the plaintiffs' case of any undue influence having been exercised upon the musammat in the execution of the document in question, or her not having understood the contents thereof before executing it, is a myth. This is corroborated by the fact that the document was given effect to and the donee, the defendant, came in possession of it forthwith and has been so for over 16 years up to 1916 during the time of the musammat, without any objection on her part, although the connection between the two families had to a large extent been severed by the death of the daughter Chhotan Bibi in 1904 and of her second son in 1906. All this time she has not been shewn to be in any suspected atmosphere.

There is no substance in the contention of the plaintiffs. It must be held upon the evidence on the record and the circumstances of the case that the document was executed by the lady independently and that she understood its full nature and effect. She hardly needed any advice in the matter; she had

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before her the accredited servants to seek their advice in the matter. In fact, the nature of the transaction does not necessitate that she should have the advice of anybody. She was nominally a pardahnashin lady, but, as observed above, she had the full capacity of understanding business transactions.

Accepting the case of the plaintiffs, she was in touch with Bishwambhar Das who was shortly after appointed manager, and the document was executed upon the advice of Bishwambhar Das. There is no reason to suppose that this was not independent advice, simply because Bishwambhar Das's son, the defendant, was the beneficiary under the deed. This would only require the transaction to be examined with caution. It must be remembered that the defendant was her son-in-law and the only person upon whom she could bestow her affection. Then her brother was also there, besides responsible servants of the estate. What more is needed for independent advice in a matter of this kind, I fail to understand. It will be too much to hold that a document of this kind should be held invalid simply because no independent advice was offered to the lady. The authorities have not gone so far, nor is the rule that a pardahnashin lady should have independent advice inflexible. Even if no independent advice was taken by her, the document will not be invalid, unless it was shown that independent advice would have affected the execution of the document by the lady. It is amply proved in this case, and the circumstances unmistakably point to the fact that the musammat intended to give the property in dispute to her son-in-law as a gift and she, as a matter of fact, did give effect to her intention by parting with the possession of the property. Any advice, therefore, would not have affected her action in the matter. The principles are well laid down in *re Coomber* (1), *Santi Balā* v. *Dharadundari* (2) and *Satish Chandra Ghosh* v. *Kalidasi* (3).

(1) (1911) 1 Ch. 174. (2) (1919) L. R. 46 I. C. 272.
(3) (1921) 34 Cal. L. J. 529.

It is not denied that the lady signed the document. In fact, her signature thereon is admitted. The document was presented by her to the Sub-Registrar before whom she admitted its execution and signed the endorsement made by the Sub-Registrar. It must, therefore, be held that the deed of gift was executed by the lady of her own free will and that it was properly registered by the Sub-Registrar of Beguserai.

The learned District Judge was, therefore, right in deciding both the parts of issue no. 6 against the plaintiffs and in favour of the defendant.

The next question is whether Musammat Jainti Kumari had authority to execute the deed of gift. The defendant says that it was executed under a direction given to the lady by her husband, Babu Banarsi Prasad. In other words, it is said that Babu Banarsi Prasad had directed Musammat Jainti Kumari to make a gift of the property at the marriage of Chhotan Bibi and the lady in executing the deed simply carried out the wishes of her husband. Upon this plea of the defendant Issue no. 7 was raised. [After stating the evidence with respect to this issue his Lordship continued as follows:]

Upon the evidence in the case I am not inclined to differ from the view taken by the learned District Judge and in deciding this issue against the defendant.

Issues nos. 8, 9 and 10 are interwoven. In order to determine those issues it is necessary to ascertain the facts underlying them.

The defendant's case is that Musammat Jainti Kumari was anxious to marry her daughter to the defendant and sent Babu Krishna Mohan Lal, elder brother of Banarsi Prasad, along with two other persons to the defendant's house at Benares to negotiate for it. Raman Lalji, the elder brother of

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the defendant's father, raised two objections: (1) that Isri Prasad of Bhagalpur in the vicinity of the girl's residence at Olao was excommunicated by the Benares Agarwalas and (2) that Olao in the district of Monghyr in Bihar was at a great distance from Benares in the United Provinces and it would be troublesome and expensive to take the barat (marriage party) there. The people representing the widow agreed that Isri Prasad would not join in the marriage and that they would give property worth Rs. 50,000 to the bridegroom. Thereupon the friends of Raman Lalji, who were there, persuaded Raman Lalji to agree to the marriage. As an assurance for the promise the lady subsequently sent a letter (Exhibit G), dated the 26th November, 1898, duly signed by her, agreeing to make a gift of immoveable property worth Rs. 50,000 at the time of gantha pakrai (catching hold of the skirt of the mother-in-law by the son-in-law) during the palanga or leave-taking ceremony after the marriage. This being done, the marriage was settled and performed, and the lady made the gift by verbally declaring it at the time and subsequently she executed the deed of gift in question.

The plaintiffs deny the above facts and say that there was no such promise or agreement made on behalf of the lady and that no gift was declared at the time of the aforesaid ceremony. They also deny any ceremony being performed, such as the gantha pakrai ceremony in the community. They admit that there is a leave-taking ceremony performed in the community variously called palka or palanga ceremony in which the bride and the bridegroom sit on a palanga (bedstead) and mehdi (juice of the leaves of a plant which paints red the part to which it is applied) is applied to their feet by the daughters and daughters-in-law of the family and friends, and the mother-in-law applies on the foreheads of the bride and the bridegroom rori (red paint considered as auspicious) and gives small gifts, such as a bati or case made of gold or silver for keeping pan (betel)

and possibly a small amount in cash according to the means of the family. They say that palanga ceremony was performed during the marriage in question, but no gantha pakrai or gantha chhorai ceremony, such as is described by the defendant was performed nor was any ilaqa or immoveable property given by the mother-in-law at the time.

In support of the promise made by the lady, the defendant has filed a letter (Exhibit G), dated the 26th November, 1898, said to have been sent by the lady to Raman Lalji in pursuance of the negotiations for the marriage already referred to. This letter bears the admitted signature of the lady in two places. It is written on cartridge paper. The plaintiffs impugn this document as a forgery, and have produced a similar cartridge paper containing the signature of the lady in two places and they contend that such papers are used for court purposes and Bishwambhar Das, father of the defendant, must have such blank papers signed by the musammat for petitions in connection with cases in court when necessary and that the one filed was also blank with the signature of the musammat in two places and has been used by Bishwambhar Das after writing on it the letter in question.

The learned District Judge, accepting the plaintiffs' version, has rejected the document. It was filed late in Court, long after the settlement of issues. It has not been referred to in the written statement nor has it been referred to in the deed of gift. It is not necessary to decide in this case as to whether the document is genuine or forged; suffice it to say that it is not safe to rely upon it in view of the suspicious circumstances referred to by the learned District Judge.

The promise has, however, been referred to in the deed of gift in which the lady recites as follows:—

"I negotiated her marriage with Babu Gobind Das, the second son of Babu Bishwambhar Das, resident of Thatheri Bazar, Sundaipur,

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a quarter of the Benares city; one of the conditions of the marriage was that the following properties worth Rs. 50,000 were to be made over in gift to the said Babu Govind Das; on acceptance of this stipulation the said Babu Govind Das and his father consented to accept the match and the marriage was performed in Chait 1306 Fs."

There is ample oral evidence in the case in support of this recital in the deed. [His Lordship stated the evidence and proceeded as follows:]

Considering the respectability of the members of the family and of the widow in particular, the vastness of the property both moveable and immoveable left by Babu Banarsi Prasad and there being no other child except the girl in question, it is not unlikely that the promise of the gift should have been made by and on behalf of the lady. Therefore, the learned District Judge is right in accepting the case of the defendant that there was a promise or an agreement to give the property in question. The recital in the deed, therefore, is correct and proved by the evidence and circumstances.

The next question is:—Did the lady fulfil the promise? In other words, did she give the property in question at the time of the marriage? Herein also the recital in the deed of gift may be referred to. Says the lady—

"Out of my own free will and accord and without persuasion on the part of others I made a gift of 8 annas pokhta share.....of Mahal Barsham.....to Babu Govind Das, aforesaid, at the time of gantha-pakrai during marriage and on the occasion of bidagi (departure). I had (further) promised him to execute an instrument in his favour.....I make a trustworthy declaration and put in writing that I made a gift of 8 annas pokhta share.....".

As to whether the lady actually did or did not declare the gift at the time of the leave-taking ceremony, there is only oral evidence on both sides. The defendant and his witnesses swear that the gift was actually made at the time. The plaintiffs' witnesses, on the other hand, deny this.

* * * * *

There is, therefore, oath against oath. The court below has accepted the defendant's version and

rejected that of the plaintiffs. It seems that the defendant's witnesses are more independent and reliable than those of the plaintiffs. The most convincing reason for accepting the defendant's version is afforded by the unmistakable facts and circumstances. It is undisputed that a leave-taking ceremony is solemnly performed after the marriage as the final ceremony in connection with the marriage, call it gantha-pakrai (cacthing hold of the skirt of the mother-in-law by the son-in-law), gantha-chhorai (getting release of the skirt, or barely palanga or palka ceremony. It is also undisputed that gifts are made at the time to the son-in-law according to the means of the bride's party. The donor recites in the deed that she made the gift in question at the time of the ceremony. The donee, the defendant, swears on oath that such a gift was made. The marriage expenses of the girl undisputably did not exceed in this case beyond a paltry sum of Rs. 1,000 or Rs. 1,100, as stated by the plaintiffs, witness no. 2, Hari Narayan, commencing with the tilak ceremony and ending with the palanga ceremony. The geneaology of the family of the plaintiffs will show that Krishna Mohan Lal, husband of Tirbeni Koiri, witness no. 6, had a number of daughters. She in her evidence has admitted that Rs. 40,000 to Rs. 50,000 was spent in her first daughter's marriage and Rs. 30,000 each in the marriage of other daughters. It is also admitted that Babu Banarsi Prasad's income was equal to that of Krishna Mohan Lal. It is, therefore, no wonder that the lady made the gift in question during one of the ceremonies of the marriage of her daughter, curtailing the expenses with respect to the other ceremonies, thus bringing the total expense to the level of the usual expense of marriage of daughters in the family in keeping with its status and dignity. Again, ever since the marriage the defendant was receiving money from his mother-in-law which, he says, was the income of the property,

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and this he received up to the date of the registration of the deed when he came into the possession of the property.

These circumstances, therefore, incline us to believe the defendant's case of the gift having been made in connection with the ceremony in question.

The plaintiffs then say that the widow, Musammat Jainti Kumari, had no right to promise or agree to give immoveable property to her son-in-law at the time of the marriage nor had she any right to give the property either by verbal declaration at the time of the marriage or by means of a subsequent deed of gift.

Evidence has been adduced on behalf of the plaintiffs to the effect that it is considered mean and derogatory to make stipulations or contract about dowry before the settlement of marriage. Witnesses on both sides agree as to this. They also agree that gifts are made to sons-in-law during marriage and generally it consists of cash and ornaments according to the means of the parties; but there is nothing to prevent immoveable property being given to the son-in-law. Witness no. 1 Thakur Das on behalf of the plaintiffs says,

"No respectable Agarwalas will ever have stipulations about dowry before the settlement of marriage. If any sum is voluntarily paid it is accepted. It all depends upon the sweet will of the bride's family to make presents. If any immoveable property is presented, that is also thankfully accepted."

Banwari Lal (witness no. 3 for the plaintiffs), a relation of the plaintiffs, who was in charge of the marriage of his maternal-uncle's son with the sister of plaintiff no. 2, says that if in that marriage the bride's party

"promised to give any immoveable property, I on behalf of Tirjogi Narain, would have accepted it, but I did not ask for anything or property from the bride's side on behalf of the bridegroom nor is there any custom to that effect. Whatever is promised to be given at the time of the marriage can be given at any time afterwards."

Again, he says,

"If anybody wants to give immoveable property to his son-in-law or father-in-law it is not illegal amongst the Agarwalas."

Similar is the evidence of witness no. 4 for the plaintiffs, Murari Prasad.

Defendant's witness no. 1, Jagannath Das, says,

"Among the Agarwalas it is looked down upon to make stipulations of payment before marriage. There is a distinction between the marriages of daughters and sons. In son's marriage money is given and taken as a matter of course, but in the case of daughter's it is quite contrary. It all depends on the wishes of both parties and the emergency of the occasion."

Again the witness says,

"It is not a necessary element in marriage to make presents of immoveable property but a contract if made has to be fulfilled. The amount of present depends upon one's own capacity and wish."

On behalf of the defendant, two deeds of gift (Exhibits J and U) have been filed. The former is a deed of relinquishment executed by Rai Radha Krishna and others, Agarwalas of Patna, in favour of Musammat Kanol Mani Bibi, married to Lachhmi Narayan Gupta, an Agarwala of Benares city, in which it is said that their ancestor Rai Hari Kishun at the time of rukhsati (going to the husband's house) of Kanol Mani Bibi had promised to give 14 annas 6 pies share in village Kohna Ram Nagar as a gift but no deed was executed, and hence the deed of release in favour of Kanol Mani Bibi. The second is a deed of gift with respect to a house executed by Rani Lachhmi Kumari of Nashipur and an Agarwala by caste in favour of Srimati Madhu Kumari, which states that according to the custom of the family a dwelling house should have been given as jautak or dowry at the time of the marriage of the donee; but as no house was available at the time it was not given; hence the present deed of gift. Neither these documents nor the evidence in the case establish any custom of giving immoveable property to girls or son-in-law at the time of marriage and in fact no such custom or

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usage has been set up or pleaded. But it is evident that such gifts are not in any way forbidden and sometimes are made and promises and agreements made during marriage are subsequently given effect to. It is also established that the gift of immoveable property to a son-in-law or father-in-law, as is stated by Banwari Lal (plaintiffs' witness no. 3 examined on commission), is not considered illegal amongst the Agarwalas.

Now, what was done in the present case? The defendant's witnesses say that when Raman Lalji, uncle of the defendant, put forward his objections to the marriage, the lady's party, namely, Krishna Mohan Lal and others of their own accord and without any pressure or demand from the defendant's side offered to make a gift of an ilaqa or immoveable property worth Rs. 50,000 at the time of the marriage. Amongst others the defendant's witness no. 1 Jagannath Das says so. He adds,

> "I cannot say if Raman Lalji would have agreed to the marriage of the defendant if he had not been offered the immoveable property of Rs. 50,000. In my opinion, they might not have agreed to the marriage if the village property had not been offered. Raman Lalji and Bishwambhar Das consulted us and we all were of opinion that the marriage should be settled when Rs. 50,000 worth of property was being offered."

It is clear from the evidence that the offer was voluntarily made on behalf of the lady that gift of immoveable property would be made at the time of the marriage and that there was no pressure brought to bear upon her. It may be that but for this offer the bridegroom's party would not have agreed to the marriage.

On behalf of the plaintiffs it is contended that the agreement was in the nature of marriage brokerage and as such it is immoral and opposed to public policy. It is said that under section 23 of the Indian Contract Act the consideration of the gift was unlawful and hence the gift itself is vitiated. The section is based upon the English law, as according

to notions in the West every marriage ought to be free and open: *Scott* v. *Tyler* (1). In certain cases in India it was held that the aforesaid rule cannot be applied in its entirety in this country, as marriages are scarcely, if ever, free and open, the real contracting parties being the parents and the guardians. The Court has to consider the relation of the contracting party (the promisee) to the boy or girl given in marriage and the motive, that is, whether the main object was to benefit himself without considering the fitness or unsuitableness of the marriage, or whether the latter was the prime consideration, the benefit to himself being incidental. All the cases were considered by Mookerji, J., in *Bakshi Das* v. *Nandu Das* (2). In that case the brothers agreed to give their sister in marriage to the plaintiff upon his agreeing to pay them Rs. 190 as pan money, out of which Rs. 135 was paid in cash and the balance was to be paid on the day of the marriage. The plaintiff performed all the ceremonies and incurred expenses; but when he went to marry the defendants' sister they refused. He brought a suit for recovery of the money paid by him and damages for the expenses incurred. The lower courts gave a decree to the plaintiff and Mookerji, J., in second appeal, upheld it. Upon a review of the authorities he laid down the following rules:—

(*1*) An agreement to reward a third person in consideration of negotiating a marriage is contrary to public policy.

(*2*) An agreement to pay money to the parents or guardians of the bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare but give her to a husband otherwise ineligible the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced.

(1) (1787) 1 Wh. & T. L. C. 573. (2) (1905) 1 Cal. L. J. 261.

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(3) An agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is under the circumstances of the case neither immoral nor opposed to public policy. It will be enforced and damages also will be awarded for breach of it: *Umed Kika* v. *Nagindas Narotamdas* (1), *Mulji Thakersay* v. *Gomti* (2) and *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh* (3). The onus of proving that the agreement was opposed to public policy is upon the party who alleges it to be so. In this respect the English law is not to be followed.

The text of Manu relative to the subject is as follows:—

"Let no father who knows the law receive a gratuity (sulka), however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring." Manu, Chapter III, section 51.

"Even the acceptance of a bovine pair by the father of the bride from the bridegroom is designated as a dowry by certain authorities. The acceptance of a dowry, be it costly or be it of insignificant value, constitutes the sale of the girl." Manu, Chapter III, section 53.

"A marriage in which the bride's relations do accept the dowry voluntarily presented by the bridegroom's father, etc., is no sale of the bride since such a present is but an adoration of the bride done out of love or affection." Manu, Chapter III, section 54.

This is a prohibition against the father taking gratuity for giving his daughter, which amounts to selling her. This rule in Manu agrees with the English Law on the subject and with section 23 of the Indian Contract Act with this difference that a gift voluntarily made out of love or affection is not a sale of the bride as laid down in Manu, Chapter III, section 54, referred to above. But Manu does not seem to prohibit the settlement of a nuptial gift on the bride or bridegroom at the time of the marriage. In practice the receiving of a gift by the bride's parents or relations at any time in connection with the marriage is not permissible; but gifts by the bridge's

(1) (1870) 7 Bom. H. C. R., O. C. J., 122.
(2) (1887) I. L. R. 11 Bom., 412.
(3) (1875) 25 W. R. 32.

parents to the bridegroom and his relations is not considered to be bad and is in vogue. Such is also the evidence in this case as referred to above. On the other hand, the Hindu Law requires gifts to be made to the bride and the bridegroom during marriage, and without such a gift the marriage is not considered to be properly solemnised and performed.

The Bombay High Court, in the case of *Dholidas Ishvar* v. *Fulchand Chhagan* (1) held that a stipulation for monetary payment for himself is an incentive and is dangerous both in the case of a father seeking a wife for his son and in the case of a father seeking a husband for his daughter. This was followed by a Full Bench of the Madras High Court in *Kalavagunta Venkata Krishnayya* v. *Kalavagunta Lakshmi Narayan* (2) which held that a contract to make a payment to a father in consideration of his giving his daughter in marriage must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act and the money cannot be recovered by suit. If the money had been paid and the marriage solemnised, the money cannot be recovered back.

In England such a practice will not be enforced as law: *Kean* v. *Potter*(3).

The prohibition in the text of Manu is against receiving a gift by the father of the girl or her relations through avarice or greed which amounts to selling the girl. But the gift actually made whether to the bride, the bridegroom or the father of the bridegroom by the bride's parents cannot be recovered back when once the marriage is solemnised, though it may not be enforced in a suit: vide *Kalavagunta Venkata Krishnayya* v. *Kalavagunta Lakshmi Narayana* (2) and *Jagdishwar Prasad* v. *Sheo Bukhsh Rai* (4). In other words, a suit may not lie to recover the promised

(1) (1897) I. L. R. 22 Bom. 658.
(2) (1908) I. L. R. 32 Mad. 185.
(3) 3 P. Will. 76; Story's Eq. Juris., Plac., 260-261.
(4) (1919) 51 Ind. Cas. (All.) 656.

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dowry, but when once the dowry is paid as a consideration for the marriage and the marriage is performed, the dowry cannot be recovered back.

Colebrooke, in his Digest, volume I, pages 449-450, quotes the texts of Virhaspati and Narada, to show that a nuptial gift to the bride or her family is valid and not revokable. A nuptial gift is said to be a general term and to comprehend what is given to a bridegroom on his marriage by the parents of the bride. It includes not only the gift of money but also land and the like.

Shyamacharan Sarkar in his Vyavastha Darpana, 2nd edition, at page 621, mentions a nuptial gift as valid and irrevokable and relies upon the texts of Virhaspati and Narada referred to above: a nuptial gift or gratuity given to the bridegroom on his marriage to the daughter is not revokable nor is the property which is received after marriage from the wife's parents and kindred. Property given by the husband's father at the bridal procession is also not revokable.

In the present case, in accordance with the promise or agreement made, Musammat Jainti Kumari actually made over the property to her son-in-law who has been in possession thereof.

The question is whether the plaintiffs can now recover the property back. Section 23 which renders the consideration of an agreement, which is opposed to public policy, as unlawful, does not go far enough to entitle the plaintiffs to recover the property after the object of the agreement was fulfilled; otherwise the defendant would be put to a great hardship. If the lady had not agreed to give the property in question to the defendant, his father and others who were in charge of the marriage would not have agreed to the marriage and the marriage would not have taken place. Musammat Jainti Kumari herself was anxious, considering the position of the family, the fitness of the bridegroom and the former connection

with the uncle of the bridegroom through her sister, to have the marriage of her daughter settled with the defendant. Her wishes would not have been fulfilled at all if she had not promised to make the gift in question. After having obtained the object and having fulfilled the promise, I do not think that she could have availed herself of the provisions of section 23 and recover back the property in question, far less could the plaintiffs, who have succeeded as reversioners of her husband, recover it back on that ground.

We have now to consider the most difficult question in this case covered by issue no. 11, and that is, whether, under the Hindu law, the lady having succeeded to her husband with the restrictions imposed upon her in the matter of the use and enjoyment and power of alienation, could validly make a gift of an immoveable property to her son-in-law.

It is undisputed that she inherited the property of her husband both moveable and immoveable as a lawfully wedded wife of her husband, Babu Banarsi Prasad, who died in the year 1897 without leaving any male issue. The parties belong to the Agarwala community, a sect of Vaisya class called Bisa Agarwalas. The plaintiffs are the Purbia (eastern) Agarwalas of Monghyr district in Bihar, and the defendant is a Pachhanhi (western) Agarwala of Benares in the United Provinces. This division does not create any difference in the status, respectability or dignity of the parties. They are both high class and are governed by the Mitakshara (Benares) School of the Hindu Law. According to this School, Musammat Jainti Kumari, after the death of her husband in 1897, without any male issue, inherited the entire estate of her husband consisting of moveable and immoveable property.

The widow's right of succession is based upon the text of Yajnavalkya, Chapter II, verses 138-139, under which in default of a son the wife takes the

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estate of her husband in preference to the other heirs, Vriddha Manu and Katyayana also declare the widow's right to the whole estate of her sonless husband.

The commentary of Yajnavalkya by Vijnaneswara which is followed as an authority by the Benares School discoursing on the text regarding the succession of the widow sums up his conclusions as follows:—

> "Therefore it has been established that a wedded wife (patni) takes the whole estate of a man who being separated (from his co-heirs) and not subsequently re-united (with them) dies leaving no male issue": *vide* Colebrooke's translation, Chapter II, section 1, clause 39.

She, thus, succeeds as any other male member to the entire estate of her husband (moveable and immoveable) and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male co-parcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband. She is supposed to be half the body of her husband and confers so much temporal and spiritual benefit on her husband as half of his own body does and associates with him in the performance of religious sacrifices: Smiritichandrika, Chapter XI, paragraph 6. A lawfully wedded wife is called 'patni' as a correlative of the term ' pati ' (husband). The marriage is attended with nuptial rite and the object of such a marriage is to enable the husband to offer sacrifices and to discharge his religious duties and to beget a son unto him in order that he may be delivered from the hell called 'put' to which the shades of a sonless man, according to Hindu ideas, descend: Manu, Chapter IX, paragraph 138; Dayabhaga, Chapter V, paragraph 6, Dttak Mimansa, Chapter I, paragraphs 3 and 5; Colebrooke's Digest, Volume III, pages 159, 293 and 294. A man is enjoined by the Sastras to marry a wife as his last Sanskara or religious rite. During the lifetime of the husband the wife acquires ownership of a dependant character

and on his demise she obtains independent power over it. Vraddha Manu says,

"The widow (patni) of a childless man, keeping unsullied her husband's bed and persevering in religious observances, shall alone present his funeral oblations and obtain also his entire share (कृत्स्नमंशम्) ": *vide* quotation in the Mitakshara on widow's succession and Viramitrodaya, Chapter III, part 1, section 2.

She takes the entire estate of her husband and is enjoined to perform acts calculated to increase the prosperity of her and her lord, such as, performing sraddhas, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her.

Thus, the performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which she takes the estate of her husband. Accordingly, Smiritichandrika in Chapter XI says that she possesses independent power of making gifts for religious and charitable purposes, for such gifts

"her husband even if wanting a son shall reach the heavenly abodes,"

and for purposes not being religious or charitable but purely temporal, such as, gifts to dancers, etc., she has no independent power. Hence arises the restriction imposed upon the widow's power of disposition.

In this respect the property inherited by a widow from her husband differs from those properties which a woman receives as presents at the time of marriage or at the time of going to her husband's family or on happy rites or ceremonies or those given to her by her father, mother or brother which are called Stridhan, or her own property or peculium. Over these latter she has absolute dominion and her power of disposition is not restricted.

Mitakshara in Chapter II, section 11, clause (2) includes in the word Adya (आद्य) in Yajnavalkya's text among the aforesaid kinds of stridhan such property which a woman "may have acquired by

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inheritance." Interpreting the said clause in the light of clauses 11 to 25 of the same section, Sir James W. Colville, in the case of *Bhugwandeen Doobey* v. *Myna Baee* (1) would make it applicable only to property inherited in the husband's lifetime or from some persons other than him. The conclusion to which his Lordship arrived is summed up in the following words:—

"Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara no part of her husband's estate whether moveable or immoveable, to which a Hindu woman succeeds by inheritance, forms part of her stridhan or particular property; and that the text of Katyayana which is general in its terms and of which the authority is undoubted must be taken to determine first,—that her power of disposition over both is limited to certain purposes; and secondly, that on her death both pass to the next heir of her husband."

The text of Katyayana referred to above, which imposes restriction upon the widow's power of disposition is as follows:—

"Let the sonless widow preserving unsullied or inviolate the bed of her landlord and abiding with her venerable protector or strictly obedient to her spiritual parents enjoy her husband's property being moderate (or with moderation) until her death, and after her let the co-heirs (dayadas) take."

A similar passage in Mahabharata Dandharama dealing with the religious merits of gifts runs as follows:—

"It is ordained that the property of the husband when devolving on wives has enjoyment for its use. Let not woman on any account make a waste or apahara of her husband's property."

Viramitrodaya, citing these texts and in commenting upon them in Chapter III, part I, section 3, says that by the phrase "on any account" in the texts it is intended that waste under all circumstances is reprehensive. Literally apahara (waste) is theft. Making useless gifts to dancers,

(1) (1866-67) 11 Moo. I. A. 487, 513, 514.

players and the like and the wearing of delicate apparel, etc., the tasting of rich food, etc., and the like being improper for a widow who is enjoined to restrain her passions are equal to theft. Thus, the term 'apahara' is used in a secondary sense; but gifts and the like for religious purposes are not so and cannot be included under the term apahara or waste.

Viramitrodaya sums up his conclusions: Therefore it is established that making gifts for spiritual purposes as well as making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband. The restriction, however, is intended to prohibit gift to players, dancers and the like as well as sale or gift without necessity.

Katyayana's text enjoins the widow to use the husband's property being moderate or with moderation, which practically means the same as the word 'waste' used in Mahabharata, that is, the widow shall not uselessly spend the property which prohibits expenditure not useful or beneficial to the late owner of the property. The widow takes the whole property as heiress of her husband, and not merely the use of the whole or part of it. She is only enjoined by law not to commit waste. Thus, she has power to make a gift, mortgage or sale of the property at her pleasure for lawful purposes conformable to her duty as a Hindu widow and after her death what is left by her after the lawful use of it goes to the next heirs of her husband. They take only the residue of the estate remaining due after the use of it by the widow. Accordingly, she has power of disposition for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband as well as for legal necessity.

Lord Gifford, in delivering the opinion of their Lordships in the case of *Cossinut Bysack* v. *Hurroosoondry Dossee* (1) which was heard by the Supreme

(1) (1820) 2 Morley's Digest, 198; Montr. 477-587.

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Court at Calcutta in 1819 and by the Judicial Committee in 1826, stated that a Hindu widow had for certain purposes a clear authority to dispose of her husband's property and might do it for religious purposes including *dowry* to a daughter. His Lordship further stated that it is impossible to define "the extent and limit of her power of disposing of it because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition." This was a Dayabhaga case, but the rule laid down is the same as regards the Mitakshara law. This has been firmly established by their Lordships of the Judicial Committee. At the Bar the following authorities were cited: *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1), *Bhugwandeen Dooby* v. *Myna Baee* (2), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (3), *Rao Kurun Singh* v. *Nawab Mahomed Fyzali Khan* (4), *Sham Sunder Lal* v. *Achhan Kunwar* (5), *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank, Limited* (6), *Munshi Karimud-din* v. *Kunwar Gobind Krishna Narain* (7), *Janaki Ammal* v. *Narayanasami Aiyar* (8), *Sadasi Koer* v. *Ramgobind Singh*, and *Khub Lal Singh* v. *Ajodhya Misser* (10).

Justice Turner in the case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) stated the law as follows:—

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

(1) (1859-61) 8 Moo. I. A. 529.
(2) (1866-67) 11 Moo. I. A. 487.
(3) (1869-70) 13 Moo. I. A. 209.
(4) (1871-72) 14 Moo. I. A. 187.
(5) (1897-98) L. R. 25 I. A. 183.
(6) (1902-03) L. R. 30 I. A. 209.
(7) (1908-09) L. R. 36 I. A. 138.
(8) (1915-16) L. R. 43 I. A. 207.
(9) (1910-11) 15 Cal. W. N. 857.
(10) (1916) I. L. R. 43 Cal. 574.

This distinction between legal necessity for wordly purposes on the one hand and the promotion of spiritual benefit of the deceased on the other has been recognized by the Indian courts as well as by their Lordships of the Judicial Committee, and within a proper limit a widow can alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit: *Khub Lal Singh* v. *Ajodhya Misser* (1) and *Chowdry Junmejoy Mullick* v. *Sreemutty Russomoyee Dossee* (2).

In *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (3), Benson and Krishnaswami Ayyar, J.J., stated that the spiritual purposes should be such as are regarded by the Hindu community as reasonable and proper though not absolutely necessary. If the property sold or gifted bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners.

She is required to perform not only the funeral or periodical sraddaha ceremonies but also such religious ceremonies as the last holder was bound to perform and she has power within proper limitations to alienate the estate inherited by her from the last male holder thereof.

This being the law, let us examine the gift of the property in question made by Musammat Jainti Kumari to her son-in-law on the occasion of the marriage of her daughter.

It is the imperative and religious duty and a moral obligation of a father, mother or other guardian to give a girl to be married before she attains puberty to a suitable husband capable of procreating children.

(1) (15) 22 Cal. L. J. 345.

(2) (1868) 11 Bom. L. R. 418, 421.

(3) (1911) I. L. R. 34 Mad. 288, 292.

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Yajnavalkya, in Chapter I, verse 64, says,

"(A qualified person) not giving away (in marriage, a maiden) will be visited by the sin of the destruction of foetus at every time of her menses. In the absence of a giver the maiden should herself give her away."

Vas'ishtha, in Chapter XV, says,

"Fearing the appearance of the menses, the father shall marry his daughter while she still runs about naked. If she stays (in her father's house) after menstruating, sin visits the father. As often as are the menstrual courses of a maiden, who is desirous of, and is solicited in marriage by, a qualified bridegroom of the same caste, so often her father and mother are guilty of (the crime of) killing an embryo: such is the sacred law."

To the same effect is the enjoinment of all the Samhitas: Manu, Chapter IX, paragraph 4; Yama, verses 22 and 23; Gautama, Chapter XVIII; Narada, Chapter XII, verses 24 to 27; Vyas, Chapter II, verse 7; and Vishnu, Chapter XXIV, verse 40.

Vyas, in the chapter referred to above, says,

"He who does not give away his daughter in marriage before she attains puberty becomes degraded."

Narada concludes by saying,

"This is the rule established amongst the virtuous."

Thus, according to the texts, the marriage of a girl by her father is enjoined as a religious duty in order to prevent him from being degraded and visited with sin and crime. There is, however, direct spiritual benefit also conferred upon him by such a marriage.

According to Manu, marriage is religiously enjoined so that a man may beget a son and thus deliver himself from the hell called 'put' to which the shades of a sonless man, according to Hindu ideas, descend. The word 'putra' (son) literally means deliverer from the hell called 'put'. Manu says that there is no distinction between a son's son and the daughter's son in this world, inasmuch as a daughter's son like a son's son can succour a man from hell: Manu, Chapter IX, slokas 138 and 139. In the earlier slokas 132-133 he says that a daughter is like

unto a son and a daughter's son offers two oblations: one to his deceased father and another to his mother's father and that is the reason why a daughter and daughter's son successively take the estate of a sonless man. Vide also Dayabhaga, Chapter V, paragraph 6; Dattak Mimansa, Chapter I, paragraph 3; Colebrooke's Digest, volume III, pages 159, 293 and 294. It is obvious, therefore, that the marriage of a daughter confers spiritual benefit on her father. The authorities also have taken the same view.

In the case of *Jummona Dassya Chowdhrain* v. *Bamasoonderi Dassya Chowdhrain* (1), Sir James W. Colvile observes—

"The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is mature virgo, a husband capable of procreating children."

Vide also *Churaman Sahu* v. *Gopi Sahu* (2), *Venkatacharyalu* v. *Rangacharyalu* (3) *Devulapalli Kameswara Sastri* v. *Polavarapu Veeracharlu* (4), *G. Gopala Krishnam Razu* v. *S. Venkatanarasa Razu* (5), *D. Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (6), *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (7), *Ganpat* v. *Tulsiram Ukha Dhangar* (8), *Bhagirathi* v. *Jokhu Ram Upadhia* (9) and *Kasturi* v. *Panna Lal* (10).

According to the texts, after the death of the father the duty of giving his daughter in marriage falls upon, amongst other relations, his widow, both under the Mitakshara and the Dayabhaga, with this difference that the latter would postpone her right to that of a maternal-grandfather and maternal-uncle.

(1) (1875-76) L. R. 3 I. A. 72, 78.
(2) (1916) I. L. R. 37 Cal. 1.
(3) (1891) I. L. R. 14 Mad. 316.
(4) (1911) I. L. R. 34 Mad. 422.
(5) (1914) I. L. R. 37 Mad. 273.
(6) (1915) I. L. R. 38 Mad. 556.
(7) (1908) I. L. R. 32 Bom. 81.
(8) (1912) I. L. R. 36 Bom. 88.
(9) (1915) I. L. R. 32 All. 575.
(10) (1916) I. L. R. 38 All. 520.

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Marriage, according to the Sastras, is a religious act. It is the last Sanskara for a man or woman.

According to Hindu ideas marriage has for its object the performance of religious duty. It is a sansakara, that is, an essential ceremony held indispensable to constitute the perfect purification of a Hindu, both male and female. The sansakaras are ten or eleven in number and are performed by oblations to fire and customary offerings to idols: Wilson's Glossary, page 463.

According to Manu, Chapter II, verse 67, the sacrament of marriage is to a female what initiation with the thread is to a male.

According to Yajnavalkya, the purificatory rites of a woman are performed without Mantras, except marriage which is accompanied with Mantras: Chapter I, verse 13. The Mitakshara also recognizes marriage as a religious obligation for both male and female: *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (1).

The texts prescribe details of nuptial rites to be performed at the time of marriage and the authorities already quoted above have recognized it to be so. The widow of a deceased Hindu has a right not only to provide for the marriage of his girl but also the expenses thereof for the performance of ceremonies, etc., connected therewith. The moral and the religious obligation cast upon the parents or other guardians to provide a husband for a girl confers upon them the right to spend, out of the estate, funds necessary for the performance of marriage ceremonies.

Atri Samhita in Chapter I, sloka 320, says,

"It is essential to make *gifts* on the occasion of an eclipse, the *marriage*, the last day of month and at the delivery of a woman."

Accordingly, he says that such a gift can be made even in the night time.

(1) (1908) I. L. R. 32 Bom. 81.

Yajnavalkya, in Chapter II, verse 179, relating to gift, says,

"Let the acceptance be public, specially of immoveable property; and delivering what may be given and has been promised; let not a man resume it." In other words, whatever is promised to be given shall be given. Having once given it let him not resume it.

Mitakshara, commenting upon this with reference to the text of Narada, makes a distinction between valid and invalid gifts and says that the valid gifts if once promised must be performed and among the seven valid gifts are mentioned a gift made "from affection" and "a woman's sulka". The former is defined as what is given out of affection to "daughters, sons and the like" and the latter, namely, sulka as

"that which are given to the relations of a damsel for bringing about the marriage."

Continuing the author says,

"These seven kinds of gifts are valid gifts and must not be resumed": *vide* Mitakshara by Gharpure, book II, Chapter XII, on the resumption of gifts, pages 314-315.

Shyamacharan, in his Vyavastha Darpana, 2nd edition, page 54, paragraph 35, discussing the widow's limited power of disposition of the property inherited by her from her husband, construes the word "waste" or "apahara" used in the Mahabharata Dana Dharma as implying

"expenditure not useful or beneficial to the late owner of the property,"

and says that a gift or other alienation by the widow is permitted for the husband's funeral rites, etc., as that is for the benefit of the husband. He sums up his conclusion at page 54, paragraph 35, as follows:—

"Widow is, however, competent even without the consent of the reversioners to make sale or other disposition of her husband's property for the liquidation of his debts, *for the marriage of his daughters*, for the support of such persons as it was incumbent upon him to support, *likewise to defray expenses of such other acts as are beneficial to his soul or very necessary to be performed*. Great benefit is done to a departed soul by paying his debts, by *bestowing his daughter in marriage* and supporting his family; indeed if these debts are neglected he is doomed to hell. To maiden should be given a nuptial portion of the father's estate."

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In support of his conclusion he refers to the text of Devala; see Colebrooke's Digest, volume I, page 185. In paragraph 38 he says.

"But a gift or other alienation by a widow of a moderate portion of her husband's property for his spiritual benefit (be the same made with or without the consent of his heirs) is religious and moral as well as valid.

The right of a Hindu daughter, whose father is dead, to receive a dowry at the time of marriage from the estate of her father is based upon the ancient texts: vide Manu, Chapter IX, verse 118, and Yajnavalkya, Chapter II, verse 127, which enjoin upon the brothers to perform the marriage of their uninitiated sisters by giving them a quarter of their share.

According to Vishnu, the initiations of the unmarried daughters are to be defrayed in proportion to the wealth.

Mitakshara, Chapter I, section 7, clauses 5 to 14, discusses the question of allotment of a portion of the estate of the deceased for the marriage of his daughter and comes to the conclusion that it is not right to interpret the text of Yajnavalkya, referred to above, as signifying giving money sufficient for her marriage and hence,

"' after the decease of the father an unmarried daughter participates in the inheritance and is entitled to a share." (Colebrooke's translation of Mitakshara, Chapter I, section 7, clause 14.

Viramitrodaya in Chapter II, part I, section 21, says that shares should be allotted to uninitiated or unmarried daughter out of the paternal wealth, which represents her *dowry and marriage expenses*, and such a share is one-fourth of what she would have been entitled to receive if instead of being a daughter she had been a son.

These texts, particularly the Mitakshara which governs the present case, make it perfectly clear that when upon the death of a Hindu governed by the Mitakshara law the property is taken by his widow a

gift by her to her daughter on the occasion of her marriage out of the estate of her husband is within her power provided that the portion so given is reasonable in amount and the question whether it is reasonable or not has to be determined with respect to what should have been the share of the unmarried daughter under the above rules laid down in the Mitakshara, Chapter I, section 7, paragraphs 5 to 14. Such gifts are recognized in all the texts.

Among the six-fold properties of a woman called stridhan or her own peculium are the two most permanent ones, namely, what is given before the *nuptial fire* and what is presented in the *bridal procession*: vide Manu, Chapter IX, verse 194; Dayabhaga, Chapter X, section 1, paragraph 4; Narada, Chapter XIII, stanza 8; Vishnu Samhita, Chapter XVII, verse 18; Yajnavalkya, Chapter II, verse 146.

Thus, gifts of property during the performance of the nuptial rites and in the bridal procession form two most important properties of a woman. This supports the view that during the marriage she is given out of the estate of her father *dowry* which represents her share in her father's estate.

Gifts during marriage have become customary and are coming down from the ancient times: Riga Veda, Mandal 10, Sukta 85, verses 9 and 11, refers to the presents given by Surjya to his sister in marriage. Marriage in the first four approved forms of Brahma, Daiva, Arsha and Parjapatya is a gift of the girl to the bridegroom, and the gift of the girl is accompanied with gifts of all kinds of necessaries in life including property to her and to the son-in-law so that both might live together with comfort and perform the religious duties having been united into one by the religious rites. The religious ceremony of giving the girl to the bridegroom must be accompanied with a gift of property to the son-in-law in order to enhance the merit of the spiritual ceremony of giving the girl in marriage, which is one of the highest Yajna or religious ceremony performed and a Yajna cannot

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become meritorious without a gift. The gift of land is ordained on every occasion of a Yajna (यज्ञ) as being efficacious for conferring spiritual benefit: vide Virhaspati Samhita. For these reasons Rishya Shringa ordains that one should give to the son-in-law according to his or her means *lands* (भूमि), cows, maids, cloths, she-buffaloes, horses, gold and jewels. The sloka runs as follows:

भूमिं गावश्च दासीश्च वासांसिच स्वशक्तिः ।
महिष्यो वाजिनश्चैव दद्यात् स्वर्णमर्णानपि ॥

It has been quoted in (1) Viramitrodaya, Vivaha Sansakara, page 831, edited by Parvatiya Nityananda Sarma, the Chowkhamba Sanskrit Series, no. 141, page 831; it also quotes at that page a similar passage from Linga Purana; (*2*) Nirnaya Sindhu, page 228, Bombay edition, Venkateshwara Press, Sambat 1965; (*3*) Dana Chandrika, page 28, Venkateshwara Press edition; (*4*) Dana Mayukha, page 170 (in the Bhagwanta Bhaskar by Nilkantha) edited by Pandit Ratna Gopala Bhatta, Benares edition, 1909. To the same effect is the sloka in Dana Mayukha at page 171 which enjoins, among other things, gift of land according to the means of the giver in order to enhance the merit of the kanya-dana (giving the girl in marriage) कन्यादान प्रतिष्ठार्थं .

The learned Vakil on behalf of the defendant produced manuscript editions of Parayoga Ratan, page 62, Girhya Karika by Bhatta Kumarila Swami, page 13, verses 7 and 8, and Nirnaya Sagar Press edition of Sansakara Bhaskara, page 248, which recommend giving of land to the son-in-law after marriage and also at the time of departure.

Paraskar Grihya Sutra (Hari Har Bhaskya), Venkateshwara Press edition, Sambat 1950, pages 28-29, recommends, among other things, gift of villages by the father of the girl; other relations should also give dowry or yautaka at the time of marriage. Such gifts to the son-in-law are also recommended on occasions other than marriage: vide Dana Mayukha,

page 404, which quotes from Bhavishya Purana and Vishnu in support of it.

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Hence gift of land to a son-in-law on the occasion of marriage or at the time of departure, that is, bidagi, is meritorious. Such a gift by the mother cannot be considered to be an apahara or waste which alone is a restriction placed upon her use of the property inherited from her husband, provided the gift is reasonable in extent and not extensive.

Thus, the gift of a reasonable portion of landed property to the daughter or *son-in-law* by the widow is supportable by the texts as a part of religious ceremony of marriage of the daughter and as being conducive to the spiritual welfare of her husband. It is her duty to perform the marriage ceremony accompanied with gift as discharging an obligation of her own husband. In making a gift of *landed property to her son-in-law* she only gives what is due to her as the nuptial portion of the estate of her father. The gift can be made at the time of the actual marriage or in connection with the ceremonies connected therewith, for gifts in the bridal procession as well as nuptial rites are permissible.

The authorities in India seem to have interpreted the texts as above. The well-known passage in Lord Gifford's judgment in the case of *Cossinaut Bysack* v. *Hurroosoondry Dossee*(1), referred to above, gives the widow power to dispose of property for religious purposes including *dowry to a daughter*.

In *Damoodur Misser* v. *Senabutty Misrain*(2), a Mithila case, it was held that property sufficient to defray all the nuptials should be given to unmarried daughters, and accordingly 1/24th share of the estate in view of there being several sons and daughters was directed to be set apart for nuptial purposes.

In the case of *Churaman Sahu* v. *Gopi Sahu*(3), Mookerji, J., reviewed the texts and the authorities

(1) (1820) Morley's Digest, 198. (2) (1892) I. L. R. 8 Cal. 537.
(3) (1909) I. L. R. 37 Cal. 1.

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and upheld a gift of a house made by the widow to her daughter a few days after the performance of the dwiragaman of gauna ceremony (that is, sending off the girl to reside in the family of her husband), a ceremony which was performed two years after the marriage. His Lordship overruled the contention that the gift should not be supported as the gauna ceremony had nothing to do with the marriage, and observed that the ceremony was connected with the marriage and there was no substantial distinction between gifts made at the nuptial fire or in the bridal procession and those made at the time of dwiragaman ceremony; the last may be regarded as *dowry deferred*. He also held that the gift was reasonable in extent upon the ground that the house in question was worth only Rs. 1,200 and the total value of the three houses inherited by the widow was Rs. 3,800 and the husband of the widow had left only one daughter.

Shortly after the above case, in 1910, his Lordship in the case of *Gobinda Rani Dasi* v. *Radha Ballabh Das*(1), upheld the decree passed by the subordinate court allowing maintenance to the *son-in-law* against the mother-in-law when it was found that the father-in-law had agreed to the marriage upon the understanding that he would be brought up in the family as a gharjamai. This case was decided upon the principle of putrika putra which finds place in the Sastras under which the marriage takes place upon the condition that the son born of the girl would belong to her father and would be treated as his son and successor. Putrika putra means a son of an appointed daughter.

The Madras High Court in the case of *Ramaswami Ayyar* v. *Vengidusami Ayyar*(2), upheld a gift of a portion of the landed property by the mother to the *son-in-law* at the time of the marriage of her daughter. The parties were Brahmanas, and it was found that there was a practice in that community of

(1) (1910) 12 Cal. L. J. 173; 15 Cal. W. N. 205.
(2) (1898) I. L. R. 22 Mad. 118.

(bhudan) making a *gift of land* along with other things at the time of giving the girl in marriage. Subramania Ayyar, J., however, supported the gift also upon the ground that the gift was a provision for the married couple and that it was believed to enhance the merit of the primary act, namely, the giving of a virgin in marriage which from a religious point of view is supposed to be productive of considerable spiritual benefits to the parents. Referring to the texts relating to the allotment of a quarter of a share of a son by the brothers to the unmarried sisters, his Lordship held that the texts justify something more than the disbursement out of the estate of only the price of things required in connection with the celebration of the marriage.

Following this case, the Madras High Court upheld the *gift of landed property* in favour of a *son-in-law* in the case of *T. R. Sudaram Aiyar* v. *Krishnasami Aiyar*(1).

In the case of *Kudutamma v Narasimha Charyalu*(2), the plaintiffs were sisters and were married by their father to men of small means and were maintained by the father until his death which happened three years after the marriage. His son, defendant no. 1, became the managing member of the family. He executed a deed of gift whereby he gave to his sisters, the plaintiffs, certain portions of the joint family property. He and his son subsequently resiled from the gift and hence the plaintiffs brought the suit to obtain possession of the gifted property. The plaintiffs' suit was decreed and the gift was upheld, upon the ground stated by their Lordships that there was a strong moral obligation on the joint family of which the father was the managing member to make a gift of the joint family property on the occasion of the marriage either to the girls or to their husbands as a provision for them, and the fact that the father maintained the daughters and their husbands out of the family property until his death may be regarded

(1) (1915) 28 Ind. Cas. 992.

(2) (1907) 17 Mad. L. J. 523.

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as the continuing recognition of such moral obligation which obligation continued until it was discharged by the deed of gift executed by the brother of the plaintiffs. The gift was found not to be in excess of the powers of the brother as the managing member of the family and therefore it could not be recalled by him or avoided by his son.

In *Pugulia Vettorammal* v. *Vettor Goundon*(1), (Sundera Aiyar and Spencer, J.J.), the *gift to the girl* by her father's brother some years after the marriage which was performed by him was upheld as against his minor son who was joint with him. The property gifted was worth Rs. 400, and the family property was worth Rs. 2,400, that is, 1/6th of the entire joint family estate. The father of the girl had died without marrying her, leaving his brother and the minor son of the brother as the surviving male members of the family.

Following this decision a gift of 1/10th of the *immoveable property* by a father to his daughters at the time of their marriage was upheld as against the nephew who was a co-parcener: vide *in re Subba Naiker minor*(2).

In *A. Sundararamayya* v. *C. Sitamma*(3), a gift by a father to his daughter of a small portion of ancestral property 40 years after the marriage was upheld as binding upon the co-parcener, the son of the donor. There was no promise proved as having been made by the father at the time of the marriage. The gift was upheld, as it being a moral obligation could be discharged at any time. The important pronouncement in that case is that the *gift to daughters* stands in the same position as *gifts to sons-in-law*, for such gifts are intended to provide for the married couple and are probably given in lieu of her share of the family property when by marriage she is leaving it for another family. Such a gift is permissible both of moveable and *immoveable property*.

(1) (1912) 13 Ind. Cas. (Mad.) 475.
(2) (1915) 30 Ind. Cas. (Mad.) 781.
(3) (1911) I. L. R. 35 Mad. 628.

The Lahore High Court in *Jowala Ran* v. *Hari Kishen Singh*(1), upheld a gift of 70 bighas out of 300 bighas as being less than ¼th of the entire property by a Hindu widow as a dowry to her daughter on the occasion of her marriage.

In *Bachoo Harkisondas* v. *Mankorebai*(2), Harkishun Das and Bhagwan Das were brothers. Harkishun Das died on 14th September, 1898, leaving behind him as his survivors his wife who was ancient and his brother Bhagwan Das. On the 5th November, 1900, Bhagwan Das made a *gift to his daughter*, who was his only child, of Promissory Notes worth Rs. 20,000. On the 30th November, 1900, he made a will directing his wife to adopt even if a son was born to the widow of his deceased brother Bhagwan Das, and directing further that in the event of a son being born to his brother's widow she should before making an adoption enter into an agreement with the adopted son that he would be bound to accept as valid the provision made for his daughter and his wife. Bhagwan Das died on the 17th December, 1900, and the next day a posthumous son was born to his brother. On the 13th February, 1901, Bhagwan Das's widow already adopted Nagar Das Pitambar. The widow of his deceased brother brought a suit contesting the adoption and the gift on behalf of her posthumous son. Taiyabji, J., upheld the adoption but decided against the validity of the gift. On appeal Sir Lawrence Jenkins, C. J. and Russel, J., upheld both the adoption and the gift, setting aside the decision of Taiyabji, J. The Promissory Notes of Rs. 20,000 were purchased out of the income of the property, which represented 1/50th part of the estate valued at rupees ten to fifteen lakhs. The gift was held to be valid on the ground that it was a gift of moveable property made through affection under the Mitakshara, Chapter I, section 1, pl. 27 and Mayukha, Chapter IV, section 70, pl. 11 and 13

(1) (1924) I. L. R. 5 Lah. 70. (2) (1905) I. L. R. 29 Bom. 51.

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This decision was upheld by their Lordships of the Judicial Committee in *Bachoo Hurkisondas* v. *Mankorebai*(1).

In *Abhesang Tirabhai* v *Raisang Fatesang*(2), a Hindu widow shortly after the marriage of her daughter conveyed all the properties by way of *gift to her son-in-law*. Three days later the reversioners passed a deed of release in favour of the widow on receiving consideration. More than 50 years after, one of the sons of the reversioners questioned the validity of the gift. It was held that the consent of the reversioners validated the alienation as being evidence of the proprietv of the gift. It was also observed that there is authority that gifts by a widow on the occasion of a daughter's marriage are understood in the Hindu law to conduce to the spiritual benefit of the widow's husband and, if so, it is another reason for upholding the transaction.

In *Rustom Singh* v. *Moti Singh*(3), it was held that when a Hindu father does not leave sufficient means to provide for the marriage of his daughter the mother of the girl can mortgage properties of her own stridhan, which she had inherited from her father, to meet the expenses of the daughter's marriage and that such an alienation was binding on the reversionary heirs of her father. It is noticeable that the property alienated in this case was not that of the father of the girl but that of the father of her mother, which the mother had got from her own father. The principle upon which the alienation was upheld against the heirs of the father of the mother to the property in question, with which the girl could have no concern, is that it is not only the duty of the father of the girl to provide for her marriage but that of the mother also to provide from her personal property in order to confer spiritual benefit upon her husband and upon herself.

(1) (1907) I. L. R. 31 Bom. 373. (2) (1912) 14 Bom. L. R. 602.
(3) (1892) I. L. R. 18 All. 474.

In the case of *Bhagwati Shukul* v. *Ram Jatan Tewari*(1), Sir Grimwood Mears, C. J., and Stuart, J., upheld the gift of the entire property which the widow had inherited from her husband to her *son-in-law as a dowry* as against the claim of the husband's brother's son. The daughter married was blind and cripple, and the property was very small in value. The ground for the decision was stated to be that it was the duty of the mother to provide a husband for her daughter and the alienation was made for sheer legal necessity, and that she had power to dispose of her husband's property for religious purposes including *dowry to a daughter*, and that the extent of the power depends upon the circumstances of each case as held by Lord Gifford.

In the case *Madhusudan Prasad Singh* v. *Ramji Das*(2) (Sir Dawson Miller, C. J., and Mullick, J.), a verbal gift of cash and grains as monthly allowance to the *son-in-law* and his sons and heirs by a Hindu father at the time of his daughter's marriage was upheld. The father possessed considerable wealth, and the allowance was made with a view to maintain the position of the bridegroom and also the bride. The father's intention was to benefit the daughter. The contract was held to be legal and enforcible, and not in the nature of a marriage brokerage, though the son-in-law had stated that he would not have married in the family if the allowance had not been promised.

The case-law on the subject summarised above fully indicates the inclination of all the High Courts to uphold a gift by a widow of *landed property* to her daughter or *son-in-law* on the occasion of the marriage or any ceremonies connected with the marriage and that the promise made may be fulfilled afterwards; and it is not essential to make a gift at the time of the marriage but that it may be made afterwards, upon the ground that the gift when made fulfills the moral and religious obligation of giving a portion of the property for the benefit of the daughter and the son-in-law.

(1) (1922) I. L. R. 45 All. 207. (2) (1920) 5 Pat. L. J. 516.

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The only limitation placed upon this power of making a gift is that it should bear a reasonable proportion to the entire property of the deceased father and that it should be justifiable in the circumstances of the case in terms of the principle laid down in *Cossinaut Bysack* v. *Hurrosoondry Dossee*(1).

Now, gifts of a small portion of the property of the deceased are permissible by a widow even if it is not for the performance of the strictly religious duties such as are expressly enjoined by the Sastras, provided the gifts are made upon the occasions which are conducive to the spiritual welfare of the deceased: vide *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma*(2), *Musammat Narainbati Kumri* v *Ramdhari Singh*(3) and *Khub Lal Singh* v. *Ajodhya Misser*(4).

In *Gopalji Sah* v. *Manbirti Kuer*(5), the gift by a widow of a house on the occasion of her husband's anniversary saraddha ceremony was upheld upon the ground that it was conducive to her husband's spiritual benefit, and that it was not excessive.

Their Lordships of the Judicial Committee, in the case of *Sardar Singh* v. *Kunj Behari Lal*(6), upheld the gift of a small portion of the estate inherited by the widow for the observance of Bhog or food offerings to the deity of Puri and the maintenance of the priest. In that case their Lordships observed that the lady had of course sufficient income to provide for the observances without any alienation of the part of the estate. The alienation was, however, held to be valid upon the ground that the property given formed only a small portion of the whole estate and the gift was for the continuous spiritual benefit of the deceased, though not for an observance essential to the salvation according to the Hindu religious law. It was pointed out that there were two sets of religious acts; one essential for the performance of obsequial rites and other pious observances which conduced to the bliss of the deceased

(1) (1820) Morley's Digest, 198.
(2) (1911) I. L. R. 34 Mad. 288.
(3) (1916) 1 Pat. L. J. 81.
(4) (1916) I. L. R. 43 Cal. 574.
(5) (1918) 52 Ind. Cas. (Pat.) 996.
(6) (1923) I. L. R. 44 All. 503.

soul. In the case of the former if the income is not sufficient to cover the expenses she is entitled to sell the whole of the property. In the other case she can alienate a small portion for the pious or charitable purposes she may have in view. It depends upon the circumstances of each case what is reasonable.

These decisions are based upon the texts already referred to that the widow takes the estate for the performance of religious duties and acts conducive to the welfare of her and her lord by " pious liberality." I need not quote the texts in extenso again. The words " pious liberality " imply acts conducive to the spiritual benefit of her husband and herself, such as, performing sraddhas, digging wells, and giving presents, all requiring for the accomplishment pecuniary aid.

It has already been shown by reference to the texts and authorities that the marriage of the daughter and the gift made to the daughter and the son-in-law are acts which confer spiritual benefit upon the husband of the widow and such gifts are enjoined to be made on account of the unmarried daughters having share in the estate as her nuptial portion to be given to her in the shape of dowry and for meeting the marriage expenses.

No prohibition anywhere in the texts or in the authorities against a gift of immoveable property by the widow on the occasion of her girl's marriage or in connection with any of the marriage ceremonies has been pointed out.

Therefore, the gift of the landed property in question in the present case by Musammat Jainti Kumari to Gobind Das, the defendant, is not in any way prohibited by the texts or the authorities. The gift in question has not been challenged as being in any way excessive. On the other hand, it has been shown that the property is only worth Rs. 50,000, whereas the deceased father of the girl had left behind property of very considerable value yielding an income of over

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a lakh of rupees from the landed property, the Promissory Notes and the money-lending business. The property gifted bears but a very small fraction of not more than one-fortieth of the entire estate. Chhotan Bibi was the only child of the deceased and would have succeeded to the estate in case she had survived her mother. The girls of the family of the brothers of the deceased were married at considerable expense, whereas the marriage of the girl in this case was performed at a very moderate expense and the property gifted including the actual expense incurred otherwise at the marriage does not in value exceed the amount spent in the marriage of the daughters of the family. The gift was, therefore, not unreasonable. It was in no sense a waste or apahara of the property inherited by the widow who by her good management and economy augmented the income of the estate and added to the corpus thereof. She has in terms of the texts used the property with moderation and without any waste and left it in a sounder and more substantial condition than what she inherited from her husband, in order to be taken by the reversioners, the plaintiffs in the present case. They have no reason for any complaint. They would certainly have no grievance if instead of giving the land the lady would have given cash in her possession even much more than the value of the property.

I have already disposed of the contention of Mr. Jayaswal that the gift is invalid, inasmuch as the consideration of it was in the nature of marriage brokerage by reason of the promise of the gift having beer made prior to and as a condition for the bridegroom's party (father and uncle) consenting to marry the girl in question. The texts make such a gift unrevokable. Narada has gone so far as to make a woman's sulka, that is, the fee given to the relations of a damsel for bringing about the marriage as unresumable or unrevokable. Manu, while forbidding the acceptance of a gift by the father of a girl by way of sulka from the bridegroom, in verses 51 and 53 of

Chapter III condones it in verse 54 if the bridegroom's father voluntarily and out of affection presents the sulka. Manu does not forbid the giving of presents or dowry by the bride's parents and relations to the girl or the bridegroom. On the other hand, nuptial gifts at the bridal procession to the bride and the bridegroom are enjoined. The question in this case does not arise, inasmuch as the gift in the present case was actually made, and the donee has been in possession of the property for the last 26 years ever since the deed of gift was executed. The gift cannot be revoked or cancelled. The lady herself could not recover it upon the ground that the gift was invalid: much less can the plaintiffs, whc are reversioners, recover it on that ground.

In the result, in agreement with the view of the court below I dismiss the appeal with costs.

BUCKNILL, J. (after stating the facts and issues, proceeded as follows):

As to the question of the widow having the advantage of independent advice, it is not imperative that she should have any independent advice if, from the environing circumstances, it may safely be assumed that had she had any independent advice her conduct would not have been materially affected thereby [vide *Musammat Hira Bibi* v. *Ramadhan Lal*(1), *Satis Chandra Ghosh* v. *Kalidasi Dasi*(2)]. Now there was nothing to my mind remarkable in a transaction of this kind. If one accepts any substantial part of the whole story, i.e., that it was with the object of obtaining a suitable husband for her daughter that the widow contemplated and did make this gift, I do not consider that the transaction was of such a character as would have been adversely affected by the advice of a prudent and independent person. As a matter of fact the widow's own brother was one of the attesting witnesses to the document and, although it is true that he now

(1) (1921) 6 Pat. L. J. 465. (2) (1921) I. L. R. 34 Cal. 529.

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has given evidence in favour of the plaintiffs, yet, as is pointed out by the learned District Judge, this brother, at any rate, represented what may be called the widow's side of the family. Under these circumstances I do not think that the widow could be said to have suffered from the absence of independent advice even if she did not have such; indeed, I am inclined to think that she did have and take advice which was not improper in any way.

As to the question of the validity of the registration it is suggested that, as there was some evidence to show that the bigha or jote land situated in Ulaon was not in the jote possession of the widow at the time when she executed the document, its inclusion in the deed was fraudulent or improper and solely for the purpose of enabling the registration to be effected in the Monghyr and not in the Darbhanga district But this objection to the registration has I think little or no solid foundation. The record-of-rights which was published in 1902 (sometime after the execution of the deed) shows that the bigha of land *was* in the zamindari of the widow although it is true that it is not shown as being in her khas possession. There is nothing to indicate that there was any intention on the part of the widow to effect any fraud on the registry or deliberately to do anything of a character which would invalidate the registration. The law as laid down in a number of decisions is quite clear that in circumstances similar to those disclosed in this case, the registration cannot be regarded as invalid unless there is some intention definitely to commit a fraud upon the registry [vide *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(1), *Musammat Ram Dai* v. *Ram Chandrabati Debi*(2) and *Musammat Jasoda Kuer* v. *Janak Missir*(3)].

One must now turn to the second issue, i.e., whether there was any direction given by Babu Benarsi Prasad (the widow's deceased husband) to Musammat

(1) (1914) I. L. R. 41 Cal. 972. (2) (1919) 4 Pat. L. J. 433.
(3) (1924) 4 Pat. L. J. 394.

Jainti Kumari about the gift of the property at the marriage of Chotan Bibi as alleged by the defendant.

* * * * * * * * *

Personally, although I do not think that it is impossible to believe that the deceased *did* express such a wish, I do not consider that it has been well proved. To base the case upon the not altogether convincing oral testimony which has been adduced in support of this point would appear to me to be dangerous. It may be borne in mind that, in the ordinary way, the whole of the deceased's property would in due course, have come to the deceased's daughter and would have been enjoyed by her husband with her: whilst the absence of any mention of the matter in the deed of gift itself is certainly noticeable. On the whole, therefore I agree with the learned District Judge that it would be unwise to hold that it was satisfactorily proved that the deceased himself made any definite statement as to his wish that such a gift should be made

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The 3rd, 4th and the 5th issues must be taken together as they are closely interconnected and cover the main points which are important in the case. The 3rd is whether there was any contract between Musammat Jainti Kumari and the defendant made *before* the defendant's marriage with Chotan Bibi about the gift of any property to the defendant in consideration of his marriage as alleged by the defendant; if so, whether the said contract is legal, valid and binding upon the plaintiffs?

The 4th, i.e., is whether the disputed property was a gift to the defendant by Musammat Jainti Kumari in fulfilment of the said contract and as consideration for his consent to his marriage to Chotan Bibi?

The 5th is whether the alleged gift was made on the occasion of the ganth pakri (part of the bridegroom's leave-taking or departure) ceremony as alleged by the defendant.

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With the exception of the last portion of the 3rd issue these are all entirely questions of fact. If it is decided that there was an arrangement between the widow and the defendant prior to the marriage that she would give him the property in consideration of the marriage and that the deed of gift was drawn up subsequently in fulfilment of that contract; or if it is decided that, whatever the answer may be to the previous questions, the gift was made, not as the result of any anterior arrangement but as part of the bridegroom's leave-taking ceremony, there remains then the important question of law as to whether the gift made by the widow (with her limited power over her interest) to the bridegroom under any of such circumstances is a valid gift and binding upon the reversioners. I may say at once that the District Judge has held that the defendant has proved satisfactorily his contention that arrangements that this gift should be made were effected during the marriage negotiations; that the property was verbally given at the time of the bridegroom's departure ceremony and that the deed of gift was subsequently in due course executed in accordance with the agreement. There is undoubtedly a great deal of contradictory evidence upon all these questions. It is clear that one has to choose between two bodies of conflicting testimony which is in the main adduced by persons who are interested on one or the other side.

* * * * * * * * *

I am inclined to agree with the District Judge that, taking all the circumstances of the case into consideration, the defendant has satisfactorily proved that the land was given to him as the result of a promise made at the time when the negotiations for the marriage were taking place.

The question as to whether there was a verbal donation at the time of the bridegroom's departure ceremony is one upon which, again, there is a quantity of conflicting evidence. The question is important because, as will be seen, when the discussion as to the intrinsic validity of the gift comes under consider-

ation, great weight has to be attached to the propriety and legality of donations made at the actual time when the nuptial rites are being carried out according to the Hindu ceremonial. The learned Judge has pointed out that in spite of the verbal gift, made as alleged that it was in the defendant's evidence, the title to the property remained with the widow until about two years after the marriage ceremony and that it was only then that the deed was executed. The defendant's story, as supported by his evidence, was to the effect that, until the title to the property was actually transferred to him, the profits derived from the village, amounting roughly to Rs. 50 per month, were transmitted to him by the widow's managers. On the other hand, the plaintiffs, whilst not denying that some allowance was made during this period to the defendant, allege that such sums were given by way of pocket-money and not as representing the income derived from the property subsequently given to him. There is, however, no documentary evidence which can be said to support materially the plaintiffs' allegations upon this point. The learned District Judge has found, therefore, that the defendant's evidence that the fact of the gift was made more or less public at the time of his marriage has not been satisfactorily rebutted; and that he got cash money equivalent to his interest in the property later.

If one has come to the conclusion that the gift was arranged at the marriage negotiations, I think it is not an unfair opinion at which to arrive in expressing the view that, under such circumstances, it was probable that the fact of such gift would be announced at the wedding itself; indeed it seems to me extremely unlikely that no such great announcement would have been made; not merely because of the fact that there was no reason for its concealment but on the ground of the manner in which gifts of many kinds are regarded as forming a very essential part of the necessary concomitants of Hindu marriage ceremonials,

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Having dealt with this question of fact one now passes to the next issue (f). This issue is really the main question of importance in this case and is whether Musammat Jainti Kumari had any authority or *power* to make a valid gift of the property in suit to the defendant; if she had, of course the gift binds the reversioners; if she had not, it does *not* so bind them.

We have been favoured with references to a very large number of ancient texts from the Hindu sages' works and with a formidable array of cases bearing more or less upon the subject-matter of this point. I think that it would serve little purpose to attempt to refer to them all: but one may, I think, attempt to collate the effect of decided cases (supposed to interpret the Hindu Law) in a series of simple statements.

It is, generally, contrary to public policy for a father to be paid money in consideration of giving his son or daughter in marriage and a contract to that effect cannot be enforced in a Court of Law (per Farran, C. J. and Tyabji, J., in *Dholidas Ishvar* v. *Fulchand Chagan*[1]), but an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not *necessarily* immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare but give her to a husband otherwise ineligible in consideration of a benefit secured to themselves, the agreement, by which such benefit is secured, *is* opposed to public policy and ought not to be enforced; where an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is, under the circumstances of the case, neither immoral nor opposed to public policy, it will be enforced and damages will also be awarded for breach of it; and, semble, an agreement to remunerate or reward a *third* person in consideration of negotiating a marriage *is* contrary to public policy and cannot be enforced [per Mookerjee, J., in

(1) (1897) I. L. R. 22 Bom. 658,

Bakshi Das v. *Nadu Das*(1)]; and where a contract provided that when a marriage has been arranged and performed the parent of either the boy or girl who is a party to the marriage shall pay a certain sum of money the contract is not void ab initio as being opposed to public policy [per Walsh and Ryves, J.J., in *Jagadishwar* v. *Sheo Bakhsh Rai*(2)]. There is a moral obligation imposed on a Hindu father to make a gift to his daughter on the occasion of her marriage; he may legally for such purpose give her a small portion of ancestral property either at or after the wedding [per Munro and Sankaran Nair, J.J., in *Sundaramayya* v. *C. Sitamma*(3)]: see too *In re Subba Naiker*(4) (per Sankaran Nair and Oldfield, J.J.); the gift must be of a reasonable amount; a Hindu brother, who is the managing member of a joint family, will not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters, who though married in their father's lifetime, were left, for some reason or other without a marriage portion [per Wallis and Miller, J.J., in *Kudutamma* v. *Narasimka Charyulu*(5)].

A destitute sonless widow must, however, look for her maintenance primarily to her deceased husband's family and not primarily, to her father's family [per Maclean, C.J. Prinsep and Hill, J.J., in *Mokhada Dassee* v. *Nundo Lal Haldar*(6)], but if provision should fail and the widowed daughter has to return to live with her father and brother there is a moral and social obligation but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estates in the hands of the heirs [per Parsons and Ramade, J.J., in *Bai Mangal* v. *Bai Rukhmini*(7)], and see, also *Mokhoda Dassee* v. *Nundo Lal Haldar*(8), per Ameer Ali, J. So much for

(1) (1905) 1 Cal. L. J. 361.
(2) (1914) 41 I. C. (All.) 856.
(3) (1911) I. L. R. 35 Mad. 628.
(4) (1915) 30 Ind. Cas. (Mad.) 781.
(5) (1907) 17 Mad. L. J. 528.
(6) (1901) I. L. R. 28 Cal. 278.
(7) (1898) I. L. R. 23 Bom. 291.
(8) (1900) I. L. R. 27 Cal. 555.

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the position as between a Hindu father and his daughters. Next as to the position as between a Hindu father and his son-in-law.

It is neither contrary to any tenet of the Hindu law or against public policy for a Hindu father to contract to maintain his son-in-law and such a contract can be enforced. Where a Hindu father who had no son gave his daughter in marriage on the understanding that the bridegroom should be brought up and maintained as a member of his family as also his daughter the bride and any issue, the son-in-law cannot subsequently be turned out without any provision for his and his wife's and issue's maintenance; and even his separate maintenance can if the Court thinks fit be ordered [per Mookerjee and Teunon, J. J., in *Gobinda Rani Dasi* v. *Radha Ballabh Das*(1)], and where a Hindu father agreed to make an allowance to his son-in-law for the latter's maintenance, the sons and grandsons of the grantor are liable to discharge the debt out of the ancestral property which devolves on them [per Dawson Miller, C.J., and Mullick, J., in *Madhusudan Prasad Singh* v. *Ramji Das*(2)].

As to the position of a Hindu widow and her daughter. Where a Hindu husband dies intestate and without issue, the widow is entitled to the absolute possession of the property descended from him to enjoy it during her lifetime and to dispose of it under certain restrictions. The extent and limit of her power of disposing of the property are not definable in the abstract; but must be left to depend upon the circumstances of the disposition when made and must be consistent with the law regulating such disposition [per East, C. J., in *Cossinauth Bysack* v. *Hurroosoondry Dossee*(3)]. According to the Hindu Law prevailing in Benares (Western School) a widow cannot generally alienate the estate, inherited from her

(1) (1910) 12 Cal. L. J. 173. (2) (1920) 5 Pat. L. J. 516.
(3) (1820) Morley's Digest, 198.

husband, to the prejudice of his heirs which at her death devolves on them [per Sir J. W. Colville in *Bhaugwandeen Doobey* v. *Myna Baee*(1)]; a Hindu widow in possession of the estate of her deceased husband, who made a gift by deed of immoveable property forming about one-seventy-fifth of the whole estate for the observance of bhog (food offerings) to a deity and for the maintenance of the priests was entitled to do so; such a widow is entitled to spend or alienate not only in connection with the actual obsequies of her deceased husband but also for such obsequial rites which are considered as essential for the salvation of the soul of the deceased [per Mr. Ameer Ali in *Sardar Singh* v *Kunj Behari Lal*(2)]; such a widow is also justified in alienating a small portion of the property (which she had inherited) of her father at the time of performing her father's sradh ceremony; and such alienation binds the reversioners [per Benson and Ayyar, J.J., in *Vuppuluri Tatayya Verranna* v *Garimilla Ramakrishnamma*(3)]. A Hindu widow has a larger power of disposition of her deceased husband's estate for religious and charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes; but each case must be considered on its own merits as to the propriety and legitimacy of the transaction [per Mookerjee and Newbould, J J., in *Khub Lal Singh* v. *Ajodhya Misser*(4)]. A Hindu widow governed by the Mitakshara Law is competent to make a valid gift of a reasonable portion of the immoveable property of her deceased husband to her daughter on the occasion of the daughter's gowana (transfer from father's to husband's house) ceremony and such a gift is binding upon the reversioners [per Mookerjee and Carnduff, J.J., in *Churaman Sahu* v. *Gopi Sahu*(5)]. The provision of a dowry for a daughter is a matter of legal

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(1) (1867) 11 Moo. I. A. 487.
(2) (1922) I. L. R. 44 All. 503.
(3) (1910) I. L. R. 34 Mad. 288.
(4) (1915) I. L. R. 43 Cal. 575.
(5) (1909) I. L. R. 37 Cal. 1.

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necessity which would justify the alienation by a Hindu widow of a larger or smaller portion of her husband's property. No hard and fast rule can be laid down as to what proportion of the property may be alienated; but where the daughter was blind and a cripple and the property was small (Rs. 500 only in value) an alienation of the whole of it in favour of the *son-in-law* was upheld [per Ryves, J., and, on appeal, per Mears, C.J., and Stuart, J., in *Bhagwati Shukul* v. *Ram Jatan Tiwari*(1)]; such a gift should consist only of a reasonable and moderate portion of the deceased's husband's estate [per Scott-Smith and Fforde, J. J., in *Jowala Ram and others* v. *Hari Kishen Singh*(2)].

Lastly, as to the position as between the widow and the son-in-law. The exact point—or at any rate almost precisely the same point—occurring in the present appeal was dealt with in the Madras High Court in the case of *Ramasami Ayyar* v. *Vengidusam Ayyar*(3). In that suit the circumstances were that a Hindu man (a Brahman) died in 1895 leaving a widow, a son and a daughter; the son took the whole of the estate of his deceased father but died unmarried and the widow inherited the property. Later on she gave her daughter in marriage and at the time of the marriage made a gift of a portion of the landed property to her son-in-law. The widow then died and the heir brought a suit against her son-in-law to set aside the alienation; it was contended by the reversioner that this Hindu widow holding but a widow's limited interest in the estate had no power to make such a gift and that in any case the particular gift was not a justifiable one in the sense that it was an unreasonably large gift. The District Munsif and on appeal the Subordinate Judge held that the gift was quite a reasonable one and also bound the reversioner: the latter appealed. The learned Judges of

(1) (1921) 70 Ind. Cas. (All.) 410; on appeal (1922) I. L. R. 45 All. 297.

(2) (1923) I. L. R. 5 Lah. 70.

(3) (1899) I. L. R. 22 Mad. 118.

the Madras High Court (Subramani Ayyar and Moore, J.J.), dismissed the appeal. They agreed with the lower courts that the gift, having regard to the extent of the whole estate and the other circumstances bearing on the matter, could not be declared unjustifiable. 1925-26. RAM SEMRAN PRASAD v. GOBIND DAS.

They also held on two grounds that the gift bound the reversioners. One ground was that " At the time a girl, belonging to the community with which we are concerned in this case, is handed over in marriage, certain other gifts have to be made *to the bridegroom* of which one is bhudanam or gift of land. That, according to the notions of these people, a gift of that kind on such an occasion is indispensable is clear from what is done even in cases in which the family of the bride is not really in a position to give any land. In such cases conformity to the requirements of custom is sought to be secured by giving some little money as and for land. Nor is it difficult to understand how such a practice came to prevail from time immemorial. For apart from its being in reality a provision for the married couple, the gift is believed to enhance the merit of the primary act, viz, the giving of a virgin in marriage which, from a religious point of view, is supposed to be productive of considerable benefits to the parents of the virgin." This was, I take it, a finding that there was a definite and indispensable custom amongst these Brahmans that a gift of land (or something allegorically representing land) should be made by a bride's family to the bridegroom. BUCKNILL, J.

The learned Judges referred in support of this custom to the well-known work by the Abbè J. A. Dubois entitled, " Description of the character, manners and customs of the people of India and of their institutions religious and civil." Father Dubois was a missionary in Mysore and wrote in the 18th century about the people (chiefly Brahmans) with whom in that neighbourhood he was brought into contact. In Chapter VII describing marriage ceremonies

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amongst the Brahmans he observes of the father of the bride—

"He then takes the hand of his daughter and puts it into that of his son-in-law and pours water over them in honour of the great Vishnu. This is the most solemn of all the ceremonies of the festival, being the symbol of his resigning his daughter to the authority of the young man. She must be accompanied with three gifts; namely, with a present of one or more cows, *with some property in land*, and finally with a Salagrama, which consists of some little amulet stones in high esteem among the Brahmans, worn by them, as talisman and dignified even with the homage of sacrifices" [p. 111, Society for the Resuscitation of Indian Literature. New edition of English translation, Calcutta, 1905].

The gifts mentioned are said, by the learned Judges, to be gifts to the *bridegroom* and not gifts by the father of the bride to his daughter; and I think the proper reading of this passage from Father Dubois' work *must* bear that construction. Indeed from other passages in the same work the meaning of the extract becomes quite clear. In the Abbè's time daughters were valuable and had to be paid for as brides; at the present day it is rather the other way and it is the bridegroom who is the valuable commodity. On page 108 of the Edition which I quote of Father Dubois' work, he writes:—

"To marry, or to buy a wife, are synonymous terms in this country. Almost every parent makes his daughter an article of traffic, obstinately refusing to give her up to her lawful husband until he has rigorously paid down the sum of money which he was bound for, according to the custom of the caste. This practice of purchasing the young women whom they are to marry, is the inexhaustible source of disputes and litigation, particularly amongst the poorer people. These, after the marriage is solemnised, not finding it convenient to pay the stipulated sum, the father-in-law commences an action, or more commonly recalls his daughter home, in the expectation that the desire of getting her back may stimulate the son-in-law to procure the money. This sometimes succeeds; but if the young man is incapable of satisfying the avarice of his father-in-law, he is obliged to leave his wife with him in pledge. Now there is time for reflection; and the father-in-law, finding that the sum cannot be raised, and that his daughter from her youth is exposed to great temptations which might lead to the disgrace of all his family, relaxes a little, and takes what the son-in-law is able to pay. A reconciliation is thus effected and the young man takes his wife quietly home.

"Men of distinction do not appropriate to their common purposes the money thus acquired by giving their daughters in marriage, but lay it out in jewels, which they present to the lady on the wedding day. These are her private property as long as she lives and on no account can be disposed of by her husband."

The above observations refer to that part of the judgment which I have called the first ground upon which the learned Judges of the Madras High Court held that the gift bound the reversioners and as I have stated, it may, I think, be regarded as a ground which refers particularly to customs which existed amongst the Brahmans of whom Father Dubois was writing and amongst the Brahmans who were concerned in the case decided by Ayyar and Moore, J. J. But there was a second ground upon which they founded their judgment and which was of more general application. The learned Judges observed, "The question therefore is, had Thaiyyu Ammal (the widow) authority to make a gift of landed property inherited by her to her son-in-law at the time of her daughter's marriage? No direct ruling on the point was cited before us. Reference was, however, made to certain passages in the Mitakshara (Chapter I, section VII, paragraphs 6-14) and the Smriti Chandrika (Chapter IV, section 20, etc.), wherein the texts of Manu, Yajnavalkya and other Smriti writers dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition are commented upon. With reference to the true meaning of these texts, commentators are divided. Some of them hold that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate. Other commentators—Vijnaneshwara among them—lay down that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding a fourth of what they would have got had they been males. For the purposes of this case it is not necessary to discuss which of the two views is to be taken as law. Assuming that, as argued for the appellant, the view advocated by Vijnaneshwara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favourable to maiden daughters, ought to make one hesitate to accept as sound the exceedingly limited construction which was insisted on on behalf of the appellant and which can scarcely be in itself

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very reasonable; viz., that the texts justify a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage. In my opinion, the better and sounder view is, as contended for the respondents, that the authorities should be understood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs."

This very important decision has been followed in the Madras High Court in the case of *T. R. Sundaram Aiyar v. Krishnasami Aiyar*(1) (per Ayling and Tyabji J. J.), where it was unequivocally held that a gift of family property to a son-in-law is not necessarily invalid: it has also been followed in the case of *Bhagwati Shukul* v. *Ram Jatan Tewari*(2), per Ryves, J., and on appeal per Mears, C. J., and Stuart, J.(3). in which case it was held that a sonless widow was justified in alienating in favour of her son-in-law the whole of the property which she inherited from her husband; the property was of small value (Rs. 500 only) and the widow's daughter was a blind cripple; the gift was in order to promote the marriage and was held to be a matter of necessity and therefore to bind the reversioner. In this case the Madras case was cited with approval; the Madras case has also been quoted and referred to (apparently with approval) in several cases, e.g., by Mookarjee and Carnduff, J.J., in *Churaman Sahu* v. *Gopi Sahu*(4); by Dawson Miller, C. J., and Mullick J., in *Madhusudan Prasad Singh* v. *Ramji Das*(5); by Mears, C. J , and Stuart, J., in *Bhagwati Shukul* v. *Ram Jitan Tiwari*(6), and by Scott-Smith and Fforde, J. J , in *Jowala Ram* v. *Hari Kishen Singh*(7); see too *Abeshang Tirabhai* v *Raisang Fatesang*(8), per Batchelor and Heaton, J. J. In that

(1) (1915) I. L. R. 28 Mad. 992.
(2) (1921) 70 Ind. Cas. (All.) 419.
(3) (1922) I. L. R. 45 All. 297.
(4) (1909) I. L. R. 37 Cal. 1.
(5) (1920) 5 Pat. L. J. 516.
(6) (1922) I. L. R. 45 All. 297.
(7) (1923) I. L. R. 5 Lah. 70.
(8) (1912) 14 Bom. L. R. 602.

case a widow alienated all her inherited husband's property in favour of her son-in-law shortly after his marriage he undertaking to support her; the transaction was upheld and declared to bind the reversioners: some of whom had acquiesced in what was viewed by the court as a very proper "family arrangement."

Now if the decision given in the Madras case to which I have just referred at length is correct there can be no doubt that in the present appeal the gift by Musammat Jainti Kumari to the defendant must be regarded as valid. No objection could possibly be taken in this case to the value of the gift because it is common ground that it only formed a very small portion of the property in which the widow held her limited interest. The learned District Judge has pointed out in referring to the case decided in the Madras High Court that the fact that a gift of land to a bridegroom from the bride's family was regarded as an indispensable part of the nuptial ceremonies of Brahmins is of the strongest possible effect as indicating that such a custom could not have grown up or would not have been tolerated had it been in any way inconsistent with the Sastras and early Hindu law. He therefore came to the conclusion that the plaintiff's suit must fail. But in this Court the learned Counsel who has appeared for the appellant has strenuously argued that the decision of the Judges of the Madras High Court. if not actually incorrect, is incapable of being applied to persons who do not belong to a caste in which there exists no custom such as that stated to exist amongst Brahmins who were the parties in the Madras suit. It certainly cannot be said that in the present case any custom of giving landed property to a bridegroom by the family of the bride on the occasion of a wedding was satisfactorily proved to exist amongst the Agarwallas to which caste the parties here belong; on the other hand there certainly was some evidence amongst this community that presents are as a

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rule made to the bridegroom and are accepted without demur. But the Madras case was not decided only on the ground of caste custom.

An endeavour has been made to show that there are some texts in some commentaries which indicate that a gift such as that which was made by the widow in the present case is invalid according to Hindu law. I have had the advantage of reading the judgment of my learned brother upon this somewhat intricate question and I agree entirely with the views which he has expressed thereon. I may, however, say that so far as I myself was able to form any opinion at all satisfactory to my own judgment, I thought that it could, at any rate, be stated with confidence that no authoritative texts had been placed before us which forbade or declared illegal a gift such as that made by the widow in this case.

In my view, therefore, the decision of the learned District Judge was correct and this appeal must be dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Foster, J.J.

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Jan., 27; May, 3.

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v.

SARDAR CHRANJIT SINGH.*

Santal Parganas Settlement Regulation, 1872 (Bengal Regulation III of 1872), sections 5 and 9—"Suit" whether includes execution proceeding—suit, institution of, under Code of Civil Procedure—decree, execution of, by the court which passed the decree—jurisdiction—notification under section 9—execution, whether can be transferred to special

*Miscellaneous Appeal no. 241 of 1925, from an order of Najabat Hussain, Subordinate Judge of Bhagalpur, dated the 22nd August, 1925.

court in Santal Parganas—sections 38 *and* 39(2), *Code of Civil Procedure*, 1908.

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Section 5, Santal Parganas Regulation, 1872 provides:

(*1*) From the date on which under section 9 the Lieutenant-Governor declares by a notification in the *Calcutta Gazette* that a settlement shall be made of the whole or any part of the Santal Parganas until the date on which such settlement is declared by a like notification to have been completed, no suit shall lie in any civil court established under the Bengal, Agra, and Assam Civil Courts Act, 1887, in regard to—

(*a*) any land or any interest in, or arising out of, land, or

(*b*) the rent or profits of any land, or

(*c*) any village headship or other office connected with any land, in the area covered by such first-mentioned notification nor shall any civil court proceed with the hearing of any such suit which may be pending before it.

" (*2*) Between the dates referred to in sub-section (*1*), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Santal Parganas Act, 1855, or section 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct, and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them. "

Held, that the term " suit " in this section does not include a proceeding in execution.

Ram Kripal v. *Rup Kuari* (1), followed.

Baijulal Marwari v. *Thakur Prasad Marwari* (2), not followed.

Maha Prasad Singh v. *Ramani Mohan Singh* (3), referred to.

Where, therefore, a decree was passed by the Bhagalpur court long before the notification directing a settlement to be made under section 9 of the Regulation had been published,

(1) (1884) I. L. R. 6 All. 269 (274), P. C.
(2) Civil Revision 60 of 1925.
(3) (1915) I. L. R. 42 Cal. 116, 143, P. C.

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but the execution application for the sale of one of the properties situate in the Santal Parganas was filed in the court which passed the decree after the publication of the notification, and the judgment-debtor objected to the execution on the ground that the Bhagalpur court's jurisdiction was barred by section 5 of the Regulation,

Held, (*i*) that section 5 did not bar the institution of the execution proceeding in the Bhagalpur court, and

(*ii*) that the suit having been instituted under the Code of Civil Procedure, the decree-holder was bound to take out execution in the court which passed the decree, and that court could transfer the decree to another court for execution only on an application by the decree-holder under section 39(*1*) of the Code or, suo motu, to a subordinate court, under section 39(*2*), of the Code; but that the decree could not be transferred by the Bhagalpur court, under section 39(*2*) of the Code, to the officer referred to in section 5(*2*) of the Regulation, inasmuch as that officer was not subordinate to the Bhagalpur court.

Appeal by the judgment-debtor.

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

S. M. Mullick and *S. N. Palit*, for the appellant.

Kailas Pati, for the respondents.

Cur. adv. vult.

May, 3.

DAS, J.—This appeal is directed against the order of the learned Subordinate Judge of Bhagalpur dated the 22nd August, 1925, by which he has overruled certain objections to the execution proceedings instituted by the respondent against the appellant. Only one point has been taken before us, and it is this: that having regard to section 5 of Regulation 3 of 1872, the Bhagalpur court has no jurisdiction to entertain the application for execution or to sell the properties. One of the properties sought to be sold is in the Santal Parganas; and it is not disputed that a settlement is now being made of the Santal Parganas for the purpose of ascertaining and recording the various interests and rights in the land. That being the position, the appellant relies upon section 5 of Regulation 3 of 1872 [set out in the headnote, supra].

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In order to understand the argument, it is necessary to remember that the notification under section 9 in regard to the settlement was published in the Gazette long after the pronouncement of the decree which is sought to be enforced in these execution proceedings, but before the presentation of the application for execution. It is accordingly argued on behalf of the respondent that section 5 of the Regulation has no application; and that the Civil Court in Bhagalpur has complete jurisdiction to entertain the application for execution and to proceed to sell the properties. On behalf of the appellant, it is contended that the term "suit" has not been used in the Regulation in its narrow sense as being terminated by the decree made by the first court but in a broad sense as including the proceedings in execution of the decree made in the suit; and reliance was placed on a decision of this Court in *Baijulal Marwari* v. *Thakur Prosad Marwari* (1).

It may be conceded that the term "suit" has been used in a very broad sense in various statutes; but the question is in what sense that term has been used in the Regulation. The bar of jurisdiction is with respect to suits in regard to

(*a*) any land or any interest in, or arising out of, land,

(*b*) the rent or profits of any land, or

(*c*) any village headship or other office connected with any land.

Paragraphs (*b*) and (*c*) have no application whatever. In order to bring the case within paragraph (*a*) it must be established that an execution proceeding which seeks to have immovable properties of the judgment-debtor sold in pursuance of the decree is a suit in regard to any land or any interest in, or arising out of, land. As was pointed out by the Judicial Committee in *Maha Prasad Singh* v. *Ramani*

(1) C. R. no. 60 of 1925.

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Mohan Singh (1), " the aim of the provision was to prevent any clash of jurisdiction between different courts in matters relating to land until such time as the Government proclaimed the settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the settlement records ". But no clash of jurisdiction is to be apprehended after the decree has decided the rights of the parties. The object of an execution proceeding is to enforce the decree already passed; and, in my opinion, a careful consideration of the scope and the object of the Regulation does not suggest the interpretation that the term " suit " was used in the Regulation in a broad sense as including the proceeding in execution.

The position will be made abundantly clear on a reference to the provision of the Code relating to execution. Section 38 says:

> " A decree may be executed either by the court which passed it or by the court to which it is sent for execution."

Now it seems to me that this provision was wholly unnecessary if proceedings in execution were regarded as proceedings in the suit. An application in the suit must obviously be made to the court in seisin of the suit; and the Legislature is not in the habit of making provisions as to matters which do not require legislation. The Legislature obviously took the view that it was necessary to make provision on this point; and, on grounds of convenience, it decided that the court which passed the decree should be the court to execute the decree, unless that court sends it for execution to another court. What I wish to emphasize in this connection is that, although an application for execution has to be presented to the court which passed the decree, it is only by Legislative sanction that that is so; which I think, must lead to the inference that an application for execution was not regarded by the Legislature as an application in the suit itself. For instance, the Legislature did not

(1) (1915) I. L. R. 42 Cal. 116, 143.

think it necessary to provide that an application for the appointment of a receiver, or an application for the issue of an injunction, which are undoubtedly applications in the suit itself, should be made to the court in seisin of the suit. It assumed that position as obvious in the nature of things.

Then there is another aspect of the case which I must not omit to consider. The suit itself was instituted in the Civil Court under the provision of the Civil Procedure Code. That being the position, where was the decree-holder to present his application for execution? Section 38 of the Code to which I have already referred says that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. It was contended before us on behalf of the appellant that here is a clear provision that the decree may be sent for execution to another court, and it was insisted that the Civil Court should have sent the decree for execution to the Special Court in the Santal Parganas. But such an argument is an impossible one, as I shall presently show. Section 38 of the Code read with section 39 shows that the court which passed the decree is primarily the court to execute the decree but that such a court may send the decree for execution to another court either on the application of the decree-holder or of its own motion, only if certain conditions are satisfied. Here the decree-holder did not ask the court to send the decree for execution to another court. But the court might of its own motion send the decree for execution to another court; but section 39(2) shows that it could only send it for execution

> "to any subordinate court of competent jurisdiction."

Now the Special Court in the Santal Parganas is not a court subordinate to the Civil Court at Bhagalpur. In my opinion, there is no jurisdiction in the Civil Court at Bhagalpur to send the decree for execution to the Special Court in the Santal Parganas. Under the Civil Procedure Code (which governed the procedure in this case) the decree-holder was entitled, even

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bound to present his application for execution in the court which passed the decree. He did not apply for the transfer of the decree to the Special Court in the Santal Parganas, and the court of its own motion could not send the decree for execution to that court. In my opinion, the court which passed the decree has complete jurisdiction to execute the decree.

Reliance was, however, placed on the decision of this Court in *Baijulal Marwari* v. *Thakur Prosad Marwari* (1). The decision of the learned Judges in that case was based, not on the construction of the Regulation, but on the view that proceedings in execution are proceedings in the suit. But this position cannot be maintained, having regard to the decision of the Judicial Committee in *Ram Kripal* v. *Rup Kuari* (2) which was not placed before the learned judges. The facts were these: The appellant had brought a suit against the respondent for certain reliefs including one for mesne profits. He obtained a decree in due course. He applied for the ascertainment of the mesne profits in the execution department, and this was resisted on the ground that the decree did not award any mesne profits to the appellant. The District Judge, Mr. Probyn, decided on the 20th December, 1867, that the decree did award mesne profits to the appellant. Proceedings with a view to obtaining execution were then taken by the appellant, and he applied for mesne profits estimated at a large sum of money. The judgment-debtor again objected that the mesne profts not having been awarded, were not claimable; and the question arose whether the order of Mr. Probyn, dated the 20th December, 1867, operated as res judicata so as to bar the right of the judgment-debtor to reagitate the question involved in the decision. The Allahabad High Court decided that the order passed by Mr. Probyn in the execution department could not be regarded as an order passed in the suit itself and that the question

(1) C. R. no. 60 of 1925.
(2) (1884) I. L. R. 6 All. 269, 274, P. C.

of res judicata did not fall to be considered. The Judicial Committee accepted the first proposition, but not the second. They referred to their decision in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) for the proposition that the binding force of a judgment or order depends, not upon the rule of res judicata as enunciated in the Code, but upon general principles of law; but they were of opinion that "the matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation". Now a clear distinction is drawn by the Judicial Committee between a proceeding in the suit itself and a proceeding which is a continuation of the suit; and, in my opinion, we cannot ignore the distinction in considering whether proceedings in execution are comprehended within the term "suit" as used in the Regulation. In my opinion, they are not; and I must therefore affirm the order of the court below and dismiss the appeal with costs.

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It follows that the application, which has been made in the appeal, must be refused.

FOSTER, J.—I concur in the final order.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

MADHO RAY

v.

MUSAMMAT BIBI MAHBUWAN NISA.*

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May, 3, 4.

Court-fees Act, 1870 (*Act VII of* 1870), *section* 7(1) *and Schedule I, Article* 1—*appeal against final decree—ad valorem*

*Stamp Reference.

(1) 1871) I. L. R. 8 Cal. 51.

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court-fee payable—property sought to be exempted from liability of the decree—value of the property, court-fee payable on.

Defendant no. 2 sold to the plaintiffs certain land which was alleged to be free of incumbrances. Subsequently he sold other land to defendants 1, 3, 4 and 5. There was, however, a mortgage on the land sold to the plaintiffs, and, the mortgagees having obtained decree, the plaintiffs paid the decretal amount and then sued the defendants for recovery of the amount so paid and for a declaration charging the properties purchased by defendants 1, 3, 4 and 5, with the same. They obtained a preliminary decree and then applied for a final decree under Order XXXIV, rule 5, Code of Civil Procedure, 1908. The defendants 1, 3, 4 and 5 objected to their properties being made liable for the decree. The objection having been overruled by the Subordinate Judge, the defendants appealed to the High Court and paid Rs. 4 as court-fee, treating the appeal as a Miscellaneous Appeal. The Taxing Officer was of opinion that an ad valorem court-fee was payable on the amount found due to the plaintiffs and which had been declared to be charged on the properties held by appellants. The appellants disputed this view.

Held, that if the value of the properties purchased by the appellants was less than the decretal amount, an ad valorem court-fee on the value of the properties was payable; but if the value of such properties was not less than the decretal amount an ad valorem court-fee on the decretal amount was payable.

Kesavarapu Ramkrishna Reddi v. *Kotta Kota Reddi* (1), *Jugal Prasad Singh* v. *Parbhu Narain Jha* (2) and *Bunwari Lal* v. *Daya Sunker Misser* (3), followed.

The facts of the case material to this report are stated in the order of the Court.

J. P. Sinha, for the appellants.

L. N. Sinha, Government Pleader, for the respondents.

JWALA PRASAD, J.—This is a reference under section 5 of the Court-fees Act. The appellants were

(1) (1907) I. L. R. 30 Mad. 96, F. B.
(2) (1910) I. L. R. 37 Cal. 914.
(3) (1908-09) 13 Cal. W. N. 815.

defendants 3 to 5 in the court below. In 1904 the plaintiffs purchased certain properties from defendant no. 2 who stated in the deed of sale that the villages sold were free from encumbrances of any sort. Shortly after, the said defendant no. 2 sold other properties to defendant no. 1 and defendants nos. 3 to 5, appellants in this case. There were, however, encumbrances upon the properties sold to the plaintiffs and the mortgagees of those villages obtained mortgage decrees and caused the properties purchased by the plaintiffs to be put up to sale. The plaintiffs deposited the decretal amount and thus saved the villages and got the mortgage decrees satisfied and the sale set aside. They then instituted the action which has given rise to the present appeal for recovery of the money so deposited by them from the defendants and prayed for declaring the same a charge upon the properties purchased by defendant no. 1 and defendants nos. 3 to 5, appellants before me. The Subordinate Judge gave a decree in the following terms:

"It is hereby ordered that the suit be decreed for Rs. 12,724-12-0, with interest at six per cent. per annum from the date of deposit, together with Rs. 110 with cost and interest at six per cent. per annum till realisation, against defendant no. 2. It is further ordered that in case the defendant no. 2 does not pay the decretal money within four months from the date of the decree the properties given in the petition for amendment of the plaint will be sold subject to the rights of persons that have not been made parties to this suit. Defendant no. 1 is exempted. He is to get one-fourth cost."

Against the said decree there was an appeal to the High Court at Calcutta with the result that the suit was dismissed. Then the plaintiffs appealed in the Privy Council and their Lordships on the 2nd of December, 1921, set aside the decree of the High Court at Calcutta and restored that of the Subordinate Judge with certain modifications. On receipt of the order of His Majesty in Council the plaintiffs applied for a final decree to be prepared under Order XXXIV, rule 5, of the Code of Civil Procedure. The defendants-appellants objected to the properties purchased by them from defendant no. 2 being liable to the decree of the plaintiffs. The

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contest before the Subordinate Judge raised by the appellants was that the properties purchased by them from defendant no. 2 were not at all liable to the money due to the plaintiffs under the decree. This question was decided by the Subordinate Judge against the defendants and hence they have preferred an appeal to this Court. They have paid Rs. 4 as court-fee treating the appeal as miscellaneous appeal.

The Taxing Officer, upon the report of the stamp-reporter, was of opinion that the court-fee payable was upon the amount found due to the plaintiffs with respect to which the final decree had been prepared and which had been made a charge upon the properties held by the appellants. In other words, according to the Taxing Officer the value of the appeal is Rs. 33,315, the amount found due to the plaintiffs and which has been declared to be a charge upon the properties held by the appellants. The appellants disputed the view. Hence the matter has been referred for a decision of the Taxing Judge.

It is true that in an appeal against the final decree ad valorem court-fee should be paid. The point has been concluded by decisions not only of the other High Courts, but of this Court also. The defendants in this case do not dispute the amount due to the plaintiffs under the decree. They dispute the liability of the properties held by them to the decretal amount. They are not personally liable to pay the decree. They are liable to the extent of the value of the properties held by them and their appeal is therefore directed against so much of the decree as is equivalent to the value of their properties. In support of this, the case of *Kesavarapu Ramakrishna Reddi* v. *Kotta Kota Reddi* (1) may be referred to. The facts of that case seem very much to be analogous to the present case. That was a suit to recover Rs. 9,420 due on a hypothecation bond executed in favour of the plaintiff by defendants 1 to 3. Defen-

(1) (1907) I. L. R. 30 Mad. 96, F. B.

dants nos. 6 to 9 had purchased some of the hypothecated properties. A decree was passed in favour of the plaintiff for the amount claimed against the hypothecated properties, excepting the items purchased by defendants nos. 6 to 9. The plaintiff appealed on the ground that such properties were wrongly exonerated from liability. He paid court-fee upon the value of the properties which he said were wrongly excluded from the liability. The value of those properties was Rs. 4,000. It was held that under Article 1, schedule 1, of the Court-fees Act the value of the appeal for the purpose of court-fee was the value of those properties when such value is less than the amount of the decree; and, when such value exceeds the amount of the decree, such decretal amount. This principle was accepted in the case of *Jugal Pershad Singh* v. *Parbhu Narain Jha* (1) which again referred to an earlier case, *Bunwari Lal* v. *Daya Sunker Misser* (2). The decisions in the aforesaid Madras and Calcutta cases seem to be fully in accordance with section 7, clause (*i*), under which the court-fee payable is according to the amount claimed. The appellants in this case claim exemption of their properties from the liability of the decree, i.e., they dispute the decree to the extent of the value of the properties held by them; and that is the amount of their claim in the present appeal. If the value of the properties is less than the decretal amount, they should pay a court-fee upon the value of the properties. If, however, the decretal amount does not exceed the value of the properties then in that case they should pay court-fee upon the entire decretal amount, because they will be asking for an exoneration of their properties from the entire decree. I do not know what the value of the properties in the present case is. The appellants have not stated the value of the properties. They should satisfy the Court that the value of the properties is less than the decretal amount. If not, they should pay court-fee upon the entire decretal amount.

(1) (1910) I. L. R. 37 Cal. 914.

(2) (1908-09) 13 Cal. W. N. 815.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

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May, 4.

MAHARAJA CHANDRA MOULESHWAR PRASAD SINGH BAHADUR

v.

HEM NALINI DEVI.*

Land-Revenue Sales Act, 1859 (Act XI of 1859), section 37—Purchaser of entire estate, suit to recover land by —defendants' claim as lakheraj—onus—lease of land covering tank—section 37, exception (4), applicability of—assessment of fair and equitable rent, suit for, by co-sharer landlord—absence of other co-sharers—decree, if can be made.

Section 37, Land-Revenue Sales Act, 1859, provides: "The purchaser of an entire estate in the permanently-settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all undertenants with the following exceptions." Exception (4) exempts "Leases of land...whereon...tanks... have been made.....".

Held, (i) that the purchaser of an entire estate sold for arrears of revenue takes the estate as created at the time of the Permanent Settlement; but in a suit brought by him to recover land claimed by the defendant as lakheraj he must prove a prima facie case that these lands were included in the mal asset of the estate at the time of the Permanent Settlement, and that his mal land has since 1790 been converted to lakheraj.

Hurryhur Mookhopadhya v. *Madub Chunder Baboo* (1), *Sm. Krishna Kalyani Dasi* v. *Mr. R. Braunfield* (2), and *Abdul Rahman Kazi* v. *Baikunth Nath Roy Chowdhury* (3), followed.

*Appeals from Appellate Decree nos. 150 to 153 of 1924 and 288 to 297 of 1924, from a decision of C. J. Monahan, Esq., I.C.S., District Judge of Monghyr, dated the 17th July, 1923, modifying a decision of Babu Sushil Chandra Mukherji, Munsif of Monghyr, dated the 31st January, 1922.

(1) (1871-73) 14 Moore I. A. 152. (2) (1915-16) 20 Cal. W. N. 1028. (3) (1918) 27 Cal. L. J. 133.

(*ii*) that Exception (*i*) to section 37 does not mean that in order to bring a case within this exception the lease must be a lease for the purposes of excavating a tank thereon; it covers a case of a lease of land upon which the tank in dispute stands.

Asmat Ali v. *Hasmat Khan* (1), distinguished.

Held, further, that in a suit for assessment of fair and equitable rent by a co-sharer landlord, no order can be passed in the absence of the other co-sharers.

Kamal Kumari Chowdhurani v. *Kiran Chandra Roy* (2), distinguished.

These 14 appeals arose out of suits brought by the plaintiff for declaration of title to and recovery of possession of certain lands and houses. The plaintiff was the purchaser of the entire estate bearing Tauzi no. 6104 of the Monghyr Collectorate at a sale for arrears of revenue held on the 25th of March, 1913. She obtained delivery of possession on the 16th of September, 1913, and her name was registered as proprietor of the 16-annas of the estate. The present suits were for a declaration that the lands and houses in dispute were included in this Tauzi no. 6104 and, therefore, by virtue of the purchase at the revenue sale she had acquired a title thereto and was entitled to possession. There was an alternative relief prayed for, for fixing a fair and equitable rent.

Sultan Ahmad (with him *Jagannath Prasad*), for the appellants in second appeals nos. 150-153 of 1924, and for the respondents in nos. 288, 291, 295 and 296.

S. K. Mitter, for the respondents in nos. 150-153 of 1924, and for the appellants in nos. 288-297 of 1924.

P. K. Mukerjee, for the respondents in nos. 289, 292 and 294 of 1924.

S. M. Mullick and *S. N. Bose*, for the respondents in no. 297 of 1924.

The respondents in nos. 290 and 293 of 1924 were not represented.

(1) (1897-98) 2 C. W. N. 412. (2) (1897-98) 2 Cal. W. N. 229.

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KULWANT SAHAY, J.

KULWANT SAHAY, J.—It has been necessary to deal with these appeals separately as the subject matters of the suits are different and the points raised are not exactly the same in each case.

Appeals nos. 150 *and* 288 *of* 1924.

These appeals arise out of suit no. 454 of 1920, which was appeal no. 78 of 1922 before the District Judge. Appeal no. 150 is by the defendant and appeal no. 288 by the plaintiff. In this suit the plaintiff claimed a tank known as Laboopokhar which was in the exclusive possession of the defendant, the Maharaja of Gidhaur. The plaintiff claims a 4-annas share in this tank as lying within her tauzi and alleges that she is entitled to possession thereof on dispossessing the Maharaja. The defence of the Maharaja was that he had a lakhiraj title to this tank as it was included within an area of 30 bighas of lakhiraj land purchased by him in 1882, and it was not included in the mal land of the tauzi. The Munsif dismissed the suit holding that the tank was ijmal and that the Maharaja had a lakhiraj title thereto. The learned District Judge has found that a 2-annas share of the tank was allotted by batwara to tauzi no. 6104, and that the Maharaja had failed to prove that the 30 bighas of land purchased by him, within which this tank was situated, was lakhiraj land at the time of the Permanent Settlement. He, however, held that the plaintiff was not entitled to oust the Maharaja from possession as the tank came within the 4th exception to section 37 of Act XI of 1859, but was entitled to recover rent for a 2-annas share of the tank. He, however, held that the rent could not be assessed in the present suit as the remaining 14 annas proprietors were not before the court, and he accordingly dismissed the suit.

The Maharaja appeals against this decree, in so far as it is against him, in Second Appeal no. 150 of 1924; and the plaintiff appeals against the decree dismissing the suit in Second Appeal no. 288 of 1924.

The mahal out of which Tauzi no. 6104 was carved out was partitioned twice, once in 1868 and again in 1880. The Tauzi no. of the original mahal was 424. In the partition of 1868, half of the tank was allotted to the estate which retained the old Tauzi no. 424. In the partition of 1880, which was a partition of the estate which retained the old Tauzi no. 424, the tank was not divided, but the income derived from the tank was divided. One-fourth of the income of this tank was by this partition allotted to the patti of Darwesh Muhammad and others, which was given Tauzi no. 6104. Now, this one-fourth was of the one-half of the tank which was allotted to Tauzi no. 424 by the partition of 1868. Therefore, what was allotted to the patti of Darwesh Muhammad and others bearing Tauzi no. 6104 was one-fourth of one-half, i.e., one-eighth of the tank. The learned District Judge, therefore, found that a 2-annas share of the tank was allotted to Tauzi no. 6104 This finding is supported by the Batwara Khasra of 1868 (Exhibit Z-7) and the 16-column register of 1880 (Exhibit 12*a*). It is also supported by the other batwara papers referred to by the learned District Judge. The finding of the learned Judge, therefore, that a 2-annas share of the tank was included in Tauzi no. 6104 is based on the evidence in the case and must be accepted as correct.

The question is whether the plaintiff is entitled to oust the Maharaja on a declaration that the latter had no lakhiraj interest therein. As stated above, the Maharaja claims title to this tank as included in 30 bighas of lakhiraj land purchased by him from Sardhari Lal under a deed of sale, Exhibit A, dated the 10th of August, 1882. These 30 bighas of land were purchased by Girdhari Lal, the father of Sardhari Lal, at a court sale on the 2nd of October, 1852. Exhibit X(*a*) is the sale certificate of Girdhari Lal. It appears, however, that a suit had to be brought by Sardhari Lal for khas possession of this 30 bighas of land and he obtained a decree on the 9th of May

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1863, and obtained delivery of possession in execution of the decree on the 2nd of August, 1866. The parwana dakhaldehani under which Sardhari Lal obtained possession is Exhibit W and is dated the 17th of March, 1866. In the sale certificate, Exhibit X(*a*), the property is described as 30 bighas situate in Lalookhar in mauza Salempur Dhamdaha, pargana Monghyr. There is no mention therein that the land was lakhiraj. In the parwana dakhaldehani (Exhibit W) the description of the property is similar to that in the sale certificate, Exhibit X(*a*); but there is a further description that the land was lakhiraj. The learned Munsif held that the land must have been held to be lakhiraj in the civil suit brought by Sardhari Lal and that the description of lakhiraj in the sale certificate might have been omitted by mistake. The learned District Judge, however, observed that there is no reason to suppose that there was a mistake in the description of the property in the sale certificate: he infers that the lakhiraj title might have been created between 1852 and 1866. He, however, found that the Maharaja was actually in possession and no rent was paid by him for this 30 bighas of land: but he was of opinion that this does not establish that the land was lakhiraj since the time of the Permanent Settlement as required by section 37 of Act XI of 1859.

The point taken by the learned counsel for the Maharaja, appellant, is that the learned District Judge has misplaced the onus of proof upon the Maharaja to show that the land was lakhiraj from the time of the Permanent Settlement: he contends that it was for the plaintiff to prove that the land was included in the Permanent Settlement in mal land of the estate, and that the onus was upon the plaintiff to prove that the land was mal land at the time of the Permanent Settlement. In my opinion this contention is sound and ought to prevail. Section 37 of Act XI of 1859 provides that a purchaser of an entire estate shall acquire the estate free from

all encumbrances which may have been imposed upon it after the time of the Permanent Settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with certain exceptions. In *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (1) it was held by the Privy Council that a plaintiff in a suit for resumption of land as part of his mal zamindari for assessment is bound in the first instance to prove a prima facie case of payment of rent since 1790 or that the land formed part of the mal assets of the estate at the Decennial Settlement. When such a prima facie case is made out the onus probandi is shifted on to the defendant, who to exempt himself from assessment must show that his tenure existed rent-free before the 1st of December, 1790. Their Lordships observed: "If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal." Their Lordships further observed that "he (plaintiff) may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790". The principle enunciated by the Privy Council in this case is applicable to the present case. The plaintiff has to prove in the present case that at the time of the Permanent Settlement the land was included within the estate permanently settled as mal land. This principle has been followed in the courts in India in a large number of cases. In *Sm. Krishna Kalyani Dasi* v. *R. Braunfield* (2) it was held by a Division Bench of the Calcutta High Court that a purchaser

(1) (1871-73) 14 Moo. I. A. 152. (2) (1915-16) 20 Cal. W. N. 1028.

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of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must prove a prima facie case that his mal land has, since 1790, been converted into lakhiraj. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden. In *Abdul Rahman Kazi* v. *Baikunth Nath Roy Chowdhury* (1) the same view was taken by another Division Bench of the Calcutta High Court. As was observed by Mookerjee, J., in the last case, the rule is that the purchaser of an entire estate at a sale for arrears of revenue takes the estate as created at the time of the Permanent Settlement, and the question is reduced to this: has the plaintiff established that these lands were included in the estate at the time of the Permanent Settlement, in other words was the revenue assessed on the basis of the assets of these lands. It is clear, therefore, that in order to succeed, the plaintiff in the present case must make out a prima facie case that at the time of the Permanent Settlement the land in dispute was mal land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute; in other words, that the assets of the land was taken into account in settling the revenue at the time of the Permanent Settlement. It appears from the decisions of the courts below that there is a total absence of such evidence on the part of the plaintiff. Learned counsel for the plaintiff is unable to point to a single piece of evidence showing that the land in dispute was treated as mal land at the time of the Permanent Settlement. The defendant, Maharaja, has proved that at least since the year 1866 no rent has been paid for the 30 bighas of land within which the tank in dispute is situate. The learned District Judge has relied on the absence of the description of the land as lakhiraj in the sale certificate [Exhibit X(*a*)]. This, in my opinion, is not sufficient in law to show that the land was mal at the time of the Permanent Settlement.

(1) (1918) 27 Cal. L. J. 133.

Under the circumstances, I am of opinion that the decision of the learned District Judge that the land was not lakhiraj land, and that the plaintiff was entitled to possession of the land but for the Exception (4) to section 37 of the Act, is not sound. The plaintiff having failed to prove that the land was mal at the time of the Permanent Settlement her suit for declaration of title and possession in respect of this tank must fail.

In this view of the case it becomes immaterial to consider the appeal of the plaintiff, namely, Second Appeal no. 288 of 1924. Her contention in this appeal is that the learned District Judge was wrong in holding that the case came within Exception (4) to section 37 of the Act, and that she was entitled to oust the Maharaja from possession, or in any event she was entitled to have a rent assessed in respect of the 2-annas share of the tank which the District Judge had found to appertain to her estate Tauzi no. 6104 and that the proprietors of the remaining 14 annas were not necessary parties to the suit.

As regards Exception (4) to section 37 of the Act it is contended that there is no plea in the written-statement that the tank came within the exception. It is also contended that the leases referred to in the 4th Exception must be leases of lands for the purpose of excavating tanks thereon. In my opinion neither of these contentions can prevail. The defence of the defendant in the present case was that the entire area of 30 bighas within which the tank in dispute was situate was lakhiraj land, and the mere omission of the defendant to take the plea of Exception (4) to section 37 in the written statement will not entitle the plaintiff to a decree for possession.

As regards the second contention, the language of the 4th Exception does not warrant the construction sought to be placed upon it by the learned counsel. It does not say that in order to bring the case within

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this exception the lease must be a lease for the purpose of excavating a tank thereon. Reliance was placed upon the decision of the Calcutta High Court in *Asmat Ali* v. *Hasmat Khan* (1) where it was held that a lease of a tank without any portion of the surrounding land is not protected under clause 4, section 37 of Act XI of 1859, as it was not within the meaning of that clause a lease of land whereon a tank has been excavated. This case has clearly no application to the facts of the present case. In the present case the lease is of 30 bighas of land upon which stands the tank in dispute.

As regards the contention that rent ought to have been assessed for the 2-annas share of the tank even in the absence of the proprietors of the remaining 14 annas share, reliance has been placed upon *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (2). That was not a case for assessment of rent and in that case the plaintiffs did not ask for direct or actual possession of the land, but indirect or constructive possession by a receipt of rent to the extent of their share from the cultivating tenants upon a declaration that the intermediate tenure was cancelled by the sale for arrears of revenue. That case is clearly distinguishable from the facts of the present case.

The result is that suit no. 454 of 1920 must be dismissed with costs. Appeal no. 150 of 1924 of the defendant, Maharaja, is decreed, and appeal no. 288 of 1924 of the plaintiff-appellant is dismissed. The defendant, Maharaja, will be entitled to his costs in all the courts. There will, however, be only one hearing fee in the two Second Appeals in this Court.

[The decision in the remaining appeals is not material to this report.]

Ross, J.—I agree.

(1) (1897-98) 2 Cal. W. N. 412. (2) (1897-98) 2 Cal. W. N. 229.

PRIVY COUNCIL.

RAJA DHAKESHWAR PRASAD NARAIN SINGH

v.

GULAB KUER*

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May, 10.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 22(2), 103B—*Occupancy Right—Record-of-rights—khudkasht bakasht—order on partition—limitation—Limitation Act*, 1908 (*IX of* 1908), *Schedule I, Article* 14—*Estates Partition Act*, 1897 (*Ben. V of* 1897), *section* 13(*xv*).

The appellant-zamindar sued to eject the respondents from lands in a village in Bihar which had been partitioned under the Estates Partition Act, 1897. In a record-of-rights made in 1908 under section 103-B of the Bengal Tenancy Act, 1885, the land had been described as the appellant's "bakasht". That term is used by revenue officers in Bihar to describe land which is either khudkasht (i.e., proprietor's private land) or land temporarily in his possession. The order on partition, while stating that the land was originally raiyati, allotted it to the appellant as "bakasht" and assessed a rent payable to him.

The defence to the suit was that the land had been the raiyati land of the first respondent's husband, deceased; further, that as the suit was not brought within one year of the order on partition, it was barred by the Limitation Act, 1908, Schedule I, Article 14.

Held, that the appellant was entitled to khas possession; the record-of-rights was to be presumed to be correct, and there was no evidence to show to whom the alleged raiyati kasht belonged, or when it came into the possession of the first respondent's husband; the suit being in ejectment was not governed by Article 14.

Section 13 (*xv*) of the Estates Partition Act, 1897, does not give power to assess rent when a raiyati kasht falls within the allotment of a proprietor.

Section 22, sub-section 2, of the Bengal Tenancy Act, 1885, applies only when there has been a transfer of land in which an occupancy right is shown to exist.

Judgment of the High Court reversed.

* PRESENT.—Lord Blanesburgh, Lord Darling, Sir John Edge, Mr. Ameer Ali, and Lord Salvesen.

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Appeal (no. 98 of 1924) from a decree of the High Court (June 18, 1923) reversing a decree of the second Subordinate Judge of Patna (May 26, 1920).

The appellant sued the respondents claiming khas possession of certain land, part of a village in Bihar, in respect of which there had been partition proceedings under the Estates Partition Act (Ben. V of 1897). The question in the appeal was whether the defendants had a right of occupancy, and whether the suit was barred by limitation.

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

The trial Judge made a decree in favour of the appellant. On appeal to the High Court (Ross and Jwala Prasad, J.J.) the suit was dismissed. The reasons of the learned Judges appear from the present judgment.

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Dunne, K. C., E. B. Raikes and *K. Ali Afzal*, for the appellant.

Dube, for the respondents.

The judgment of their Lordships was delivered by—

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Patna pronounced on the 18th June, 1923, which, reversing the decree of the Subordinate Judge made on 26th May, 1920, dismissed the plaintiff's suit.

The action is for the possession of some lands lying in a village, or, rather, in a conglomeration of villages and hamlets, called collectively mauza Katauna, situated in pargana Bihar, district Patna. In this district proprietary rights are often split up amongst numbers of owners and frequently run into very small fractions. The present case furnishes not only an illustration of the infinity of subdivision, but also of the inconvenience to revenue

officers in dealing with the shares. Until its partition in 1914, to which reference will be made particularly later on, mauza Katauna bore one tauzi number (10905) and paid to the Government a consolidated jama (revenue) of Rs. 1,542. The mauza was held by a number of proprietors (maliks) in specific but undivided shares. Apparently when the partition was started there were some fourteen sets of co-sharers. The plaintiff owned a little over 4 annas or one-fourth; whilst one Munshi Bakhori Lal, now deceased, the husband of the first defendant, held an anna and a fraction. Besides his proprietary or milkiat interest in the village, he owned a mukurrari, or permanent tenure, and some lands which were in his direct cultivation.

It should be observed here that besides Bakhori Lal, the other maliks also held possession, in proportion to their milkiat shares, the same class of lands which appear to have been called minhai khudkasht—minhai because the lands by private arrangement among the co-sharer proprietors had been exempted from payment of rent, and khudkasht because they were the owner's "private lands." The definition of the zamindar's "private lands" in section 120 of the Bengal Tenancy Act (VIII of 1885) will be referred to later.

It is to these lands held by Bakhori Lal that the present dispute relates.

Long before the Government resolved to institute a survey and have a record-of-rights prepared under Chapter X of the Bengal Tenancy Act, preliminary to a partition among the several maliks, Bakhori Lal had parted with almost the whole of his proprietary rights and interests in the village. The fractional share he retained was held ijmali with the purchasers.

To the sale-deeds their Lordships will refer later, as they throw considerable light on the question for determination in this appeal.

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This joint holding appears to have been maintined by the Batwara officer.

The survey settlement officer, on the conclusion of the record-of-rights, made an entry under section 103-B, as follows (omitting the boundaries of the plots) :—

SURVEY KHATIAN OF VILLAGE KATAUNA.

Village—Katauna No. 307.	Estate — Mohamoodpur Bhaidi, Mohanpur Bhaidi, Ugarsenpur Bhaidi, Rajpur Bhaidi, otherwise called Katauna.	Name of proprietor and number in proprietary Khewat —Babu Dhakesar Prasad Narain Singh alias B. Haribar Prasad Narain Singh and others, Khewat no. 3.
	Tauzi no.—10905.	Name of tenure-holder and number in tenure-holder's Khewat, if any—Samilat Bakhori Lal and others recorded in Khewat no. 14.
	Patti.—Katauna.	

Bakasht of Malik and others.	3598	Paddy 4 Kitas.	31	30	In possession of Bakhori Lal with field.			
	3625	Do.	16	26	In possession of Bakhori Lal.			

It will be noticed that in the above entry Bakhori Lal is described as tenure-holder and the lands are stated to be in his direct cultivation. There is no mention of any raiyati kasht. The two plots no. 3598 and no. 3625 appear to have been included by the survey officer in the plaintiff's property.

Broadly speaking, the Bengal Tenancy Act classifies agricultural lands under two heads: (1) Raiyati lands, in respect of which a raiyat acquires a right of occupancy which is explained in Chapter V; and (2) lands which are held by the malik or owner, in his own direct cultivation, and are called in the Act the "private lands" of the zamindar. In these lands the raiyat cannot acquire a right of occupancy.

The zamindar's " private lands " are dealt with in Chapter XI under the heading of " Non-accrual of occupancy rights, etc." Section 116 (as amended by the Bengal Act I of 1907) provides:—

" Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to,

[lands acquired under the Land Acquisition Act, 1894, for the Government or for any Local Authority or for a Railway Company, or lands belonging to the Government within a Cantonment, while such lands remained the property of the Government, or of any Local Authority or Railway Company, or to]

a proprietor's private lands known in Bengal as khamar, nij or nijjot [and in Bihar as zirát, nij, sir or khamat], where any such land is held under a lease for a term of years or under a lease from year to year."

Then dealing with the powers of a revenue officer appointed in any particular locality to make a survey of the proprietor's " private lands," it is provided by section 120:—

" (1) The revenue officer shall record as a proprietor's private land—

(*a*) land which is proved to have been cultivated as khamar [zirát, sir,] nij, nijjot [or kamat] by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(*b*) cultivated land which is recognised by village usage as proprietor's khamar [zirát, sir] nij, nijjot, [or kamat].

" (2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown."

It is evident from the present record that besides the words sir and zirait the term khudkasht is in common use in this part of Bihar as a synonym of sir. Khudkasht literally means " one's own cultivation."

It appears that a new designation has sprung up in Bihar. In the course of proceedings under the Partition Act (V of 1897) and in the record-of-rights survey the revenue officers found in the landlords' possession, and under their cultivation, lands in

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regard to which it was difficult to ascertain whether they were sir or zirait, or whether they were raiyati lands temporarily in the possession of the zamindar. These officers appear to have solved the difficulty by inventing a new designation for this kind of lands. They called it bakasht. The word bakasht literally means " in the cultivation of," and when the word malik is added to it, the difference between khudkasht and ba-kasht-i-malik becomes very slight.

The idea was apparently to leave it to the civil courts to find out on the evidence of the parties the origin and nature of the lands held by the zamindar as bakasht.

The question now presented for the determination of the Board relates to the interpretation to be attached to the entry in the record-of-rights. Shortly after the survey the partition proceedings in the present case followed. They were long drawn and complicated, and their Lordships are not surprised that the Batwara officer was bewildered. There were fourteen parties represented by nine pleaders and legal practitioners. The present defendant (Gulab Kuer) and the vendees of her husband claimed to have the sixty-seven bighas of bakasht lands in a single takhta.

On the 14th September, 1914, the Batwara officer made the following order, which their Lordships consider should be set out in full.

" *14-9-1914.* Read petition no. dated 12th September 1924, filed by Musammat Gulab Kuer, wife of Bakhori Lal. Also petition on behalf of parties I, III, V and XIII filed, petitions rejected.

" I have heard the parties at great length. The bakasht lands of about 67 bighas which has been entered in the record-of-rights as being in possession of the Ijmal Maliks (Bakhori Lal) has been assessed to rent under section 3, *xv*, of the Batwara Act (1). It is doubtful if section 77, Act V of 1897, will apply to the case of the bakasht lands of 67 bighas of Ijmal party as the explanation to section 77 seems to exclude all Khanear lands, etc., and to apply to raiyati lands only. These lands were original raiyati lands as was admitted by Bakhori Lal in his deposition in the civil court in case no. 54 of 1891 (Munsif of Bihar). These bakasht lands of 67 bighas and odd of party Ijmal were evidently in this original raiyati land. The roadcess

(1) Estates Partition Act V of 1897, Ben.

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return of 1894 supports this view. Section 22, Cl. 2, of the Bengal Tenancy Act will apply in this case; so far as I can make out these lands will retain this raiyati character subject to payment of rent assessed thereupon by me, in case these lands fall outside the takhta of ijmal. *The point is not free from doubt and the question can only be finally decided by the civil court.*"

Their Lordships desire to lay proper emphasis on this passage. The Batwara officer continues thus:

"I have followed the record-of-rights and applied the [batwara law (section 3, XV (6)]. Upon it I will give takhta to ijmal according to his share in Reg. D and Ijmal has been recorded as bakasht malik in 67 bighas 11 katthas 15 dhurs of khudkasht lands as shown in amin's report of khudkasht lands. Section 77, Act V of 1897, will not apply to this 67 bighas 11 katthas 15 dhurs of khud (?) land of Ijmal party. This is to be governed by section 22 of the Bengal Tenancy Act.

"I have heard all the objections urged before me.

"Plot nos. 7362-7362 (?) to go to Ijmal as they are in possession of Bakhori Lal."

Then followed a series of petitions and expostulations on the part of Gulab Kuer. She claimed that the lands of which a part had been allotted to the plaintiff were her husband's bakasht, lands of which he had been long in possession, and that the Batwara officer had no power to assess rent thereon.

Her contention went in appeal after successive stages to the Board of Revenue, and was dismissed by the revenue authorities in succession. Throughout the proceedings in the revenue courts she never appears to have taken her stand on the claim that those lands formed part of a raiyati kasht. In the result the takhta allotted to the plaintiff included some 47 bighas of the lands which were held by Bakhori Lal "in his own cultivation." The plaintiff thereupon attempted to take possession of the same; he was resisted, which led to criminal proceedings in the Magistrate's court. As the defendant was in possession of the lands in dispute, the plaintiff was referred to assert his right in the civil court. Accordingly, he brought this action on the 4th February, 1919, in the second court of the Subordinate Judge of Patna.

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The defendants in the action are Gulab Kuer, the widow of Bakhori Lal, his daughter, and the daughter's son, Gopalji, who is the reversioner to Bakhori's estate.

The defendant no. 1 alleged, in her written statement, that the lands in suit had always been held by her husband for many years past as a raiyati holding, and that the Batwara officer's award was illegal. With reference to the previous statements regarding the khudkasht or bakasht nature of the lands, she made this further allegation:—

"As during the survey the husband of this defendant no. 1 being very old could not personally look after the survey proceedings and moreover as he had also become the proprietor of a fractional share in mauza Katauna aforesaid, the survey authorities wrongly and in utter disregard of the legal aspect recorded the disputed land constituting his raiyati kasht as his bakasht land, although the said land had been his raiyati kasht for a long time."

The question for determination thus narrowed itself to two issues: first, whether the entry in the record-of-rights was correct; and, secondly, what was meant by bakasht lands.

In other words, were the bakasht lands, as the defendant contended, Bakhori Lal's raiyati kasht? The Subordinate Judge held that the defendant was bound by the entry in the record-of-rights, and that the lands were sir lands of Bakhori Lal, and that the allotment to plaintiff was valid. He also held that the receipts and luggit statements adduced by the defendant to establish her allegation that the lands were a raiyati kasht were not genuine. He considered them to be unworthy of credit, for reasons he stated in his judgment. He accordingly made a decree in favour of the plaintiff. The defendants appealed to the High Court of Patna. The learned Judges, differing from the first court, reversed its order and dismissed the plaintiff's suit.

Ross, J., was of opinion that section 22(2) of the Bengal Tenancy Act, as amended by Act I of 1907, applied to the case. He also relied on the receipt and luggits produced by the defendant, and came to the

conclusion that the lands held by the defendant's husband formed a raiyati kasht. Jwala Prasad J., in his judgment, dealt with the case from a different point of view. He proceeded on different premises, but came to the same conclusion—that the expression bakasht in this case denoted a raiyati kasht. The learned Judges accordingly dismissed the plaintiff's suit for the actual or khas possession of the lands allotted to him. Hence this appeal to His Majesty in Council.

Before dealing with the point at issue their Lordships desire to observe that section 22 (2) of the Bengal Tenancy Act, which has been held by the High Court to apply to the subject-matter of the suit, 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."

It can only apply on the assumption that an occupancy right existed in the lands, which right is transferred to a person jointly interested—in other words, that a raiyati kasht existed in fact. In the present case the raiyati right is in controversy, and consequently the section has no application until the claim is established.

With regard to the view expressed by Jwala Prasad, J., it is enough to observe that although the Batwara officer, following the survey officer, declared the lands held by Bakhori Lal to be kasht lands, and although the Batwara officer stated dubitante that Bakhori Lal at one time had stated he held a raiyati kasht, the entry, in fact, records the lands to be bakasht lands. So far as this declaration is concerned the entry made by the survey officer under section 103, B (3), is to assumed to be correct until the contrary is proved. The defendant Gulab Kuer has

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challenged its correctness. The question is, Has she established her allegation?

Bakhori Lal, as already stated, conveyed to a number of persons, by several deeds of sale, shares of his milkiat or proprietary interest which he possessed in the village. In the kabala executed by him to one Dundi Sahu, on 13th September, 1888, after reciting the share he was conveying, he states what he does not include under the sale in the following terms:

"With the exception of jagir lands, etc., etc., and lands excepted under the Muhammedan law and by the standing customs, as well as of the minhai khudkasht lands which have been partitioned among the 16 annas co-sharers in proportion to their shares."

In another document executed on 29th March, 1890, in favour of one Chintaman Singh, he excepts from the sale the khudkasht lands, known as minhai land, to the extent of the share allotted under private partition among the 16 annas co-sharers.

In another document of the same date executed in favour of Nilkanth Singh, the following passage is embodied:—

"Be it known that the said purchaser has willingly agreed to exclude in proportion to the share sold the khudkasht land called minhai land partitioned by the 16 annas co-sharers. To this the said purchaser or his heirs or representatives shall have no claim or contention."

The same exception is made in other conveyances.

It is to be observed here that a large area of khudkasht lands in this village have been partitioned among the co-sharers, which, as already stated, being exempted from payment of rent, are called minhai. There is absolutely nothing to show on the evidence to what other lands these clauses in the deeds of sale relate.

Their Lordships have no doubt that when Bakhori Lal excluded from his sale khudkasht lands, he was referring to lands which he had under his own cultivation, described in the record-of-rights and the batwara khatian as bakasht lands.

The term bakasht, invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht, which is admittedly the same as sir or zirait. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under his cultivation. In the present case, however, there is no evidence, and certainly nothing is brought to their Lordships' notice, to show to whom the alleged raiyati kasht belonged, or when it came into the possession of Bakhori Lal. The defendants' allegation accordingly is not established. Some stress is laid in the judgment appealed against on the fact that the Batwara officer assessed rent on the lands allotted to the plaintiff as indicating that he regarded it as a raiyati holding. Section 3 (xv) of Act V of 1897, to which reference is made, empowers the partitioning officer, for the purpose of equalising the allotment, to assess the rents on the lands allotted. Clause XV defines "assets" as follows:—

> "Assets, when used with reference to land, means:—
>
> (*a*) In the case of land held by cultivating raiyats, the rent payable by them.
>
> (*b*) In the case of land which is occupied by a proprietor, the rent which might reasonably be expected to be payable by cultivating raiyats if the land were occupied by them.

This has, in their Lordships' opinion, nothing to do with the fixing or assessment of rent when a raiyati kasht falls within the allotment of a proprietor. That question appears to be dealt with by other sections.

With regard to the objection put forward by counsel for the respondents, that the plaintiff's suit is barred under Article 14, Schedule 1, of the Limitation Act, their Lordships desire to observe that this suit is not brought for the purpose of setting aside any order of the revenue court; it is simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff.

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On the whole, their Lordships are of opinion that this appeal should be allowed, the decree of the High Court should be reversed, and that of the Subordinate Judge restored with costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *W. W. Box and Co.*

Solicitors for respondents: *Ranken Ford and Chester.*

APPELLATE CIVIL.

Before Dawson Miller, C. J , and Foster, J.

ACHUTANAND JHA

v.

SURJANARAIN JHA.*

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April, 29, 30; May, 11.

Hindu Law—family property, sale of—consideration, portion of, not justified by legal necessity—sale, whether should be set aside—son's pious obligation to pay father's time-barred debt.

A sale of joint Hindu family property to a bona fide purchaser should not be set aside merely because the consideration paid is somewhat greater than the actual requirements of the joint family.

Lal Bahadur Lal v. *Kamleshar Nath*(1), *Felaram Roy* v. *Bagalanand Banerjee*(2), *Chattar* v. *Chote*(3), *L. A. Niqlakanta Sarma* v. *Ganesha Iyer*(4) and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan*(5), followed.

*Second Appeals nos. 1056 of 1923 and 41 of 1924, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 30th June, 1923, modifying a decision of Babu Parmeshwari Dayal, Munsif of Darbhanga, dated the 14th June, 1923.

(1) (1926) I. L. R. 48 All. 183, F. B.
(2) (1909-10) 14 Cal. W. N. 895.
(3) (1917) 40 Ind. Cas. 269.
(4) (1925) 91 Ind. Cas. 310
(5) (1922-23) 27 Cal. W. N. 365; (1922) A. I. R. (P. C.) 307.

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Deputy Commissioner of Kheri v. *Khanjan Singh*(1) and *Sanmukh Pande* v. *Jagarnath Pande*(2) distinguished.

The pious obligation of a Hindu son to pay his father's debts, does not extend to the payment of his father's time-barred debts.

Appeal no. 1056 of 1925, by the plaintiffs. Appeal no. 41 of 1924 by defendant no. 5.

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

Murori Prasad and *R. K Jha*, for the appellants in no. 1056 of 1925 and for the respondents in no. 41 of 1924.

S. K. Mitter, for the respondents in no. 1056 of 1923 and for the appellants in no. 41 of 1924.

Cur. adv. vult.

May, 11.

DAWSON MILLER, C.J.—These two appeals numbered 1056 of 1923 and 41 of 1924 are brought from a decision of the District Judge of Darbhanga modifying the decree of the Munsif.

The appellants in appeal no. 1056, who are the plaintiffs in the suit, are the younger son and the widow of Deokishun Jha who died in 1913 leaving, in addition to the plaintiffs, an elder son, Subhanand Jha (son of a deceased wife) who became the karta of the family on Deokishun's death

By a kabala dated the 17th March, 1917 (Exhibit E), Subhanand Jha, during the minority of his half-brother, sold to the defendants first party a portion of the family property consisting of between 6 and 7 bighas of kasht and brahmottar land in mauza Ranti for a sum of Rs. 750. By a second kabala dated the 20th May, 1918 (Exhibit I), he sold two other plots of land and a dwelling-house to the defendant second party for a sum of Rs. 128.

In 1922 the male plaintiff, who by that time had attained majority, together with his mother instituted

(1) (1907) I. L. R. 29 All. 331; L. R. 34 I. A. 72.
(2) (1924) I. L. R. 46 All. 581.

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the present suit against the respective purchasers and Subhanand Jha, their vendor, claiming to recover a two-thirds share in the property sold on the ground that the plaintiffs had separated from the elder brother after the death of Deokishun and before the sales took place, and that they were entitled to a third share each in the property which the elder brother had no power to sell beyond the extent of his own share. The plaint also alleged that the sale-deeds were not genuine or for consideration, and that they were executed by Subhanand Jha without any legal necessity and that the plaintiffs were not benefited by the transaction They claimed a declaration that the sale-deeds were illegal and inoperative as against the plaintiffs and asked for recovery of their two-thirds share with mesne profits.

It will be seen from what I have stated that the claim was based upon the allegation that at the date of the transfers the family property had already been partitioned, the mother and each of the sons being separately entitled to a third share in the whole. The question of legal necessity was therefore only material in case there had been no separation, but such a case was not specifically pleaded. Nevertheless issues were framed before the hearing dealing with this point. The fourth and fifth issues were as follows :—

"4. Are the kabalas sought to be impugned genuine and for consideration and for the benefit of the plaintiffs?

5. Were the kabalas in question for legal necessities and are they binding upon the plaintiffs?"

Considerable evidence was adduced at the trial upon these issues and the question of legal necessity was discussed in great detail in the judgments of both the Munsif, who originally tried the case and the District Judge before whom it went on appeal.

On the 20th February, 1922, after the evidence was closed, the plaintiffs filed a petition before the Munsif praying that they might be allowed to amend their plaint upon payment of the necessary additional

court-fee by adding to the relief claimed therein the following prayer :—

" That if in the opinion of the Court the separation as alleged by the plaintiffs be not proved then a decree for recovery of possession of the entire property with mesne profits covered by the kabalas dated 27th March, 1917, and 20th May, 1918, may be passed in favour of your petitioners or jointly in favour of your petitioners and defendant no. 6 (Subhanand Jha)."

The learned Munsif rejected the application on the ground that it was unfair to ask the defendants to meet a different case at that stage. Had the question of legal necessity not been raised in the plaint and had no issue been framed on the point I consider that the learned Munsif's decision would have been unassailable and that it would have been improper to allow the amendment at that stage, as it would involve the taking of evidence on a question of fact not raised in the pleadings or the issues. But having regard to the course which the case took it cannot be said that the defendants would be in any way prejudiced by allowing the amendment asked for. The question of legal necessity was one of the issues for trial and both parties had every opportunity to produce evidence and did produce evidence on the point; and as the materials were before the court to enable it to decide the point and both courts in fact decided it, I consider that in the particular circumstances of the case, and in the interests of justice the court should have allowed the amendment under Order VI of rule 17, of the Code of Civil Procedure, for the purpose of determining the real questions in issue between the parties. We accordingly ruled that the plaint should be treated as amended in the manner prayed as above set out.

The trial court found that there had been no separation and that the plaintiffs and the defendant no. 6, Subhanand Jha, were joint in estate. This finding was, in the absence of any amendment of the plaint, sufficient to dispose of the suit, but the learned Munsif, after stating that this decision might not find favour with a higher tribunal, proceeded to determine issues 4 and 5. He found that the sales were

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genuine and for legal necessity and binding on the plaintiffs and dismissed the suit.

From this decision the plaintiffs appealed to the District Judge. The learned District Judge found that there had been no separation in the family of the plaintiffs and the defendant no 6 and that the property in suit was joint family property. With regard to the kabala of 1917 he found that out of the consideration of Rs. 750 a sum of Rs. 550 was required for family necessity but that no legal necessity had been proved in respect to the balance of Rs. 200. He considered that this was only a small portion of the consideration and held that the kabala should not be set aside, but directed that the plaintiffs should recover from the transferees the defendants first party the male plaintiff's half share of this amount, viz., Rs. 100.

With regard to the second kabala the sale was made to the defendant second party in order to raise money to pay off a sum of Rs. 128 due under a mortgage dated the 1st March 1904 executed by Deokishun Jha, the father of the first plaintiff and the defendant no. 6 whereby certain family property had been mortgaged. The personal debt incurred by Deokishun Jha under the mortgage of 1904 was time-barred in 1918 when the kabala was executed, and, therefore, it could not be justified on the ground of the antecedent debt of the father. The property which was the subject of the mortgage had also passed out of the possession of the family, as it formed part of the property sold to the first party defendants under the kabala of 1917. The District Judge accordingly found that there was no necessity to pay the debt and the family property could not validly be sold for that purpose. In the result the appeal was allowed in part and the decree of the trial court was varied by awarding the plaintiffs the sum of Rs. 100 in respect of the first sale and by declaring that the second sale was not binding on the plaintiffs and had no effect in so far as

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the half share of the male plaintiff was concerned. The learned District Judge, although he does not in terms say so, in fact dealt with the suit as if the plaint had been amended.

From this decision the plaintiffs have preferred a second appeal, 1056 of 1923, to this Court and contend that as the lower appellate court has found that legal necessity was not established in respect of the whole of the consideration for the first kabala he should not have set aside the sale upon payment by the plaintiffs of the amount found justified by legal necessity, viz., Rs. 550.

The defendants first party, the purchasers under the first kabala, have also entered a cross-objection and contend that on the pleadings the question of legal necessity did not arise, the plaint not having been amended, and that the lower appellate court was wrong in awarding the plaintiffs the sum of Rs. 100.

The defendant second party, the purchaser under the second kabala, has also preferred a second appeal numbered 41 of 1924 to this Court. He contends (*1*) that the lower appellate court was not justified, in the absence of any amendment of the plaint, in considering the question of legal necessity and allowing the plaintiffs' claim on the ground of the absence of legal necessity, (*2*) that the defendant no. 6 as karta of the family was under a pious obligation to discharge his father's debt under the mortgage of 1904 even though the personal debt was time-barred and (*3*) that the mortgage debt still subsisted after the transfer of the mortgaged property under the first kabala and the liability of the joint family to discharge the debt remained with them.

As to the plaintiffs' contention in appeal no. 1056 of 1923 certain authorities have been relied on to support the argument that where a portion of the consideration for a sale of family property is not justified by legal necessity the sale should be set aside on payment to the transferee of that part of the consideration which is so justified. No doubt this rule has been

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followed where a substantial portion of the consideration is not proved to have been necessary for the needs of the family. In *Deputy Commissioner of Kheri* v. *Khanjan Singh*(1), their Lordships of the Judicial Committee set aside a sale where out of a total consideration of Rs. 19,998 necessity was found to have existed for Rs. 7,080 only. In *Sanmukh Pande* v. *Jagarnath Pande*(2), Rs. 200 out of Rs. 1,000 was found not to have been supported by legal necessity or antecedent debts. The learned Judges of the Allahabad High Court (Sulaiman and Mukherji, J.J.), in setting aside the sale in that case said, "It is impossible to lay down any hard and fast rule which could apply equally to every case; for every transaction has to be considered on its own merits and the court has to come to a finding on the merits of every case." Other cases were cited where in similar circumstances the sale was set aside, but in all of them the portion of the consideration not justified by family necessity or antecedent debt was substantial. The rule, however, is not of universal application and in cases where the part of the consideration not justified on the grounds of legal necessity is small the courts have frequently refused to set aside the sale; and where it is insignificant the courts have even gone the length of upholding the sale without ordering the defendant to restore to the plaintiff that part of the consideration not proved to have been justified by necessity. One of the latest cases on the subject is the Full Bench decision of the Allahabad High Court in *Lal Bahadur Lal* v. *Kamleshar Nath*(3), where the authorities are reviewed and where the court refused to set aside the sale, or even to order a refund, where the sum of Rs. 259 out of a consideration of Rs. 5,995 was found to be unsupported by legal necessity. Other cases where the court exercised its discretion in favour of the purchaser are *Felaram Roy* v. *Bagalanand Banerjee*(4), *Chattar* v. *Chote*(5), *L. A. Niglakanta*

(1) (1907) I. L. R. 29 All. 331. L. R. 34 I. A. 72.
(2) (1924) I. L. R. 46 All. 531. (3) (1926) I. L. R. 48 All. 183, F. B.
(4) (1909-10) 14 Cal. W. N. 895. (5) (1917) 40 Ind. Cas. 269.

Sarma v. *Ganesha Iyer*(1), and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan*(2). In the last case cited their Lordships of the Judicial Committee held that where Rs. 711 out of a consideration of Rs. 5,300 was not proved to have been justified by legal necessity the sale was not invalid. It seems obvious that where it is necessary to sell property in order to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements, and unless it appears that the transaction itself was an improper one or that some more advantageous arrangement could have been made, which is not the case here, I consider that the courts should be slow to set aside a sale to a bona fide purchaser merely because the consideration paid is somewhat greater than the actual requirements of the joint family. Moreover in the present case the transfer has remained unchallenged for a period approaching five years and on a consideration of all the circumstances I am not prepared to hold that the District Judge acted illegally, or exercised a wrong discretion, in allowing the sale to stand on condition that the purchasers pay to the plaintiffs the sum of Rs. 100. Appeal no. 1056 of 1923 is accordingly dismissed with costs. The cross-objection of the defendants first party in this appeal is also dismissed with costs, as we consider that the plaint should be amended as prayed.

With regard to appeal no. 41 of 1924 in which the defendant second party, the purchaser under the second kabala, is appellant, his first point fails as we have allowed the amendment. His second point is based upon the contention that the pious obligation of a son to pay his father's debts extends even to a time-barred debt. Whatever may be the duty or the powers of a Hindu widow succeeding to her husband's estate with regard to the payment of her husband's debts, when barred by limitation, the pious obligation of the son

(1) (1925) 91 Ind. Cas. 310.
(2) (1922-23) 27 Cal. W. N. 365; (1922) A. I. R. (P. C.) 307.

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does not extend to the payment of his father's time-barred debts. If the debt could not have been enforced against the father, were he alive, the son is not bound. This, however, does not conclude the case for it appears that the kabala of 1918 was executed in order to pay off the sum due under a previous mortgage (Exhibit C) executed by Deokishun Jha, father of Subhanand and the male plaintiff, in 1904, and it is conceded that the mortgage Exhibit C created a valid charge upon the family property. The learned District Judge held that, as the property charged by Exhibit C had already been transferred to the first party defendants under the previous kabala of 1917, the liability to discharge the mortgage no longer rested with the plaintiffs' family. If this property had been sold subject to the encumbrance the learned Judge's decision might be justified on the ground that the liability to discharge the encumbrance had passed away from the family. But under the terms of the kabala of 1917 (Exhibit E) it appears that the lands comprised in that sale were sold free of all encumbrances, the vendor undertaking to discharge any encumbrance still subsisting and to indemnify the purchasers from any loss they might suffer by reason of the existence of such encumbrance. This was not creating a new liability but retaining a liability already created and binding on the family in respect to the vended property. I must hold therefore that the transaction of 1918 (Exhibit I) was binding upon the plaintiffs and cannot be set aside. Appeal no. 41 of 1924 is accordingly allowed. The judgment and decree of the District Judge are set aside and the decree of the Munsif is restored in so far as it dismissed that part of the claim which relates to the kabala of the 20th May 1918. The plaintiffs will pay the defendant second party his costs incurred in this appeal and in both the lower courts.

FOSTER, J.— I agree.

Appeal no. 1056 *of* 1923 *dismissed.*

Appeal no. 41 *of* 1924 *decreed.*

APPELLATE CIVIL.

Before Das and Adami J.J.

BADRI NARAYAN

v.

EAST INDIAN RAILWAY COMPANY.*

1926.

May, 14.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 20, *scope of —some only of joint claimants impleaded as respondents—appeal incompetent—rule inapplicable.*

There is no power in the court under Order XLI, rule 20, Civil Procedure Code, 1908, to revive an appeal or to give power to an appellant to present an appeal when there is none at all in the file of the court.

Giris Chandra Lahiri v. *Sashi Shekhareswar Roy*(1), *Padarath Mahto* v. *Hitan*(2), distinguished.

Manindra Chandra Nandi v. *Bhagabati Devi Chowdhurani*(3), referred to.

A joint decree was passed in favour of seven plaintiffs and the defendants preferred an appeal to the District Judge but impleaded some only of the plaintiffs as respondents. At the hearing of the appeal it was objected on behalf of the respondents that the appeal was incompetent; but the District Judge, acting under the provision of Order XLI, rule 20, Code of Civil Procedure, added the omitted respondents as parties-respondents to the appeal and dealt with the appeal.

Held, that the order of the District Judge was without jurisdiction inasmuch as the appeal being against some only of the joint claimants, it was incompetent, and the effect of the order was to give power to the appellants to present the appeal although it was time-barred at the time when the particular order was passed.

Held, further, that Order XLI, rule 20, applies only when there is an appeal pending in the court on which a decision may be given by the court.

* Appeal from Appellate Decree nos. 393, 410, 411, 412, 413 of 1924, from a decision of Rai Bahadur Jyotirmay Chatterji, District Judge of Shahabad, dated the 18th December, 1923, reversing a decision of Babu Phanindra Lal Sen, Subordinate Judge of Arrah, dated 24th July, 1922.

(1) (1906) I. L. R. 33 Cal. 329. (2) (1924) 5 Pat. L. T. 509.
(3) (1925-26) 30 Cal. W. N. 45.

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Appeal by the plaintiffs.

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

S. N. Bose, for the appellants.

N. C. Sinha, *N. C. Ghosh* and *B. B. Ghosh*, for the respondents.

DAS, J.—These appeals are directed against the decision of the learned District Judge of Shahabad dated the 18th December, 1923, by which he allowed the appeals of the East Indian Railway Company, as against the plaintiffs. It is not necessary for me to deal with the facts of the case, for in my view the appeals to the court of the learned District Judge were incompetent and he should have dismissed those appeals on that ground.

The suits were filed by seven individuals—Badri Narayan, Behari Lal, Srinath, Harinath, Kashi Nath, Kanhyajee and Gopaljee, the last four of these persons being minors. The court of first instance decreed the claim of the plaintiffs on the 24th July, 1922. Appeals were presented to the court of the learned District Judge of Shahabad on the 15th September, 1922. The appeals came on for hearing sometime in September 1923. It was then discovered that the railway company, had appealed only as against Badri Narayan, Behari Lal and Srinath. It is quite true that Harinath and Kashi Nath were brought on the record as respondents, but although they were minors that fact was not stated in the memoranda of appeals at all and Kanhyajee and Gopaljee were altogether omitted from the memoranda of appeals. The result was that the appeals were only against Badri Narayan, Behari Lal and Srinath. I may mention that the decree obtained by the seven plaintiffs was a joint decree and under that decree it was competent for any of these plaintiffs to execute the decree for the full amount.

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When the appeals were called on for hearing it was objected on the part of the respondents that the appeals were incompetent. Obviously they were incompetent, because the claim being a joint claim all the joint claimants had to be brought on the record as respondents. Time was taken by the railway company to deal with the point and on the 28th September, 1923, an application was put in asking in substance for leave to bring the omitted respondents on the record under the provisions of Order XLI, rule 20, of the Code. There was also a prayer to the effect that time may be extended under the provisions of section 5 of the Limitation Act.

The learned Judge dealt with the whole matter and he thought that he had complete jurisdiction to deal with it under Order XLI, rule 20, of the Code. Acting under that particular rule he added the omitted respondents as parties-respondents to the appeals and dealt with the appeals. He allowed them and dismissed the plaintiffs suits. The plaintiffs have appealed to this Court.

Order XLI, rule 20, runs as follows:—

"Where it appears to the court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent."

To my mind it is perfectly clear that Order XLI, rule 20, will only apply where there is an appeal pending in the court on which a decision may be given by the court. It seems to me that there is no power in a court under Order XLI, rule 20, to revive a dead appeal or to give power to an appellant to present an appeal where there is none at all in the file of the court. Now, in this case the appeals which were presented on the 14th September, 1922, were incompetent. They were filed as against three of the joint claimants who had obtained decrees as against the appellants. The appeals could not proceed in the absence of those who were not made parties to the

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appeals. By the course which the learned District Judge adopted he in effect gave power to the appellants to present the appeals, although there was no right in the appellants to present them at the time when this particular order which is the subject-matter of the contention before us was passed by the learned District Judge. The learned District Judge has referred to a case in *Giris Chandra Lahiri* v *Sashi Shekhareswar Roy*(1), but in truth that case has nothing whatever to do with this question. In that case there was a perfectly good appeal pending in the High Court, but the appellant had not brought on the record one of the persons who was a party to the suit in the court below. The appeal was a good appeal and the court could adjudicate on the rights of the parties in that appeal and the High Court took the view that in order to do complete justice between the parties it was necessary to have before it those persons who were defendants in the suit but who had not been made respondents in the appeal. To the same effect is the decision of this court in *Padarath Mahto* v. *Hitan*(2). But this is an entirely different case. As was pointed out by the Calcutta High Court in *Manindra Chandra Nandi* v. *Bhagabati Debi Chaudhurani*(3) " it, " that is to say, Order XLI, rule 20, " is not intended to override the provisions of Order XXII of the Civil Procedure Code. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated." The right of those respondents who were not made parties to the appeals is a valuable right, because they were not made parties to the appeals and the appeals as against them would be barred by limitation at the date when they were added. In my opinion the learned District Judge was wholly wrong in having recourse to Order XLI, rule 20, of the Code.

It was then contended that the learned District Judge in substance condoned the delay and gave leave

(1) (1906) I. L. R. 33 Cal. 329. (2) (1924) 5 Pat. L. T. 509.
(3) (1925-26) 30 Cal. W. N. 45.

under section 5 of the Limitation Act. But the learned District Judge has not dealt with the matter on that footing. As it appears the railway company was much to blame in the matter. We are informed that the judgment of the court of first instance had to go from office to office until it was finally decided that an appeal should be presented to the court of the District Judge of Arrah. Under these circumstances there was very little time available to the pleader to prepare the grounds of appeal. In my opinion no ground has been shown for extension of time under section 5 of the Limitation Act.

I would accordingly allow these appeals, set aside the judgment and the decree passed by the court below and restore the judgment and the decree passed by the court of first instance. The appellants are entitled to their costs throughout.

ADAMI, J.—I agree.

Appeals allowed.

LETTERS PATENT.

Before Dawson Miller, C. J., and Foster, J.

KUMAR RAMESHWAR NARAIN SINGH

v.

MAHABIR PRASAD.*

1926.

May, 27.

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *section* 231—*Rent decree—execution sale—suit to avoid sale on the ground of fraud—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Articles* 12 *and* 95.

Under section 231 of the Chota Nagpur Tenancy Act, 1908, " all suits.....instituted.....under this Act for which no period of limitation..... .....is provided elsewhere in this Act shall be commenced.... .. ..within one year from the date of the occurring of the cause of action ".

*Letters Patent Appeal no. 69 of 1925, from a decision of Kulwant Sahay, J., dated the 29th April, 1925, affirming a decision of Rai Bahadur Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 12th April, 1922, reversing a decision of Maulavi Shaikh Ali Karim, Munsif of Hazaribagh, dated the 31st January, 1921.

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Held, that a suit for declaration that a sale held in execution of a rent decree has been fraudulently confirmed, and for recovery of possession, is not a suit governed by the Chota Nagpur Tenancy Act, and, therefore, that section 231 does not apply to it.

Held, further that such a suit is governed by Article 95 of the Limitation Act, 1908, which provides a period of three years for a suit " to set aside a decree obtained by fraud or other relief on the ground of fraud," and not by Article 12 which provides a period of one year for a suit to set aside, inter alia, " a sale in execution of a decree of a civil court or a sale in pursuance of a decree or order of a Collector or other revenue officer ".

Appeal by the defendant.

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

B. C. De, for the appellant.

S. N. Roy and *S. Sahai*, for the respondents.

DAWSON MILLER, C. J.—In this case the plaintiffs were the kashtkars of a holding in mauza Manjura consisting of 8.43 acres. They were in default in the payment of their rent, a rent suit was brought against them and a decree was passed in favour of the present defendant. The decretal amount was in round figures Rs. 52. Before the sale, which took place under the provisions of the Chota Nagpur Tenancy Act, the plaintiffs appear to have paid into court, at different times, certain sums on account of the decretal amount, and at the date of the sale of the property in execution of the decree, which was on the 3rd December, 1917, there was still a balance of Rs. 11-5-0 due. On the 29th December, 1917, that is within a month of the date of the sale, the plaintiffs sent this sum to the defendant's mukhtar as payment of the balance due under the decree. Under the provisions of section 212 of the Chota Nagpur Tenancy Act the judgment-debtor in such cases, or any one who claims under a title acquired before the sale, may, within a period of 30 days from the date of the sale, apply to have it set aside on depositing in court 5 per cent. of the purchase

price together with the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may from the date of the proclamation have been received by the decree-holder. The plaintiffs did not comply strictly with the provisions of that section because they did not deposit the money in court. They did however pay the money to the decree-holder who was himself the purchaser of the property at the auction sale. Therefore the defendant was the only person interested in the sale apart from the plaintiffs themselves at that time. The plaintiffs in such circumstances might reasonably expect that they would get back their property, for they had paid the small balance that was due within a month of the date of the sale. So far however from getting their property back the defendant, who was their landlord and decree-holder in the rent suit, actually applied for confirmation of the sale and the sale was accordingly confirmed. Whether the defendant remained in possession of the holding, or for how long, if at all, he remained in possession, is not very clear from the facts disclosed in the case; but we are told that the landlord has since that date, and sometime apparently before the suit was brought, settled the land with other tenants, but whether those other tenants have actually got possession, or whether the plaintiffs are still in possession, again we do not know. The plaintiffs prayed in the present suit that it may be held that the defendant got the sale fraudulently confirmed and that the order confirming the sale should be set aside, and they further asked that if in the opinion of the court the plaintiffs are considered out of the possession of the disputed land, then khas possession may be awarded to them.

Two points arose for consideration in the trial court, first, whether the circumstances which I have detailed amounted to a fraud on the part of the landlord against his tenants and, if so, whether the sale should be set aside, that is to say whether the title to

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the land should be restored to the plaintiffs, and, secondly, whether even if the plaintiffs were in law or equity entitled to get back possession of the land, they were not barred by limitation having brought their action more than one year after the date of the sale.

The learned Munsif before whom the case came for trial arrived at the conclusion that there was undoubtedly fraud on the part of the defendant and he considered that the defendant was wrong and fraudulent in getting the sale confirmed in spite of the fact that full payment of the sums due to him had been made within one month of the sale. He considered, however, that the suit was barred by limitation although he does not specify under which article of the Limitation Act, or whether under any provision of the Chota Nagpur Tenancy Act the suit was barred.

The matter went on appeal to the Subordinate Judge, the plaintiffs contending in that appeal that the suit was not barred by limitation. The finding of fact that the defendant had got the sale fraudulently confirmed was not disputed, that finding being apparently accepted by the defendant on appeal. In the result the learned Subordinate Judge came to the conclusion that neither section 231 of the Chota Nagpur Tenancy Act nor Article 12 of the Limitation Act applied to the case but that Article 95 of the Limitation Act was the Article applicable. That Article provides for a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, the period of limitation being three years from the date when the fraud becomes known to the party wronged.

From that decision there was a second appeal to this court which came for hearing before Kulwant Sahay, J. He agreed with the finding of the lower appellate court that the case was governed by Article 95 of the Indian Limitation Act and not by Article 12 or by section 231 of the Chota Nagpur Tenancy Act. A further point was urged before him, namely, that under the Chota Nagpur Tenancy Act no provision is

actually made for having a sale confirmed and therefore the sale was complete on the 3rd December and required no confirmation, and that any fraud which may have been perpetrated by the defendant was not a fraud bringing about the sale and that the sale as such was free from fraud, the fraud alleged having occurred subsequently. This point, if it could be established, and if the defendant could satisfy the court that the fraud perpetrated by him was something altogether apart from the sale, was a point which he could have taken in first appeal when the plaintiffs appealed from the decision of the Munsif on the ground of limitation, for it is obvious that although he might not have been able to support the Munsif's decision on the ground of limitation, still he could have supported it upon this ground of fraud by urging before the Subordinate Judge that, although the Munsif may have been wrong in the view he took, still his decision was right because there was in fact no fraud connected with the sale. The point, however, was not taken and it appears quite clearly from the decision of the Subordinate Judge that the findings of fact in the court below were not challenged by the defendant, and the only question debated in the appeal was whether the suit as held by the trial court was barred by limitation. Mr. Justice Kulwant Sahay accordingly refused to entertain the point in second appeal and, in my opinion, he was perfectly justified in doing so. The point is not one entirely in bar of the suit. It is undoubtedly a point of law but it is a point that depends to some extent upon questions of fact and it is certainly a point which was open to the defendant in the first appellate court. If he did not choose to raise such a point when he might have, I do not think it can be said that he is of right entitled to raise such a point in second appeal. Moreover, looked at from an equitable point of view it seems to me quite clear in this case that the defendant having accepted the balance of the decretal amount due to him impliedly undertook to retransfer the

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property to the plaintiffs, or at all events not to go on with the sale and have it confirmed as in fact he did. That he practised a fraud I do not think can be disputed, and therefore I am certainly not prepared to interfere with the decision come by the learned Judge of this court.

DAWSON MILLER, C.J.

With regard to the second point here again I think that the decision of Kulwant Sahay, J., should be affirmed. Section 231 of the Chota Nagpur Tenancy Act places a limitation period of one year upon all suits and applications instituted or made under this Act for which no period of limitation is provided elsewhere in the Act. It is, to my mind, quite clear that a suit of the present nature is not a suit under the Chota Nagpur Tenancy Act. The right to sue for the possession of land and the right to ask for a declaration that a sale has been fraudulently confirmed are not rights arising under the Chota Nagpur Tenancy Act. It is true that the Act in some cases takes away the right to sue for setting aside a sale but it nowhere grants that right although to some extent it limits it. Then with regard to the Limitation Act, Article 12 under which one year's limitation is prescribed is with regard to cases of a sale in execution of a decree of the Civil Court, and if the matter stood there, there is no doubt that it might apply to the present case; but Article 95 seems to be a more specific article in so far as sales are concerned. That article applies to suits to set aside a decree obtained by fraud or for other relief on the ground of fraud. If the sale therefore which it is sought to have set aside is obtained on the ground of fraud then I think that the more specific Article 95 ought to be applied and that the more general article must be governed by that which is more specific. It is upon this ground that Kulwant Sahay, J., dismissed that part of the appeal and, in my opinion, he was quite right.

This appeal will be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Foster, J.

BODHA GANDERI

v.

ASHLOKE SINGH.*

1926.

May, 28.

Possession—person in possession, without title dispossessed by trespasser—right to regain possession—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 3—*Immoveable property, whether includes mango tree.*

Where a person who has been in possession of property for several years without title is dispossessed by another, who also has no title, the former is entitled to be restored to possession.

Query.—Whether a mango tree is immoveable property within the meaning of the Transfer of Property Act, 1882, under section 3 of which, " Immoveable property does not include standing timber, growing crops or grass ".

Appeal by the plaintiff.

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

P. Dayal and *R. Lal*, for the appellant.

L. N. Sinha, for the respondents.

DAWSON MILLER, C. J.—The plaintiff in this case sued for recovery of possession of a mango tree standing on what has been referred to as plot no. 246 in mauza Biswambharpur of which the defendants are the tenants. It appears that in the year 1911 the landlords of the village made a gift of this tree to the plaintiff apparently in consideration of his past services. The gift was evidenced by a writen document but it was not registered as required by law assuming that the interest transferred was immoveable property. Accordingly the document

*Letters Patent Appeal no. 79 of 1925, from a decision of Ross, J., dated the 8th July, 1925, setting aside a decision of B. P. L. Sen, Subordinate Judge, 2nd Court, Arrah, dated the 2nd August, 1922, reversing a decision of M. Aziz Ahmad, Munsif, 3rd Court, Arrah, dated the 5th December, 1921.

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could not be, and in fact was not, put in evidence on behalf of the plaintiff in proof of his title. He proved, however, that since the year 1911 up to the year 1919 when he was dispossessed by the defendants he had been in undisputed possession of this mango tree without any opposition on behalf of the maliks and enjoying the fruits thereof. In the year 1911 there had been some dispute between the defendants and the maliks as to the right to possess the plot of land no. 246 on which the mango tree stood. The defendants' holding was adjacent to that plot. In the result a compromise was arrived at between them whereby of the five mango trees standing on the plot the defendants were allowed to have the use of the three easternmost whereas the other two were retained by the maliks whose case was that this particular plot was their bagh. At the same time on payment of nazarana the land in plot 246 was settled with the defendants the tenants of the neighbouring holding. It is quite clear, however, that that settlement expressly excluded the two western mango trees from the possession of the defendants. Shortly afterwards the landlords made a gift of one of these two mango trees to the plaintiff and as I have said he has remained in possession ever since except for some dispute which arose between him and the defendants in, I think, the year 1912 when some criminal proceedings were instituted by the defendants but were withdrawn upon the understanding that the defendants would not endeavour to take the fruits of that tree until they had proved their title in a civil court.

I have referred to these facts which have been found by the learned Subordinate Judge on appeal because it is necessary to see at the outset exactly what the title claimed by the plaintiff and the defendants respectively in the property is. It is clear from what I have stated that if the interest which the plaintiff took was an interest in immoveabel property and if the mango tree is to be regarded as immoveable property then the gift to him in 1911 which was not

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registered was not a valid gift and he cannot prove his title by production of that document. It is equally clear from the facts found by the learned Subordinate Judge to which I have just referred that the defendants themselves also had no title to this mango tree. Their main defence was that it was true two trees had been left in possession of the landlords at the time of the dispute in 1911 and that one of them had been given to the plaintiff but that both these trees had subsequently been cut down, one by the landlords themselves and the other by the plaintiff. This case, however, was not substantiated and the evidence called to support it was disbelieved by the learned Subordinate Judge. The Subordinate Judge in the result found that the gift being a gift of moveable and not immoveable property did not require a registered document and he gave a decree in favour of the plaintiff.

On appeal to this Court by the defendants the main point which seems to have been argued before the learned Judge, Ross, J., was that mango trees are not timber within the meaning of the definition clause in the Transfer of Property Act. By that Act, section 3, immoveable property does not include standing timber, growing crops or grass. Ross, J., in a considered and very careful judgment dealt with the authorities on the subject both in this country and in England and arrived at the conclusion that in the particular circumstances of this case and having regard to the fact that this tree was not intended to be used as timber but was intended and was in fact used by the plaintiff for the purpose of enjoying the fruits from it, it must be regarded as immoveable property and not moveable. Although the subject is one about which there has been considerable difference of opinion in this country and although the decisions upon it are somewhat conflicting I am not prepared to differ from the decision arrived at by Ross, J. But the matter does not end there for this is a case in which the plaintiff being in lawful possession and having

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been in lawful possession for eight years was suddenly dispossessed by the defendants. If the defendants could make out that they had a title to the tree in question then I think undoubtedly the plaintiff would not be able to recover but as the defendants have no title whatsoever to the tree as appears from the facts found by the lower appellate court then the situation is this :—as between two persons who are unable to make out a valid title one is in possession and has been in possession for several years. He is suddenly dispossessed by another who has no better title than the person whom he dispossesses, in fact he has no title at all. In these circumstances it seems to me that the plaintiff is entitled to be restored to possession of this tree. The defendants had no right whatever to dispossess him and, if they do, whatever may be his title he clearly can seek the aid of the court to be put back in such possession as he had before being dispossessed by those who had no title. The judgment of Ross, J., will be set aside and the plaintiff will be given a decree declaring that he is entitled to recover possession from the defendants. The plaintiff is entitled to his costs here and before Ross, J.

FOSTER, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Ross and Macpherson, JJ.

1926.

May, 28, 31.

RAJ GOPAL ACHARJYA

v.

UPENDRA ACHARJYA GOSWAMI.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act of* 1908), *section* 258—*Minor, ex parte decree against—suit for*

*Appeal from Appellate Decree no. 1117 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 11th of August, 1923, confirming a decision of Babu Sachindra Nath Ganguli, Munsif of Raghunathpur, dated the 30th of April, 1923.

declaration that decree is inoperative whether maintainable—gross negligence, finding as to, whether amount to finding of fraud.

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Where an ex parte rent decree has been obtained against a minor properly represented by his guardian, a suit by the minor for a declaration that the ex parte decree is invalid and inoperative, on the ground of gross negligence on the part of the guardian in the rent suit, is barred by section 258 of the Chota Nagpur Tenancy Act, 1908, which provides that " no suit shall be entertained in any court to vary or modify or set aside, whether directly or indirectly ", inter alia, " any rent decree, except on the ground of fraud or want of jurisdiction".

Where the lower appellate court found that there had been gross negligence, and following *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1) and *Chunduru Pynnayyah* v. *Rajam Viranna*(2), held that gross negligence amounts to fraud, *held*, that this was not a finding of fact as to fraud.

Raghubardayal Sahu v. *Bhikya Lal Misser*(3), referred to.

Appeal by the defendant.

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

S. M. Mullick and *S. N. Palit*, for the appellant.

S. C. Mazumdar, for the respondent.

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Ross, J.—The appellant contends that this suit was barred by the provisions of section 258 of the Chota Nagpur Tenancy Act. The plaintiff-respondent brought the suit for a declaration that an ex parte rent decree which had been obtained against him under the guardianship of his maternal uncle was invalid and inoperative. The ground on which the suit was brought was that there was a good defence open which was not taken, namely, that the holding was rent-free and on the findings arrived at by the courts below it must be taken that that was so. But section 258 imposes an absolute bar against suits of this kind

(1) (1895) I. L. R. 22 Cal. 8. (2) (1922) I. L. R. 45 Mad. 425.
(3) (1886) I. L. R. 12 Cal. 69.

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unless they are founded on fraud or want of jurisdiction. The question is whether it has been properly found that the ex parte rent decree was obtained by fraud.

The findings of the Munsif were that the maternal uncle of the plaintiff was his lawfully constituted guardian and that he was not guilty of fraud or collusion, but that he was guilty of gross laches in conducting the defence. Dealing with section 258 of the Act the Munsif said that " the law herein enacted contemplates that the judgment was obtained in an action, fought out adversely between two litigants, sui juris and at arms length " and that these elements were lacking in the ex parte order in question. I do not know what authority the learned Munsif had for this statement; and the learned District Judge did not proceed on this ground. The learned Munsif further found that there was no reasonable distinction between the case of fraud and gross negligence since it equally jeopardised the interest of the minor. Finding the plaintiff's case established on the merits, he passed a decree in his favour.

The learned District Judge dealing with the plaintiff's allegation that his uncle was guilty of such gross negligence as amounted to fraud, said that this contention had been accepted by the learned Munsif and was the first point raised in the appeal. He then referred to certain decisions and followed those in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1) and *Chunduru Pynnayyah* v. *Rajam Viranna*(2), in which it was held that gross negligence in not defending where a valid defence is available amounts to fraud. He is of opinion that he should follow these rulings and hold that gross negligence amounts to fraud; and, dealing with the case itself, he found that there was gross negligence and that the plaintiff was entitled to succeed on the merits.

(1) (1895) I. L. R. 22 Cal. 8. (2) (1922) I. L. R. 45 Mad. 425.

The contention on behalf of the appellant is that there is no finding here that the ex parte decree was obtained by fraud. I think this contention is sound. It can hardly be said that the District Judge has come to a finding of fact that there was fraud. It is true that the negligence may be so gross as to be evidence of fraud; and, if the District Judge had found that that was the case here, he might have come to a positive finding that there had been fraud, although, in doing so, he would have had to set aside the finding of the Munsif that there was no fraud in the matter: that finding has not been dealt with at all. But in fact the learned District Judge has not taken this course. He has followed a decision which he thinks entitles him to say that gross negligence amounts to fraud. This is, therefore, not a finding of fact.

It is difficult to see how negligence, however gross, could amount to fraud.

"Negligence and fraud are in truth mutually exclusive conceptions; although the same facts may be evidence either of one or of the other."

The reason why gross negligence came to be treated as evidence of fraud or even equivalent to fraud was the historical reason that at first the Court of Chancery did not claim to deal with legal titles except in cases of trust, fraud and accident; and, on the question of notice, they had to hold that while mere negligence would not affect the conscience, yet acts of negligence were sometimes so gross and culpable that it could be inferred that the person concerned was deliberately shutting his eyes. In the circumstances therefore he was affected with notice of what he ought to have seen on the ground of fraud. Now, none of these considerations are present here. The question is a question of procedure. The learned District Judge has followed the decision in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1), where it was held that there

(1) (1895) I. L. R. 22 Cal. 8.

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was no res judicata where the next friend of a minor plaintiff has been guilty of gross negligence in the original suit. Now this decision is not inconsistent with the law laid down in *Raghubardayal Sahu* v. *Bhikya Lal Misser*(1) where the question of procedure has been explicitly dealt with. Their Lordships there laid down that an infant is bound by judgment as much as if he was of full age, unless gross negligence, laches or fraud and collusion appear in the prochein ami, then the infant might open it by a new bill, according to the Chancery practice; while in India the procedure in cases of gross laches was to apply for a review or, if the decree was ex parte, to get the ex parte decree set aside. Their Lordships distinctly laid down that " If it be sought to set aside a decree obtained against an infant, properly made a party, and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion ". In this matter, therefore, fraud and gross laches are not identical; and it is fraud, not gross laches, which removes the bar imposed by section 258. It is argued on behalf of the respondent that where the infant has lost a valuable property through the gross negligence of his guardian, he is entitled to bring a suit; but, in my opinion, the proper procedure was laid down in the decision in *Raghubardayal Sahu* v. *Bhikya Lal Misser*(1); and, so long as fraud, as distinct from gross negligence, is not established (and it has not been established or found as a fact in this case), section 258 of the Chota Nagpur Tenancy Act is a bar.

I would therefore allow this appeal with costs and dismiss the plaintiff's suit with costs throughout.

MACPHERSON, J.—I agree.

Appeal allowed.

(1) (1886) I. L. R. 12 Cal. 69.

LETTERS PATENT.

Before Dawson Miller, C. J. and Foster, J.

CHANDERCHOOR DEO

v.

BANWARI LALL.*

1926.

June, 1.

Landlord and Tenant—recognition by some only of the co-sharers, effect of—suit for possession by other co-sharers—proper decree, what should be.

In a suit by a co-sharer landlord for possession of a holding on the ground that he had not consented to a transfer to new tenants, the proper decree should be a decree for joint possession with the tenants to the extent of the plaintiff's share.

Hoosein Mahomed v. *Fakir Mahomed*(1), *Gajadhar Ahir* v. *Munshi Bhikari Lal*(2) and *Radha Kishun* v. *Bhagwat Prasad*(3), referred to.

A landlord who has in fact recognised the tenants cannot afterwards turn them out on the ground that his recognition alone was not that of the whole body of landlords and therefore was not binding either upon himself or his co-sharers.

Appeal by the plaintiffs.

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

S. Saran and *L. K. Jha*, for the appellants.

Anand Prasad, for the respondents.

DAWSON MILLER, C. J.—The original plaintiff, Babu Kunj Lal, was a co-sharer landlord of a separate

*Letters Patent Appeal no. 15 of 1925, from a decision of Adami, J., dated the 1st February, 1926, setting aside a decision of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 19th December, 1922, which modified a decision of Babu Raghunandan Prasad, Munsif, 2nd Court of Begusarai, dated the 28th May, 1921.

(1) (1909) 10 Cal. L. J. 618. (2) (1913-14) 18 Cal. W. N. 1011.
(3) (1917) 38 Ind. Cas. 72.

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takhta bearing tauzi no. 8205 in mauza Mohammadpur Raghunath. He had an interest to the extent of a one-third share in that estate. The other two-third share belong to the parties who were originally the defendants second party and the defendants third party in the suit, the interest of the defendants third party having passed to the defendants second party. The suit was instituted by Babu Kunj Lal to recover possession of a certain holding in the village from the defendants first party who had purchased the holding at a sale in execution of a money decree against the original tenants who are the defendants fourth party in the suit. It appears that after the purchase in execution by the first party or principal defendants their tenancy was recognised by the co-sharer landlords of the plaintiff but was not recognised by the plaintiff himself. The plaintiff therefore brought the present suit claiming to oust the purchasers from possession on the ground that they had not been recognised by the whole body of landlords and were therefore not entitled to remain in possession as there is in the village no custom of transferability without the consent of the landlord.

After the suit was instituted the defendants third party, the co-sharer landlords, who had at that time acquired the whole of the remaining interest were transferred from the category of defendants to the category of plaintiffs. Therefore at the time when the suit was tried all the co-sharer landlords were on the record as plaintiffs. The claim made by the original plaintiff was for recovery of khas possession as well as for mesne profits of the whole holding. Alternatively he claimed for possession of his share, that is to say a third share jointly with the principal defendants, the purchasers.

The Munsif before whom the case came for trial decreed the plaintiffs' suit with costs, declared the plaintiffs' title in respect of the disputed land and ordered that they should recover possession by

dispossession of the defendants together with wasilat to be ascertained later on.

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On appeal the Subordinate Judge varied the decree of the Munsif to this extent that the added plaintiffs who were originally the defendants second party were not to get possession of anything and that the principal defendants, the purchasers, were to remain in possession of two-thirds of the land in suit as tenants under the added plaintiffs Harish Chandra and Banwari Lal on payment of rent.

DAWSON MILLER, C.J.

On second appeal to this Court the case was heard before Mr. Justice Adami who reversed the judgment of the Subordinate Judge and restored that of the Munsif. I ought to add that the appeal to this Court was brought by the added plaintiffs that is to say the co-sharer landlords of the two-thirds interest in the property. The original plaintiff was apparently content with the decision of the Subordinate Judge which awarded him joint possession with the tenant purchasers of a one-third share in the holding. The reasons which induced the learned Judge of this Court to overrule the decision of the Subordinate Judge and restore that of the Munsif were that the effect of the Subordinate Judge's decision would be to split up the holding, the result of which would be that the plaintiff no. 1 would be in khas possession of a one-third share while the principal defendants would be tenants of the other two-thirds share paying rent, he assumed, to the added plaintiffs. This position he considered was an impossible one and great difficulties would arise because under the Bengal Tenancy Act rent receipts must be granted by all the landlords and in the same way the recognition to be effective must be a recognition by the whole body of landlords, and as in the present case only two out of the three landlords had recognised the principal defendants as tenants he considered that he must hold that such a recognition could not amount to a consent of the landlords to a transfer of the holding, a consent which must be made by the entire body in order to make it good.

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No authorities appear to have been cited to the learned Judge when the case came before him in second appeal. I cannot help thinking that there is a great deal to be said for the view taken by Mr. Justice Adami in this case, and had this been a case of first impression I am not at all sure that the difficulties which he pointed out would not have appeared to me insuperable, but a number of authorities have been referred to us in which it has been held that in similar circumstances, where a co-sharer landlord sues for possession on the ground that he has not consented to a transfer to new tenants the proper decree to make is a decree for joint possession with the tenants to the extent of the plaintiff's share. The cases in which this principle appears to have been laid down are *Hossein Mahomed* v. *Fakir Mahomed*(1), a decision of Sir Lawrence Jenkins, Chief Justice of the Calcutta High Court and Mookerjee, J., and the case of *Gajadhar Ahir* v. *Munshi Bhikari Lal*(2) also a decision of two Judges of the Calcutta High Court in which again joint possession to the extent of an eight-annas share was awarded to the plaintiff in somewhat similar circumstances. There are other cases, for example *Radha Kishun* v. *Bhagwat Prasad*(3) which is a decision of this Court. In the present case it has been pointed out that the plaintiff and his co-sharers were collecting their rents separately, and this possibly may account for the fact that there had been recognition by some of the co-sharer landlords and no recognition on the part of the others but the appellants themselves recognised the defendants as their tenants. The original plaintiff having obtained a decree in his favour in the lower appellate court to the extent of his one-third share was content with that decision and he is not an appellant before us to-day nor was he an appellant in the appeal before Adami, J. I think that in these circumstances we should be slow to allow the appellants who have recognised the tenants as their

(1) (1909) 10 Cal. L. J. 618. (2) (1913-14) 18 Cal. W. N. 1011.
(3) (1917) 38 Ind. Cas. 72.

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tenants to turn round and join with the original plaintiff in an endeavour to oust those whom they have recognised from their tenancy even to the extent of their own share. I am not aware of any case similar to the present in which the landlords who had in fact recognised the tenants afterwards endeavoured to turn them out on the ground that their recognition alone was not that of the whole body of landlords and therefore was not binding either upon themselves or upon their co-sharers. I am inclined to think even apart from the decisions I have referred to that in a case like the present we should not allow the co-sharer landlords who have recognised the tenants to endeavour afterwards to go back upon their word and endeavour to turn them out even from their own share in the tenancy although their co-sharers are raising no objection. In these circumstances it seems to me that the decision of the learned Judge must be set aside and the decision of the Subordinate Judge restored. This appeal will be allowed with costs. The appellants are also entitled to the costs of the appeal before Adami, J.

FOSTER, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Foster, J.J.

CHANDRESHWAR PRASAD NARAIN SINGH

v.

BISHESHWAR PRATAP NARAIN SINGH.*

1926.

April, 13.

Evidence Act, 1872 (Act I of 1872), sections 32, 33, 65 and 158—public document, secondary evidence of—section 65 inapplicable when original lost or destroyed—opinion of court upon character of witness, whether admissible—statement of case for opinion, admissibility of—probate, whether proof of

* Appeal from Original Decree nos. 39 and 152 of 1923.

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CHANDRESHWAR PRASAD NARAIN SINGH v. BISHESHWAR PRATAP NARAIN SINGH.

execution of will—finding of execution binding on parties in probate—"representative in interest" whether includes privies in estate—section 33—statements of deceased person, admissibility of—test—vakil appearing in case when likely to be witness—propriety of—Hindu Law—adoption—dattak form—adopted son more than five years old, adoption whether invalid—Mithila School, whether recognises dattak adoption—dattak son in Mithila inherits to collaterals.

The rule laid down in section 65, Evidence Act, 1872, that a certified copy is the only secondary evidence admissible when the original is a public document does not apply where the original has been lost or destroyed.

Kunneth Odangal Kalandan v. *Yayoth Palliyil Kunhunni Kidavu* (1), and *Haranund Ray Chellangia* v. *Ramgopal Chellangia* (2), followed.

The opinion of a court upon the character of a witness is not admissible in evidence in another case under section 158, Evidence Act; for there is no material for judging whether the witness was rightly disbelieved or wrongly disbelieved. The question whether a witness is entitled to credit or not must be decided by a court on the evidence before it and not on what another court thought of the witness in another case.

Pasumarty Juggappa, In the matter of (3) and *Seaman* v. *Netherclift* (4), referred to.

Partners and joint contractors who are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts are regarded as privies in estate, and are included in the term "representatives in interest" in the proviso to section 33, Evidence Act.

A case drawn up by an attorney for counsel's opinion is admissible in evidence, for what is said or done by the attorney in the course of his business and within the scope of his authority must be regarded as a statement of the persons on whose behalf he acts.

(1) (1883) I. L. R. 6 Mad. 80.
(2) (1900) I. L. R. 27 Cal. 639, P.C.
(3) (1899-1900) 4 Cal. W. N. 684.
(4) (1878) L. R. 2 C. P. D. 53(59).

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A finding not essential to the judgment in a probate action cannot operate as a finding in rem; but all that is essential to the decision that the executor is entitled to probate, must be taken to have been conclusively determined.

Held, therefore, that probate is conclusive proof of the due execution of the will by the testator which is the foundation of the title of the executor.

A finding by a probate court as to the execution of the will is at any rate binding on the parties to the probate proceedings and their privies.

Statements made in a will, to the effect that the beneficiary was the adopted son of the testator, can be used as evidence by the plaintiff in a suit for a declaration of the adoption, provided that the statements were not made in the testator's own interest or in view of contemplated litigation.

Kidar Nath v. *Mathu Mal* (1), referred to.

Promotha Nath Mullick v. *Prodymno Kumar Mullick* (2), *Nalan Pattashirana Rao* v. *Mandavilli Narayana Moorthy* (3), *Bhagaban Ramnauji Das* v. *Ram Praparna Ramanuj Das* (4), distinguished.

It is desirable that a vakil should not appear in a case if he knows or has reason to believe that he will be an important witness in the case; if he accepts the brief not knowing or having reason to believe that he will be such a witness, but discovers subsequently that he is a witness on a material question of fact, he should retire from the case.

W. Weston v. *Peary Mohan Dass* (5), followed.

A book of accounts may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transactions take place.

Deputy Commissioner of Bara Banki v. *Ram Prasad* (6), referred to.

(1) (1913) I. L. R. 40 Cal. 555, P. C.
(2) (1921-22) 26 Cal. W. N. 772.
(3) (1921-22) 26 Cal. W. N. 273, P. C.
(4) (1895) I. L. R. 22 Cal. 843, P. C.
(5) (1913) I. L. R. 40 Cal. 898 (938).
(6) (1900) I. L. R. 27 Cal. 118, P. C.

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The Hindu law imposes no restrictions as to age in the matter of adoption, and, whatever be the age of the adopted son, his adoption is valid if made before upanayana, if he belongs to any of the regenerate classes, and before marriage, if he belongs to the Sudra caste.

No adoption will, therefore, be set aside on the ground that the boy adopted was older than five years at the date of the adoption.

Raja Makund Deb v. *Sri Jagannath Jenamoni* (1), *Ganga Sahi* v. *Lekhraj Singh* (2), followed.

The Mithila school, like the Mitakshara school, recognises the dattak form of adoption; and a son adopted in the dattak form in Mithila inherits to collaterals.

The law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara.

Sourendra Mohan Sinha v. *Hari Prasad* (3), referred to.

Defendant no. 25 was the appellant in appeal no. 39 of 1923. Defendants 1-5 were the appellants in appeal no. 132 of 1923.

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

P. K. Sen, for the appellants in appeal no. 39 of 1923 (with him *A. Sen*, *S. M. Mullick*, *L. K. Jha*, *S. N. Roy*, *J. P. Singh*, *N. C. Ghosh*; *S. K. Mitter*, and *N. N. Sinha*).

S. M. Mullick (with the same) for the appellant in appeal no. 132 of 1923.

Manuk, for the respondents, in appeal no. 39 of 1926 (with him, *Sultan Ahmed*, *R. K. Jha*, *S. Prosad*, and *B. K. Sinha*).

(1) (1923) I. L. R. 2 Pat. 469. (2) (1887) I. L. R. 9 All. 253.
(3) (1926) I. L. R. 5 Pat. 135, P. C.

April, 13.

Sultan Ahmed (with him the same), in Appeal no. 132 of 1926.

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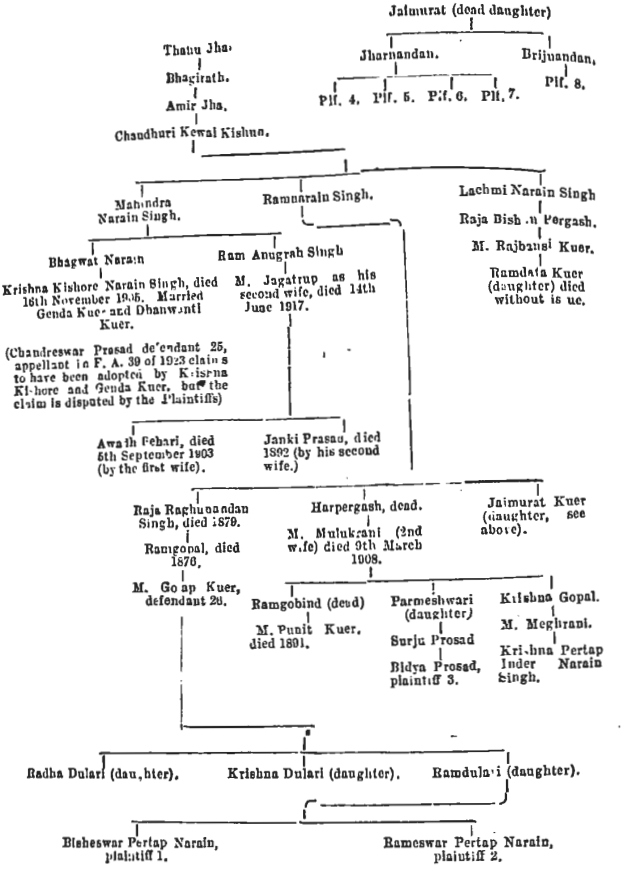
DAS, J.—We are concerned in this litigation with the question of succession to the estate of Krishna Pertap Inder Narain Singh, who died on the 17th March, 1878, leaving a mother Musst. Meghrani Kuer, and a grandmother, Musst. Mulukrani Kuer. Meghrani Kuer succeeded to the estate, and on her death, which took place many years, ago, Mulukrani Kuer took the estate as the next heir of the last male holder. Mulukrani died on the 9th March, 1908, and, on her death, the question of succession arose in a very serious form. On the 24th March, 1908, the police reported that there was grave apprehension of a breach of the peace and on the 31st March, 1908, proceedings under section 145 of the Code of Criminal Procedure were initiated by the Subdivisional Officer of Sitamarhi. By his orders, dated the 20th May, 1908, and 30th May, 1908, respectively, the learned Subdivisional Officer held that none of the parties was in possession of the properties which are set out in schedules 2 and 3 of the plaint, and he accordingly attached those properties under section 146 of the Code. Certain proceedings then took place which will be considered hereafter. The present suit was instituted on the 8th March, 1920, to try the question of succession to the estate of Krishna Pertap Inder Narain Singh.

Before proceeding further, it will be convenient to set out that portion of the genealogical tree which is admitted by all the parties before us.

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The family belongs to what is known as the Sursand Raj family; and it is a remarkable fact that, on the pedigree as set out, and which is the pedigree which was supplied to us by the plaintiffs, there were no agnatic relations of Krishna Pertap Inder Narain Singh living at the date when the succession opened

out, that is to say, at the date of the death of Mulukrani Kuer. The plaintiffs accordingly claim to succeed as the nearest bandhus of Krishna Pertap; but it is to be noticed that, if we accept the case of the plaintiffs, Sarju Prosad, the son of Parmeshwari Kuer, was the nearest bandhu living at the date of the death of Mulukrani Kuer. There were disputes between the plaintiffs amongst themselves during the proceedings before the Subdivisional Officer of Sitamarhi; but they have composed their differences and now claim a joint decree as against the defendants.

The claim is resisted by Chandreswar Prosad, cited as defendant 25 in this action (appellant in First Appeal 39 of 1923) as also by Ashraf Singh and others, cited as defendants first party, (appellants in First Appeal 132 of 1923). Chandreswar Prosad claims to have been adopted by Krishna Kishore Narain Singh on the 11th June, 1905, in dattak form: and it is conceded that he is entitled to succeed to the estate in suit provided that he makes good his assertion that he was so adopted by Krishna Kishore. The defendants first party allege that they are the agnatic relations of Krishna Pertap Inder Narain Singh and they claim to be his nearest heirs. They rely upon a pedigree which shows that Thanu Jha had two sons, Banwari Jha and Bhagirath Jha and that they are the direct male descendants of Banwari Jha. The plaintiffs do not deny that the defendants first party are the direct male descendants of Banwari Jha, but they deny that Banwari was a son of Thanu Jha. They do not deny that the defendants first party would have a better claim than them, provided they made good their assertion that they are the agnatic relations of Krishna Pertap Inder Narain Singh. I may mention that there were disputes between the defendants first party and Chandreswar as to their respective rights in the proceedings before the Subdivisional Officer of Sitamarhi; but they now accept Chandreswar as the adopted son of Krishna Kishore and admit his title to the estate; but they insist that, should Chandreswar fail

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in establishing his adoption, the disputed estate should be adjudged to belong to them as their title is superior to that of the plaintiffs.

The position then is this: if Chandreswar establishes his adoption, then all the other parties must give way to him. If he fails in establishing his case, then the question will arise whether the defendants first party are the agnatic relations of Krishna Pertap Inder Narain Singh. If we find in favour of the pedigree upon which they rely, we must dismiss the plaintiffs' action. If we find against their pedigree, the plaintiffs, or at all events, plaintiff no. 3, must succeed, for, although the matter was in issue in the Court below, it is no longer disputed that they are the bandhus of the deceased. The learned Subordinate Judge disbelieved the case as to adoption and refused to act on the pedigree upon which the defendants first party relied. He accordingly gave the plaintiffs a decree substantially as claimed by them.

It will now be convenient to refer to the disputes which have taken place and the proceedings in Court leading up to the present litigation. On a reference to the pedigree it will be noticed that there are five estates comprised within what was originally the Sursand Raj, (*1*) the estate of Krishna Kishore Narain Singh, (*2*) the estate of Janki Prosad, which was in the possession of his mother, Jagatrup Kuer, (*3*) the estate of Raja Bishun Pergash Narain Singh which is in the possession of his widow Rani Rajbansi Kuer, (*4*) the estate of Raja Raghunandan Singh which is now in the possession of plaintiffs 1 and 2, and (*5*) the estate of Krishna Pertap Inder Narain Singh which is the estate in suit and which was in the possession of Mulukrani Kuer until her death which took place on the 9th March, 1908. So far as the estate of Raja Raghunandan Singh is concerned, no dispute is possible, as that estate is properly in the possession of plaintiffs 1 and 2 under a will executed by the deceased Raja. It will be important to

remember the name of Golab Kuer in this connection, for she is the central figure in this litigation. She is the daughter-in-law of Raja Raghunandan Singh and is the grandmother of plaintiffs 1 and 2, and has made strenuous efforts throughout to secure the other estates for her daughter's sons. So far as the remaining four estates are concerned, there are no direct descendants either in the male or female line, and Chandreswar Prosad must succeed to those estates provided he makes good his assertion that he was adopted by Krishna Kishore in the dattak form. The dispute first arose in connection with the question of succession to the estate of Krishna Kishore who died on the 16th November, 1905. He left a will by which he devised his estate to his widows Genda Kuer and Dhanwanti Kuer in equal shares with remainder as to the share of each of them, to his adopted son Chandreswar Prosad. There was a distinct assertion in the will that the testator in conjunction with Genda Kuer took Chandreswar Prosad in adoption in the dattak form on the 24th Jeyth, 1312 (11th June, 1905). On the 22nd December, 1905, Genda Kuer applied for probate of the will of Krishna Kishore. On the 28th February, 1906, a caveat was entered on behalf of the present defendants first party who claimed to be the agnatic relations of Krishna Kishore and who will be referred to as the gotias throughout this judgment. Caveats were subsequently entered on behalf of the bandhus including the present plaintiffs. They denied the adoption of Chandreswar Prosad and insisted that the will was a forgery. It may be mentioned that Chandreswar was the natural son of Sarjug Prosad (erroneously referred to as Sarju Prosad in various places) and the grandson of Debi Prosad, and that Debi Prosad was the brother of Genda Kuer. The case of the caveators was that the document propounded as the will of Krishna Kishore was the outcome of a conspiracy between Debi Prosad, Sarjug Prosad and Genda Kuer and that the whole object of the conspiracy was to benefit the family of Debi Prosad. It may be mentioned that it was not

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the case of the caveators that the will was the result of undue influence exerted on Krishna Kishore by Genda Kuer, Debi Prosad and Sarjug Prosad or any of them.

It was realised that, if the adoption was established, Chandreswar Prosad would succeed, not only to the estate of Krishna Kishore but also to the three other estates which have already been enumerated when the succession to those estates opened out. On the 28th June, 1906, an agreement was entered into between the alleged gotias (the defendants first party) of the first part, Satrani Kuer and Fulrani Kuer (the two wives of Ashrafi Singh, defendant 1) of the second part, and Lachmi Prosad, the son of Jagatrup Kuer's sister of the third part, by which Satrani Kuer and Fulrani Kuer and Lachmi Prosad agreed to bear the costs of all the litigations that might ensue, and the gotias agreed to give Satrani and Fulrani 3-annas and Lachmi Prosad 3-annas in the fruit of the victory. It may be mentioned here Lachmi Prosad was the reversionary heir to the estate of Janki Prosad, which was then in the possession of Jagatrup Kuer, if Chandreswar Prosad failed to establish his adoption, and the gotias failed to establish their pedigree. By the agreement of the 28th June, 1906, Lachmi Prosad seems to have accepted the title of the gotias and agreed to join his resources with those of the gotias against Chandreswar Prosad and against the other bandhus. The agreement of the 28th June, 1906, may be referred to as the first gotia agreement.

On the 30th July, 1906, a similar agreement was entered into on behalf of some of the bandhus. The parties to this agreement were Harnandan and Brijnandan of the first part, and Ramdulari, the mother of plaintiffs 1 and 2 of the second part. It may be mentioned here that although Chandreswar would be entitled to succeed to all the estates if he proved his adoption and the gotias would be similarly entitled to succeed to all the estates, if they established their pedigree and repelled the claim of adoption, the

bandhus to succeed to each estate would be different. In the absence of Chandreswar and the gotias, the nearest heir to the estate in suit is Bidya Prosad, plaintiff no. 3: the nearest heir to the estate of Janki Prosad is Lachmi Prosad: and the nearest heirs to the estate of Raja Bishun Pergash are Harnandan and Brijnandan. It will be noticed that plaintiffs 1 and 2 have no possible interest in any of the estates; and yet we find them through their mother Ramdulari entering into the agreement of the 30th July, 1906, by which they agreed to bear 9-annas share of the expenses in return for 9-annas share of the properties that might be gained through their joint efforts.

Meanwhile the probate proceedings went on before the District Judge of Muzaffarpur and the caveators made a determined effort to bring into controversy the question of the adoption of Chandreswar Prosad. The applicant got a statement from one of her witnesses that

> "the deceased has adopted Chandreswar as dattak putra,"

and, having done that, she stated to the Court that the question of adoption did not legitimately arise in the probate action and that

> "she was not prepared to adduce any further evidence as to the factum of adoption."

The Court thereupon intimated to her pleader that there was no onus upon him to prove the adoption, but that the factum of adoption may be challenged by the caveators, the question being material under the second issue. The learned District Judge obviously took the view that the question of adoption did not directly arise in the probate proceedings and was material only as bearing upon the genuineness of the will. It appears that the caveators cross-examined the witnesses produced on behalf of the applicant on the question of adoption and adduced evidence in support of their case that the adoption did not take place. On the 28th July, 1909, the District Judge delivered judgment holding that the will was genuine and granted probate of the will to Genda Kuer. The

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caveators appealed to the Calcutta High Court, and, on the 29th August, 1913, the Calcutta High Court reversed the decision of the District Judge. An appeal to the Privy Council followed, and, by its judgment, dated the 29th February, 1916, the Judicial Committee reversed the decision of the Calcutta High Court and restored that of the District Judge. On the question now before us, the Judical Committee said as follows:

"Although the question as to the alleged adoption is not one which could be excluded from consideration by a court when considering whether it is probable that the will is a genuine will or a fabrication, it could not be tried as a material and vital issue on an application for a grant of probate, the necessary parties to such an issue not being before the Court. Further, a finding either for or against the adoption would not be decisive as to whether the will which was propounded was a genuine will or a fabrication. The District Judge before whom the application for a grant of probate first came rightly declined to frame an issue as to the alleged adoption. The caveators were, however, not precluded from questioning the adoption of Chandreswar Prosad. They cross-examined at great length and very fully some of the appellant's witnesses on the subject, and they called evidence in an attempt to disprove the alleged adoption. Their Lordships have been pressed to take into their consideration, on the question as to whether the will is a genuine will or a forgery, the evidence as to the adoption. All that their Lordships need say is that, having regard to the evidence brought out by the cross-examination of witnesses for the appellant, and having regard to the evidence of the witnesses who were called by the caveators to prove that Chandreswar Prosad was not adopted, they see no reason to doubt that Chandreswar Prosad was adopted by Krishna Kishore."

The probate proceedings terminating in the decision of the Privy Council determined, once for all, the question of succession to the estate of Krishna Kishore.

Meanwhile Mulukrani died on the 9th March, 1908, and the question of succession to the estate in dispute arose in a serious form. On the 24th March, the police reported that a breach of the peace was likely to occur, and, on the 31st March, 1908, proceedings under section 145 of the Criminal Procedure Code were initiated by the Subdivisional Officer of Sitamarhi. He held that the properties which are set forth in schedules 2 and 3 of the plaint were not in the possession of any of the parties, and he accordingly attached them under section 146 of the Code. The

properties detailed in schedules 1 and 4 of the plaint were not the subject matter of the proceedings before the Subdivisional Officer of Sitamarhi.

A civil suit was now imminent; and the gotias (defendants first party) entered into another agreement on the 14th April, 1911, to enable them to find money for the litigation. It will be remembered that they had entered into an agreement on the 28th June, 1906, with Satrani Kuer and Fulrani Kuer of one part and Lachmi Prosad of the other part by which Satrani and Fulrani agreed to bear 8-annas share of the expenses of the litigation in return for 3-annas share of the properties and Lachmi Prosad agreed to bear the remaining 8-annas share of the expenses in return for 3-annas share of the properties. The parties to the agreement of the 14th April, 1911, were the gotias of the first part, Satrani and Fulrani of the second part and Golab Kuer (the grandmother of plaintiffs 1 and 2) of the third part. By this agreement Satrani and Fulrani took Rs. 10,000 from Golab Kuer and assigned their interest to Golab Kuer, Golab Kuer agreeing to bear 8-annas share of the expenses in return for 3-annas share of the properties. The agreement of the 14th April, 1911, may be referred to as the second gotia agreement.

On the 18th May, 1911, a suit (being suit no. 176 of 1911) was instituted by the gotias, the present defendants 1 to 5, and Golab Kuer on the footing of the agreement of the 14th April, 1911, against Chandreswar Prosad and the bandhus for possession of the estate of Krishna Pertap Inder Narain Singh, that is to say, the estate now in suit, on adjudication of their title as gotias. For some reason or other this suit was not heard till the 14th January, 1919, when a petition of compromise was filed on behalf of plaintiffs 1 to 5 (that is to say, the present defendants first party) and Chandreswar Prosad. By this petition, the gotias admitted the title of Chandreswar as the adopted son of Krishna Kishore, and

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Chandreswar admitted the title of the plaintiffs as the gotias. It will be noticed that Golab Kuer was not a party to the compromise. The learned Subordinate Judge took up the case on the 20th January, 1919, when the plaintiffs 1 to 5 offered to give evidence in support of their pedigree as against the bandhus. The learned Subordinate Judge properly disallowed the prayer holding that, on their own admission of the superior title of Chandreswar Prosad, they could not succeed in the action; and, as Golab Kuer adduced no evidence whatever, the learned Subordinate Judge dismissed the suit. The judgment is Exhibit 9.

Meanwhile Jagatrup Kuer died on the 14th June, 1917. It will be remembered that she was in possession of the estate of Janki Prosad, and, on her death, the question arose as to the succession to that estate. Proceedings were initiated in the Court of the District Judge of Muzaffarpur under the Curator's Act, Act 19 of 1841, to determine summarily the right to possession of that estate. The claimants were, (*1*) Chandreswar Prosad, claiming as the adopted son of the nearest male agnate of Janki Prosad, (*2*) the present defendants first party, claiming as the agnates of Janki Prosad, and (*3*) the present plaintiffs 1 and 2, claiming as the nearest bandhus of Janki Prosad. It was admitted that if Chandreswar's case that he was adopted by Krishna Kishore was true, he was entitled to possession. The learned Judge thought that the finding of the Judicial Committee as to the adoption of Chandreswar Prosad in the probate action was by itself sufficient to enable him to accept the claim of Chandreswar; and relying on the decision of the Judicial Committee, he held that the right to possession was with Chandreswar Prosad and directed that the possession of the estate be delivered to him through his guardian Genda Kuer on her furnishing security to the value of Rs. 1,00,000. The order of the District Judge was challenged by a revision application to the High Court; but the High Court, by its order, dated the 20th August, 1917, declined to

interfere. Now the order passed by the District Judge only operated as an order pendente lite, that is, pending any civil suit that might be brought; and, on the 13th September, 1917, a suit, being suit no. 307 of 1917, was instituted by the present plaintiffs 1 and 2 against Chandreswar Prosad and the gotias claiming title to the estate of Janki Prosad. It was objected that the plaintiffs to that suit had no cause of action, as Harnandan was a nearer gotia. The plaintiffs presented an application for amendment of the plaint which was refused; and thereupon, on the 9th October, 1920, the plaintiffs asked for leave to withdraw the suit with liberty to bring another suit. The leave was granted, and the suit was withdrawn on the 9th October, 1920; but it is noteworthy that a fresh suit has not yet been instituted with reference to the estate of Janki Prosad which is still in the possession of Chandreswar Prosad.

I have already referred to suit no. 176 of 1911, which was a suit by the gotias and Golab Kuer against Chandreswar and the bandhus to try the question of succession to the estate now in dispute. That suit failed because the gotias admitted the title of Chandreswar Prosad. The present suit was instituted on the 8th March, 1920, by the bandhus against the gotias and Chandreswar for declaration of their title to, and for recovery of possession of, the estate of Krishna Pertap Inder Narain Singh. The learned Subordinate Judge has decided all the material issues in favour of the plaintiffs and has given them a decree substantially as claimed by them. Both Chandreswar and the gotias appeal against the decision of the learned Subordinate Judge; the appeal of Chandreswar being F. A. 39 of 1923 and the appeal of the gotias being F. A. 132 of 1923.

F. A. 132. I will first consider F. A. 132 of 1923, which is the appeal of Ashrafi Singh and others, defendants first party. The question is, whether the appellants are the agnatic relations of the deceased

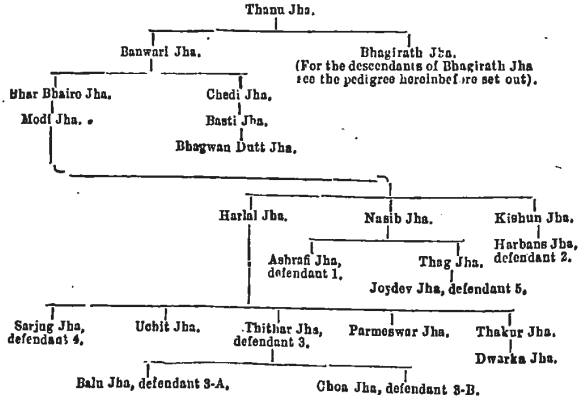
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Krishna Pertap Inder Narain Singh. They do not produce any authentic pedigree in support of their case; but there is a large body of oral evidence which has been considered by the learned Subordinate Judge. According to them Thanu Jha had two sons, Banwari Jha and Bhagirath Jha; and they are the direct male descendants of Banwari Jha and therefore the agnatic relations of Krishna Pertap Inder Narain Singh who was the direct male descendant of Bhagirath Jha.

The plaintiffs deny not only the agnatic relationship between the Sursand family and the defendants first party, but any relationship. It is their case that Ashrafi Singh was a cook in the employ of Mulukrani and that some of the other defendants constituting the defendants 1st party were servants in the employ of the different members of the Sursand family. I will set out such portion of the family tree relied upon by the defendants 1st party as is necessary for the understanding of the evidence.



As I have said, there is a considerable body of oral evidence on both sides. The learned Subordinate Judge has considered that evidence and has found against the appellants. I am of opinion that we

would not be justified in differing from the trial court on a simple question of fact unless the documentary evidence and the surrounding circumstances clearly contradict the finding of that Court. This position was accepted by Mr. Mullick on behalf of the appellants; and he confined his arguments mainly to the documents and contended that the evidence furnished by the documents strongly corroborates his oral evidence and refutes that of the plaintiffs respondents.

It is necessary, then, to see how the documents affect the respective position taken up by the parties.

I will first consider Exhibit TT series, which consists of deposition of witnesses in two suits brought by Krishna Kishore to have certain alienations made by his father set aside.

Depositions of witnesses taken by an officer of the Court are public documents within the meaning of that term as used in section 74 of the Evidence Act, and section 65 provides that when the original is a public document,

> "a certified copy of document, but no other kind of secondary evidence, is admissible."

But section 65 also provides that any secondary evidence of the contents of the document is admissible when the original has been destroyed or lost. The appellants have proved by the evidence of Sharfuddin Ahmad, a court officer, that the original depositions have been destroyed "under the rules," and they have therefore not been able to produce certified copies of those depositions. Mr. Sultan Ahmad, on behalf of the respondents contended that the rule as to the production of any secondary evidence does not apply to the case of a public document, in which case,

> "a certified copy of the document, but no other kind of secondary evidence, is admissible."

If this argument be well founded, then it is obvious that the Legislature has made no provision for cases in which the original is a record of a Court of Justice, and, therefore, a public document, which has also

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been lost or destroyed. In my opinion, the rule laid down in section 65 that a certified copy is the only secondary evidence admissible when the original is a public document does not apply where the original has been lost or destroyed. This was the view taken by the Madras High Court in *Munneth Odangat Kalandan* v. *Vayoth Palliyil Kunhunni Kidavu*(1) and, I think, by implication, by the Privy Council in *Haranund Roy Chetlangia* v. *Ram Gopal Chetlangia*(2). In the former case, it was pointed out by the Court that the rule upon which Mr. Sultan Ahmad relies, " applies to the case in which the public document is still in existence on the public records, and is a provision intended rather to protect the originals of public records from the danger to which they would be exposed by constant production in evidence, than to interfere with the general rule of evidence given in clause (*c*) of the same section that secondary evidence may be given when the original has been destroyed or lost." In the latter case the question was whether the deposition of the party taken in a foreign Court was, in the circumstances, receivable as evidence. An official of the foreign court was examined and he produced a document which he swore was a copy of the deposition and in the handwriting of one of the court amlas. That copy was endorsed, " copy corresponding with the original." Now the question debated was whether the copy was receivable in evidence without notice to the adverse party under section 66 of the Evidence Act. This seems to imply that, in the view of the Privy Council, the copy produced was not a certified copy of the original, for the rule laid down under section 66 applies to clause (*a*) only of section 65 and not to clause (*c*). With reference to the argument, the Privy Council pointed out that no notice was necessary as the person in possession of the document was not subject to process. In the result, they thought that the deposition was receivable in evidence. Now if the document produced was not the certified

(1) (1883) I. L. R. 6 Mad. 80. (2) (1900) I. L. R. 27 Cal. 689, P.C.

copy of the original, and the argument based on section 66 was certainly irrelevant if it was considered that the document produced was the certified copy of the original, then it could only have been admitted as "any secondary evidence of the contents of the document." Messrs. Woodroffe and Amir Ali in their well-known work on Evidence Act have certainly taken this view of the decision of the Privy Council.

The next question is whether there is sufficient proof of the contents of the original deposition.

The appellants have produced the paper books prepared in regular appeal no. 261 of 1869 and regular appeal no 296 of 1875. These paper books have been marked as exhibits in the case, and the depositions, taken from the paper books, have been separately marked. They have also examined Amar Nath Bose, aged eighty, a Vakil of the High Court of Calcutta. He says, that he

> "used to make translations in regular appeal cases"

and that

> "the paper books were prepared according to the rules of the High Court."

Referring to the paper books in question, he said as follows:—

> "I say that these paper books were authoritatively prepared in the High Court. From the endorsement on the fly-leaf of paper book in regular appeal No. 261 of 1869 I say the vernacular papers were translated by Babu Mahesh Chunder Mitter, printed in the Government Press and edited by an officer of the Court. In regular appeal No. 296 of 1875 the vernacular papers were translated by Sayed Tajamul Hossain, printed in the Government Press and edited by an officer of the Court, Mr. McMahon."

He had previously said that both Mahesh Chunder Mitter and Tajamul Hossain are now dead. The question is whether this evidence is sufficient to prove the depositions produced by the appellants. The learned Subordinate Judge was satisfied with the proof, and I see no reason to differ from him on this point.

The next question is whether these depositions help the case of the appellants. These depositions

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were recorded in two suits brought by Krishna Kishore to set aside certain alienations made by his father. A question had risen as to how the janao ceremony of Krishna Kishore had been met, it being his case that his father was wasting and dissipating the estate, not caring to incur the necessary expenses for the family. Exhibit TT(1) is the deposition of Heeranand taken on the 2nd July 1869. The relevant portion of the evidence is to the effect that none of Krishna Kishore's relatives was present at the janao ceremony except Busti Jha who performed the ceremony. Exhibit TT (2) is the deposition of Nandlal Jha taken on the 5th July, 1869. He said that he was the family priest of Krishna Kishore and officiated as such in the Janao ceremony and that

"Busti Jha, one of the relations, was present and none else."

Exhibit TT(3) is the deposition of Parmessary Jha taken on the same day. He describes Krishna Kishore as his relative. Exhibit TT(4) is the deposition of Harlal Jha in another suit and taken on the 22nd June, 1875. The deposition shows that Harlal is the son of Modi Jha and he said that he was a relative of Krishna Kishore.

We may at once rule out Exhibit TT(1), for it is not shown who Heeranand was and how he could be said to have had special means of knowledge as to the relationship between Krishna Kishore and Busti Jha. Exhibit TT(2) is, however, clearly admissible in evidence; for it is admitted by the plaintiffs that Nandlal Jha was the family priest of Krishna Kishore. But beyond establishing that a Busti Jha was a relation of Krishna Kishore, it does not help the case of the appellants any further, for a relation is not necessarily an agnatic relation. Exhibit TT(3) is open to the same objection. We may take it that Parmessary Jha was a relation of Krishna Kishore; but it is not shown that he was an agnatic relation. Exhibit TT(4) is on no better footing; for beyond establishing that Harlal Jha and Modi Jha are related

to Krishna Kishore, it does not establish, that they are his agnatic relations. We may take it to be established on these depositions that Krishna Kishore had relations named Busti Jha, Parmessary Jha, Harlal Jha and Modi Jha. They certainly rebut the case of the plaintiffs that they are no relations at all, but beyond that, they establish nothing at all. All these names will be found in the pedigree upon which the defendants rely.

I now come to Exhibit BB which is the deposition of Uchit Jha taken on the 26th May, 1903, in certain land registration proceedings. Mohunt Mithila Saran as the head of the Nawadhi Mutt had applied for registration of his name in respect of certain lands on the allegations that Ram Anugrah Singh had made a gift of that land to the Mutt. The application was supported by Mussammat Jagatrup Kuer, the widow of Ram Anugrah, but opposed by Awadh Bihari Singh, the son of Ram Anugrah, and the step son of Jagatrup Kuer. On a reference to the pedigree it will be noticed that Ram Anugrah was the brother of Bhagwat Narain who was the father of Krishna Kishore. Uchit Jha gave evidence on behalf of the mohunt in the land registration proceedings. He said that Ram Anugrah was his gotia five or six generations removed. He could not, however, give the name of the common ancestor.

The importance of this evidence is that it was given at a time when both Awadh Bihari and Krishna Kishore were alive and therefore when there was no question of succession to any of the Sursand estates. Uchit Jha described himself as the son of Harlal Jha and in distinct terms claimed agnatic relationship with Ram Anugrah and therefore with Krishna Pertap Inder Narain Singh at a time when there was no motive to put forward a false claim. The learned Subordinate Judge rejected the evidence on two grounds; first, on the ground that he could not give the name of the common ancestor; and, secondly, on the

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ground that his evidence was not accepted by the Court. I confess that I am not impressed by either of the grounds put forward by the learned Subordinate Judge for rejecting the evidence. It is consistent with the common course of natural events for persons to name other persons as their gotias without being in a position to say who their common ancestors may have been. As regards the second ground, I have no doubt whatever that the opinion of the Land Registration Court upon the character of Uchit Jha is not admissible in evidence; for we have no materials for judging whether Uchit Jha was rightly disbelieved or wrongly disbelieved. [See *Pasumatry Juggappa*, an insolvent(1) and *Seaman* v. *Netherclift*(2)]. Section 158 of the Evidence Act provides that whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested. Now could the fact that he was disbelieved in the Land Registration case be put to Uchit Jha if he were alive and had been called as a witness on behalf of the appellants? I think not; for the question whether a witness is entitled to credit or not must be decided by a court on the evidence before it, and not on what another court thought of the witness in another case. If I am right in this view, as I think I am, the judgments in the Land Registration case could not put in to impeach the credit of Uchit Jha. Section 155 read in the present case with section 158 of the Evidence Act prescribes the different ways in which the credit of a witness may be impeached. They are:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit,

(2) by proof that the witness has been bribed or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence.

(1) (1899-1900) 4 Cal. W. N. 684. (2) (1878) L. R. 2 C. P. D. 53, 59.

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

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It is clear to my mind that, had Uchit Jha been called as a witness on behalf of the appellants, the decision in the Land Registration case could not be put to him to shake his credit; for the decision may have been erroneous; and it obviously does not stand on the same footing as " the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit." Persons called to discredit a witness are liable to be cross examined; but there are no means of judging whether a finding as to the credibility of a witness in another proceeding is a right finding or not. In my opinion, therefore, the judgments in the Land Registration case were not admissible in evidence to impeach the credit of Uchit Jha.

But what actually did the case decide as to the credibility of Uchit Jha? There are two judgments in the same proceeding, the judgment of the Collector, dated the 4th August, 1903, and the judgment of the Commissioner on appeal, dated the 31st May, 1904. The Collector dismissed the claim of the mohunt on the ground that, as Awadh Bihari's name had stood in the register for over eighteen years, the mohunt could not succeed merely on the allegation of a verbal gift made to him as, in his opinion,

" in the absence of any registered deed which the law requires it is impossible to say that the applicant has even a prima facie title."

There is not one word in the judgment of the Collector to throw any discredit on the witnesses examined on behalf of the mohunt. The Commissioner, in appeal, went a little further. He said,

" the family priest and the old servants have probably been gained over."

He referred to a judgment of the District Judge in another proceeding to show that Jagatrup and the mohunt were in league against Awadh Bihari; and he thought that, even if the oral gifts were believed, it

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was impossible to believe that the mohunt got possession. This is all. There is no reference whatever to Uchit Jha, although it may be said that, as an old servant, he came within the sweeping generalization that the old servants have "probably" been gained over. There is certainly no indication in the judgment that the Commissioner directed his mind to the question whether Uchit Jha was speaking the truth when he said that he was a gotia of Ram Anugrah. How can it then be said that his evidence on this point was disbelieved by the Court? In my opinion, the statement of Uchit Jha made on the 26th May, 1903, at a time when both Awadh Bihari and Krishna Kishore were alive and therefore made before the question in dispute was, or could be, raised, constitutes important evidence on behalf of the appellants. It is not denied that if Uchit Jha be a gotia of the Sursand family, the defendants first party are all gotias of the family.

Exhibit TT series may again be considered in the light of Exhibit BB. The statements which constitute Exhibit TT series were made in 1869 and 1875. I have said that they establish that Busti Jha, Parmessary Jha, Harlal Jha, Modi Jha are relations, but that they are not agnatic relations of Krishna Kishore. Exhibit BB in my opinion establishes that Uchit Jha is an agnatic relation of Ram Anugrah and therefore of Krishna Kishore. Now it is not denied that Uchit Jha, Busti Jha, Parmessary Jha, Harlal Jha and Modi Jha are agnatic relations of each other. Exhibit TT series, therefore, read with Exhibit BB, lend strong support to the case of the appellants.

The next document is Exhibit DD which is an application of Jagatrup Kuer for letters of administration with the will annexed in respect of the estate of her stepson Awadh Bihari. This application was presented on the 29th October, 1903. The application was opposed by Krishna Kishore who was the next heir of Awadh Bihari and who contended that the will

was a forgery. The Court of probate found in favour of Krishna Kishore and rejected the application of Jagatrup Kuer. We are, however, not concerned with the result of the application. The third paragraph of the petition gave the names of Dwarika Jha, Uchit Jha, Thithar Jha, Thug Jha, Harbans Jha and Bhagwan Dutt Jha as the " near relations " left by Awadh Bihari. Jagatrup Kuer is now dead; and Mr S. M. Mullick lays considerable stress upon the statement as to the relationship contained in this petition. It is not open to doubt that Jagatrup Kuer had special means of knowledge as to the relationship and that the statement is undoubtedly admissible under section 32(5) of the Evidence Act. The statement was, however, challenged by Krishna Kishore who in his petition of objection filed on the 10th December, 1903, stated as follows:—

" That the objector denies that Dwarika Jha, Uchit Jha, Thithar Jha, Thug Jha, Harbans Jha and Bhagwan Dutt Jha are relatives of the deceased and submits that some of them are the servants of the said applicant."

Mr. Sultan Ahmad contends that if the statement of Jagatrup Kuer is admissible under section 32 of the Evidence Act, so is the statement of Krishna Kishore and that the statement of Krishna Kishore is entitled to the same weight as that of Jagatrup Kuer. Mr. S. M. Mullick draws our attention to the fact that the petition of Krishna Kishore is not signed by him but by his Vakils Jogendra Chandra Mukherji, Syed Ahmad Hussain and Ram Saran Lal and he contends that the statement as to the relationship contained in this petition ought not to be regarded as the statement of Krishna Kishore. I am unable to assent to this argument. It is quite true that the petition does not bear the signature of Krishna Kishore; but the petition was filed on his behalf by his vakils and must be regarded as his petition. The Court of Probate acted on this petition and ultimately rejected the application of Jagatrup Kuer. Some importance must accordingly be attached to the petition of Krishna Kishore and it must be weighed along with the other evidence

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in the case to help us to decide the issue as to the relationship.

The next document upon which Mr. S. M. Mullick relies is a case for opinion submitted to Sir Rash Bihari Ghosh and Golap Chandra Sarkar on behalf of Rani Mulukrani Kuer referred to in the case as "Rani Soorsar." This document was rejected by the learned Subordinate Judge and has not been printed in the paper book. There is a clear statement in the case for opinion that Ashrafi Singh is a gotia of the Sursand family; but the questions are, first, whether the document is admissible in evidence; and, secondly, what weight should be attached to the document.

The circumstances under which the opinion was taken were these: Krishna Kishore who was the immediate reversioner of Krishna Pertap Inder Narain Singh expectant upon the death of Mulukrani Kuer found himself in financial difficulty during the proceedings in connection with the application of Jagatrup Kuer for Letters of Administration to the estate of her stepson. He applied to Mulukrani Kuer for a loan of Rs. 40,000. Now Ashrafi Singh defendant no. 1 had been brought up by Mulukrani Kuer in her house and was an object of bounty on her part. She was willing to give Rs. 40,000 to Krishna Kishore on his agreeing to release a portion of the estate of which he was the reversioner and which was in the possession of Mulukrani in favour of Ashrafi Singh. There was some controversy in those days as to whether a widow could release a portion of the estate in favour of the next reversioner and the opinion of counsel was taken on the point. The following passage in the case for opinion is material:

"It may be mentioned here that this family is governed by the Mitakshara school of the Hindu Law, but this branch does not with the other branches form a Hindu joint family. There are now living one Kissen Kishore, Ashrafi Singh and four other persons marked (1), (2), (3) and (4) in the pedigree hereinafter set out belonging to the said family. Kissen Kishore is Kissen Pratap's great-great-grandfather's great grandson and Ashrafi Singh and the four other persons are Kissen Pratap's great-great-grandfather's great-grandfather's great-great-

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grandson's sons. Rani Soorsar who is desirous of making some provision for the said Ashrafi Singh has made the following arrangement with the said Kissen Kishore who appears to be the next reversioner expectant on the death of the said Rani namely that the Rani will execute a release of a portion of the said estate in her possession in favour of the said Kissen Kishore and he in his turn in consideration of Rs. 40,000 to be so paid to him will execute a conveyance of the said portion to be so released as aforesaid (the value whereof is far in excess of the said sum of Rs. 40,000) in favour of the said Ashrafi Singh. Learned Vakil's opinion is now sought on the following points," and the points are then enumerated.

There is no doubt whatever that the document is of considerable value to the appellants; for the relationship as therein set out is exactly the relationship which is claimed by Ashrafi and the others, the appellants in this appeal; but the important question is whether this document is admissible in evidence.

Babu Subodh Chandra Mitter, an attorney-at-law, who drew up the case for opinion has been examined on behalf of the appellants. He admits that the case was drawn up by him and that a pedigree was attached to the case; but he says that he does not remember whether he got the relationship from any paper which was sent to him or from the instructions of the persons who came to him. It appears from his evidence that certain persons came to him with a letter from Babu Ram Mohan De who in his day was a leading Vakil practising in the Benares Civil Court and he says that Babu Ram Mohan De sent him several cases

" always accompanied by his letter which contained as a rule as much instructions as could be conveyed through a letter."

He adds :—

" In this particular case I have no doubt that he did so."

This is the evidence of Babu Subodh Chandra Mitter.

It is important to refer to the evidence of two other persons on this point, Ashrafi Singh and Subalal Jha (misnamed Sukulal Jha in the paper book). Ashrafi's evidence on this point is as follows :—

" There was a will case between Jagatrup Kuer and Krishna Kishore after the death of Awadh Bibari Singh. Khakhan Jha was sent by

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Krishna Kishore Narain to Mulukrani Kuer for a loan of Rs. 40,000. Mulukrani Kuer talked to him from behind the parda over the matter. She proposed to give certain property to Kishun Kishore out of her husband's estate and wished that he should pay the money. She then sent Pandit Suba Lal Jha in company with Khakhan Jha to him for ascertainment of facts and consultation. Afterwards Pandit Suba Lal Jha, Khakhan Jha and Mutukdhari Lal, karpardaz of Mulukrani Kuer, came back and expressed that Krishna Kishore was willing to do that. Ram Mohan De, pleader, was then called in. Mulukrani Kuer and Khakhan Jha told him the facts and he noted them down. His note was taken by the aforesaid persons to Calcutta for consultation with lawyers. Khakhan Jha had brought a kursinama in Hindi from Krishna Kishore. The kursinama was taken by them to Calcutta. They brought the opinion of the lawyers. It was explained to her by Ram Mohan De. Afterwards she executed a deed of surrender in favour of Krishna Kishore who afterwards executed a deed of sale in my favour. The opinion paper remained in my custody. I filed it in the will case before the District Judge, Muzaffarpur. After the decision of that case it was returned to me and I kept it in my custody. I have filed it in this suit too."

This evidence is substantially corroborated by Suba Lal Jha.

He says as follows:

"I knew Awadh Bihari Singh of Sursand. After his death there was a dispute between Krishna Kishore and Jagatrup Kuer in respect of his will. There was a will case. Krishna Kishore being in need of money to meet the expenses of that case he sent Khakhan Jha to Mulukrani Kuer to lend money. Mulukrani Kuer sent me to Kishun Kishore to ascertain the fact. On my return I told her that the fact was true. She then sent me to Krishna Kishore to tell him that she would willingly lend him money if he could give up his right in the estate held by her in favour of Ashrafi Singh. I brought that fact to his notice and he agreed to part with a part of it. Lawyers were then consulted and a kabala and a deed of surrender were executed. The deed of surrender was executed by Mulkrani Kuer in favour of Krishna Kishore Narain Singh. The kabala was executed by Krishna Kishore in favour of Ashrafi Singh. Properties yielding an income of Rs. 10,000 or Rs. 11,000 a year were conveyed under the kabala. Khakhan Jha had taken a kursinama with him from Krishna Kishore to Mulukrani Kuer. That kursinama was shown to Dr. Rash Behari Ghosh. Mohan De, pleader of Benares, were consulted. Ram Mohan De was Mohan De, pleader of Benares were consulted. Ram Mohan De was sent for by Mulukrani Kuer and she consulted him at her own Deurhi at Benares. After that Khakhan Jha, Matukdhari Lal and I went to Calcutta with a letter from Babu Ram Mohan De, pleader, to Subodh Chandra Mitter, attorney; he also gave a paper with the kursinama written on it. He mentioned the facts of the case on which matters were to be consulted. Subodh Chandra took us to the house of Rash Bihari Ghosh and consulted him. Ram Mohan De had prepared that paper after consulting Mulukrani Koer. Subdoh Chandra Mitter, attorney, had written out the statement of facts with reference to the

said papers in accordance with rules of his office and the paper prepared by him was placed before Dr. Rash Behari Ghosh, vakil. Rash Behari Ghosh looked into that paper, wrote out his opinion on it and signed it. Afterwards the said attorney took us to Golap Chandra Sarkar, vakil, for his opinion. Golap Chandra Sarkar looked into the paper and the opinion of Dr. Rash Behari Ghosh. He agreed with the opinion of Dr. Rash Behari Ghosh and signed it. He then returned to Benares and informed Mulukrani Kuer of it."

The evidence of these three witnesses, Subodh Chandra Mitter, Ashrafi Singh and Pandit Subalal Jha, establishes the following facts:

1. Krishna Kishore being in need of money applied to Mulukrani Kuer for a loan of Rs. 40,000. He sent Khakhan Jha to Mulukrani to negotiate the loan on his behalf.

2. Mulukrani was willing to give Rs. 40,000 to Krishna Kishore on condition of his releasing a portion of the estate in favour of Ashrafi. Her agent in the matter of the negotiation was Subalal Jha.

3. Babu Ram Mohan De, pleader of Benares, was consulted in the matter and he sent Khakhan Jha and Subalal Jha to Babu Subodh Chandra Mitter with a letter giving all the facts relevant to the case.

4. Khakhan Jha took with him a kursinama of the family from Krishna Kishore.

5. Babu Subodh Chandra Mitter drew up a case for opinion either on the letter written to him by Babu Ram Mohan De or on the instructions given to him by Subalal Jha and Khakhan Jha. That case for opinion contains a definite statement that Ashrafi is a gotia of Krishna Pertap Inder Narain Singh.

6. In the result Mulukrani and Krishna Kishore settled property upon Ashrafi Singh.

In my opinion the case for opinion is admissible in evidence. It is inseparably connected with the evidence of these three witnesses. Babu Subodh Chandra Mitter was undoubtedly acting on behalf of both Rani Mulukrani and Krishna Kishore. He undoubtedly acted on the instructions given to him in the course of business. In taking the opinion of counsel it was necessary to set out the names of all the reversioners for one of the questions asked was,

" whether the transfer would be valid as against the actual reversioners upon the death of the Rani."

The statement must be regarded as the statement both of Mulukrani Kuer and of Krishna Kishore,

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especially as we have it clearly established that Khakhan Jha took with him a kursinama from Krishna Kishore. The learned Subordinate Judge rejected the document. The ground given by him for such rejection may be stated in his own words:—

"It is inadmissible in evidence there being nothing to see that pedigree was supplied by Mulukrani Kuer or Krishna Kishore and the original having not been filed. It is rejected."

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In saying that there is nothing to show that the pedigree was supplied by Mulukrani Kuer or Krishna Kishore, the learned Subordinate Judge is obviously in error. There is evidence of Ashrafi Singh and Subalal Jha to the effect that Khakhan Jha took a kursinama from Krishna Kishore. It is quite true that the original pedigree has not been filed; but the appellants are not seeking to prove a copy of the original which was taken to Subodh Chandra Mitter by Khakhan Jha. They rely upon the statement embodied in the case for opinion which, if believed, establishes beyond doubt that Ashrafi Singh is an agnatic relation of Krishna Pertap Inder Narain Singh. I regard the statement in the case for opinion as the statement of Mulukrani Kuer and Krishna Kishore. Babu Subodh Chandra Mitter was acting on their behalf and his statement in the discharge of his duty and within the scope of his authority must be regarded as a statement of the persons on whose behalf he was acting. What is said or done by Babu Subodh Chandra Mitter in the course of his business and within the scope of his authority is said or done by Mulukrani Kuer and Krishna Kishore through him as their mere instrument. We have accordingly admitted the document in evidence in this Court.

In my opinion the value of this document is enormous. There was no object whatever for putting forward a false claim at that time since Krishna Kishore was still living. Both Mulukrani and Krishna Kishore are parties to the statement of the case for opinion and they are certainly persons who

have special means of knowledge as to the relationship between Ashrafi Singh and themselves.

The next document is Exhibit M. This is the petition of objection filed by Bhagwan Dutt Jha to the application of Genda Kuer for probate of the will of Krishna Pertap. In that petition Bhagwan Dutt Jha and others claimed to be the nearest gotias of Krishna Kishore. An issue was framed in the probate proceedings as to whether the caveators Bhagwan Dutt and others were agnates of the deceased and this issue was decided in favour of Bhagwan Dutt, Ashrafi Singh and others. The decision on the question of locus standi in a court of probate is of course not final between the parties; but the proceedings show that a claim was put forward on behalf of the defendants first party at the earliest opportunity and that the claim was recognised by the Court of Probate.

I now come to two transactions which in my opinion constitute important evidence in favour of the appellants. I have already referred to the agreements as between the gotias and certain other persons to contest the claim of Chandreswar Prosad Singh. These agreements, in my opinion, constitute admissions on the part of Jagatrup Kuer, Lachmi Prosad and Golab Kuer that the defendants first party are the gotias of Krishna Kishore. I will first refer to Exhibit EE which is an ekrarnama between the present defendants first party (who are the appellants in this Court) of the first part and Fulrani Kuer and Satrani Kuer, wives of Ashrafi Singh, of the second part and Lachmi Prosad Singh of the third part This ekrarnama was the necessary prelude to the attack upon Chandreswar Prosad and it sets out in distinct terms that the defendants first party were the agnatic relations of the Sursand family and were entitled to succeed to the four estates which were set out in the schedule, namely, the estate of Babu Krishna Kishore Narain Singh, the estate of Raja Bishun Pergash Narain Singh, the estate of Babu

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Janki Prosad and of the estate of Babu Krishna Pertap Inder Narain Singh. It provided that in consideration of the expenses of all the litigations being borne by Fulrani Kuer and Satrani Kuer and by Babu Lachmi Prosad Singh, 3 annas in each of the estates should go to Fulrani Kuer and Satrani Kuer and 3 annas should go to Lachmi Prosad Singh. Now Lachmi Prosad Singh who is a party to this ekrarnama is the son of a sister of Jagatrup Kuer; and in the absence of any agnatic relations he was the presumptive reversioner to the estate of Janki Prosad Narain Singh expectant on the death of Jagatrup Kuer. The ekrarnama definitely asserts that the defendants first party were the agnatic relations of the Sursand family; it is inconceivable that Lachmi Prosad who was the presumptive reversioner to one of these estates should recognise the title of the defendants first party unless he believed in their title. Now it is the case of both sides that Jagatrup Kuer was really financing Lachmi Prosad. The ekrarnama therefore constitutes an admission as to the title of defendants first party, on the part of Jagatrup Kuer, who had certainly special means of knowledge as to the relationship, as well as on the part of Lachmi Prosad.

This ekrarnama was modified by another ekrarnama, dated the 14th April, 1911, by which Golab Kuer the grandmother of plaintiffs 1 and 2, paid Rs. 10,000 to Fulrani Kuer and Satrani Kuer and took their place in the earlier ekrarnama. There is a distinct assertion in this ekrarnama that the present defendants first party are the " sapinda gothias " and legal heirs of the last male owners of each of the four estates already enumerated. This position is accepted by Rani Golab Kuer who pays Rs. 10,000 to Satrani Kuer and Fulrani Kuer for the privilege of coming into the agreement which conferred on her a right to 3 annas share in each of the four estates, on condition of her bearing 8 annas share of the necessary expenses. This agreement, it will be noticed,

is signed by Gulab Kuer by her own pen and she states definitely that

"the ekrarnama executed is correct."

It appears that a conveyance of 3-annas share in each of these estates was actually executed by the defendants first party in favour of Golab Kuer.

On the 18th May, 1911, a suit, being suit no. 176 of 1911, was instituted on the basis of the agreement. The present defendants first party and Golab Kuer were the plaintiffs in the suit and Chandreswar Prosad and the bandhus were the defendants. The first paragraph of the plaint set out a genealogical table which showed that Thanu Jha was the common ancestor of the defendants first party and Krishna Pertap Inder Narain Singh. The third paragraph recited as follows:—

"That on the death of the said Mussammat Mulukrani Kuer the plaintiffs nos. 1, 2, 3 and 4 and the father of plaintiff no. 5 who thereupon as the nearest Sapindas were entitled to succeed to Krishna Pertap Inder Narain Singh's estate proceeded to take possession of the said estate but were obstructed in so doing and that in consequence of such obstruction proceedings were taken under section 145 of the Criminal Procedure Code in the Court of the Subdivisional Magistrate of Sitamarhi concerning the properties mentioned in the first part of the said schedule 1 situate within the jurisdiction of the said subdivision of Sitamarhi."

The 8th paragraph of the plaint alleged that of the claimants arrayed against them, the claim of Chandreswar Prosad as the adopted son of Krishna Kishore and the claim of defendant no. 7 as the grandson of Maharaja Bishun Pergash Narain Singh were entirely false and that the claims of defendants 8-22 as gotias were also false and as regards the other claims, namely, the claims of the bandhus, the plaintiffs stated that

"the defendants so claiming have no right to succeed as long as the present plaintiffs or any one of them or any of their heirs may be living."

The first relief claimed by the plaintiffs was as follows:

"That it be declared that plaintiffs Nos. 1 to 4 and father of plaintiff No. 5 were the nearest gotias of Babu Krishna Pertap Inder Narain Singh living at the time of the death of Mussammat Mulukrani

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Kuer and entitled to succeed to his estate and that they having conveyed a three annas share of the same to the plaintiff No. 6 the said plaintiff No. 6 is entitled to a three annas share of the same."

The plaint was verified amongst others by Golab Kuer by her own pen and her verification is as follows:

"I, Dulhin Gulab Kuer, plaintiff, do hereby declare that the contents of this plaint are to the best of my knowledge true and correct."

Golab Kuer who has been examined in this case on behalf of the plaintiffs denies all knowledge of the ekrarnama. Her evidence on this point is instructive.

* * * *

She admits execution of the ekrarnama, but her case is that she signed it, not as an acknowledgment of the title of the gotias, but to get rid of their title by paying them Rs. 10,000. She throws the whole blame upon her servant Jogeshwar Jha. Jogeshwar Jha is of course dead and cannot be called to contradict her story; but Ashrafi Singh was in a position to contradict the story and it is worthy of note that the story told in the witness box by Golab Kuer was not put to Ashrafi Singh. Ashrafi Singh asserts in his evidence that the proposal for the ekrarnama was made to him by Golab Kuer and that the share of his wives was purchased by Golab Kuer; and he said that the draft of the ekrarnama was made by Apurba Krishna Mitter and Jogeshwar Prosad Singh and settled by Mr. Kennedy. Both Apurba Krishna Mitter and Mr. Kennedy were appearing in this case on behalf of the plaintiffs.

There is, therefore, a distinct assertion by Ashrafi Singh which, if believed, establishes the case of the plaintiffs that there was an intelligent execution of the document by Golab Kuer. It is quite true that Ashrafi Singh does not say that the document was read and explained to Golab Kuer; but he does say that the proposal came from her and that the proposal was that she should buy up the shares of his wives. Now it is remarkable that the evidence of Ashrafi Singh on this point was not

challenged in cross examination; and I have no doubt whatever that the story told by Golab Kuer in the witness box is entirely devoid of truth. Ashrafi Singh was examined on the 31st May 1921 and Golab Kuer was examined a year later, namely, on the 29th March, 1922. If there was any foundation for the story told by Golab Kuer in the witness box it would undoubtedly have been put to Ashrafi Singh.

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This is not all. The plaint was filed on the footing of the ekrarnama by Golab Kuer along with the defendants first party. Golab Kuer verified the plaint by her own pen and she said distinctly that the contents of the plaint were to the best of her knowledge true and correct. The plaint was drafted and filed by Mr. Kennedy, a vakil commanding universal respect in Muzaffarpur and it is most unlikely that he would have consented to file the plaint on behalf of a pardanashin lady unless, (as the rules of the Court provide), he had satisfied himself that she was the real party to the suit. I disbelieve the story told by Golab Kuer and I hold that she was a party to the ekrarnama, Exhibit EE, and to the plaint, Exhibit 7.

I was at one time inclined to take the view that much importance should not be attached to the statement of Golab Kuer in the ekrarnama and in the plaint, because, from one point of view, it may be said that she was merely gambling to get certain shares in the Sursand estate for her grandsons; but on mature consideration, I do not think that this view can be maintained. In the first place, it is improbable that belonging, as she did, to a proud aristocratic family, Golab Kuer would make a solemn admission of a relationship, and an agnatic relationship, between her and one who, according to her present case, was a cook employed by Mulukrani, even for the purpose of embarking on a speculation to secure a portion of the estate for her daughter's sons In the next place, it is to be remembered that her grandsons plaintiffs 1 and 2 had already entered

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into an agreement with Harnandan and Brijnandan on the 30th July, 1906, for the division of these estates amongst themselves in certain definite sharers. A more comprehensive agreement followed on the 9th May, 1908. By these agreements plaintiffs 1 and 2 who were represented in those agreements by their mother Ram Dulari agreed to bear certain expenses in connection with the litigations which were now inevitable. It is not denied that Golab Kuer in entering into the ekrarnama on the 14th April, 1911, was acting entirely in the interest of her grandsons, plaintiffs 1 and 2. Is it likely that she should agree to pay Rs. 10,000 to Satrani Kuer and Fulrani Kuer and then to bear 8-annas share of the expenses of the litigation for the purpose of getting 3-annas share in the estates on behalf of her grandsons if she did not believe in the claim of the gotias? Under the bandhu agreements her grandsons were to bear $3\frac{2}{5}$ths annas of the expenses and get in return $3\frac{3}{5}$ths share of the properties. In the gotia agreement of the 14th April, 1911, Golab Kuer pays down Rs. 10,000 for the privilege of coming into the agreement; and then she agrees to bear 8-annas of the expenses to get 3-annas share of the properties. It is not open to doubt that Golab Kuer had special means of knowledge as to the relationship existing between the parties and her definite admissions first in the ekrarnama of the 14th April, 1911, and, secondly, in the plaint filed on the 18th May, 1911, constitute important evidence in favour of the case put forward on behalf of the appellants.

The position may now be reviewed. On the death of Awadh Bihari the only living members of the family according to the case of the plaintiffs were (*1*) Krishna Kishore, (*2*) Mulukrani Kuer, (*3*) Jagatrup Kuer, (*4*) Golab Kuer and (*5*) Rajbansi Kuer. Rajbansi has always lived at Ajodhya and although cited to give evidence on behalf of the plaintiffs, she was not called on their behalf. So far as Krishna Kishore is concerned, his petition in opposition to the application of Jagatrup Kuer is undoubtedly in

favour of the plaintiffs, but as against that it is to be remembered that the case for opinion was the case submitted on his behalf; and there is evidence which in the circumstance it is impossible to ignore that a kursinama was sent by him to the solicitor in Calcutta through Khakhan Jha. So far as Mulukrani Kuer is concerned, Ashrafi Singh was brought up in her house and there is no question that she had a great deal of love and affection for Ashrafi Singh. It has been suggested that Ashrafi Singh was a cook in the employ of Mulukrani Kuer. That suggestion I have no doubt is wholly false. It is a recent invention in the heat of litigation, which is utterly incongruous with the proved activities of Mulukrani Kuer and Ashrafi Singh before Mulukrani Kuer's death in 1908. The case for opinion constitutes an admission on the part of Mulukrani Kuer that Ashrafi Singh is a gotia of the Sursand family. Her attitude towards Ashrafi Singh makes the case of the appellants inherently probable. So far as Jagatrup Kuer is concerned, she has clearly admitted the title of the plaintiffs in two proceedings; first, in her application for letters of administration to the estate of her stepson; and, secondly, in enabling Lachmi Prosad, the son of her sister, to enter into the first gotia agreement. Golab Kuer has stated in clear terms that the defendants first party are the agnates of the Sursand family. The documentary evidence, in my opinion, is therefore overwhelmingly in favour of the case put forward on behalf of the appellants.

If this be the position of the documents, why should the oral evidence adduced on behalf of the appellants be disbelieved? That evidence is consistent with the documents whereas the oral evidence adduced on behalf of the plaintiffs is inconsistent with it. I do not propose to discuss the oral evidence nor to follow the learned Subordinate Judge into the details of that evidence. It is sufficient to say that although I would be prepared to accept the estimate of the learned Subordinate

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Judge of the oral evidence if the documents corroborated that evidence, I am not prepared to accept it since I have no doubt that the documents not only do not corroborate but contradict the finding of the learned Subordinate Judge. I have carefully considered the oral evidence and although I am not prepared to accept the testimony of all the witnesses called on behalf of the defendants, I have no reason to doubt that some of them at any rate are witnesses of truth and ought to have been relied upon by the learned Subordinate Judge. I refer in particular to D. Ws. 5, 10, 13, 24, 2, 22, 28, 23, 27 and 79. I hold that the defendants-appellants have established their case that they are the gotias of Krishna Pertap Inder Narain Singh and are entitled to succeed to the estate in preference to the plaintiffs. Whether they are entitled to succeed to the estate must however depend on the question whether Chandreswar Prosad has established his case that he was adopted in the dattak form by Krishna Kishore. But on this finding the plaintiffs' suit fails and I allow the appeal with costs payable by the plaintiffs to the defendants first party both in this Court and in the Court below.

F. A. 39/23.—I now come to First Appeal 39 of 1923 which is the appeal of Chandreswar Prosad; and the material question in this appeal is whether Chandreswar Prosad was adopted by Krishna Kishore in the dattak form on the 11th June, 1905.

* * * *

The plaintiffs contest the case of Chandreswar on every point. First they say that the case of adoption is wholly false and that the case was set up by Genda Kuer in collusion with her brother Debi Prosad and his son Sarjug Prosad in order to benefit the family of Sarjug Prosad; secondly, they say that the day when the adoption is alleged to have taken place was an inauspicious day and that it is unlikely that the adoption could have taken place on that day; thirdly, they say that the boy was over five years of age and that the adoption was invalid in law; and, fourthly, they say that Krishna Kishore was governed by

Mithila law and that dattak adoption was inadmissible in his case. A further point was taken in this Court on behalf of the plaintiffs to the effect that assuming that dattak adoption was permissible in his case, it did not, in the school of law he was subject, give him the right of collateral succession. In their evidence they deny that Chandreswar Prosad performed the Sradh of Jagatrup Kuer or that of Genda Kuer and that his Janao ceremony or the ceremonies connected with his two marriages took place in Sursand.

I will first deal with the question whether the adoption in fact took place The evidence on this point falls under five different heads; first, the statement of Krishna Kishore in his will to the effect that Chandreswar Prosad was his dattak son; secondly, evidence showing that the adoption was accepted as a fact in various proceedings and by the relatives; thirdly, evidence constituting the declaration of Krishna Kishore that he intended to adopt the boy and his treatment of the boy from the 4th January up to the date of adoption; fourthly, evidence showing the preparation made for the adoption, and, fifthly, evidence of the actual adoption.

Mr. P. K. Sen on behalf of the appellant contends that the statement of Krishna Kishore in the will is sufficient in itself to prove the adoption. The will is dated the 15th November, 1905, and the statement upon which reliance is placed is as follows:

> "I, the declarant, have at present two wives, namely, Dulhin Genda Kuer and Dulhin Dhanwanti Kuer, and a dattak son Babu Chandreswar Prosad Narain Singh alias Paramhansji, living. For some time past I kept the said dattak son with me and brought him up and maintained him, and in consultation with and with the consent of the two wives, I with my first wife took him in adoption in the dattak form on the 24th Jeth, 1312, Fs. from Babu Sarjug Prosad Narain Singh, father of Babu Chandreswar Prosad Narain Singh alias Paramhansji aforesaid, according to the Shastra after the performance of the dattak homa, etc., with all attendant rites."

The will then proceeded to appoint his eldest wife Genda Kuer the executrix of the will and the guardian of his adopted son and (subject to the provision for maintenance, education, Janao, marriage, etc., of his

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adopted son) to devise his estate in equal shares to his two widows with remainder with regard to the share of each of them to his adopted son. Mr. P. K. Sen contends that the statement of Krishna Kishore is admissible under section 32 of the Evidence Act and that it is sufficient in itself to prove the adoption. It is obvious that the plaintiffs-respondents took a very serious view of the statement in the will as to the adoption of Chandreswar Prosad. Krishna Kishore died on the 16th November, 1905. and Genda Kuer applied for probate on the 22nd December, 1905. Caveats were entered on behalf of the present plaintiffs or their predecessors in title. The caveators questioned the adoption in those proceedings. The learned District Judge intimated that there was no onus upon Genda Kuer to prove the adoption, but that the factum of adoption might be challenged by the caveators, the question being material on the issue as to the due execution of the will by the testator. In pursuance of this direction the caveators cross-examined the witnesses called on behalf of Genda Kuer at great length on the question of adoption. They also produced evidence to establish that the adoption did not in fact take place. On the 28th July, 1909, the learned District Judge granted probate of the will to Genda Kuer. The Calcutta High Court reversed the decision of the learned District Judge on the 29th August, 1913, and the Privy Council on the 29th February, 1916, restored the decision of the learned District Judge. On the question which I am now considering the Privy Council said that it had no reason to doubt that the adoption was in fact made.

The first question is whether the statement has been properly proved. It is not disputed that it is admissible under section 32 of the Evidence Act; but it is contended that there is no proof in the record of this case that the statement upon which reliance is placed is that of Krishna Kishore. It is quite true that the appellant has not called any witnesses in this case to prove the due execution of the will by Krishna Kishore; but he has produced the probate

granted by the learned District Judge and he contends that the probate is conclusive proof as to the due execution of the will by the testator. Section 91, *Exception 2*, of the Evidence Act provides that wills admitted to probate in British India may be proved by the probate. Mr. Manuk on behalf of the respondents contends that probate is conclusive proof only in regard to the legal character to which it declares any person to be entitled and the actual dispositions made in the will which the decree of the probate court declares to have been made by the testator; and that anything beyond these did not fall to be considered by the Court of Probate and cannot be said to have been conclusively determined. It was contended, in other words, that probate is conclusive proof of the execution of the dispositive portion of the will and of that portion by which an executor is appointed; and that the statement relied upon by the appellant, being in a collateral matter which was irrelevant to the grant itself, cannot be proved by the production of the probate.

In my opinion there are three conclusive answers to this argument. I entirely agree that a finding not essential to the judgment in the probate action cannot be said to operate as a finding in rem. For this reason I am of opinion that the finding of the Judicial Committee that there was no reason to doubt that the appellant was duly adopted by Krishna Kishore must be disregarded by us. If there had been no such finding or if the finding had been the other way, it might equally well have been the case that the Judge was bound to grant probate of the will to the executor; but, at the same time, all that is essential to the decision that the executor was entitled to probate must be taken to have been conclusively determined. Now the due execution of the will is the foundation of the title of the executor. For the purpose of this question we are not concerned with the truth of the statement made by the testator but with the question whether the statement was in fact made. The caveators challenged the will as a

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forgery; and one of the grounds put forward by them was that the story as to adoption was wholly false and that the statement in the will as to the adoption could not be the statement of Krishna Kishore The trial Judge allowed the caveators to cross-examine the witnesses called on behalf of the executors at great length on the question of adoption and to call witnesses in support of their case that the adoption did not take place as he considered that the question was material on the issue as to whether the will which was propounded was a genuine will or a fabrication. In my opinion, the question whether the statement was the statement of the testator was involved in the issue as to whether the will was duly executed by the testator.

Secondly I consider that the statement as to the adoption cannot be separated from the dispositive portions of the will. It is fundamentally related to those portions which are concerned with the actual dispositions of the property It was contended by Mr. Manuk that although in the earlier paragraph the testator makes a very elaborate statement as to the adoption of Chandreswar Prosad, he does not refer to him as his adopted son in the dispositive portions of the will. A careful scrutiny of the will does not support this argument. Chandreswar Prosad has been already described as his dattak son in the first paragraph of the will. Thereafter he is always referred to as:

"Babu Chandreswar Prosad Narain Singh alias Paramhansji aforesaid."

The word "aforesaid" indicates that he was throughout referring to him as his dattak son.

Now how can the description of Chandreswar Prosad as his dattak son be separated from the dispositive portions of the will? The testator is making provisions for the maintenance, education, janao, marriage, etc., of his adopted son. He is making provision for his guardianship during his minority. Now it was quite impossible for the testator to make

provision for his guardianship unless he were his son. A person may confer bounties on any one he chooses, but he has no right whatever to appoint a guardian over the person and property of that person unless he happens to be the father of the boy. In my opinion, it is quite impossible to separate the various statements in the will regarding Chandreswar Prosad from the dispositive portions of the will. I hold that the finding of the Court of Probate that the will was duly executed by the testator is a finding in rem and operates as against the world; and that the will so executed includes, as an intrinsic part thereof, the declaration by the testator that Chandreswar alias Paramhansji was the testator's adopted son.

In the third place, it is not open to doubt that the finding as to the execution of the will binds at any rate the parties and privies to the probate proceedings. It is objected, however, that the plaintiffs 2 and 3 were not parties to those proceedings. There is no difficulty so far as plaintiff no 2 is concerned. He is the younger brother of plaintiff no. 1 who was one of the caveators and who substantially represented the interest of plaintiff no. 2. So far as plaintiff no. 3 is concerned, the position is this: his father was one of the caveators but he died during the pendency of the probate proceedings. Plaintiff no. 3 thereupon applied for substitution. His application was however rejected on the ground that he had no locus standi. It is on this ground that it is contended that the decision of the probate court if it does not operate as a decision in rem, cannot be said to be binding on plaintiff 3.

In my opinion, however, plaintiff no. 3 is bound in the same way as the other plaintiffs are bound. The point is one of some nicety, and in dealing with it it is necessary to remember the following facts.

* * * *

In my opinion plaintiff no. 3 was substantially represented in the probate proceedings although he was not actually a party thereto. I hold therefore

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that the finding as to the execution of the will by the probate court binds plaintiff no. 3 just as effectively as it binds the other plaintiffs who were parties to the probate proceedings.

Mr. P. K. Sen draws our attention to the deposition of Sarjug Prosad. Exhibit A, and says that Sarjug Prosad has proved the will of Krishna Kishore. Mr. Manuk asked us to consider whether this document was properly admitted in evidence. Sarjug Prosad is now dead and his deposition was put in obviously under section 33 of the Evidence Act. That section provides as follows:

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding."

The questions in issue may be said to be substantially the same in the two proceedings; for, although no separate issue was framed on the question of adoption in the probate proceedings, evidence was given on it as bearing on the issue as to the due execution of the will. There is also no doubt that the adverse party in the probate proceedings had the right and opportunity to cross-examine Sarjug Prosad. In fact that right was specifically given to them by the learned District Judge, and they cross-examined Sarjug Prosad very fully on the question of adoption. The only question is whether the probate proceeding was between the same parties or their representatives in interest.

As I have already said plaintiff no. 3 was not a party to the probate proceedings; but it is contended that the other plaintiffs who were all represented in the probate proceedings were his representatives in interest. The vague expression "representatives in interest" has not been defined in the Act; but whatever scope may be given to those words, they must at least include privies in estate. Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate. The rule is stated in these terms in Taylor on Evidence (11th edition, page 345):

> "The admissibility of evidence seems to turn, rather on the right to cross-examine, than upon the precise identity, either of the parties or of the points in issue, in the two proceedings, provided they are substantially the same."

I have already considered the matter; and, in my opinion, having regard to the two ekrarnamas, dated the 30th July, 1906, and the 9th May, 1908, respectively, plaintiff no. 1 and the predecessors in title of plaintiffs 4—8 must be regarded as having substantially represented the interests of plaintiffs 2 and 3, and therefore as the representatives in interest of plaintiffs 2 and 3. In this view I think the deposition of Sarjug Prosad was properly admitted in evidence by the learned Subordinate Judge. Now Sarjug Prosad undoubtedly proves due execution of the will by Krishna Kishore.

In my opinion the statement of Krishna Kishore is properly before us and we must now consider the effect which must be given to it. Mr. Manuk contends that although the statement may be admissible under section 32 of the Evidence Act, the question of value is for the court and that having regard to the surrounding circumstances we should not attach any value to the statement. Mr. Manuk has cited various authorities before us for the purpose of showing that statements of deceased persons have not always received very great weight in the hands of the

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courts. It is useless to consider authorities on a pure question of fact. I agree that the statement should not receive much weight if it could be shown that it was made in the interest of the testator and in view of a litigation; but this is not the case here. Mr. Manuk asks us to consider whether Krishna Kishore by merely making a declaration could affect the question of succession to the various estates comprised in Sursand. The answer is that the declaration did not pretend to affect succession; but on the other hand it was in the power of Krishna Kishore by making an adoption to affect the course of succession to all those estates. He was the presumtive reversioner to those estates and if he had no son he could make an adoption and thus defeat whatever interest the plaintiffs might have to these estates. A statement of this nature differs fundamentally from any statement that a deceased person might make in his own interest in view of a contemplated litigation. In England a person could not make any person his son even if he wanted to do so; but in India it is possible to supply a son where there is no natural son in existence. Mr. Manuk's argument is that Krishna Kishore may have been interested in the boy whom he may have wanted to adopt; but he died suddenly, and he may have yielded to the importunities of Genda Kuer and thus described Chandreswar Prosad as the adopted son. Now there is no basis for the argument and it is purely conjectural and does not take the place of proof. On the other hand it is natural—and it is by no means uncommon in ordinary experience—that a Hindu adopting a son will form the intention in his mind to put the fact of adoption on record in a formal document at some convenient time. There is evidence to show that this was the mind of Babu Krishna Kishore. Mr. Manuk further contended that the statement was fraudulently made with the intention of making all the different estates available to Chandreswar. The answer is that it was in the power of the testator to make those estates available to Chandreswar by merely going through the form of adoption. The best answer

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which I can make to Mr. Manuk's argument is by citing the decision of the Judicial Committee in *Kidar Nath* v. *Mathu Mal* (1). That was a suit by Mathu Mal to set aside the alienation by the widow who was in possession of the estate in favour of the defendant The question was whether the plaintiff was the reversioner and therefore entitled to challenge the alienation made by a Hindu widow. He claimed to be the son of a daughter of the husband of the widow by a former wife; but this was denied by the defendant. He produced a will made by the widow five years before the suit in which she stated " I have no issue or any near relative. Mathu Mal is related to me as daughter's son, and Lala Khairati Lal. as my husband's younger brother. These are my relatives on my husband's side ". The oral evidence as to the plaintiff's title was found to be meagre and conflicting and therefore his only claim rested on the statement of the widow in the will. It was held by the Judicial Committee that the statement in the will was, under the circumstances, conclusive of the plaintiff's relationship. Lord Shaw in delivering the judgment of the Board said as follows: " In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge; and, if her version of the facts be sound, there can, in their Lordships' view, be no doubt that the judgment appealed from is correct. Their Lordships put to the learned counsel, who argued the case with conspicuous moderation, the point whether, if this lady, being alive, had testified in a court of law in the same sense as this will declared, there could have been any answer; and it was admitted that such testimony, unshaken in cross-examination, would have been conclusive on this matter of fact. Their Lordships are accordingly of opinion that the Chief Court was justified in attaching great weight to the contents of this will, and that the conclusion, upon this matter of fact, reached by them, is a conclusion which now

(1) (1913) I. L. R. 40 Cal. 555.

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cannot be successfully assailed". Turning to the argument advanced before them, Lord Shaw said as follows: "Their Lordships desire to add that they do not think it is open to this Board to entertain, in lieu of evidence, a suggestion to the effect that this will—made five years before her death—was part of a scheme which was to emerge in favour of one party to the present suit, after that suit was brought. These were conjectural efforts made in the argument, but they do not amount to anything which would weigh with the judgment of the Board on the point of evidence".

It is necessary now to see how the learned Subordinate Judge has dealt with this important matter. He concedes that "the will is no doubt evidence"; but he cites various cases to show that the statements in the will cannot be used as evidence for the purpose of showing that the facts therein mentioned are true. The first case to which he refers is the case of *Promotho Nath Mullick* v. *Prodymno Kumar Mullick* (1). The question in that case was whether a statement in a will to the effect that the testatrix had kept in deposit with her eldest son one pearl ring worth about Rs. 25,000 could be used as evidence on behalf of the plaintiff who was executor of the will in a suit for recovery of the ornament in question or the value thereof. How the decision in that case bears on the present case it is difficult to understand. The learned Subordinate Judge has entirely missed the point, which is, that the statement of the testator in the case before is a statement which comes within section 32 of the Evidence Act since he must have had special means of knowledge as to the relationship between him and Chandreswar Prosad. The next case referred to by the learned Subordinate Judge is the case of *Nalam Pattabhirama Rao* v. *Mandavilli Narayana Moorthy* (2). In that case it was held by the Judicial Committee that a statement in a will which suggests an inference as to a fact in

(1) (1921-22) 26 Cal. W. N. 772.
(2) (1921-22) 26 Cal. W. N. 273, P. C.

issue cannot be proved by or on behalf of the person who made it or his representative in interest. The statement in that case was clearly a self-serving statement and could not be proved on behalf of the person making it; but the statement in the present case stands entirely on a different footing. The last case referred to by the learned Subordinate Judge on this point is the case of *Bhagban Ramanuj Das* v. *Ram Praparna Ramanuj Das* (1). In that case a certain statement in an alleged will was relied upon by a party in support of his case that he was entitled to succeed to the office of mohant. Probate of the will was not taken and the Judicial Committee found that the will had no testamentary effect and that the statements in the alleged will were not true. It is certainly open to us in the present case to come to the conclusion that the statement made by the testator is not a true one; but for that we must have evidence and not conjectures. The fact that a particular statement was found not to be true in another case which was heard by the Judicial Committee certainly does not warrant the conclusion that the statement in this case is not a true one. It is necessary to repeat once more that cases of pure facts are of no assistance to us. The learned Subordinate Judge then points out that " no acknowledgment by words of mouth or by documents as regards adoption will do " and that " no question of law in adoption is involved but it is the question of fact and the fact must be proved by reliable and convincing evidence ". I entirely accept the view of the learned Subordinate Judge on this point but in considering the evidence I am bound to take into consideration the statement of the testator in the will. The learned Subordinate Judge then proceeds to speculate and he speculates as follows:

" *There might have been* circumstances under which the fact and ingredients of adoption *might have been* introduced into the will in a haphazard manner. It is a well known fact that in the month of Jeth, zamindars and cultivator-class of people remain free and marriage lagans begin. Sunday is considered to be a convenient day for all purposes. The month, day and time *might have been* introduced in

(1) (1895) I. L. R. 22 Cal. 843, P. C.

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the will on those accounts. The ingredients of adoption and the age of the boy *might have been* introduced in consultation with any lawyer well versed in Hindu law of adoption."

It is sufficient to say that speculation of this nature will not do. He then suggests that the statement of Krishna Kishore regarding the adoption may be considered to be like a declaration of a dying person and so no implicit reliance can be placed upon it. Lastly he says:

> "At the time when he was suffering from diarrhoea or cholera of which he died, he *might have* for the sake of ease or to get rid of the importunity of those around him, yielded to the suggestions made by them;"

and he concludes as follows:

> "His statement of adoption under these circumstances therefore cannot be held to be a conclusive proof of adoption. Even the admission of Krishna Kishore regarding adoption if he were alive would not have been a conclusive proof of adoption unless the ingredients of adoption were proved in case of any litigation between him and somebody else as regards adoption."

As I have said, the learned Subordinate Judge has entirely missed the point. He has concentrated his attention on points which are entirely irrelevant and in refusing to attach weight to the statement he has advanced no argument at all; he has merely indulged in speculation. I hold that the statement of Krishna Kishore in his will is admissible in evidence and is of considerable weight in this case though, as I said before, it is not conclusive.

I now come to the decisions in two cases on which reliance is placed as establishing the adoption. The first decision relied upon is that of the Judicial Committee in the probate case. It was faintly suggested that that decision operates as res judicata in the present case. The suggestion is an impossible one. The question of adoption was not in issue in the probate action; although it could properly be considered as bearing on the question as to the due execution of the will. I do not think that the decision in that case is admissible in evidence in the present case. Mr. Sen contended that it is admissible under section 13 of the Evidence Act. He says that a claim

was put forward on his behalf and that the claim was recognised by the Judicial Committee. The weakness of the argument is that the claim was not put forward. Genda Kuer declined to give more than a minimum of evidence on the question of adoption; and the learned District Judge said that there was no onus upon her to prove the adoption. I think therefore that the decision in the probate action is not admissible in this case. Mr. Sen next relied on the decision of the District Judge of Muzaffarpur in a proceeding under the Curator's Act. Jagatrup Kuer died on the 14th of June, 1917; and on her death the question arose as to who was entitled to succeed to the estate of Janki Prosad which was held by Jagatrup Kuer The claimants were (*1*) Chandreswar Prosad who claimed as the adopted son of Krishna Kishore and therefore as the nearest gotia, (*2*) Ashrafi Singh (defendant no. 1) who denied the adoption and claimed as a gotia, and (*3*) the present plaintiffs 1 and 2 who denied the adoption, disputed the title of Ashrafi Singh and claimed as bandhus. Proceedings were taken under the Curator's Act, Act 19 of 1841, to determine summarily the question of the right to possession of the estate. The learned District Judge decided in favour of Chandreswar and put him in possession. That judgment is Exhibit Z2. But the decision of the District Judge proceeded on the basis of the decision in the probate action and stands on the same footing as that decision. The learned District Judge did not pretend to decide either the question of title or that of possession. He thought that as Chandreswar had succeeded in having his title established in the Judicial Committee, he was entitled to be put in possession. It is obvious that Exhibit Z2 has not been properly admitted in evidence.

Mr. Sen relies upon the treatment of Chandreswar Prosad by his family. He claims that he was allowed to perform the sradh of Jagatrup Kuer and that of Genda Kuer, and that his janao ceremony and both his marriages took place in Sursand. This was denied by the plaintiffs; but the learned Subordinate Judge

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found in favour of Chandreswar on this point. There is no doubt whatever that the decision of the learned Subordinate Judge on this point is right; but no importance should be attached to the evidence. If therefore there was in fact a conspiracy between Genda Kuer and Sarjug Prosad to put forward Chandreswar as the adopted son of Krishna Kishore care would be taken to see that he answered to the description in the necessary ceremonies in the family.

I now come to the question of the treatment of the boy by Krishna Kishore prior to adoption and of the declarations made by him from time to time that he intended to adopt the boy. The most important evidence on this point is that of Jogendra Chandra Mukharji, a leading vakil of the Muzaffarpur court and commanding universal respect in Muzaffarpur. He says that he was professionally connected with Krishna Kishore since the death of Punit Kuer. On the question which is under discussion, he said as follows:

> "Mussammat Jagatrup Kuer propounded a will of Awadh Bihari Narain Singh. Babu Krishna Kishore opposed her application before the District Judge. I saw Krishna Kishore during the pendency of the will case brought by Jagatrup Kuer at Muzaffarpur. He was living near my house. I know Sarju Prosad. Babu Sarju Prosad with his wife and children was living in the same house since Krishna Kishore came here. Krishna Kishore used to see me very often almost every evening when he was at Muzaffarpur during the pendency of that case. In those days sometimes Krishna Kishore Narain Singh used to borrow and drive my carriage and pair. Sarju Prosad's son sometimes used to come to my house with Krishna Kishore. One day I remember distinctly that Krishna Kishore came to me with one of the sons of Sarju Prosad whom he said he liked very much and whom he said was a Paramhans and whom he wanted to give the name of Paramhans and about whom he expressed his intention of adopting as his son. He is known as Chandreswar Prosad alias Paramhans and he is defendant no. 25 in this case. After that my opinion was sought as to the form of adoption which was to be resorted to in the case of Paramhans. I advised him the dattak form of adoption as a perfectly valid form irrespective of whether the family was governed by Mitakshara or Mithila law."

He afterwards added that he came to know that Paramhans was adopted and that he came to know about it about the time of the death of Krishna Kishore. In cross-examination he said that he could

not swear whether he did not hear of the adoption till after his death. He also said that he made no enquiry about the adoption since he met Krishna Kishore for the second time in Muzaffarpur until after his death, and he added " nor did I hear of it ". He made it perfectly clear in his evidence that Krishna Kishore came to Muzaffarpur on two occasions during the pendency of Jagatrup's probate action.

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It is conceded by the learned Subordinate Judge that Krishna Kishore came to Muzaffarpur in January, 1904. Dr. Steven's certificate is dated the 16th January, 1904. His deposition has been put in and it shows that he was examined on the 20th January, 1904. What reason is there to doubt the testimony of Jogendra Babu? The learned Subordinate Judge has, however, made a violent attack on him on (what is now conceded) absolutely no materials whatever. As the question is of importance I propose to show at once that the learned Subordinate Judge has dealt with the evidence of Jogendra Babu with entire lack of discretion. In his examination-in-chief he had said that he came to know of the adoption about the time of the death of Krishna Kishore In his cross-examination he admitted that he could not swear that he did not hear of the adoption till after the death of Krishna Kishore.

* * * *

I have scrutinised the cross-examination of Jogendra Babu with care and I can find in it no foundation for the charge of criminal conspiracy brought against him by the Subordinate Judge It is fair to Mr. Manuk to say that he entirely dissociated himself from the charges levelled against Jogendra Babu by the Subordinate Judge. Indeed it is impossible to listen to charges of this kind unsupported, as they are, by a shadow of proof or even of allegation.

But Mr. Manuk has very properly drawn our attention to the fact that Jogendra Babu was actually appearing in the case on behalf of Chandreswar; and, he contends, that, being a witness in the case, it was

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his clear duty to retire from the conduct of the suit. I certainly think that it is desirable that a vakil should not appear in a case if he knows or has reason to believe that he will be an important witness in the case; and that he ought to retire if he accepts the brief not knowing or having reason to believe that he will be such a witness but discovering afterwards that he is a witness on a material question of fact. We have however no rules of professional conduct regulating the vakils in this matter, and it is impossible for us to lay down any rule which would be binding on them. All that we can say is, following Woodroffe, J., in *Weston* v. *Peary Mohan Das* (1) " that as a general practice, it is undesirable, when the matter to which counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting ".

I have anxiously considered the evidence of Jogendra Babu in the light of the criticism of the learned Subordinate Judge, and in my opinion, no ground has been shown for disbelieving him His evidence establishes that Krishna Kishore came twice to Muzaffarpur during the pendency of the probate case instituted by Jagatrup Kuer and that Krishna Kishore used to see Jogendra Babu almost every evening frequently accompanied by Chandreswar Prosad whom he used to call Paramhans and that Krishna Kishore stated to Jogendra Babu that he proposed to adopt the boy and asked his advice in regard to the adoption. There is other oral evidence which substantially corroborates that of Jogendra Babu.

The account books must now be considered, as they constitute important evidence on behalf of Chandreswar Prosad. The oral evidence shows that Krishna Kishore came to Muzaffarpur in January, 1904, and left for Baijnath about the end of that month accompanied by Chandreswar Prosad. They stayed in Baijnath for two or three days and returned to Sursand. They came back to Muzaffarpur some

(1) (1913) I. L. R. 40 Cal. 898, 938.

time in March and after about two weeks they again returned to Sursand. The account books corroborate the story on every point and testify to the fact that Krishna Kishore and probably his childless wives were greatly attracted by Chandreswar Prosad. We get the exact dates from the account books. They show that Krishna Kishore came to Muzaffarpur on the 4th January, 1904, left for Baijnath on the 25th of January and returned to Sursand on the 29th of January. I propose to deal with the entries in the account books of the period between 4th of January and the 29th of January. The learned Subordinate Judge has disbelieved the account books and I propose to show at once that there is no foundation whatever for the opinion.

* * * * *

Mr. Manuk contends that the ordinary course of business was not followed so far as Exhibit U is concerned. Exhibit U is the account of expenses incurred by Krishna Kishore from the 4th of January, 1904, to the 31st January, 1904. These expenses were incurred in Muzaffarpur and in Baijnath and the chithas of these expenses were made over to Kishori Lal by Sarjug Prosad on the 31st of January, 1904, and that they were entered in the Hindi cash book under date the 31st of January. Kishori Lal of course has no personal knowledge as to these expenses; and as Sarjug Prosad is now dead and as there is nobody to take respon sibility for these accounts, Mr. Manuk contends that they have not been regularly entered in the cash book in the course of business. But we know what the course of business in Krishna Kishore's office was. The cash book was kept in the office and receipts or disbursements of money at any other place were entered when the receipt or disbursement was brought to the knowledge of the office under the date of entry. This course of business was strictly adhered to in this case. It is hardly necessary to say that a book of account may be said to be regularly kept, although the book is not entered up from day to day or from hour to hour as the transactions take place: [see *Deputy Commissioner of Bara Banki* v. *Ram*

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Proshad (1)]. In regard to the criticism that there is no one who takes responsibility for the entries in Exhibit U, it is sufficient to say that that is not the test in considering whether the entry is admissible in evidence or not. The considerations which have induced the courts to recognise this species of evidence appear to be that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business and in the discharge of a duty are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false and that such entries usually form a link in a chain of circumstances which mutually corroborate each other. In other words, there is a presumption of truth which arises from the character and nature of this evidence and its constant liability, if false, to be detected. It is not quite correct to say that no one takes responsibility for these entries. Kishori Lal takes full responsibility for his statement that he entered these entries in the Hindi cash book on the 31st January, 1904. Krishna Kishore was then alive and it is unthinkable that a false case as to adoption could be manufactured in the lifetime of Krishna Kishore. The evidence of Kishori Lal may be false; but Mr. Manuk's argument, so far as this point is concerned, is not on the question whether Kishori Lal is entitled to credit or not. If Kishori Lal's evidence be false, we have complete power to deal with it. But the question is whether, accepting the evidence of Kishori Lal to be true, there is any foundation for the argument that Exhibit U should be rejected because there is no one who takes responsibility for it. In my opinion there is not the slightest reason to take the view that Sarjug Prosad was fabricating an account in the lifetime of Krishna Kishore with a view to put forward a case of adoption after the death of Krishna Kishore.

* * * *

I have considered the question of the books of account with the utmost care and I hope I have dealt

(1) (1900) I. L. R. 27 Cal. 118, 124, P. C.

with all the arguments of the learned Subordinate Judge and of Mr. Manuk before us. In my opinion they are not only admissible in evidence but are above suspicion. Nothing has been established in the case to show that these books of accounts were fabricated for the purpose of this case. I hold that these books of accounts are reliable documents and should be considered by us.

I now return to the question of Krishna Kishore's treatment of the boy before adoption. I have dealt with the evidence of Jogendra Babu, and I now propose to show that Chandreswar's case on this point receives substantial corroboration from the account books. It should be kept in mind that there is much oral evidence marching step by step with the details of these accounts.

Exhibit U (which has unfortunately not been printed in the paper book) shows that Krishna Kishore came to Muzaffarpur on the 4th January, 1904.

[His lordships here enumerated the entries in Exhibit U and proceeded as follows] :—

The importance of these entries in the account book cannot be overestimated. They show that Krishna Kishore took Chandreswar with him wherever he went and that he incurred expenses on his behalf. It may be said that nothing definite follows from these facts; but in my opinion the entries relating to the expenses incurred for puja in Muzaffarpur and in Baijnath are significant. They show to my mind that there was a close relationship or a contemplated relationship in spiritual matters between Krishna Kishore and Chandreswar; for on no other hypothesis is it possible to explain why on each occasion when Krishna Kishore incurred expenses for Puja for himself he should have incurred similar expenses for this infant Chandreswar. The subsequent entries are strongly indicative of the fact that Krishna Kishore had formed a strong attachment to the boy, and make the case of the appellant

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inherently probable. I do not propose to go through all the entries, but I may refer to some of them.

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The account book corroborates the oral evidence adduced on behalf of Chandreswar on this point and there is no reason to doubt the evidence that Krishna Kishore took the boy with him wherever he went and treated him in every respect as his son.

The learned Subordinate Judge disbelieves this story of the visit to Baijnath; and, disbelieving this story, he discredits the books of account. The reason given by him for disbelieving the story may be stated in his own words: "Sarjug Prosad could not be expected to have left his wife and children uncared for at Muzaffarpur and gone to Baijnathji and from there to Sursand and then returned after a week". He adds: "Had it been his own family dwelling house the case would have been a different one having regard to the help which people receive from their neighbours". We are asked to believe that it was impossible for Sarjug Prosad to have left his family in Muzaffarpur and accompanied Krishna Kishore to Baijnath. We are not informed as to his domestic arrangements. I am not prepared to discredit the oral evidence, supported as it is, by the account books, by having recourse to arguments as conjectural as those employed by the Subordinate Judge.

* * * * *

Now if, as I hold, the books of account are honest documents, then there is not the slightest doubt that the adoption has been established beyond reasonable doubt. The Hindi cash book shows that various persons paid chumaon to the boy at the time of the adoption and that bidagi was paid to various guests who were actually present. Many of the persons paying chumaon or receiving bidagi have been examined on behalf of the appellant, and there is not the slightest reason to disbelieve them. On the other hand, the plaintiffs have not examined a single

witness whose name appears in the Hindi cash book to say that he was not present at the adoption. There are also various entries in the cash book showing that the usual fees were paid to the priests who took part in the ceremony.

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Now on what ground are we to disbelieve the story of adoption? There is abundant oral evidence of an unimpeachable character to support that story and that evidence has received strong corroboration from the account books. The learned Subordinate Judge makes a grievance that the appellant has not examined some of the more important persons mentioned in the cash book as having either paid a chumaon or received a bidagi.

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The position then is this: of the persons mentioned in the cash book as having been present at the adoption, the appellant has examined Ram Bahadur, Chaturbhuj Sahay, Brij Bihari Singh, Sardari Jha, Kishori Lal Das, Pertap Narain Singh, Sansardhar Jha, Srinath Pathak and Umrao Misser. Their evidence, if believed, establishes that Sarjug Prosad gave, and Krishna Kishore took, the boy in adoption, in conjunction with Genda Kuer and that all the religious ceremonies were performed. Of the priests who took part in the adoption, the appellant has examined Phudi Jha and Sansardhar Jha and has given satisfactory explanation as to why he did not examine Panchanan Jha and Sone Lal Misser. Whether their evidence should be believed or not depends on whether it has received corroboration from the surrounding circumstances. The solemn declaration of Krishna Kishore in his will makes the case of the appellant inherently probable. The cash books which I accept as genuine, strongly corroborate the evidence.

I now turn to the evidence adduced on behalf of the plaintiffs. To start with it is worthy of note

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that, with the exception of Golab Kuer, they have not produced a single witness whose name appears in the cash book to contradict the case of the appellant. The evidence of their witnesses is of a negative character and is of no value to us. But there is grave reason to think that the evidence of most of them is untrue. Many of the witnesses for instance P. W. 12, 14, 15, 16, 17, 18, 24, 29, 46, 49, 55 and 59 say that the adoption did not take place; but they also say that the subsequent ceremonies of which I have spoken were not performed by Chandreswar and that Chandreswar's janao ceremony and his marriages did not take place in Sursand. These are obviously partisan witnesses on whose testimony no reliance can be placed. Many of the witnesses admit that they do not reside in Sursand but they say that the adoption did not take place because they would have heard of the adoption if it took place. They are P. W. 10, 13, 19, 20, 26, 34, 41, 45, and 53. Their evidence does not establish anything. The evidence of P. W. 1, 2, 3, 4, 5, 6, 7, 8, 11, 22, 25, 27, 30, 32, 33, 35, 37, 38, 40, 44, and 47 is irrelevant on the question which I am now considering. An unduly high proportion of the plaintiffs' witnesses are connected in one way or another with Mussammat Gulab Kuer who, as her own evidence shows, not only has strong personal feelings in the matter, but also a large pecuniary interest. I propose to deal a little more in detail with some of the witnesses on whom reliance has been placed.

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There remains the deposition of Rani Rajbansi Kuer taken in the probate action on behalf of Madhabishwarindra who was a party to those proceedings. Rajbansi Kuer was actually alive when this case was being heard before the learned Subordinate Judge. She was actually cited as a witness on behalf of the plaintiffs. They took out a commission for her examination in Ajodhya; but the commission was not executed and the learned Subordinate Judge allowed

the plaintiffs to put in her deposition apparently under section 32 of the Evidence Act. It is obvious that her deposition is not admissible in evidence to establish the truth of any of the statements made by her. She was actually living and it was not shown that her attendance could not be procured without an amount of delay or expense which appeared to the Court unreasonable.. But Mr. Manuk contends that although her evidence may not be admissible to prove the truth of her statement it is admissible to show that the appellant made a different case in regard to Rajbansi Kuer at that time. The case of the appellant now is that Rajbansi Kuer was present at the adoption and actually gave a chumaon and received a bidagi. It is said that the case put to Rajbansi at that time was that she was not in Sursand at the time of the adoption and therefore was not expected to know whether the adoption did or did not take place. I think the deposition (Exhibit 20) is admissible to prove that a different case was made on behalf of the appellant at that time.

Now in dealing with this question it must be remembered that Genda Kuer had stated definitely to the learned District Judge of Muzaffarpur that she did not propose to give any evidence on adoption. In her view the adoption was not a material issue in the probate action. Rani Rajbansi said in her evidence that she objected to the will set up by Genda Kuer as a forgery and the adoption as false. The only question put to her in cross examination on this point was: "Had you any talk with anybody about the adoption of Chandreswar Prosad alleged by Genda Kuer"? Her answer was: "With whom shall I have any talk? I received a letter from Muzaffarpur saying that it is false. I received the letter from Mathura Prasad Mukhtar. The letter might be with Babu Raghubar Singh. Mathura Prosad is my mukhtar. I do not know what pay he gets. It might be in the bahi khatas. Whatever I came to know about the wasiatnama and the adoption

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was from Mathura Prosad's letter ". Mr. Manuk's suggestion is that the appellant's present case that she was actually present at the adoption and gave a chumaon and received a bidagi was not put to her. This may be accepted as correct; but in my opinion nothing turns on it. It is quite true that Sarjug Prosad was instructing the cross-examining vakil; but Rajbansi was examined in Ajodhya and Genda Kuer and Sarjug Prosad were more interested in having the will established than in raising any question as to adoption. Mr. Manuk's argument amounts to this, that Sarjug Prosad should have been ready with his case in regard to adoption and should have made use of the books of account from that point of view during the hearing of the probate action. I am unable to assent to this argument. Genda Kuer intimated to the Court definitely and finally that she did not desire to produce any evidence on adoption and the Court intimated to her that there was no onus upon her to establish the adoption in the probate action. I am therefore of opinion that nothing turns upon the cross-examining vakil not putting to Rajbansi Kuer that she was actually present at the adoption. The cross-examining vakil knew nothing of it, and it is too much to expect that Sarjug Prosad should have been prepared then with the relevant entries in the cash book and instructed the vakil to put those entries to her. Her evidence that the adoption did not take place is of course inadmissible.

It remains for me to deal with the general argument which was advanced by Mr. Manuk. He complains that although the adoption is alleged to have taken place on the 11th of June, 1905, the appellant declined, in the words of Mr. Manuk, " to put his title which was always under a cloud to the ordeal of a battle in the law Courts ". In my opinion there is no substance in the argument. So far as the estate of Krishna Kishore is concerned, the probate granted by the District Judge of Muzaffarpur gave his adoptive mother the executrix, and himself in due

course, a complete title to that estate. Jagatrup Kuer died in 1917 and the question arose as to the succession to the estate of Janki Prosad. He put forward his title at once and the learned District Judge gave him possession under Act 19 of 1841. Mr. Mauuk says " That may be so, but the decision of the District Judge did not establish his title to the estate ". I entirely agree; but having got possession, it was not for him to put his title to the ordeal of a battle in the law Court. The present plaintiffs 1 and 2 instituted title suit as against Chandreswar on the 13th September, 1917. That suit failed because it was held that plaintiffs 1 and 2 had no title to the estate of Janki Prosad. It is worthy of note that no suit has as yet been instituted by any of the bandhus in regard to the estate of Janki Prosad. Mulukrani Kuer died on the 9th of March, 1908, and the question arose as to the succession to the estate which is now in litigation. The appellant again put forward his title at once and proceedings under section 145, Criminal Procedure Code, were started by the Subdivisional Officer of Sitamarhi. The learned Subdivisional Officer passed two orders, one on the 20th May, 1908, and the other on the 30th May, 1908. It is quite true that the appellant might then have instituted a suit for the declaration of his title to the estate now in litigation. But before he could do so the present defendants 1-5 and Golab Kuer instituted a suit against him for the declaration of their title to the estate in question. This suit remained pending in the Court of the Subordinate Judge up to the 14th of January 1919 on which date a petition was filed on behalf of the present defendants 1-5 by which they admitted the title of the present appellant. The present suit was instituted on the 8th of March, 1920. It is therefore idle to say that the appellant declined to put his title to the ordeal of a battle in the law Courts. As a matter of fact ever since the death of Krishna Kishore there have been nothing but litigations in the family.

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The only question that remains for consideration is whether the adoption took place on an inauspicious day. It is not suggested that the adoption would be invalid if it took place on such a day; but it is suggested that Krishna Kishore would never have consented to take the boy in adoption on an inauspicious day. Mr. Manuk accordingly contends that if he satisfies the Court that the 24th of Jeth, 1312, was an inauspicious day, he would be entitled to ask the Court to come to the conclusion that the adoption in fact did not take place.

There are three witnesses on this point; Jaikant Jha and Nityanand Jha, examined on behalf of the appellant and Ram Chandra Jha examined on behalf of the respondent.

It may be stated that the plaintiffs' case on this point was put forward for the first time on the 9th August, 1921, when Jaikant Jha was under examination. The adoption took place on the 9th day (Navami) of the lunar month and it was admitted by Jaikant Jha that the fourth, the ninth and the fourteenth days of both phases of the lunar month are rikta tithis and therefore prima facie inauspicious. The respondents rely on this admission in support of their case that the date fixed for adoption was inauspicious. It appears however that a rikta day is prima facie inauspicious unless there was some yoga—some astral conjunction—which made it auspicious. The appellant's case is that on this particular day Uttar Falguni Nachtra was in the ascendant between 2 and 3 in the afternon and that the next nachtra was Hasta and that as soon as Hasta came in, it being a Sunday, it became an auspicious day. The appellant also contends that the first twenty-five dandas only of a Navami tithi are inauspicious. One danda is equivalent to 24 minutes. Twenty-five dandas are therefore equivalent to ten hours. Now Navami started at 2-31 a.m. that morning. Adding 10 hours to 2-31 it follows,

according to the case of the appellant, that the day was inauspicious up to 12-31 noon. The appellant therefore contends: first, that it was only the first twenty-five dandas of the Navami which were inauspicious, and that, as the Navami started at 2-31 a.m. that morning, the day became auspicious after 12-31 p.m. that day; and, secondly, that although the Navami tithi was otherwise inauspicious, the setting in of Hasta brought in sidha yoga, the day being a Sunday.

Now this is amply borne out by the evidence of Nityanand Jha and, as I shall show, by the evidence of the plaintiffs' witness Ram Chandra Jha.

Before dealing with the evidence of these two witnesses, I must refer to Exhibit 17 the astrological patra which was produced by the plaintiffs and which was admitted by the appellant's witness Nityanand to be correct. On a reference to that document, it will be noticed that Uttar Falguni was in the ascendant on Sunday, the ninth (Navami) day of the lunar month and that its influence lasted for 9 hours 26 minutes 48 seconds and that Hasta followed and was in the ascendant the whole of that day and for 7 hours 50 minutes the next day. It will also be noticed that the sun rose on the Navami at 5-14 a.m. It follows, therefore, that Hasta was in the ascendant in the afternoon of Sunday, the Navami, when the adoption took place. This is the common case of the parties. Mr. Sen on behalf of the appellant contends that Sunday is particularly auspicious so long as Hasta is in the ascendant. This is denied by the plaintiffs-respondents; and it is contended, on their behalf that sidha yoga lasted only for 3 hours 12 minutes 48 seconds on the Navami and that it was accordingly over before half past eight that morning and that the next yoga was vyatipat, under which the adoption could not take place. The appellant admits that vyatipat yoga came in that morning but he contends that vyatipat yoga is inauspicious only

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up to noon and that it is auspicious for the rest of the day.

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I hold that the actual time when the adoption took place was auspicious and that the appellant's account of the adoption is altogether free from suspicion.

These are all the matters which have been argued before us in connection with the question of adoption. I recognise that, on a question of fact, the opinion of the learned Subordinate Judge is entitled to great weight. But it is my clear duty in this case to say that the judgment of the trial court cannot be supported. In regard to two matters at least, it can be definitely said that the learned Subordinate Judge was wrong. He was wrong in not attaching any weight to the declaration of Krishna Kishore in his will. He was wrong in rejecting the books of account as forged documents. I have taken some pains to show that the learned Subordinate Judge's decision on these points is entirely erroneous. Once due weight is attached to the declaration of Krishna Kishore, and the account books are taken into consideration, the oral evidence has to be considered from a different standpoint altogether. In my opinion the appellant has established that he was adopted by Krishna Kishore in dattak form on the afternoon of the 11th June 1905 and that he is prima facie entitled to succeed in this action.

Two grounds are however urged as invalidating the dattak adoption; first, that Chandreswar was over five years of age at the time of the adoption and therefore incapable of being taken as a dattak son by Krishna Kishore; and, secondly, that dattak adoption is inadmissible in Mithila which has its own particular form of adoption known as Kritrima. It was also urged before us (but not in the Court below) that a dattak adoption does not give the right of collateral succession in Mithila to the son adopted.

I will first deal with the argument that Chandreswar was over five years at the date of the adoption, and that the age of the boy rendered the ceremonies invalid according to the Hindu Law. There are two questions involved in the argument, first, a question of fact, and, secondly, a question of law. But the point was not raised in the plaint, nor was any issue framed on this point. The onus of establishing the adoption was clearly on the defendant-appellant; but the onus of establishing any ground for invalidating the adoption was on the plaintiffs respondents. In my opinion, the plaintiffs should have raised the point in the plaint so as to put the defendant on notice of the argument intended to be urged against him at the trial. One consequence of this lack of proper pleading is that we are asked to decide this point practically without any evidence. For my part, I cannot come to any conclusion as to the age of Chandreswar at the date of adoption; for, apart from certain general statements which are of no value to us, we have absolutely no evidence on this point. There is one passage in the deposition of Sarjug Prosad which was relied upon by the respondents. He said,

"Paramhans was born in Chait 1307."

If this be so, then Chandreswar was older than five years at the date of the adoption; but when the deposition was read over to the witness, he said,

"I have said the year 1307 by mistake. Paramhansji was born in Chait 1308."

The respondents contend that his first statement is true, and that his subsequent correction is false. I have a suspicion that this is so; but suspicion is not proof, and all that we can say is that his evidence on this point should be wholly disregarded. I am of opinion that if the onus be upon the plaintiffs to establish that Chandreswar was over five years at the date of adoption, they have failed to discharge the onus; but that, if the onus be upon Chandreswar to establish that he was under five years, he has similarly failed to discharge the onus.

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I will assume, however, that Chandreswar was over five years at the date of the adoption. It is conceded that so far as we are concerned, the point is concluded by the decision of this Court in *Raja Makund Dev* v. *Sri Jagannath Jenamoni*(1).

The learned Chief Justice of this Court pointed out in that case that all the High Courts and many of the modern text writers are agreed in holding that the Hindu Law imposed no restrictions as to age and, whatever be the age of the adopted son, it is now settled that his adoption is valid if made before upanayana, if he belongs to any of the regenerate classes, and, before marriage, if he belongs to the Sudra caste. The classical decision on this point is that of Mahmood, J., in *Ganga Sahai* v. *Lekhraj Singh*(2). That learned and distinguished Judge reviewed all the authorities and came to the conclusion that the passage of the Kalika Purana, upon which the limitation of five years for adoption is entirely founded, is not proved to be authentic; that even if it be taken to be authentic the interpretation adopted by Nanda Pandita in his Dattak Mimansa is not shown to be universally applicable and that this interpretation should be restricted only to Brahmans intended for priesthood. I may say that ever since that decision in 1886 the law has been settled in every Court in India that an adoption will not be set aside on the ground that the boy adopted was older than five years at the date of the adoption. This is how the law has stood for the last forty years, and title has been bought, in many cases, on the faith of that law. I do not propose to discuss the point at length; for I entirely agree with the decisions of Mahmood, J., and of the learned Chief Justice in this Court. I hold that the adoption of Chandreswar is not liable to be set aside on the ground that he was older than five years at the date of the adoption. I must not, however, be understood to hold that he was in fact older than five years at the date of the adoption.

(1) (1923) I. L. R. 2 Pat. 469. (2) (1887) I. L. R. 9 All. 253.

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The only other question is whether the parties, are governed by the Mitakshara Law or by the Mithila Law, and if by the former, whether dattak form of adoption is admissible in this case, and if so, whether the dattak son is capable of inheriting to collaterals. This question was not raised in the plaint, nor in the issues framed by the learned Subordinate Judge. The learned Subordinate Judge has however discussed the matter and, without recording an opinion on the question, whether the parties are governed by the Mitakshara Law or by the Mithila Law, he has held that if Chandreswar were in fact adopted by Krishna Kishore he would be entitled to succeed to the collaterals. The decision of the learned Subordinate Judge on this point is challenged by the plaintiffs.

First, as to the question of fact, whether the parties are governed by the Mithila Law. They reside in Mithila and must be presumed to be goverened by the law which prevails in Mithila until the contrary is shown. The defendant-appellant relies upon various pleadings and judgments in various suits to show that it was always assumed that this family was governed by Mitakshara Law; but in my opinion, those documents are hardly of any assistance to us since, in regard to the points involved in those suits, the Mithila law and the Mitakshara law are identical. There is some amount of reliable evidence that the Sursand family is a family of Paschima Babhans. This is admitted by at least two witnesses examined on behalf of the plaintiffs. There is also a statement to this effect in the will of Krishna Kishore. We may take it then that the parties are Paschima Babhans. But what does this term indicate? It is contended on behalf of the appellant that the term indicates that the family migrated to Mithila from the west and that accordingly the law which governed them in their original home must be deemed to govern them in their new home until the contrary is established. The explanation however is of the learned counsel appearing before us and not of any witness examined

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in the case. This being the position, I am unable to say on the evidence that the Sursand family migrated to Mithila from a Mitakshara country. The lack of evidence in the record is no doubt due to lack of pleadings in this case.

I will assume that the parties are governed by the Mithila law; but as the Judicial Committee has recently pointed out:—"The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara" [see *Sourendra Mohan Singh* v. *Hari Prosad Sinha*(1).] Now it is not open to doubt that a dattak adoption is recognised in the Mitakshara. It is also not open to doubt that a dattak son when he is governed by the Mitakshara law inherits to collaterals. The critical question for our consideration is, whether, in respect of this matter the Mithila school has departed from the law of the Mitakshara.

Dealing with the first question, namely, whether dattak adoption is permissible in Mithila it is sufficient to point out that dattak adoption is dealt with both in Vivada Ratnakar and Vivada Chintamani. Bachaspati Missra deals with the question in discussing the text of Vasistha which is to the effect that a woman has no power to give or take a son but with the assent of her husband. After discussing the text, he draws the following conclusion:—

> "She has a right to do so" (that is to say, to take or give a son in adoption) "in association with her husband, but not alone, since in such a case the rule, which empowers her to take a son with her husband but not to preform the rights of adoption, will be infringed." (Tagore's edition of Vivada Chintamani, page 74 and page 75).

The Mithila school apparently takes the text of Vasistha to mean that the assent of the husband must be given at the time of the adoption and that therefore a widow cannot receive a son according to the dattak form at all (*see* Mayne's Hindu Law, 8th edition,

(1) (1926) I. L. R. 5 Pat. 135.

paragraph 112, page 139). It follows that Mithila law recognises dattak adoption; but that it has departed from the Mitakshara in requiring that the assent of the husband should be given at the time of the adoption and, therefore, in ruling out an adoption by a widow.

It is quite true that the ingenuity of the Mithila Brahmins has discovered a form of adoption which avoids the difficulties of dattak adoption and enables a person, or even a widow, to adopt so that there may be somebody to perform the obsequies and take the inheritance. This form of adoption known as Kritrima is a recent innovation and its genesis is thus stated by Mr. Macnaghten:

"But according to the doctrine of Vachaspati, whose authority is recognised in Mithila, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the dattak form; and to this prohibitory rule may be traced the origin of the practice of adopting in the Kritrima form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, party. It is natural for every man to expect an heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithila, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therfore less likely to be frustrated by the impending dissolution of the party desirous of adopting." (*See* Sarkar's Hindu Law of Adoption, 2nd edition, page 447).

There is nothing to show that a dattak adoption is obsolete in Mithila. On the contrary, Mr. Sutherland was of opinion that an actual adoption made in the dattak form by a person of Mithila would not be illegal (*see* the passage quoted at page 447, Sarkar's Hindu Law of Adoption).

I have now to deal with the question whether a son adopted in the dattak form in Mithila would inherit to collaterals. It is not open to doubt that the Mitakshara gives him the right. The question is whether in regard to this matter the law of the Mithila school has departed from the law of the Mistakshara.

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Before dealing with this question, it is well to remember, that the Smriti writers recognised various sorts of sons, a son by adoption being one of them. There was a controversy between them as to the relative position of these different sorts of sons; and a reference to the table of sonship at page 82 of Mayne's Hindu Law (8th edition) will show that eight out of the fourteen authorities place the adopted son beyond the sixth in number. Now most of these authorities say that the first six sons inherit to the father and to collaterals; the last six only to the father. From this it is argued by those who follow the eight of the fourteen authorities who place the adopted son beyond the sixth in number that he only succeeds lineally; by those who rely on the remaining six that he inherits collaterally also. As Mr. Mayne points out, the two sets of authorities represent different historical periods of the law of adoption; the former relating to a period when the adopted son had not obtained the full rights which he was recognised as possessing at a later period. Bachaspati Missra flourished at a comparatively late period in the development of the law and it will be strange indeed if he refused to recognise the full rights possessed by a dattak son.

Dealing with the question of sons, Bachaspati Missra refers to the text of Yama and Narada. Now both Yama and Narada declare that the first six sons in their respective lists inherit to the father and to collaterals and that the last six inherit only to the father. The only comment of Bachaspati Missra is "the meaning is on default of each preceding the next succeeding in order is entitled to the property. There is not one word in his comment to suggest that he accepts the position that it is the first six only who are entitled to inherit to collaterals; but it is contended that the fact that Bachaspati Missra accepted Yama and Narada without any comment shows that he saw no reason for differing from them. But he does comment, and his comment shows that in his view no distinction could be drawn between what have been

called " succedaneous " and " non-succedaneous " sons, that is to say, between those who succeed collaterally and those who do not; and that, in his scheme, in default of the first six, the seventh is entitled to the property, no distinction being drawn between property belonging to his lineal ancestor and that belonging to the collaterals. The literal translation of this passage in Vivada Chintamani is " becomes fit to be possessed of property " that is to say, both kinds of properties mentioned in the texts of Yama and Narada. In other words, Bachaspati Missra refers to the classification of Yama and Narada only to ascertain the relative position of the different sorts of sons in the scheme of succession. There is not one word in his commentary to suggest that he was making a distinction between direct succession and collateral succession.

He then refers to the text of Menu and Baudhayana both of whom place the adopted son amongst those entitled to inherit collaterally; and there is no comment of Bachaspati Missra on these texts. After referring to the text of Devala he deals with the texts of Vishnu and Yalkavalkya. Now it is important to remember that both Vishnu and Yalkavalkya departed from the scheme adopted by the other sages in so far as they make no distinction whatever between " succedaneous " and non-succedaneous " sons. According to both the sages, " amongst these ", namely, these mentioned amongst the different sorts of sons in due order " the next in order is heir and presents funeral obligations on failure of the precedings ". Now if we turn the comment of Bachaspati Missra on the texts of Yama and Narada, it will be seen that that is the exact interpretation he is giving to those texts; his interpretation to those texts being that,

on default of each preceding the next succeeding in order is entitled to the property.

Having dealt with all these different texts Bachaspati Missra gives his own order and it is obvious that he

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is making no distinction whatever between succedaneous and non-succedaneous sons. He places the adopted son seventh in his list; and, as I understand him, he contemplates that the son adopted would be entitled to succeed to the property whether belonging to the lineal ancestor or to a collateral in default of the first six mentioned in his list.

Now if there was no indication in Bachaspati Missra whether he intended or did not intend to depart from the rule laid down in Mitakshara, we would have to apply the Mitakshara rule to this case, for, as I have already pointed out, the law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. In my opinion, however, there is clear indication, that he has not adopted the distinction between what have been called " succedaneous " and " non-succedaneous " sons. He has clearly intimated his view that on default of each preceding next succeeding in order " becomes fit to be possessed of property ". I am of opinion that a dattak son in Mithila is capable of inheriting to collaterals.

I would allow this appeal, set aside the judgment and the decree passed by the Court below and dismiss the plaintiffs' suit with costs in both the Courts.

FOSTER, J.—I agree with the judgment of my learned brother on every issue. My only reason for adding anything is that I wish to contribute a supplementary discussion of the oral evidence adduced on behalf of defendants nos. 1 to 5.

[His Lordship's analysis of the evidence referred to, not being material to this report, is omitted.]

Appeal allowed.

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Held, (*i*) that the purchaser of an entire estate sold for arrears of revenue takes the estate as created at the time of the Permanent Settlement; but in a suit brought by him to recover land claimed by the defendant as lakheraj he must prove a *prima facie* case that these lands were included in the *mal* asset of the estate at the time of the Permanent Settlement and that his *mal* land has since 1790 been converted to lakheraj; (*ii*) that *Exception* (4) to section 37 does not mean that in order to bring a case within this exception the lease must be a lease for the purposes of excavating a tank thereon; it covers a case of a lease of land upon which the tank in dispute stands.

Held, further, that in a suit for assessment of fair and equitable rent by a co-sharer landlord no order can be passed in the absence of the other co-sharers. *Maharaja Chandra Mouleshwar Prasad Singh Bahadur* v. *Hem Nalini Devi* 726

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Held, that the privilege conferred on the purchasing co-sharer by section 22(2) in derogation of the common right of the other co-sharers is not taken away by reason only of a partition taking place. Therefore a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of the holding on payment of rent to his co-sharers even after the estate in which the land is situate has been partitioned among the co-proprietors. *Jhapsi Sao* v. *Mussammat Bibi Aliman* 281

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Where, under section 61 of the Bengal Tenancy Act a tenant deposits what he *bona fide* believes to be the whole amount due at the date of the deposit and not merely a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. *Mussammat Bibi Wajihunnissa Begam* v. *Babu Lal Mahton* 46

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Section 52, Bengal Tenancy Act, 1885, comes into operation where, in determining the area, the parties either resort to measurement or agree to accept an assumed figure; and for the purposes of the section it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid.

Statements of area in the landlord's papers, whether after measurement or not, are evidence for the purpose of ascertaining what the area is for which the rent shown in the jamabandi is being paid. *Sib Sahai Lal* v. *Sir Bijai Chand Mahtab* 157

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revenue officers in Bihar to describe land which is either khudkasht (*i.e.*, proprietor's private land) or land temporarily in his possession. The order on partition, while stating that the land was originally raiyati, alloted it to the appellant as " bakasht " and assessed a rent payable to him.

The defence to the suit was that the land had been the raiyati land of the first respondent's husband, deceased; further, that as the suit was not brought within one year of the order on partition, it was barred by the Limitation Act, 1908, Schedule I, Article 14.

Held, that the appellant was entitled to khas possession; the record-of-rights was to be presumed to be correct, and there was no evidence to show to whom the alleged raiyati kasht belonged, or when it came into the possession of the first respondent's husband; the suit being in ejectment was not governed by Article 14.

Section 13(*xv*) of the Estates Partition Act, 1897, does not give power to assess rent when a raiyati kasht falls within the allotment of a proprietor.

Section 22, sub-section (*2*), of the Bengal Tenancy Act, 1885, applies only when there has been a transfer of land in which an occupancy right is shown to exist. *Raja Dhakeshwar Prasad Narain Singh* v. *Gulat Kuer* ... 735

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The words " any agreement or compromise " in sub-section (*2*) (*a*), added to section 120 by Bengal Act I of 1907, refer only to an agreement or compromise of a question in discussion as to the character of the land at the date of the agreement or compromise. *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh* ... 634

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CHOTA NAGPUR ENCUMBERED ESTATE ACT, 1876.—

1——*Sections* 2, 3, 8, 11 *and* 12—*debt, revival of—release after approval of the scheme by Commissioner—section* 12(*6*), *applicability of—Order under section* 2, *effect of—Limitation Act*, 1908 (*Act IX of* 1908), *section* 15—*whether applicable—original debt, if revived. Held*, (*i*) that an order under section 2 of the Chota Nagpur Encumbered Estate Act, 1876, bringing an estate under protection is a vesting order staying all proceedings and therefore, in computing limitation, the period of protection should be excluded under section 15, Limitation Act; (*ii*) that when the bar imposed by section 3(*1*) is removed by a subsequent notification releasing the estate, claims against the estate are revived under section 12 of the Act; (*iii*) that, in the case of a debt, what is revived, is the original debt at the original rate of interest;

Although the sixth clause of section 12 purports to apply to cases covered by the second clause of that section, which provides for revival of a debt in case of the estate being released before the scheme has been approved by the Commissioner, the section must be construed to provide for all cases where the estate is released from management before the debts have been paid off. *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh* 404

2——*Section* 231—*Rent decree—execution sale—suit to avoid sale on the ground of fraud—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Articles* 12 *and* 95. Under section 231 of the Chota Nagpur Tenancy Act, 1908, " all suits.....instituted.....under this Act for which no period of limitation.....is provided elsewhere in this Act shall be commenced.....within one year from the date of the occurring of the cause of action ".

Held, that a suit for declaration that a sale held in execution of a rent decree has been fraudulently confirmed, and for recovery of possession, is not a suit governed by the Chota Nagpur Tenancy Act, and, therefore, that section 231 does not apply to it.

Held, further, that such a suit is governed by Article 95 of the Limitation Act, 1908, which provides a period of three years for a suit " to set aside a decree obtained by fraud or other relief on the ground of fraud ", and not by Article 12 which provides a period of one year for a suit to set aside, *inter alia*, " a sale in execution of a decree of a civil court or a sale in pursuance of a decree or order of a Collector or other revenue officer ". *Kumar Rameshwar Narain Singh* v. *Mahabir Prasad* ... 750

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CHOTA NAGPUR ENCUMBERED ESTATE ACT, 1876—*concld.*

2————*Section* 258—*Minor, ex parte decree, against—suit for declaration that decree is inoperative whether maintainable, gross negligence, finding as to, whether amount to finding of fraud.* Where an ex parte rent decree has been obtained against a minor properly represented by his guardian, a suit by the minor for a declaration that the ex parte decree is invalid and inoperative, on the ground of gross negligence on the part of the guardian in the rent suit, is barred by section 258 of the Chota Nagpur Tenancy Act, 1908, which provides that " no suit shall be entertained in any court to vary or modify or set aside, whether directly or indirectly ' inter alia ' any rent decree, except on the ground of fraud or want of jurisdiction ".

Where the lower appellate court found that there had been gross negligence and held that gross negligence amounted to fraud, *held*, that this was not a finding of fact as to fraud. *Raj Gopal Acharjya* v. *Upendra Acharjya Goswami* 768

CIVIL COURTS.—*Jurisdiction of, in suit on mortgage in Santal Parganas. See* Santal Parganas 135

CODE OF CIVIL PROCEDURE, 1908.—

1————*Section* 2(*15*)—*pleader. See* Court-fees Act, 1870, no. 11 255

2————*Sections* 38 *and* 39(2)—" *subordinate officer,*" *transfer to person who is not. See* Santal Parganas Settlement Regulation, 1872 714

3————*Section* 41—*Court to which a decree has been sent for execution, jurisdiction of, when ceases.* The jurisdiction of the court to which a decree has been sent for execution ceases as soon as the court takes action under section 41, Code of Civil Procedure, and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree. *Muhammad Ibrahim* v. *Chhattoo Lal* ... 898

4————*Section* 92—*suit for declaration as to the existence of trust. See* Muhammadan Law 539

5————*Section* 148—*suit, withdrawal of, with liberty to bring a fresh suit on payment of costs within two months—whether time is of the essence of the order—Court, power of, to extend the period—condition precedent, failure—order inseparable.*

Where a court permits the plaintiff to withdraw a suit with permission to institute a fresh suit on payment of costs within a prescribed period, payment of the costs is a condition precedent to the institution of a fresh suit and must be made within the prescribed period.

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The court, however has power under section 148 of the Code of Civil Procedure, 1908, to extend the prescribed time.

Where the plaintiff complies with the conditions on which a withdrawal is permitted, the withdrawal is complete and the suit is at an end. If he does not, the suit remains pending and the plaintiff may, if he chooses, elect to proceed with it; and in the latter case the court must dispose of the suit according to law. *Syed Qazi Muhammad Afzal* v. *Lachman Singh* 306

6———*Section* 151—*Restoration of order dismissing application for ascertainment of mesne profits. See* Mesne Profits, no. 2 361

7———*Section* 151—*application impugning a compromise decree, dismissal of—whether bars subsequent suit.* The dismissal of an application under section 151, Code of Civil Procedure, 1908, impugning the validity of a compromise decree, is not a bar to the institution of a subsequent suit to avoid the compromise on the ground of fraud. *Parshan Sahi* v. *G. L. Richardson* 276

8———*Order* 1, *rule* 8—*Representative—suit on behalf of all the members of a community for declaration in favour of the poor of the community, whether maintainable. See* Muhammadan Law 539

10———*Order* 111, *rule* 4—*appointment of barrister. See* Court-fees Act, 1870, no. 11 255

11———*Order VII, rule* 2, *applicability of, to application for ascertainment of mesne profits. See* Mesne Profits, no. 2 361

12———*Order IX, rule* 4—*dismissal of application for ascertainment of mesne profits—restoration. See* Mesne Profits, no. 2 361

13———*Order XX, rule* 12—*Mesne profits, application for ascertainment of—dismissal of application—restoration—Court-fee, whether payable on the application. See* Mesne Profits, no. 2 361

14———*Order XXI, rule* 16—*Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 69—*Application for execution of order under, by transferee of the land—Person claiming versely to the decree-holder, whether entitled to execute the decree. F* instituted proceedings under section 69 of the Bengal Tenancy Act, 1885, against the tenants of certain land, and obtained an order appointing an officer to appraise or divide the produce of the land. The land in respect of which the decree had been obtained passed into the hands of *K* who had obtained a decree against *F*

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

in the civil court. *K* sought to execute the order obtained by *F* against the tenants on the ground that she was the representative-in-interest of *F*. Order XXI, rule 16, Code of Civil Procedure, provides: "Where a decree.....is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder ".

Held, (*i*) that there was no transfer of the order to *K* by operation of law within the meaning of Order XXI, rule 16; (*ii*) that *K* was not the representative-in-interest of *F* and that, therefore, she was not entitled to execute the order. *Malik Fazlul Rahman* v. *Mussammat Kokila* ... 511

15————*Order XXI, rule 22(a)—Scope of —Proviso, meaning of—Subsequent application for execution more than a year after the last order in previous execution—whether notice necessary.* Order XXI, rule 22(*a*), applies to every application for execution and not merely to the first application. It follows, therefore, subject to the proviso to that rule, that whenever an application, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the court is bound to issue the notice referred to in that rule to the person against whom execution is applied for.

Therefore, in every case where an application for execution is made more than a year after the last order made against the judgment-debtor in any previous application, a fresh notice must be served. *Aditya Prasad Singh* v. *Ram Narayan Das* 1

16————*Order XXI, rule 24(2)—unsealed warrant of attachment—obstruction to execution. See* Penal Code, No. 4 216

17————*Order XXIII, rule 1—Application for permission to withdraw from suit with liberty to bring a fresh suit—Order permitting withdrawal, effect of.* Where an application is made by a plaintiff to withdraw a suit with liberty to bring a fresh suit on the same cause of action and an order is passed giving permission to withdraw the suit although nothing is said in the order as to the plaintiff's right to institute a fresh suit, the order should be read along with the petition and construed as granting permission to institute a fresh suit. *Khudi Rai* v. *Lalo Rai* ... 28

18————*Order XLI, rule 20—scope of—some only of joint claimants impleaded as respondents—appeal incompetent—rule inapplicable.* There is no power in the court under

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Order XLI, rule 20, Civil Procedure Code, 1908, to revive an appeal or to give power to an appellant to present an appeal when there is none at all in the file of the court.

A joint decree was passed in favour of seven plaintiffs and the defendants preferred an appeal to the District Judge but impleaded some only of the plaintiffs as respondents. At the hearing of the appeal it was objected on behalf of the respondents that the appeal was incompetent; but the District Judge, acting under the provision of Order XLI, rule 20, Code of Civil Procedure, added the omitted respondents as parties-respondents to the appeal and dealt with the appeal.

Held, that the order of the District Judge was without jurisdiction inasmuch as the appeal being against some only of the joint claimants it was incompetent, and the effect of the order was to give power to the appellants to present the appeal although there was no right in the appellants to present it at the time when the particular order was passed.

Held, further, that Order XLI, rule 20, applies only when there is an appeal pending in the court on which a decision may be given by the court. *Badri Narayan* v. *East Indian Railway Company* 755

CODE OF CRIMINAL PROCEDURE, 1898.—

1————*Section* 4(*2*)—*magistrate, whether is a judge. See* no. 11 110

2————*Sections* 87, 190, 529—*Authorization of magistrate with second class powers to entertain complaints, effect of—complaint of murder, whether magistrate may entertain—prosecution for false complaint of which cognizance is taken without authority—section* 529(*e*) *effect of.* Section 190(*2*), Code of Criminal Procedure, provides: ".....the District Magistrate.....may empower any magistrate to take cognizance under sub-section (*1*), clause (*a*) or (*b*) of offences for which he may try or commit for trial". Sub-section (1) provides: ".....any other magistrate specially empowered in this behalf may take cognizance of any offence..... (*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a report in writing of such facts made by any police officer". By virtue of the powers conferred by section 190(*2*) the District Magistrate of Patna authorized the Sub-Deputy Magistrate of Dinapur, a magistrate with second class powers, to entertain complaint during the absence of the subdivisional Magistrate. A complaint having been made before the Sub-Deputy Magistrate of an offence of murder, he sent it to the police for enquiry. The police reported the case to

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be false and the magistrate dismissed the complaint under section 203, and then himself made a complaint against the complainant, who was committed to the Court of Session for trial under section 211, Penal Code.

Held, that section 37 and the Fourth Schedule of the Code must be read with section 190, and, therefore, under section 190(2), the District Magistrate can confer upon a Subordinate magistrate power to take cognizance of only such offences as such subordinate magistrate is empowered by the Fourth Schedule to try or commit for trial. Consequently the subordinate magistrate in the present case was not competent to entertain the complaint made to him.

Under section 529(*a*), if any magistrate not empowered by law to take cognizance of an offence under section 190, sub-section (*1*), clause (*a*) or (*b*), erroneously in good faith takes such cognizance his proceedings cannot be set aside merely on the ground of his not being so empowered. *Held*, however, that where a magistrate not empowered to take cognizance of an offence, does so, the complainant is not liable to be prosecuted in respect of the complaint if it proves to be false. *Bengali Gope* v. *King-Emperor* 447

3————*Sections 54 and 56—police constable, arrest by—command certificate, failure to give substance of, effect of—Statutory power to arrest.* Section 54 of the Code of Criminal Procedure, 1898, empowers any police officer, without an order from a magistrate and without a warrant, to arrest, *inter alia*, " any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists of his having been so concerned ". Under section 56, when an officer in charge of a police-station, or an officer making an investigation, requires a subordinate officer to arrest without a warrant any person who may lawfully be arrested without a warrant, " he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence or other cause for which the arrest is to be made. The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order, and, if so required by such a person, shall show him the order ". *Held*, that the issue of a written order under section 56 does not limit the power conferred by section 54.

Three persons were charged before the police with the theft of a bullock, and the sub-inspector directed a constable to arrest the accused persons. The constable, without explaining the substance of the order as required by section

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56, arrested one of them. The petitioners assaulted the constable and rescued the person arrested. They were convicted under section 147, Penal Code. It was contended that the provisions of section 56 not having been complied with, the conviction was illegal. *Held*, upholding the convictions, that the arrest was legally effected under section 54 of the Code of Criminal Procedure. *Kishun Mandar* v. *King-Emperor* 533

4————*Sections* 161, 162 *and* 360—*Statement made by accused before the police, admissibility of—Indian Evidence Act*, 1872 (*Act I of* 1872), *sections* 27, 28 *and* 54, *effect of—Evidence of bad character to prove motive, admissibility of.* Although the amendment of section 162, Code of Criminal Procedure, 1898, has altered the previous law so as to exclude completely statements made by witnesses during the course of an investigation (except for certain limited purposes), the statements of accused persons are still admissible in law, provided they do not amount to confessions.

The main object of the amendment of the section is to prevent the use of the statements of prosecution witnesses as corroboration under section 157 of the Evidence Act.

Sections 161 and 162 of the Code of Criminal Procedure do not override the general provisions of the law with regard to the admissibility of statements made by accused persons as laid down in sections 27 and 28 of the Indian Evidence Act, 1872.

Although, in a criminal case, evidence of the bad character of the accused is inadmissible for the purpose of showing that the accused was of such a disposition that he was likely to commit the offence charged, that prohibition does not in any way affect evidence which is required to prove a motive for the crime, or which is otherwise relevant.

It is not sufficient that the evidence of an approver should be corroborated with regard to the actual commission of the crime itself, for such corroboration merely proves that the approver himself took part in the offence. Experience requires that approvers should also be corroborated in material points as to the part played by their accomplices. The amount of corroboration required depends upon the view taken by the court of the approver's character and of his demeanour in the witness box.

Where a magistrate who had recorded the confession of an accused person was examined in the Session Court to prove the confession, and the certificate appended at the end of the magistrate's deposition showed that the

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deposition had been read out by the witness and not read over to him as required by section 360, Criminal Procedure Code, *held*, that the deposition was nevertheless legal evidence. *Jagwa Dhanuk* v. *King-Emperor* 68

5———*Section* 162—*Police diary, contradiction of witness by.* In a trial on a charge of murder two witnesses deposed that on the evening of the occurrence they saw the accused persons passing through the village and thereafter they did not see them at their house. The sub-inspector deposed that in the course of the investigation these witnesses had stated to him that the accused persons had been found absent from the village after the occurrence, but had not stated that they had seen them fleeing on the date of the murder. One of the witnesses referred to above admitted at the trial that he did not inform the sub-inspector that he had seen the accused that evening. The other witness maintained that he had so informed the sub-inspector. The trial court held that by reason of section 162 the sub-inspector's evidence on this point was inadmissible. *Held*, in appeal, that the sub-inspector's evidence was admissible. *Iltaf Khan* v. *King-Emperor* 346

6———*Sections* 164 *and* 337—*approver, allowed to depose to a series of crimes not relevant to the enquiry—subsequent prosecution for offences not expressly covered by the pardon—section* 164, *applicability of, to confessions recorded by a Presidency Magistrate.* In connection with a case of forgery of currency notes the Calcutta police arrested *N*, *H*. and *S*. together with others. All the three persons made full confessions before the Magistrate and in their confessions each of them started by giving details of a bogus telegraphic money-order conspiracy and went on to tell how subsequently a plan had been devised for tapping telegraphic wires and obtaining money through bogus telegrams, and lastly, *N* and *H* related how they with others had joined together and forged Government currency notes. Investigation was made into the statements in these confessions and an inquiry began before the Magistrate. Subsequently the public prosecutor applied to the Magistrate for a tender of pardon to *N* under section 337, Code of Criminal Procedure, and asked the Court's permission to examine him as an approver in the case. The Magistrate accordingly tendered a pardon as prayed for and *N* accepting the pardon gave evidence before the committing Magistrate. In his deposition he made a full statement of the previous activities of the conspirators right up to the present conspiracy under enquiry. Thereafter the accused persons were committed to the Criminal Sessions of the Calcutta High Court where *N's* evidence related only to the note-forgery case. The result of the trial, however, was an

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acquittal. Subsequently, on the strength of the previous investigation and the confessions of the conspirators *N*, *H*, and *S*, they were put on trial and convicted for offences committed in connection with the bogus telegraphic money-order conspiracy. On behalf of *N*, the pardon tendered to him in the note-forgery case was pleaded as a bar to his prosecution. The trial Court overruled the objection.

Held, on appeal, that if the intention of the Magistrate was to confine the pardon to the forgery case only, the approver should have been warned against making any incriminating statements in his evidence which were not relevant to the note-forgery case; but the fact that the Magistrate allowed the approver to give evidence of the previous activities of the conspirators showed that he considered that such activities fell within the scope of the enquiry, and having regard to the spirit of section 327, *N* was entitled to the benefit of any doubt there may have existed as to the extent of the pardon.

Section 1, Code of Criminal Procedure, bars the application of the Code to the police in presidency towns not to a Magistrate, and since the amendment of section 164 in 1923 a Presidency Magistrate is empowered to record a confession in Calcutta in the course of a police investigation.

Per BUCKNIL, J.—Even though the police in Calcutta may not conduct their investigations in precise accordance with the provisions of Chapter XIV, a construction of section 164, which would exclude its utilization in Calcutta during a police investigation, or at any time afterwards before the commencement of the enquiry or trial, is to read it in a strained and unnatural sense. *Nil Madhab Chowdhry* v. *King-Emperor* 171

7———*Section* 190(2)—*authorization of magistrate with second class powers to entertain complaints, effect of—complaint of murder, whether magistrate may entertain. See* no. 1, *ante* 447

8———*Section* 195, *non-compliance with—illegality.* Under section 195(*1*) (*b*) of the Code of Criminal Procedure, 1908 " No court shall take cognizance of any offence punishable under.....section 211 (Penal Code), when such offence is committed in, or in relation to, any proceeding in any court, except on the complaint in writing of such court, or of some other court to which such courts is subordinate ". *Held*, that when a false complaint is made to a magistrate and the complainant is proceeded against under section 211, Penal Code, with respect to the complaint, the magistrate to whom the complaint was made is not himself competent to inquire into the offence under section 211, Penal Code. *Ambika Singh* v. *King-Emperor* 450

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9———*Section* 195(*b*)—*Offence in relation to judicial proceeding, nature of—Indian Penal Code*, 1860 (*Act XLV of* 1860), *sections* 211 *and* 182. If two offences are even remotely connected by the relationship of cause and effect the first may be said to have been committed " in relation " to the second within the meaning of section 195.

Where, therefore, the petitioner laid a false charge before the police which caused the police to submit a report against the petitioner, which in its turn caused the petitioner to institute a judicial proceeding before the magistrate by lodging a formal complaint and repeating the allegations made in his information to the police, and the magistrate, on the written complaint of the sub-inspector of police, summoned the petitioner under sections 211/182, Penal Code, *held*, that the laying of the false information before the police was an offence committed in relation to a judicial proceeding and the magistrate had no jurisdiction to summon the petitioner under section 211 without a complaint being made in writing by the court under clause (*b*) of section 195, Criminal Procedure Code.

An offence under section 211 must always include an offence under section 182 and the Court is competent to proceed and convict for the minor offence under section 182 even though the major offence under section 211 has been committed.

A false charge made to the police is not necessarily an offence under section 211, Penal Code; if the intention to injure the person charged is absent, the offence falls under section 182. *Daroga Gope* v. *King-Emperor* ... 85

10———*Section* 249, *applicability of, to warrant cases—Magistrate, power of, to start a fresh case upon a complaint while the police case is already on the file.* An accused person in a warrant case was released by the Subdivisional Magistrate who purported to act under section 249 of the Code of Criminal Procedure. Subsequently the successor-in-office of the Magistrate summoned the accused on the complaint of the original informant.

Section 249, which appears in Chapter XX of the Code, the heading of which is " Of the Trial of Summons Cases by Magistrates ", provides, " In any case instituted otherwise than upon complaint " a Magistrate " may.....stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused ".

Held, (*i*) that the order of release was invalid; (*ii*) that the case being still on the file of the Magistrate it could be

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re-opened either upon application by the Crown or *suo motu* by the Magistrate; but (*iii*) that while the police case was already on the file of the Magistrate, he could not start a fresh case upon a complaint made by a private party. *Firangi Singh* v. *Durga Singh* 243

11———*Sections* 256 *and* 539—*Cross-examination before charge—right of accused to have the witnesses recalled—costs of recalling prosecution witnesses not to be imposed as a condition—affidavit, sworn before a magistrate, whether can be used in the High Court—Penal Code* 1860 (*Act XLV of* 1860), *section* 19. Section 256, Code of Criminal Procedure, 1898, does not come into operation until the charge is framed.. Therefore a statement of the pleader for the defence, made after he had cross-examined the prosecution witness before the charge, that he no longer required their attendance, does not deprive the accused of his right to cross-examine the witnesses further after the framing of the charge.

A magistrate has no power, when passing an order under section 256, to impose a condition that the expense of recalling the prosecution witnesses shall be deposited before they are recalled.

A magistrate is a " judge " within the meaning of section 19, Penal Code, read with section 4(*2*), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore an affidavit sworn before a magistrate cannot be used in the High Court. *Ramchandra Modak* v. *King-Emperor* 110

12———*Section* 269. *See* Penal Code, no. 2 238

13———*Section* 307—*reference under—interference by High Court, practice as to. See* Penal Code, no. 15 ... 573

14———*Section* 337—*approver allowed to depose to a series of crimes not relevant to the enquiry—prosecution for offences not expressly covered by the pardon. See* no. 6 171

15———*Section* 360—*deposition read over by and not to deponent, legality of. See* no. 4 68

16———*Section* 403, *scope of—trial without jurisdiction for want of sanction—conviction and sentence set aside—retrial on the same facts, whether barred—jurisdiction, meaning of—complainant, examination of, after notice to show cause, whether affects the commitment.* Section 403(*1*) Code of Criminal Procedure, 1898, provides that " a person who has once been tried by a *court of competent jurisdiction* for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal

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remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence..... ". *Held*, that section 403(*1*) does not bar a fresh trial on the same facts when the conviction and sentence are set aside on the ground that the trial court had no jurisdiction to try an offence, as, for example, where the trial court has tried an offence without a complaint having been made under section 195 in a case where such a complaint is required by law. *Sheikh Mohammad Yasin* v. *King-Emperor* 452

17————*Section* 439—*Acquittal—power of High Court to interfere in revision—locus standi of private prosecutor.*

Per MULLICK, J.—(*i*) The power of interference in revision with acquittal should be most sparingly exercised and only in exceptional cases where either there has been a denial of the right of fair trial or it is urgently demanded in the interests of public justice. This, however, does not apply where there has been no trial.

(*ii*) (MACPHERSON, J., dissentiente).—In cognizable cases the private prosecutor has no position at all and if the Crown which is the custodian of the public peace decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance.

Per MACPHERSON, J.—The power to interfere in revision is not, either in law or under the practice of the courts in India, definitely restricted to cases where there has been a denial of the right of fair trial. It is, however, neither necessary nor expedient to lay down or even suggest any limitation in this regard beyond the practice of the High Court in appeals under section 417, Code of Criminal Procedure, and the principles which guide the Court in receiving and determining, under section 439, applications for the exercise of their powers of revision in respect of convictions.

Although the Court will only interfere in revision with an acquittal in an exceptional case, the supreme consideration is that it should exercise its discretion untrammelled in each case as it arises. *Siban Rai* v. *Bhagwat Das* ... 25

18————Sections 476, 476A *and* 476B—appellate court *making complaint under section* 476B, *whether appeal lies against the order of—interference by the High Court in extraordinary cases.* A money suit was dismissed by the Munsif who tried it on the ground that he was not satisfied that the signatures on certain receipts and other documents were genuine. This decision was confirmed by the Subordinate Judge on appeal. Thereupon the defendants applied to the Munsif to make a complaint against the plaintiff and some of his witnesses in respect of offences

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under sections 467 and 471, Penal Code. The Munsif declined to make a complaint and the defendants appealed to the District Judge under section 476B of the Code of Criminal Procedure. The District Judge agreed to the institution of a prosecution and forwarded to the District Magistrate a complaint " under sections 471 and 193 of the Penal Code or any other section or sections that may apply ". From this order the plaintiff presented a memorandum of appeal to the High Court.

Section 476 of the Code of Criminal Procedure, 1898, authorizes any civil, revenue or criminal court, where it is of opinion that it is expedient in the interest of justice that an enquiry should be made into certain offences, to make a complaint thereof in writing. In any case in which such court has " neither made a complaint under section 476.....nor rejected an application for the making of such complaint ", section 476A authorizes a complaint to be made by the court to which such first-mentioned court is subordinate within the meaning of section 195(*3*), and provides that, where the superior court makes such complaint, the provisions of section 476 shall apply accordingly. Under section 476B, " Any person.....against whom such a complaint has been made may appeal " to the court to which the court making the complaint is subordinate within the meaning of section 195(*3*).

Held, on the facts stated above, that the persons against whom the complaint had been made by the District Judge had a right of appeal to the High Court.

The question, however, whether a complaint should be made under section 476, Code of Criminal Procedure, is almost invariably a matter of discretion, and the High Court will not interfere with the exercise of that discretion except in extraordinary cases. *Ranjit Narain Singh* v. *Rambahadur Singh* 262

19———*Section* 476A—*complaint by superior court—appeal. See* no. 19 262

20———*Section* 476B—*complaint by superior court—appeal. See* no. 19 262

21———*Sections* 526(*8*) *and* 528—" *enquiry* " *meaning of—omission to record reasons for transferring a case, whether vitiates the order—jurisdiction.* The reference in section 526(*8*), Code of Criminal Procedure, 1898, to " enquiry " or " trial " is intended to apply to those inquiries and trials which are specially referred to in the earlier portion of the Code.

Therefore, a District Magistrate taking cognizance of an application for transfer is not holding an enquiry within the meaning of section 526(*8*).

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Although it is a sound rule of practice that there should be something on the record showing why an order under section 528 is made, the mere omission on the part of the Magistrate to record reasons for his order is not fatal to the order. *Muhammad Sharif* v. *Rai Hari Prasad Lal* 229

22————*Section 528—withdrawal of case—reasons not recorded. See* no. 21 229

28————*Section 529—scope of—false complaint to authorised magistrate—prosecution, legality of. See* Code of Criminal Procedure, 1898, no. 2 447

COMPENSATION—
1————*Suit for, by consignee for non-delivery, limitation. See* Limitation Act, 1908, no. 5 106

2————*Suit for, by consignee for non-delivery—onus. See* Non-delivery, no. 5 106

COMPLAINT—Cognizance of without authority—complaint false—*prosecution for making false complaint, legality of. See* Code of Criminal Procedure, 1898, no. 2 447

COMPROMISE—*Dismissal of petition impugning a—suit to avoid the compromise not barred. See* Code of Civil Procedure, 1908, no. 7 276

CONFESSION—*Record of, by Presidency magistrate. See* Code of Criminal Procedure, 1898, no. 6 171

CONSTRUCTIVE POSSESSION—*whether is sufficient foundation for action in trespass. See* Mineral Rights 80

CONTRACT ACT, 1872—
1————*Section 23—Nuptial gift by bride's parents to bridegroom in consideration of consent, whether opposed to public policy—suit to recover gift after solemnization of marriage, maintainability of. See* Hindu Law ... 646

2————*Sections 59, 60 and 61—creditor, right of, to appropriate payments towards any of his debts—absence of direction by debtor—continuance of right till intimation by creditor.* Under section 60 of the Contract Act, 1872, where a debtor owing several distinct debts to one person makes a payment and omits to intimate and there are no circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any of the debts. Where either party makes any appropriation, then under section 61, " the payments shall be applied in discharge of the debts in order of time ". *Held* that where a debtor who owes more than one debt to the same creditor makes a payment to the latter without appropriating it towards the discharge of any particular debt, the right of the creditor to appropriate the amount paid towards any of the debts due to him continues up to the time when he applies the payment towards the discharge of a particular debt, *Mainsty* v. *Jameson* 826

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CONTRIBUTION—*Decree for, against Hindu Widow, whether* constitutes legal necessity *See* Limitation Act, no. 6 ... 585

CO-PROPRIETOR—*Purchase of occupancy holding by—subsequent partition, effect of. See* Bengal Tenancy Act, 1885, no. 1 281

COURT-FEE—*Mesne profits, whether court-fee payable on application for ascertainment of. See* Mesne Profits, no. 2 ... 861

COURT-FEES ACT, 1870.—

1———*Section 7(1) and Schedule I, Article 1—appeal against final decree—ad valorem court-fee payable— property sought to be exempted from liability of the decree—value of the property, court-fee payable on.* Defendant no. 2 sold to the plaintiffs certain land which was alleged to be free of incumbrances. Subsequently he sold other land to defendants 1, 3, 4 and 5. There was, however, a mortgage on the land sold to the plaintiffs and the mortgagees having obtained a decree the plaintiffs paid the decretal amount and then sued the defendants for recovery of the amount so paid and for a declaration charging the properties purchased by defendants 1, 3, 4 and 5 with the same. They obtained a preliminary decree and then applied for a final decree under Order XXXIV, rule 5, Code of Civil Procedure, 1908. The defendants 1, 3, 4 and 5 objected to their properties being made liable for the decree.

The objection having been overruled by the Subordinate Judge the defendants appealed to the High Court and paid Rs. 4 as court-fee, treating the appeal as a Miscellaneous Appeal. The Taxing-officer was of opinion that an *ad valorem* court-fee was payable on the amount found to be due to the plaintiffs and which had been declared to be charged on the properties held by the appellants. The appellants disputed this view.

Held, that if the value of the properties purchased by the appellants was less than the decretal amount, an *ad valorem* court-fee on the value of the properties was payable; but if the value of such properties was not less than the decretal amount an *ad valorem* court-fee on the decretal amount was payable. *Madho Ray* v. *Mussammat Bibi Mahbuwan Nisa* 721

2———*Section 7(iv) (c)—suit for separate and essential declartions—ad valorem court-fee payable—test to be applied.* A relief which is unnecessary and follows as a matter of course from the decision in favour of the plaintiff on the other reliefs is not a consequential relief.

But where, in a suit, the first relief related to a declaration as to the general title of the plaintiff to all the properties inherited by her from her husband and the second relief related to a particular deed of transfer

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COURT-FEES ACT, 1870—*contd.*
executed by defendant no. 1 in favour of defendant no. 2 with respect to a particular part of the estate inherited by the plaintiff from her husband, *held*, that the two reliefs were not co-extensive but separate and necessary and, therefore, that the suit was one for declaration and consequential relief, an *ad valorem* court-fee being payable under section 7(*iv*)(*c*), Court-fees Act, 1870. *Khiri Chand Mahton* v. *Mussammat Meghni* 496

8———*Section* 7(*iv*) (*c*) *and* (*v*)—*suit for ejectment—subject-matter of the suit, court-fee payable on the market value of—subject-matter, what constitutes.* Plaintiff brought a suit in relation to a house on the allegation that it belonged to her, that she had allowed the defendant no. 1, who was her daughter, and defendant no. 2, who was the husband of defendant no. 1, to live in a portion of the house, that on account of the behaviour of the defendants towards her she was not willing to allow them to remain in the house any longer and that she had served notice upon them to quit but they refused to do so. She further stated in the plaint that the defendant no. 1 had set up a title to the house under an oral gift from the plaintiff. The prayer portion in the plaint ran thus:

" (*i*) On the determination of the plaintiff's proprietary interest as also on the determination of the fact.....that the position of the defendants is that of a licensee-tenant-at-will, the defendants may be ordered to vacate the house and garden in suit.....".

The plaintiff valued the suit at Rs. 400 which was much less than the value of the house. One of the objections on behalf of the defendants was that the suit had been undervalued and that the Munsif had no jurisdiction to entertain the suit. An issue was framed on the subject and the Munsif, who proceeded to determine this issue in the first instance, held that the suit was for a declaratory decree and consequential relief and, therefore, that the suit ought to be valued according to the valuation of the subject-matter of the suit, namely, the house in dispute, under section 7(*iv*)(*c*) of the Court-fees Act. The plaint was therefore returned for presentation to the proper court. On appeal the District Judge affirmed the order.

Held, in revision, (*i*) that the suit as framed was a suit for ejectment and that court-fee was payable under section 7(*v*), Court-fees Act, according to the market-value of the subject-matter of the suit;

(*ii*) that the subject-matter of the suit was the right to eject the defendants and the value of that right was the value of defendant's right to remain in the house under the license of the plaintiff;

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COURT-FEES ACT, 1870—*contd.*

(*iii*) that the valuation of a suit is determined not upon the plea taken in the written statement, but upon the allegation made in the plaint.

Where, therefore, a suit was valued at Rs. 400 and the trial court did not find the valuation to be unreasonable the High Court held that the suit was properly valued and remanded the case for disposal according to law. *Mussammat Barkatunnisa Begum* v. *Mussammat Kaniza Fatma* 631

4———*Section 7(iv) (c)—declaratory suits, order for ad interim injunction—appeal—ad valorem court-fee payable.* Where the plaintiff-appellant brought a suit for a declaration of his title only, but subsequently obtained an order for *ad interim* injunction in the Court below which was subsisting at the date of the appeal, *held*, that although there was no specific prayer in the memorandum of appeal for an interim injunction the suit was nevertheless a declaratory one with consequential relief, an injunction having been obtained by the plaintiff in the Court below, and that, therefore, *ad valorem* court-fee was payable under section 7(*iv*) (*c*) of the Court-Fees Act. *Gangadhar Misra* v. *Rani Debendrabala Dasi* 211

5———*Section 7(iv) (f), whether applies to unascertained mesne profits. See* Mesne Profits, no. 2 361

6———*Section 7(v)—suit by occupancy tenant against landlord for possession after determination of title. See* no. 7 208

7———*Section 7(v) and (xi) (e)—Occupancy land, suit by tenant against landlord for possession of.* A tenant instituted a suit against his landlord for possession of occupancy land after determination of title. The question of title was decided in favour of the plaintiff and the suit was decreed. The defendant appealed to the District Judge. That appeal was dismissed and he appealed to the High Court. For the purposes of court-fee and jurisdiction the suit was treated as a suit under section 7(*v*)(*b*) of the Court-Fees Act, 1870, and was valued at five times the annual rental of Rs. 3. In the appeal to the High Court it was agreed that the annual rent should be taken to be Rs. 50.

Under section 7(*v*) of the Act, in a suit for "the possession of land" the court-fee is to be computed according to the value of the subject-matter. In a suit which falls within clause (*b*) of section 7(*v*) the value of the subject matter, was before the amendment of the Court-Fees Act by section 3 of the Bihar and Orissa Court-Fees (Amendment) Act, 1922, deemed to be five times the revenue payable to Government. In a suit under clause (*d*), however, the annual value of the subject-matter is deemed to be the market-value of the land.

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COURT-FEES ACT, 1870—*contd.*

In the High Court it was contended that the suit was governed by section 7(*xi*) (*c*). Under that clause, in a suit between landlord and tenant " to recover the occupancy of immovable property from which a tenant has been illegally ejected by the landlord ", the court-fee is to be computed " according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint ".

Held, that the suit fell within section 7(*v*) and that the court-fee was payable on the market-value of the land.

In a suit under section 7 (*xi*) (*c*) the Court will not try a question of title. *Krishna Chandra Gauntia* v. *Raja Mahakur* 208

8————*Section* 7(*xi*) (*c*)—*suit by occupancy tenant against landlord for possession after determination of title. See* no. 7 208

9————*Section* 11—*Mesne profits, application for ascertainment of— whether court-fee payable on. See* Mesne Profits, no. 2 361

10————*Schedule I, Article* 1. *See* no. 1 721

11————*Schedule II, Article* 10—*Advocate, power of appointment in writing filed by, whether requires a stamp—" vakalatnama ", meaning of— Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 2(*15*) *and Schedule I, Order III, rule* 4(*3*)—*Stamp Act*, 1899 (*Act II of* 1899), *section* 2(*21*) *and Schedule* 1, *Article* 48—*Government of India Act*, 1919 (9 *and* 10 *Geo. V, Ch.* 101), *section* 101(*d*). The word " vakalatnama " as used in Article 10, Schedule II of the Court-fees Act, 1870 refers to a power-of-attorney filed by a " pleader " within the meaning of section 2(*15*) and Order III, rule 4, Code of Civil Procedure, 1908.

Therefore, a power of appointment in writing filed by an advocate whether he be a barrister or not, authorizing him to make or do any appearance, application or act on behalf of his client, requires to be stamped as a vakalatnama under Article 10, Schedule II of the Court-fees Act. *Sheikh Abdul Gaffar* v. *F. B. Downing* ... 255

COURT OF WARDS ACT, 1879.—*Section* 60—*surrender by disqualified proprietors (widows), effect of. See* Hindu Law, no. 7 290

DAMAGES.—*See* Compensation.

DAMDUPAT—*Santal Parganas, interest on decretal amount in. See* Santal Parganas Regulation, 1872, no. 2 433

See also Santal Parganas 135

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DEATH.—*Presumption of date of. See* Evidence Act, 1872, no. 9 312

DECLARATORY SUIT—

1———*Court-fee payable on. See* Court-fees Act, 1870, no. 2 496

2———*Order for ad interim injunction—appeal—court-fee payable. See* Court-fees Act, 1870, no. 4 211

DECREE—*for rent, against dead tenant, effect of. See* Rent Decree 293

DEMAND OF INCOME-TAX—*Notice for, must be issued within reasonable time. See* Income-tax Act, 1922, no. 2 ... 13

DETERIORATION—*meaning of. See* Railways Act, 1890, no. 3 465

DISQUALIFIED PROPRIETOR—*surrender by. See* Hindu Law, no. 7 290

DWARIS—*suit by, for remuneration—limitation. See* Limitation Act, 1908, no. 1 238

EJECTMENT—

1———*Suit for, against non-occupancy raiyat, for failure to deposit full amount of enhanced rent. See* Bengal Tenancy Act, 1885, no. 3 46

2———*Court-fee payable. See* Court-Fees Act, 1870 no. 3 631

EMBEZZLEMENT BY PUBLIC SERVANT. *See* Penal Code, no. 12 ... 578

ENQUIRY.—*Meaning of. See* Code of Criminal Procedure, 1898, no. 21 229

ESCHEAT.—*Shia dying without heirs, whether his property escheats to the Crown. See* Muhammadan Law 539

ESTATES PARTITION ACT, 1897.—

1———*Section 13(xv)—raiyati kasht, power to assess rent on. See* Bengal Tenancy Act, 1885, no. 2 735

2———*Section 119—suit by a tenant contesting an order made under Chapter VI—whether section 119 a bar.* In a partition proceeding the Deputy Collector recorded certain land as the plaintiff's kasht land but on appeal the Collector ordered that the land should be recorded in the khasra as zerait, and the partition was made accordingly. The plaintiffs, therefore, brought the present suit on the allegation that the disputed land was their ancestral gurashta kasht land. The defence was, *inter alia*, that the suit was barred by the provisions of section 119, Estates Partition Act, 1897.

Held, that the suit was maintainable as section 119, Estates Partition Act, does not bar a suit contesting an order made under Chapter VI of the Act. *Subedar Rai* v. *Rambilas Rai* 8

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EVIDENCE ACT, 1872.—

1——*Sections 27 and 28—Statements made to the police by accused person, admissibility of. See* Code of Criminal Procedure, 1898, no. 4. 63

2——*Section 32(3)—Admission, whether can be split up.* In a suit by the reversioners of the last male holder to recover property which had been mortgaged by the latter's widow and subsequently purchased by the mortgagees in execution of a decree on the mortgage, the trial Court admitted in evidence, under section 32(3) of the Evidence Act, a statement made by the widow in a previous suit (the widow being dead when the present suit was instituted) to the effect that she had contracted the loan from the mortgagees for the performance of her husband's saradh and other necessary expenses. It was contended on behalf of the plaintiffs that the only part of the admission which was contrary to her pecuniary interest was the fact that she took the loan and not the remaining part that she took it for a particular purpose, and that, consequently, the latter part of the statement was inadmissible. *Held*, that the admission could not be split up into two parts and that the whole statement was admissible for the purpose of ascertaining exactly what the nature of the loan was. *Sita Ram Singh* v. *Khub Lal Singh* 168

3——*Sections 32, 33, 65 and 158—public document, secondary evidence of—section 65 inapplicable when original lost or destroyed—opinion of court upon character of witness, whether admissible—statement of case for opinion, admissibility of—probate, whether proof of execution of will—finding of execution binding on parties in probate—" representative in interest ", whether includes privies in estate—section 33—statements of deceased person, admissibility of—test—vakil appearing in case when likely to be witness—propriety of—Hindu Law—adoption—dattak form—adopted son more than five years old, adoption whether invalid—Mithila School, whether recognises dattak adoption—dattak son in Mithila inherits to collaterals.* The rule laid down in section 65, Evidence Act, 1872, that a certified copy is the only secondary evidence admissible when the original is a public document does not apply where the original has been lost or destroyed.

The opinion of a court upon the character of a witness is not admissible in evidence in another case under section 158, Evidence Act; for there is no material for judging whether the witness was rightly disbelieved or wrongly disbelieved. The question whether a witness is entitled to credit or not must be decided by a court on the evidence before it and not on what another court thought of the witness in another case. Partners and joint contractors who are each other's agents for the purpose of making admissions against each other in relation to partnership transaction or

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joint contracts are regarded as privies in estate, and are included in the term " representatives in interest " in the proviso to section 33, Evidence Act.

A case drawn up by an attorney for counsel's opinion is admissible in evidence for what is said or done by the attorney in the course of his business and within the scope of his authority must be regarded as a statement of the persons on whose behalf he acts.

A finding not essential to the judgment in a probate action cannot operate as a finding in rem; but all that is essential to the decision that the executor is entitled to probate, must be taken to have been conclusively determined. *Held*, therefore, that probate is conclusive proof of the due execution of the will by the testator which is the foundation of the title of the executor.

A finding by a probate court as to the execution of the will is at any rate binding on the parties to the probate proceedings and their privies.

Statements made in a will to the effect that the beneficiary was the adopted son of the testator can be used as evidence by the plaintiff in a suit for a declaration of the adoption, provided the statements were not made in the testator's own interest or in view of contemplated litigation.

It is desirable that a vakil should not appear in a case if he knows or has reason to believe that he will be an important witness in the case; if he accepts the brief not knowing or having reason to believe that he will be such a witness, but discovers subsequently that he is a witness on a material question of fact he should retire from the case.

A book of accounts may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transactions take place.

The Hindu law imposes no restrictions as to age in the matter of adoption, and, whatever be the age of the adopted son, his adoption is valid if made before Upanayana, if he belongs to any of the regenerate classes, and before marriage, if he belongs to the Sudra caste.

No adoption will, therefore, be set aside on the ground that the boy adopted was older than 5 years at the date of the adoption.

The Mithila school like the Mitakshara school recognises the dattak form of adoption; and a son adopted in the dattak form in Mithila inherits to collaterals.

The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh* 777

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EVIDENCE ACT, 1872—*concld.*

4——*Section* 33—" *representative in interest* ". *See* no. 3 777

5——*Section* 54—*bad character of accused, admissibility of, to prove motive. See* Code of Criminal Procedure, 1898, no. 4 63

6——*Section* 65—*Public document—lost or destroyed—secondary evidence. See* no. 3 777

7——*Section* 70—*admission of execution of mortgage—absence of due attestation. See* Mortgage no. 1 58

8——*Section* 106—*suit against railway company for non-delivery. See* Non-Delivery no. 1 118

9——*Section* 108—*presumption of date of death—disappearance for over seven years—Hindu Law—religious institution—Suit by Mahant to recover alienated properties of Math—Limitation—Indian Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 144. The mahanth of a math brought on November 30, 1916 four suits to recover properties of the math alienated by his predecessor before 1880. The preceding mahant had abandoned his office in 1892, but a previous suit brought by the present plaintiff to recover alienated properties had been dismissed in 1897 upon the ground that it was not established that his predecessor was then dead. The plaintiff, by his present plaints contended that as his predecessor had not been heard of since that date it should be presumed that he died seven years later, which was not more than twelve years before the present suits.

Held, that the suits were barred by the Limitation Act, 1908, Schedule I, Article 144, whether the period ran from the date of the alienations or from the death of the preceding mahant, since upon the evidence adduced by the plaintiff himself his predecessor died in 1892; it was therefore not necessary to determine whether the onus of proving the date of death was upon the plaintiff or the defendants.

Under the Evidence Act, 1872, section 108, when the Court has to determine the date of the death of a person who has not been heard of for a period of not less than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date. *Lalchand Marwari* v. *Mahanth Ramrup Gir* 312

10——*Section* 158—*Character of witness—opinion of court as to, whether admissible. See* no. 3 777

EXECUTION OF DECREE.—*Application for, more than a year after last application whether notice is necessary. See* Code of Civil Procedure, 1908, no. 15 1

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EXECUTION OF DOCUMENT.—*Admission of—absence of due attestation. See* Mortgage no. 1 58

EXECUTION SALE.—*Suit to set aside on ground of fraud—limitation. See* Chota Nagpur Tenancy Act, 1908, no. 2 ... 759

FORGERY.—*See* Penal Code, sections 463 and 470.

FRAUD.—*Finding of gross negligence is not a finding of fact of fraud. See* Chota Nagpur Tenancy Act, 1908, no. 2 ... 768

GIFT.—*By bride's parent to bridegroom in consideration of consent to marriage, whether suit to recover maintainable. See* Hindu Law 646

GOVERNMENT OF INDIA ACT, 1919.—*Section* 72D(*3*) *and* (*4*)—*tour and travelling allowances, whether "non-voted" items—Government of India (Civil Services) Act*, 1925 (15 & 16 *Geo. V, Ch.* 83), *section* 1(*3*)—*decision of Governor, finality of—appropriation of revenue by Governor—legal sanction—delegation of authority by Secretary of State—Writ of mandamus, power to issue on Governor—section* 110—*Specific Relief Act*, 1877 (*Act I of* 1877), *sections* 45 *and* 50. Section 72D, Government of India Act, 1919, provides: "(*1*).....(*2*) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year and the proposals of the local Government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the Council in the form of demands for grants. The Council may assent, or refuse its assent to a demand, or may reduce the amount therein referred to.....". Sub-section (*3*) of the section, as it existed before the amending Act of 1925 (15 and 16 Geo. 5, Ch. 83), provided: "Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure.....". (*iv*) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council .....". Sub-section (*4*) provides: "If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final". Section 1(*3*) of the amending Act of 1925 enacts that the following provision shall be added at the end of sub-section (*3*) of section 72D of the Act of 1919: "For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities..... and any other payments or emoluments payable to or on account of a person in respect of his office".

In consequence of this amendment the tour and travelling allowances of Government officers were treated by the Local Government in the budget as heads of expendi-

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GOVERNMENT OF INDIA ACT, 1919—*contd.*
ture which need not be submitted to the Legislative Council. The petitioner, a member of the provincial Legislative Council, therefore moved the High Court to issue a writ of mandamus to His Excellency the Governor requiring him under section 72D, Government of India Act, 1919, to submit to the vote of the provincial Legislative Council in the form of demands for grants, proposals for the appropriation of certain items of the provincial revenues forming part of the civil budget estimates for the current year. The items in question related to the estimated tour expenses of the Governor and his staff, and the estimated travelling allowances of the members of the Governor's Executive Council and of the Inspector-General of Police. The petitioner also prayed (*1*) for a writ of mandamus to the said officers directing them to secure " such legal sanction and authority for the proposed appropriation as might under the law be deemed necessary ", and (*2*) for a writ of injunction restraining the same parties from using any portion of the revenues of the province for the purpose aforesaid until proper legal sanction and authority had been obtained therefor.

Held, (*i*) that the Governor's tour allowance and the travelling allowances of the officers in question were covered by the amending Act and were included in " salaries and pensions " within the meaning of section 72D, sub-section 3(*iv*);

(*ii*) that the decision of the Governor to withdraw the items in question from the vote of the Legislative Council and to treat them as " non-voted " items was final and could not be questioned in any court of law;

(*iii*) that the Council had no right to require the items in question to be submitted to its vote and that, therefore, there had been no infringement of the right claimed by the petitioner;

(*iv*) that the disbursement by the Governor of the tour and travelling allowances had a legal sanction by virtue of the rules and resolutions passed by the Secretary of State in Council under sections 19A and 21, Government of India Act, 1919, by which the Secretary of State had delegated authority to the Governor in Council to sanction expenditure upon " Reserved " provincial subjects within certain limitations;

(*v*) that section 110, Government of India Act, was a bar to the exercise of any original jurisdiction by the High Court over the Governor or the Executive Councillors in connection with any thing counselled, ordered or done by them in their public capacity.

Per *Dawson Miller*, *C.J.*—(*i*) The scheme of the Government of India Act appears to be that, except as otherwise provided in the Act and the rules made there-

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under, the control of the revenues of India shall rest with the Secretary of State or the Secretary of State in Council who has the right to delegate in certain cases to various officers or bodies the powers so conferred;

(*ii*) Section 110, Government of India, Act, not only takes away the jurisdiction of the court with regard to acts already done but also deprives the court of the right to restrain acts in contemplation. It would be contrary to the spirit and intention of the enactment to hold that the court has power to prevent the doing of an Act which, when done, it would have no power to call in question.

Per *Jwala Prasad, J.*—(*i*) No municipal court has any jurisdiction to question, control or interfere with the appropriation of the revenues of India by the Local Government provided it is for the purposes of the Government of India. The appropriation is an act of state which essentially concerns the exercise of sovereign power;

(*ii*) No injunction can be granted independently of a suit instituted in court.

Per *Bucknill, J.*—Even under section 45, Specific Relief Act, none of the High Courts therein mentioned can make any order binding on a Governor. *Krishnaballabh Sahay* v. *His Excellency the Governor of Bihar and Orissa* 595

GOVERNMENT OF INDIA (CIVIL SERVICES) ACT, 1925.—*Section 1(3). See* Government of India Act.

HINDU LAW—

1———*Mitakshara—family property, sale of—consideration, portion of, not justified by legal necessity—sale, whether should be set aside—son's pious obligation to pay father's time-barred debt.* A sale of joint Hindu family property to a *bona fide* purchaser should not be set aside merely because the consideration paid is somewhat greater than the actual requirements of the joint family.

The pious obligation of a Hindu son to pay his father's debts does not extend to the payment of his father's time-barred debts. *Achutanand Jha* v. *Surjanarain Jha* ... 746

2———*limited owner, power of, to alienate—legal necessity—surrender, meaning of—presumptive heir, whether has any interest in the property during the lifetime of limited owner—female holder, duty of, to maintain persons entitled to maintenance by last holder.* Under the Hindu Law the liability of a woman who takes property either by inheritance or survivorship to maintain those whose maintenance was a charge upon it in the hands of the last holder is the same as that of a man who inherits or succeeds to property.

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HINDU LAW—*contd.*

The interest of a Hindu reversioner is a mere spes successionis which confers no right on the reversionary heir in the estate of the deceased, present or future, vested or contingent.

An alienation by way of compromise entered into between a limited owner and persons who had no *bona fide* claim to the property at the time of the compromise is not binding on the reversioners.

An alienation by a limited owner of the estate held by her may be validated (*i*) if it can be shown to be a *bona fide* surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation or (*ii*) if there was legal necessity for the alienation of the whole or part of the estate.

A Hindu widow mortgaged the estate which she held to *J*, to defray the expenses of the marriage of the son's daughter of the last male holder's paternal uncle, and the property having been sold in execution of the decree on the basis of that mortgage, was purchased by the decree-holder. *D*, a presumptive reversioner, brought a suit challenging the mortgage to *J* and all proceedings based thereon. The suit was compromised by an ekrarnama whereby *J* and *D* each took one-third of the property and the remaining one-third was retained by the widow. The share of *J* was purchased by the plaintiff, who in turn conveyed his share in zarpeshgi to *B*. Thereafter the actual reversioners of the last male holder (the limited owner having died in the meantime) entered into possession of the estate and redeemed *B's* zarpeshgi. Plaintiff instituted the present suit on the basis of the ekrarnama for a declaration that he was entitled to obtain his share of the property on payment of the zarpeshgi money and for a decree for redemption and possession in his favour. The suit was resisted by the reversioners who challenged the validity of the ekrarnama.

Held, (*i*) that the ekrarnama having been executed to compromise a suit brought by the heir-presumptive who had no title to the property itself during the life-time of the limited owner, was without legal necessity and hence invalid, (*ii*) that it could not be supported on the ground of surrender as there was no alienation of the whole interest of the limited owner in the whole estate in favour of the next reversioner. *Baijnath Rai* v. *Mangla Prasad Narayan Sahi* 350

8———*Karta, power of, to charge the estate—speculative transaction, whether binds the estate—test to be applied.* The power of the manager of an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; and the power of a karta of a joint Hindu family stands on the same footing as that of a manager.

HINDU LAW—*contd.* Page.

The test to be applied in each case is whether the transaction is one into which a prudent owner would enter.

Held, therefore, that it is not in the power of the karta to bind the joint family by entering into speculative transactions and that the question of benefit must be determined by reference to the nature of the transaction and not by reference to the result thereof, although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter. *Ram Chandra Singh* v. *Jang Bahadur Singh* 198

4————*Sons liability for father's debts—insolvency of father—Receiver's right to sell son's share. See* Provincial Insolvency Act, 1920 476

5————*Family arrangement and partition—minors, suit by, to set aside—legal necessity, proof of, whether necessary—tests to be applied.* *H* and his brother *K* were at one time joint in estate but the only joint property which they held was the house in which they lived. Although the brothers had separated in estate the house had not been divided by metes and bounds. *K* had four sons who were also living with him in the same house. Owing to dissension between *H* and *K* there was a likelihood of the value of the property depreciating for want of repairs, and of the house being sold in execution of a rent decree. The house was practically incapable of division into two equal parts. By an agreement between *H* and *K*, however the latter, in lieu of his moiety of the house, took from *H* a sum of Rs. 1,000 and gave up the entire house to *H*. The present suit was instituted by the two minor sons of *K* claiming to recover back their share in the house on the ground that the transfer by their father was not for their benefit and was not justified by any legal necessity.

Held, (*i*) that the transaction was really in the nature of a family arrangement and partition; (*ii*) that it was not necessary in order to support a transaction of this sort, to show that there was any actual legal necessity for such a course; (*iii*) that in order to assail the transaction it must be made out that the course adopted was so detrimental to the interests of those who were interested as minors that it would be inequitable to allow the transaction to stand.

Per FOSTER, J.—In the absence of proof of mistake inequality of position, undue influence, coercion or like ground, a partition or family arrangement made in settlement of disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable when some of the members of the family are minors or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner.

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Query.—Whether the equities of the Parties in a case of a family settlement are indentical with the equities in a question of legal necessity; having regard to the elaborate discussion of the legal weight of a family settlement in the judgment in *Keramatullah Meah* v. *Keramatullah Meah*, (1918-19) 23 Cal. W. N. 118. *Dangal Ram* v. *Jaimangal Saran* 480

6———*Widow—alienation—necessity—decree by co-sharers for contribution. See* Limitation Act no. 6 ... 585

7———*Widows' Estate—surrender to reversionary heirs—reservation of maintenance allowance—widow disqualified proprietors invalidity of deed of surrender—Court of Wards Act*, 1879, (*Ben. Act IX of* 1879), *section* 60. The two widows of a Hindu who were in possession of his property for a joint widows' estate were declared in 1907 to be disqualified proprietors under the Court of Wards Act, 1879, and the Court of Wards took charge of their property under the Act; a maintenance allowance of Rs. 625 each per mensem was made to the widows who resided in the house on the property. In 1918 the widows, without the sanction of the Court of Wards, executed a deed by which they purported to surrender all their rights in the property to the two grandsons of their deceased husband, as next heirs; the grandsons agreed to pay to the widows Rs. 2,000 per mensem for maintenance. The widows informed the Court of Wards of the deed and requested that the charge of the property should be made over to the grandsons, unless it was desired to retain it.

By section 60 of the above Act, " No ward shall be competent to create, without the sanction of the Court " (i.e., the Court of Wards) " any charge upon, or interest in his property, or any part thereof ".

Held, that the surrender was void under Hindu law, also as being in contravention of section 60 above mentioned, and that the transaction was ineffectual to vest the property in the grandsons. *Rao Bahadur Man Singh* v. *Maharani Nowlakhbati* 290

8———*Sonless widow, power of, to alienate property inherited from husband—gift in favour of son-in-law, whether valid—bride's parents, nuptial gift by, to bridegroom, in consideration of consent, whether opposed to public policy—property gifted, whether can be recovered after marriage solemnized—Contract Act*, 1872 (*Act IX of* 1872), *section* 23— *Registration Act*, 1908 (*Act XVI of* 1908), *section* 28, *scope of, elements essential to confer jurisdiction—fraud, absence of.* Section 28 of the Registration Act, 1908, indicates the place at which certain documents relating to land shall be registered and provides that such

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documents " shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate ".

Held, that the section requires only that the whole or a portion of the property to which the document relates shall in fact be in existence, shall be the property of the transferor and shall be situated within the jurisdiction of the sub-registrar where the registration is sought to be effected.

The question whether the donee under the registered deed of gift has exercised his rights under the deed is not material in considering the validity of the deed.

The registration of a document by the registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if, in fact, the property in question does exist.

Where a pardanashin executed a document without taking independent advice, the document is not invalid unless it is shown that independent advice would have affected the execution of the document by the executant.

In practice the receiving of gifts by a bride's parents or relations at any time in connection with the marriage is not permissible; but a nuptial gift by the bride's parents to the bridegroom and his relations is not considered to be bad and is in vogue. Such a gift may include not only money but also land and the like.

Section 23, Indian Contract Act, 1872, which renders unlawful the consideration for an agreement which is opposed to public policy, does not sanction the recovery of the property which forms such consideration after the object of the agreement has been fulfilled.

Therefore, although a suit may not lie to enforce against a bride's parent an agreement to make gift to the bride or to the bridegroom or to the latter's father, if a gift is actually made, whether to the bride, the bridegroom or the father of the bridegroom, by the bride's parents' it cannot be recovered by the donor when once the marriage has been solemnized.

A sonless Hindu widow succeeds to the entire estate of her husband and takes possession of it as an absolute owner; only her power of disposition is a qualified one and is analogous to the power of disposition of a male co-parcener in a joint Mitakshara family.

The performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which a sonless widow takes the estate of her husband.

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When she sells or gives away a portion of the property which is only a small proportion of the estate inherited, and the occasion of the disposition or expenditure is reasonable and proper according to the notions prevalent among Hindus, the transfer is justifiable and cannot be impeached by the reversioners.

Held, that a gift by a sonless Hindu widow of a reasonable portion of landed property to her son-in-law, out of the estate inherited from her husband, is permissible under the Hindu law as a part of the religious ceremony of marriage of the daughter and as being conducive to the spiritual welfare of the husband.

Per *Bucknill, J.*—It is generally contrary to public policy for a father to be paid money in consideration of giving his son or daughter in marriage, and a contract to that effect cannot be enforced in a court of law; but an agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. Where therefore, a contract provides that when a marriage has been arranged and performed the parents of the bride shall pay a certain sum of money, the contract is not void *ab initio* as being opposed to public policy. *Ram Sumran Prasad* v. *Gobind Das* ... 646

9———*Mithila School—Adoption—Dattak—adopted son more than 5 years old—inheritence to collaterals. See* Evidence Act, 1872, no. 8 777

IMPRESSMENT OF CARTS. *See* Bengal Troops Transport and Traveller's Assistance Regulation, 1806 205

INCOME-TAX ACT, 1922.—

1———*Section* 14(*I*)—*Scope of.* The whole object of section 14 is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income aliunde from property which has not been taxed as that of a Hindu joint family, the provisions of section 14 have no application whatever. *Ambica Prasad Singh* v. *Commissioner for Income-tax, Bihar and Orissa* 20

2———*Section* 29—*Limitation—notice of demand, when can be issued—reasonable time—form of notice, significance of.* No period is prescribed within which a notice demanding income-tax under section 29, Income-tax Act, 1922, is to be issued, and the mere fact that the ordinary form prescribed for such a demand contemplates that it will be issued during the current year for assessment, is not tantamount to an enactment that it cannot be issued afterwards.

But although no period of limitation is prescribed for such a demand, it must be made within a reasonable time

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A notice, issued fourteen months after the expiration of the year of assessment would not therefore necessarily be too late. *Raja Rajendra Narayan Bhanja Deo* v. *Commissioner for Income-tax, Bihar and Orissa* 13

INJUNCTION. *See* Temporary Injunction 211

INQUIRY.—*Meaning of. See* Code of Criminal Procedure, 1898, no. 22 229

INTEREST.—

1———*On mortgage money in Santal Parganas—statutory restriction on recovery. See* Santal Parganas ... 135

2———*Santal Parganas, power to award interest on decretal amount in. See* Santal Parganas Regulation, 1872, no. 2 488

JUDGE.—*Whether magistrate is a. See* Code of Criminal Procedure, 1898, no. 11 110

JUDICIAL PROCEEDING.—" *Offence in relation to* ", *whether includes false information to the police. See* Code of Criminal Procedure, 1898, no. 9 83

JURISDICTION.—*Of Civil Court in mortgage suit in the Santal Parganas. See* Santal Parganas 135

JURY.—

1———*Trial by—Penal Code, sections* 149 *and* 436. *See* Penal Code, no. 2 238

2———*Verdict of, interference into by High-Court—Practice. See* Penal Code, no. 15 573

KIDNAPPING. *See* Penal Code, section 363.

LANDLORD AND TENANT—*recognition by some only of the co-sharers, effect of—suit for possession by other co-sharers—proper decree, what should be.* In a suit by co-sharer landlord for possession of a holding on the ground that he had not consented to a transfer to new tenants, the proper decree should be a decree for joint possession with the tenants to the extent of the plaintiffs' share.

A landlord who has in fact recognised the tenants cannot afterwards turn them out on the ground that his recognition alone was not that of the whole body of landlords and therefore was not binding either upon himself or his co-sharers. *Chanderchoor Deo* v. *Banwari Lal* ... 773

LAND REVENUE SALES ACT, 1859—*See* Bengal Land Revenue Sale Act, 1859.

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LEASE.—
1————*of minerals, in perpetuity—want of delivery of possession—validity of lease. See* Mineral Rights ... 80

2————*unregistered lease for 5 years—induction of lessee—part performance—suit for ejectment—admissibility of lease. See* Registration Act, 1908 40

LEGAL NECESSITY—*decree for contribution by co-sharers against widow, whether justifies alienation. See* Limitation Act, no. 6 585

LIMITATION.—
1————*Mortgage—application for final decree, limitation for. See* Mortgage Decree.

2————*Suspension of, during the lifetime of limited Hindu owner—adverse possession, whether can be pleaded for the first time in appeal.* Limitation having once commenced to run in the lifetime of a full Hindu owner, is not suspended on his death and succession by a limited owner.

A plea of adverse possession may be taken for the first time in appeal if it arises on facts stated in the pleadings and the opposite party is not taken by surprise. *Mussammat Batina Kuer* v. *Raja Ram Pandey* 411

LIMITATION ACT, 1908.—
1————*Section* 10 *and Schedule I, Articles* 102, 120 *and* 131—*Suit to enforce payment due as remuneration arising out of a recurring right—right to be paid out of the proceeds of trust property—section* 10, *applicability of.* Article 131, Limitation Act, 1908, prescribes the period for a suit " to establish a periodically recurring right ".

Held, that the article has no application to a suit where the claim is not for the establishment of a periodically recurring right but for remuneration arising by reason of the right itself.

The plaintiffs instituted a suit for the recovery of certain dues which they claimed to be payable to them as remuneration in respect of their hereditary services as dwaris of a certain temple. The claim covered a period of thirteen years before the institution of the suit.

Held, (*i*) that the suit was not governed by Article 102, which relates to a suit for wages, inasmuch as the plaintiffs were not entitled to regularly recurring wages but merely to certain fees by way of emoluments attaching to an hereditary office; (*ii*) that it was not governed by Article 131 as it was not a suit " to establish " a periodically recurring right; but (*iii*) that it was governed by Article 120, which prescribes a six years' period of limitation for a " suit for which no period of limitation is provided elsewhere in " Schedule I of the Act; and (*iv*) that the claim in respect of the period prior to six years from the institution of

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the suit was barred; *held*, further, that section 10 of the Limitation Act which provides that, " no suit against a person in whom property has become vested in trust for a specific purpose.....for the purpose of following in his.....hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time ", does not apply to a suit brought, not for the purpose of following the trust property in the hands of the trustee, but for the recovery of payments in the nature of wages out of the proceeds of the trust property. *Sri Sri Baidyanath Jiu* v. *Har Dutt Dwari* 249

2———*Section 15—revival of debt after withdrawal of protection order under Chota Nagpur Encumbered Estate Act—exclusion of period of protection. See* Chota Nagpur Encumbered Estate Act, 1876, no. 1 404

3———*Schedule I, Article 12—sale in execution of rent decree, suit to set aside. See* Chota Nagpur Tenancy Act, 1908, no. 2 759

4———*Schedule I, Article 14—partition of land—suit by allotee to eject tenant. See* Bengal Tenancy Act, 1885, no. 8 735

5———*Schedule I, articles 21 and 115—Suit by consignee for compensation for non-delivery— proper article applicable —Notice, whether necessary—Indian Railways Act (Act IX of 1890), section 77.* A suit for compensation for breach of contract on account of non-delivery of goods entrusted to a carrier must be brought within one year from the date when the goods ought to have been delivered under Article 31, Limitation Act.

The residuary Article 115 has no application to such a suit.

Non-delivery constitutes " loss " within the meaning of section 77, Indian Railways Act, 1890, and, therefore, the service of notice under the provisions of that section is essential in a suit for compensation for non-delivery of goods. *Agent of the Bengal-Nagpur Railway Co., Ltd.* v. *Hamir Mull Chagan Mull* 106

6———*Schedule II, Articles 66, 132—Mortgage —personal covenant—decree for sale—deficiency—Hindu Law—Hindu widow—alienation—necessity—decree by co-sharers for contribution.* A suit to enforce a personal covenant in a mortgage deed is not one " to enforce payment of money charged upon immoveable property " within the Indian Limitation Act, 1877, Schedule II, Article 132.

Where upon a sale under a mortgage decree, which includes no personal decree against the mortgagor, there is deficiency, a claim to recover the balance under a personal

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LIMITATION ACT, 1908—*contd.*
covenant in the mortgage is barred by Article 66 unless it is made within a period of three years from the date when the debt became payable: the period does not begin to run only from the date when the deficiency is ascertained by the sale.

Where a Hindu widow has failed to pay her share of revenue on a mauza, a share in which forms part of the estate of her deceased husband, and the co-sharers have attached part of the estate under a decree for contribution, an alienation by the widow of part of the estate for the purpose of discharging the decree is for necessity, and is binding upon the reversionary heirs. *Ganesh Lal Pandit* v. *Khetramohan Mahapatra* 585

7——————*Schedule I, Article* 95—*sale in execution of rent decree, suit to set aside. See* Chota Nagpur Tenancy Act, 1908, no. 2 759

8——————*Schedule I, Article* 102—*scope of. See* no. 1 ... 238

9——————*Schedule I, Article* 115—*non-applicability of, to suit for compensation for non-delivery. See* no. 5 ... 106

10——————*Schedule I, Article* 120—*suit by dwaris of a temple for remuneration. See* no. 1 238

11——————*Schedule I, Article* 131—*scope of. See no.* 1 ... 238

12——————*Schedule I, Article* 132 *and* 148—*Prior mortgagee, suit by—non-joinder of second mortgagees, effect of—decree and sale, whether affects the second mortgagee's, right to redeem—second mortgagee, suit for redemption by—Article* 148, *applicability of.* A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgagee and is not bound either by the decree in the prior mortgagee's suit or by the sale held in execution thereof.

The second mortgagee not having been made a party to a suit by the prior mortgagee, who obtained a decree and in execution thereof got the mortgaged property sold, subsequently brought a suit to redeem the prior mortgage.

The defendant pleaded that the suit was barred by Article 132 of the Limitation Act, 1908, which provides a period of twelve years for a suit "to enforce payment of money charged upon immoveable property". Plaintiff contended that the suit was governed by Article 148 which provides a period of sixty years for a suit "against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

Held, that whatever right the second mortgagee had before the sale remained in tact, and the suit brought by him to redeem the prior mortgage was governed by Article 148. *Mussammat Ramjhari Kuer* v. *Lala Kashi Nath Sahai* ... 518

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18———*Schedule I, Article* 144—*Mahant, suit by, to recover properties alienated by predecessor. See* Evidence Act, 1872, no. 19 312

14———*Schedule I, Article* 144—*Mahant of math, nature of the office of—alienation made by mahant, suit to set aside—limitation, terminus a quo—whether each succeeding mahant gets a fresh cause of action.* The mahant of a math is merely the manager or custodian of the institution and he does not hold the math properties as a life-tenant or trustee.

Therefore, the effect of a sale by a mahant in excess of his authority, is not to give each succeeding mahant a new cause of action for setting aside the alienation; consequently adverse possession commences from the date of the original disposition of the property and is not interrupted by the death of the original mahant, and the succession of a new mahant; each succeeding mahant does not get a new start for the purpose of limitation. *Badri Narain Singh* v. *Mahant Kailash Gir* 341

15———*Schedule I, Article* 148—*sale under decree in suit by prior mortgagee without joining puisne mortgagee—suit by puisne mortgagee for redemption. See* no. 12 ... 513

MAGISTRATE.—*Whether is a "judge". See* Code of Criminal Procedure, 1898, no. 110

MANGO TREE.—*Whether is immoveable properly. See* Possession 765

MAHANT.—*Suit by, to recover properties alienated by predecessor. See* Evidence Act, no. 9 312

MATH. *See Religious Endowment.*

MESNE PROFITS,—

1———*application for 'ascertainment of, whether can be dismissed—decree-holder, right of, to apply to Court to ascertain mesne profits—limitation.* Where a decree for mesne profits has been passed and an application has been made for ascertainment of the mesne profits it is not competent to a court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed.

It is always open to the decree-holder to ask the Court to ascertain the mesne profits inasmuch as an application for mesne profits is an application in the suit itself and the law of limitation has no application to it so long as the suit is a pending suit. *Bhatu Ram Modi* v. *Fogal Ram* ... 228

2———*suit for immoveable property and past and future profits—decree for possession and directing ascertainment of profits in execution—application for ascertainment of profits—Court-fee, whether payable on—Dismissal of application for non-payment of court-fees, inability of—*

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MESNE PROFITS—*contd.*

Restoration of order of dismissal, application to set aside—*Revision—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 151, *Order VII, rule* 2, *Order XX, rule* 12—*Court-fees Act*, 1870 (*Act VII of* 1870), *section* 11. Where, in a suit for recovery of immoveable property and for mesne profits antecedent to, as well as subsequent to the institution of the suit, the decree directs the profits to be ascertained in the execution department, a court-fee is payable with respect to the claim for such profits but the fee cannot be claimed until the amount actually due on account of the profits has been ascertained.

Therefore, where the decree directs mesne profits to be ascertained " in execution ", an application made to the executing court for ascertainment of the profits cannot be dismissed, before the profits have been ascertained, on the ground of non-payment of the court-fee on such profits.

Per MULLICK, J.—Where a plaint claims future mesne profits the only order which the court can pass with respect to the claim is an order for an inquiry as to such profits. Such an order is a preliminary decree and under the present Code the inquiry as to mesne profits must be made in the suit itself and not in execution. Order VII, rule 2, which provides that where the plaintiff sues for mesne profits " the plaint shall state approximately the amount sued for " applies to an application for ascertainment of mesne profits in accordance with the preliminary decree. But the decree-holder is not liable to make with his application any deposit of court-fee as a condition precedent to the inquiry. The deficit court-fee, if any, can be demanded from him under section 11 of the Court-fees Act only when the inquiry has been held and the total amount of mesne profits has been determined by a final decree.

Per DAWSON MILLER, C. J., AND MULLICK, JWALA PRASAD, J.J.—An application for ascertainment of mesne profits in accordance with the directions contained in a preliminary decree is not a " plaint ".

Per JWALA PRASAD, J.—An order rejecting such an application is not a " decree ".

Neither Order VII, rule 2 of the Code of Civil Procedure, nor section 7(*iv*)(*f*) of the Court-fees Act applies to unascertained mesne profits.

An application for ascertainment of future mesne profits may be made verbally.

Query.—Whether such an application is subject to any period of limitation.

A decree-holder having applied for ascertainment of mesne profits in accordance with directions contained in the decree, his application was dismissed on the ground of

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non-payment of the court-fee. The court-fee was subsequently filed with an application for restoration which purported to be made under Order IX, rule 4. The court restored the case. The judgment-debtor moved the High Court in revision against the order of restoration. A Full Bench of the High Court held that the order dismissing the original application was without jurisdiction and, therefore, declined to interfere in revision with the order of restoration although it was held that Order IX, rule 4, under which the order of restoration purported to be made, did not apply to the case.

Per DAWSON MILLER, C. J. (agreeing with referring Judges, DAS and ROSS, J.J.):—" The powers of revision should not be exercised in such a case for by so doing the court would be giving effect to a technicality of procedure at the expense of manifest justice.

Per JAWALA PRASAD, J.—" The lower court had inherent power to set aside its order dismissing the application and to treat it as null and void, and this should be the view taken of its subsequent order restoring the application though it purported to have been passed under a wrong section of the Code of Civil Procedure." *Ramgulam Sahu* v. *Chintaman Singh* 361

MINERAL RIGHTS.—*Lease of, in perpetuity—want of delivery of possession—validity of—trust, by construction of law, scope of—Administrator, whether a legal representative in respect of properties held in trust—Succession Act*, 1865 (*Act X of* 1865) *section* 179, *scope of—constructive possession, whether sufficient foundation for action in trespass—tenant having interesse termini, remedy of—non-user, whether amounts to abandonment.* A perpetual mukarrari lease of mining rights was executed by the proprietor in the name of *K*, who took it not for himself only but also on behalf of eleven other persons. Later on *K* executed a " deed of declaration of trust " by which he declared himself to be the lessee of his share of the estate and a trustee on behalf of his co-sharers in respect of their shares. Thereafter an agreement was entered into between the so-called beneficiaries and *B* by which the former agreed to transfer their interest to the latter. Meanwhile *K* died before the legal estate was conveyed to *B*, leaving a will not touching the demised property, of which probate was taken. *F*, acting under instructions of the executors of the Will and as their constituted attorney obtained letters of administration to the estate of *K*, and, as administrator of the estate and effects of *K*, transferred the legal estate to *B* in pursuance of the agreement arrived at. *B*'s interest subsequently devolved on the plaintiff by successive transfers. In a suit by the plaintiff for a declaration of his title to the mineral rights, for damages and for a perma-

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nent injunction, *held*, (i) that by the deed of trust *K* did not constitute himself a trustee on behalf of his co-sharers, but that he was by construction of law a trustee bound to convey the legal title to his co-sharers whenever called upon to do so; (ii) that all the property of *K*, whether held by him for his own benefit or for the benefit of others, including the property in respect whereof he died intestate, vested in the administrator as the legal representative of *K* under section 179, Indian Succession Act, and that the plaintiff derived a valid title from the transferee of the administrator irrespective of the agreement with the beneficiaries.

Delivery of possession is not necessary for the completion of a permanent lease made under the Transfer of Property Act, 1882, which requires a permanent lease to be made by a registered instrument. It is, therefore, unsafe in such a case to import the English Common Law, where delivery of possession is necessary to complete a lease.

For many purposes the law regards the right to possession as equivalent to possession, especially when the property is not in the actual possession of any one; and the mere omission on the part of a grantee of mineral rights to do anything with the subject-matter of the grant does not amount to disseizin or dispossession of him in favour of the surface-owner.

Constructive possession is a sufficient foundation for an action in trespass.

A plaintiff having a mere interesse termini is not necessarily debarred from maintaining an action for injunction.

In the case of a mining lease mere non-user of the mines on the part of the lessee does not amount to abandonment; likewise a mere refusal on the part of the lessor to recognize the lease does not amount to dispossession of the lessee. Limitation begins to run against the lessee when there is a positive act of dispossession; but when a trespasser abandons possession, the rightful owner is in the same position in all respects as he was before the intrusion took place. *Midnapur Zamindari Co., Ltd.* v. *Ram Kanai Singh Deo Darpa Saha* 80

MINOR—*ex parte decree against, suit to set side— fraud—finding of fact as to. See* Chota Nagpur Tenancy Act, 1908, no. 3 768

MORTGAGE.—

1———*Attestation—Pardanashin Executant—Admission of execution—absence of due attestation—Evidence Act, Act*, 1872 (*Act I of* 1872), *section* 70—*Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 59. In a suit to enforce a mortgage, it appeared that one of the executants was a 3

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pardanashin woman who had signed the deed behind the parda, and that the persons who signed as attesting witnesses were outside the parda and did not see her affix her signature. At the trial she admitted having signed the deed.

By section 70 of the Indian Evidence Act, 1872, " The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested ". The Transfer of Property Act, 1882, section 59, requires that the execution of a mortgage must be attested by at least two witnesses.

Held, that section 70 of the Indian Evidence Act, 1872, applies only to a document which is duly attested, and that as the mortgage deed was not attested within the meaning of section 59 of the Transfer of Propriety Act, 1882, it was invalid as against her in spite of her admission. *Hira Bibi v. Ram Hari Lall* 58

2————*of land in Santal Parganas. See* Santal Parganas 135

MORTGAGOR—*purchaser from, whether personally liable to pay the debt.* Where a mortgagor executed a mortgage in favour of the plaintiff and subsequently sold the property to a third party, who, in the recitals of the sale-deed, agreed to pay off the mortgage, the plaintiff not being a privy to the contract, *held*, that the plaintiff (mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor, and that the purchaser was not personally liable to pay the debt. *Achuta Ram* v. *Jainandan Tewary* 468

Personal convennant, suit to enforce—Limitation. See Limitation Act, no. 6 585

MORTGAGE DECREE—*Final decree—Limitation for application—time from which period runs—appeals from preliminary decree—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXXIV, rules* 4, 5— *Limitation Act*, 1908 (*Act IX of* 1908), *schedule I, article* 181. Where there has been an appeal from a preliminary mortgage decree under Order XXXIV, rule 4(*1*), and the appeallate court has not extended the time for payment the period of three years within which under the Limitation Act, 1908, Schedule 1, article 181, an application for a final decree under Order XXXIV, rule 5(*2*), must be made runs from the date of the decree of the appellate Court, not from the expiry of the time for payment fixed by the preliminary decree, The above is the case, although the appeal is by the mortgagee and questions merely the amount for which the preliminary decree is made, and although the appeal is dismissed. *Jowed Hussain* v. *Gendan Singh*

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MUHAMMADAN LAW.—*Muhammadan Law—Shia dying without heirs—estate, in whom vests—Escheat, law of—trust in favour of poor Shias, whether exists—Shia community, right of, to have trust declared—trustee, whether can appeal to lapse of time—Limitation Act*, 1908 (*Act IX of* 1908), *section* 10—*Secretary of State, liability of, to be sued—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 92, *Order I, rule* 9—*Suit for declaration of trust—Representative suit.* By the personal law of the Shias a Shia cannot die heirless; as, in the event of his dying without natural heirs, his property vests in the Imam as the ultimate heir to be distributed among the poor and indigent; and in the absence of the Imam the property goes to his representative, the Mujtahid (deputy), to be distributed equitably and properly among the poor and indigent. But there being no person in the nature of an heir capable of succeeding and holding the property the right of the Crown to take by escheat intervenes and prevails.

The personal law of the Shias cannot be applied in derogation of the general right of the British sovereignty.

While it is clearly the intention of the Shia law that the property of a Shia dying without natural heirs should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefitted.

The mere fact that the Imam could give directions, and has by law given directions to his deputy to distribute the estate, which is in the nature of spoils, does not establish the relation of trustee and cestui que trustent between the deputy and the poor; and the law does not create a trust enforceable by the court for the benefit of the poor.

Held, therefore, that where the Secretary of State takes the property of a Shia dying without heirs on behalf of the Imam, the property is not impressed with a trust in favour of the poor and indigent, which is capable of being enforced against the Secretary of State.

Section 92, Code of Civil Procedure, regulates suits where there is a breach of an express or constructive trust created for public purposes of a charitable and religious nature; but where the suit is to establish the existence of the trust itself and the whole question involved is whether such a trust exists or not, section 92 is inapplicable.

The Secretary of State for India is capable of being a trustee.

Under section 32, Government of India Act, 1919, every person has the same remedies against the Secretary of State in Council as he might have had against the East Indian Company, if the Government of India Acts of 1858

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MUHAMMADAN LAW—*concld.*

and 1919 had not been passed. If, therefore, the Secretary of State takes property by an act of Sovereignty, no suit will lie against him in respect thereof; but if, on the other hand, he takes it under a decree of court he takes it under the colour of a legal title and is amenable to the jurisdiction of the courts.

Where there is a common interest and a common grievance a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent.

An order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity.

Where, however, a suit was brought by the plaintiffs representing the whole Shia community for a declaration of trust in favour of the poor and indigent Shias, *held*, that the entire Shia community was interested to have the trust declared even if it was a trust in favour of the Shia poor as there is no conflicting interest between those who are actually poor and those who are only potentially so.

Where a definite trust is impressed on certain property and the duty of the persons in possession is to receive the property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appeal to lapse of time; and it does not make any difference whether the duty arises from contract or is connected with some previous request or whether it is self-imposed or undertaken without any authority whatever. *Mussammat Khursaidi Begum* v. *Secretary of State for India in Council*, ... 539

Pre-emption. See Pre-emption 96

MUKARRARI LEASE—*of minerals. See* Mineral Rights ... 80

NON-DELIVERY.—

1———*Suit against railway company for—onus—Risk Note B, nature of contract arising out of—admission of theft in a running train—failure to prove allegation, effect of—Evidence Act*, 1872 (*Act I of* 1872), *section* 106. In order to be successful in an action against a railway company for damages for the loss of goods consigned, based on a contract under Risk Note B, the onus of proving that the loss is due to one of the exceptions under which the defendant is responsible, lies on the plaintiff. *Great Indian Peninsular Railway* v. *Datti Ram* 118

2———*Suit by consignee for compensation for. See Limitation Act*, 1908, no. 1 106

NON-OCCUPANCY RAIYAT—*Ejectment of, suit for—deposit of part of enhanced rent, effect of. See* Bengal Tenancy Act, 1885, no. 8 46

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NON-USER—*whether amounts to abandonment.* *See* Mineral Rights 80

OBSTRUCTION TO PUBLIC SERVANT. *See* Penal Code, 1860, no. 4 216

OCCUPANCY HOLDING.—*Purchase of, by co-proprietor—subsequent partition, effect of.* *See* Bengal Tenancy Act, 1885, no. 1 281

OCCUPANCY, RAIYAT—*suit by against landlord for possession after determination of title—court-fee.* *See* Court-fees Act, 1870, no. 7 208

ONUS PROBANDI—*suit against railway company for non-delivery.* *See* Non-delivery no. 1 118

ORDER-IN-COUNCIL.—*Execution—successful party not lodging Order—Power of other party to obtain execution—petition to vary Order-in-Council—Code of Civil Procedure (Act V of 1908), Order XLV, rule 15(1).* Upon cross-appeals to the Privy Council an Order was passed reducing the sum for which the defendants were liable under the decree appealed from, and extending the time within which, under that decree, they were to pay a large sum into court, until the expiry of eight months from the receipt of the Order by the High Court. The Order was issued to the defendants, as the party successful, but they failed to lodge it with the High Court. The plaintiffs petitioned for a variation of the Order so as to enable them to execute that part of the decree which was in their favour and which was affirmed.

Held, that the Order-in-Council having been passed, a variation of its terms could be advised only in exceptional circumstances, and that having regard to the plaintiffs' power under Order XLV, rule 15(1), to obtain execution by a petition to the High Court accompanied by a certified copy of the Order, no variation could be advised.

It is the duty of the party to an appeal to whom the Order-in-Council made therein is issued to lodge it forthwith with the court appealed from. *Surendra Mohan Sinha* v. *Hari Prasad Sinha* 461

PARDANASHIN.—

1———*Mortgage by—execution admitted—absence of due attestation.* *See* Mortgage, no. 2 58

2———*execution of document by—independent advice, effect of.* *See* Hindu Law, no. 8 646

PARDON.—*See* Approver.

PARTITION.—*effect of, an occupancy holding purchased by a co-proprietor before the partition.* *See* Bengal Tenancy Act, 1885, no. 1 281

PART PERFORMANCE, DOCTRINE OF—*unregistered lease—lessee put in possession—suit for ejectment.* *See* Registration Act, 1908 40

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PATNI REGULATION, 1819.—*Sections* 3, 5, 6 *and* 11—*Patni tenure. sale of, for arrears of rent—Non-registration of patnidar's name in landlords' sarishta, effect of—recorded tenant, liability of—Rent for more than one year, whether is first charge on the tenure—section* 11, *scope of—Representative, meaning of—Public Demands Recovery Act*, 1914 (*Bihar and Orissa Act IV of* 1914), *section* 46. Under section 5 of the Bengal Patni Taluks Regulation, 1819, " the zamindar is entitled, on an alienation of a patni taluk taking place, to exact a fee upon every such alienation, and he is also entitled to demand substantial security from the transferee or purchaser ". Section 6 empowers the zamindar " to refuse the registry of any transfer until the fee above stipulated be paid and until substantial security be tendered and accepted ". *Held*, (*i*) that until the transfer of a patni tenure has been registered the original patnidar remains the landlord's tenant and there is no relationship of landlord and tenant between the landlord and the transferee; (*ii*) that, if the tenure is sold by the landlord for arrears of rent due therefor, in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting patnidar, his representatives or assignees, the zamindar having an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure; (*iii*) that although an unregistered transferee cannot claim to be a tenant of the landlord he has an interest independently of the Regulation and is entitled to impugn a sale held to realize arrears of rent on the ground of illegality or fraud, but he has no right to have the sale set aside on the ground that he was not a party to the proceeding taken by the landlord to realize his rent by sale of the holding; (*iv*) that the obligation imposed by the Regulation on the transferee of a patni tenure to have his name recorded in the landlord's sarishta, applies to a purchaser in execution of a decree, other than a decree for arrears of rent due from the tenure.

The provisions of sections 5 and 6 of the Regulation do not apply to the transfer of a fractional share of a patni taluk, nor to any alienation other than transfers of the entire interest, unless made under the zamindar's special sanction; the mere receipt of money or rent from the transferee of a portion of a patni taluk does not amount to a recognition of the transfer or a splitting up of the tenure.

The Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him the additional right to recover rent by a summary process of sale which is restricted to recovery of rent for only one year. If, therefore, he allows his rent to fall into arrears for a period exceeding one year, he does not thereby lose

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PATNI REGULATION, 1819—*concld.*
the benefit of section 11 of the Regulation which makes the rent the first charge on the property.

Under section 46 of the Bihar and Orissa Public Demands Recovery Act, 1914, "every question arising between the certificate-holder and the certificate-debtor or their representatives, relating to the execution, etc., of a certificate duly filed under this Act, or relating to the.....setting aside by an order under this Act of a sale held in execution of such certificate shall be determined not by suit but by an order of the Certificate-Officer before whom such question arises.....: Provided that a suit may be brought in a civil court in respect of any such question upon the ground of fraud". *Held*, that where the patnidar is the farzidar of another, or where the recorded patnidar has transferred his interest to another, the latter is the representative of the recorded tenant and is bound by a decree against the recorded tenant and by the sale held thereunder, section 46 being a bar to his suit for setting aside the decree on grounds other than that of fraud. *Sheikh Abdul Gaffar* v. *F. B. Downing* 415

PENAL CODE—

1——*Section* 19—"*judge*" *whether includes magistrate. See* Code of Criminal Procedure, 1898, no. 11 ... 110

2——*Sections* 34, 149 *and* 436—*Notification making an offence under section* 436 *triable by a jury, whether applicable to a trial for an offence under section* 436 *read with section* 149. Under section 269(*1*) of the Code of Criminal Procedure, 1898, "The Local Government may.....by order in the official Gazette direct that the trial.....of any particular class of offence, before any Court of Session, shall be by jury in any district". By a notification published in the official Gazette on the 11th September, 1921, certain offences, including an offence under section 436, Penal Code, were directed to be tried by jury, in the district of Darbhanga. An accused person was committed by the Subdivisional Magistrate to the Court of Session for trial on charges of arson and abetment of arson. In the Session Court these charges were dropped and the accused was charged under section 436 read with section 149, and was tried by a Judge with the aid of assessors.

Held, that the effect of the notification was to make a charge under section 436 read with section 149 triable by jury, and, therefore, the trial by the Judge with the aid of assessors was void. *Ramsundar Isser* v. *King-Emperor* ... 298

8——*Section* 96, *et seq—Right of private defence, when open.* Where the parties to a dispute collect and arm men to vindicate their rights or supposed rights and a conflict ensues no question of the right of self-defence of the person arises.

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Circumstances in which homicide caused in the exercise of the right of private defence is justifiable, discussed.

When a person charged with causing injury to another pleads the right of private defence of property the onus lies on him to show that the property was his. It is not enough to show that neither he nor the injured party was in peaceful possession. *Farman Khan* v. *King-Emperor* 520

4————*Sections* 99 *and* 186—*Obstruction to public servant —Attachment under unsealed writ, illegality of—Right of private defence—Code of Civil Procedure*, 1898 (*Act V of* 1898), *Order XXI, rule* 24(2). Where a Civil Court peon, in execution of an unsealed writ of attachment, attached a bullock and calf belonging to the judgment-debtor, the latter being absent at the time, and the judgment debtor subsequently followed and obstructed the peon and others who were with him, and rescued the cattle after attacking the indentifier, *held*, in the circumstances of the case that the petitioners should not be convicted under section 186, Penal Code.

The provisions of Order XX, rule 24(2), of the Code of Civil Procedure, 1908, are mandatory and an attachment made under a writ which does not bear the seal of the Court as required by that rule is an invalid and illegal attachment. *Badri Gope* v. *King-Emperor* 216

5————*Sections* 149 *and* 436—*whether triable by jury*-*See* no. 2 238

6————*Section* 182, *conviction under, on charge under section* 211, *validity of. See* Code of Criminal Procedure, 1898, no. 9 33

7————*Section* 186—*obstruction to attachment under unsealed warrant. See* no. 4 216

8————*Section* 211—*enquiry by magistrate who dismissed tre complaint, illegality of. See* Code of Criminal Procedure, no. 8 450

9————*Section* 211—*charge under section* 211 *conviction under section* 182, *validity of. See* Code of Procedure, 1898, no. 9 33

10————*Section* 363—*kidnapping, whether a continuing wrong.* The offence of kidnapping is not a continuing offence; it is complete the moment the minor is removed from the keeping of the lawful guardian.

But the question whether the act of kidnapping was complete is a question of fact which must be decided on the evidence of each particular case. *Nanhak Sao* v. *King-Emperor* 586

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PENAL CODE—*contd.*

11———*Sections* 380 *and* 457, *separate sentences under, whether bad*....An accused person convicted of house-breaking followed immediately by theft is liable to punishment under section 457, Penal Code, only. *Makhru Dusadh* v. *King-Emperor* 464

12———*Section* 409—*wilful detention of money by servant where there is a duty cast to account, whether amounts to embezzlement—proof, what amounts to.* Where it is a servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully, amounts to embezzlement.

C, a sub-postmaster, and *D*, a parcel's clerk, were charged with criminal breach of trust in their capacities of public servants under section 409, Penal Code, in respect of three sums of money received for value-payable articles, on 23rd May, 1925, 27th May, 1925, and 30th May, 1925, respectively, these sums not being accounted for until the 9th June, 1925. The defence of *C* was that the articles were all along in the exclusive custody of *D*, that the money realized for them was never made over to him and that until the 9th June, 1925, he did not know that it had been realized. The defence of *D* was that the articles were not delivered to the addressees on the 23rd, 27th and 30th of May, but on the 9th June. The facts found were that the sums of money were paid to the post office on the dates specified in the charges, and were received by *D* in the usual course and entered by him in the register of value-payable articles received. It was also found that *C* had made some entries in the register of value-payable articles received and had also initialled the balance of articles undisposed of. Under the rules the appellants, as servants of the post office, were bound to send money received for value-payable articles to the sender on the date of receipt or at the latest on the next day. The prosecution failed to prove that *C* was ever entrusted with the money received by D or that he had any knowledge of the receipt of money in the post office.

Held, on the facts found, (*i*) that *D* was guilty of criminal breach of trust in the capacity of a public servant; (*ii*) that the mere fact that *C* had made some of the entries in the register and had initialled the daily balance of articles undisposed of, or the fact of his failure to check the register with the articles actually in hand, did not take the place of proof that he knew the monies to have been paid or that they were at any time entrusted to his care, and that, therefore, he was not guilty of an offence under section 409, Penal Code. *Chandra Prasad* v. *King-Emperor*, 578

13———*Sections* 436 *and* 149—*whether triable by jury. See* no. 2 238

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PENAL CODE—*concld.*

14———*Sections 457 and 380—separate sentences, illegality of. See* no. 11 464

15———*Sections 467 and 471—antedating a document, whether amounts to forgery—Code of Criminal Procedure, 1898 (Act V of 1898), section 307, reference under—interference by the High Court.* The antedating of a document is not forgery, unless it has or could have operated to the prejudice of anyone.

Where, therefore, a certain handnote, dated 20th Chait, 1329, F.S., bore the genuine thumb-impression of the executant, but it was found in fact to have been executed subsequently, and there was absence of evidence that the antedating by the creditor was done with the object of making any wrongful gain to himself or causing wrongful loss to the executant, *held*, that the necessary element of fraud or dishonesty was wanting in the case and, therefore, the offence of forgery was not committed.

Held, further, that the High Court will not interfere in a reference under section 307, Code of Criminal Procedure, with the verdict of the jury unless it considers that the verdict cannot be supported by the evidence on the record. *Emperor* v. *Gobind Singh* 573

PERPETUAL LEASE—*of minerals. See* Mineral Rights ... 80

POLICE DIARY—*contradiction of witness by . See* Code of Criminal Procedure, 1898, no. 5 316

POSSESSION—*person in possession without title dispossessed by trespasser—right to regain possession—Transfer of Property Act, 1882 (Act IV of 1882), section 3—Immovable property, whether includes mango tree.* Where a person who has been in possession of property for several years without title is dispossessed by another, who also has no title, the former is entitled to be restored to possession.

Quarry. Whether a mango tree is immoveable property within the meaning of the Transfer of Property Act, 1882, under section 3 of which " Immoveable property does not include standing timber, growing crops or grass ". *Bodha Gandori* v. *Ashloke Singh* 765

POWER TO APPOINT—*of barrister—stamp. See* Court-fees Act, 1870, no. 11 255

PRE-EMPTION—*suit for—joinder of co-plaintiffs not entitled to pre-emption, effect of—Shafi-i-khalit, meaning of—talab-i-ishhad, performance of, after ascertaining amount of purchase-money—reasonable delay—finding of fact.* If a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed

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PRE-EMPTION—*concld.*

as against both; but the mere joining by a person having a right of pre-emption of persons who have an actual right of pre-emption, but who have not qualified themselves according to the Muhammadan Law to enforce it and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption if he had sued alone, from maintaining a suit brought by him so far he himself is concerned.

Where an ahar adjoining certain vended property was within the plaintiffs' patti and the title to it belonged to them alone, but the proprietors of the vended property had a right of easement over the ahar, *held*, that the plaintiffs came within the second class of pre-emptions, namely, shafi-i-khalit.

Where, after performing the talab-i-mowasibat the pre-emptor waited until he had ascertained the amount of the purchase money and then performed the second ceremony of talab-i-ishhad, *held*, that the delay was excusable and did not operate as a forfeiture of the right of pre-emption.

Held, further, that the due and sufficient observance of the formality as to time is a question to be decided in each case by the Court which has to deal with the facts and the High Court should not interfere with a finding of fact on such question in second appeal. *Mahanth Tokh Narain Puri* v. *Ram Rachhya Singh* 96

PRIVATE DEFENCE, RIGHT OF. *See* Penal Code, no. 3 ... 520

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PROBATE—*execution of Will, finding as to, binds parties to probate proceedings. See* Evidence Act, 1872, no. 3 ... 777

PROVINCIAL INSOLVENCY ACT, 1920.—*Section 2(1)(d)—Receiver, right of to sell son's share to liquidate father's debt—son's pious obligation—Hindu Law.* A Receiver in insolvency in whom Hindu joint family property has vested has the right to sell the share of the son to liquidate the father's debt, not incurred for immoral purposes, and the pious obligation of the son prevents him from asserting that the family estate, so far as his interest is concerned, is not liable for that debt. *Chairman, District Board, Monghyr* v. *Sheodut Singh* 476

PUBLIC DEMANDS RECOVERY ACT, 1914.—*Section 46—"representatives", unregistered transferees from patnidars, whether are. See* Patni Regulation, 1819 415

PUBLIC POLICY.—*Nuptial gift by bride's parents to bridegroom in consideration of consent to marriage, whether opposed to public policy. See* Hindu Law, no. 8

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RAILWAYS ACT, 1890.—*Sections 70 and 140—notice to the Traffic Manager, whether sufficient—Agent, actual receipt of notice by, effect of—appointment of officer to settle claims, whether amounts to delegation of power—Railway receipt, condition on the back of, that notice must be given to Traffic Manager, effect of—limitation—terminus a quo.* Section 77 of the Railways Act, 1890, provides that a person shall not be entitled to compensation for the loss, etc., of goods delivered to a railway for carriage unless a claim has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the goods for carriage by railway. Under section 140 a notice of claim for loss of goods despatched by rail must be given to the "Agent" of the company before a suit for compensation for loss can be entertained.

Held, therefore, that the service of notice of the claim on the Traffic Manager is not a sufficient compliance with the requirements of section 140.

Held, further, that if it can be shown by the plaintiff that the notice, although addressed to a subordinate officer of the railway administration, did actually reach the Agent within the prescribed time, it would be sufficient compliance with the requirements of the law.

A condition on the back of a railway receipt that notice of loss, etc., must be given to the Divisional Traffic Manager does not amount to a delegation of the power of the Agent to receive the notice prescribed by section 140 to the Traffic Manager. Likewise, the fact that a particular officer is appointed by the Agent to investigate and settle claims for loss of goods does not imply that the Agent has delegated his power to receive notice to that officer.

The notice required by section 77 of the Act must be given within six months from the date of delivery of the goods for carriage by railway and not from the date on which the goods ought, in ordinary course, to be delivered to the consignee. *East Indian Railway Company* v. *Bhimraj Srilal* 488

2———*Section 72(2)(a), meaning of—Risk Note B, execution of, by person delivering the goods—contract, effect of, against the sender.* Section 72(2)(a), Railways Act, 1890, does not contemplate that the sender of goods must necessarily be the person delivering them to the Railway administration.

Where, therefore, *N* delivered the goods on behalf of the sender and executed the risk note B, *held*, that the case was covered by section 72(2)(a), and that the contract was effective as against the sender. *East Indian Railway Co., Ltd.* v. *Kishun Chand Kasarwani* 221

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RAILWAYS ACT, 1890—*contd.*

3————*Section 75—contents of parcel, abstraction of—whether "deterioration" within the meaning of section 75—Railway Company, liability of.* Under section 75 of the Railways Act, 1890, "when any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds Rs. 100, the railway administration shall not be responsible for the.....deterioration of the parcel or package..... ".

Plaintiff consigned a parcel for transmission on the defendant railway. When it was opened it was found that some of the contents had been abstracted. These were articles of silk and other things falling within the Second Schedule to the Railways Act, 1890. Plaintiff brought the present suit for recovery of the value of these articles. The defence was that the company was protected by section 75. The finding of the courts below was that the contents were abstracted while the parcel was in the custody of the defendant company's servants.

Held, that there was "deterioration" of the parcel within the meaning of section 75, and that the defendant company was protected under that section irrespective of whether the articles were abstracted by the company's servants or not. *Bengal and North-Western Railway Company* v. *Tupan Dass* 465

4————*Section 77—suit for compensation for non-delivery. See* Limitation Act, 1908, no. 5 106

5————*Section 77—suit for compensation for non-delivery onus. See* Non-delivery, no. 1 118

RAILWAY COMPANY.—

1————*Suit against—Agent impleaded as defendant—Suit whether maintainable—bonâ fide mistake, whether cures the defect—plaint, construction of.* In the case of a railway company, the proper name under which the company should be sued is the name and style under which it carries on its business; and if a plaintiff deliberately chooses to sue, not the company but the Agent, he cannot by any decree which he obtains in the suit bind the company. Where, however, upon a fair reading of the plaint, it is made out that the description of the defendant is a mere error and that the company is the real defendant, then the suit may proceed against the company.

Where the plaint bore the name of the Agent of a railway company as the defendant, but plaintiff, the company and the Court all treated the suit as one against the company and the company in fact appeared and conducted the case up to a certain stage of the proceedings on the footing that they were the defendants in the suit, *held*, that

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this was a case of mere misdescription and the suit was one against the company. *Radhe Lal* v. *East Indian Railway Co., Ltd.* 123

2———————*Suit against for non-delivery. See* Non-delivery 118

RATEABLE DISTRIBUTION.—*Jurisdiction of court to inquire into bonâ fide of decree* 445

RECORD-OF-RIGHTS—*holding recorded as occupancy holding—landlord's claim to it as malik's zerait—presumption—burden of proof—Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 103B. In a suit for partition the plaintiff claimed certain land to be the malik's zerait, while the defendants contended that it was their occupancy holding; the record-of-rights supported the defendants. The plaintiff contended that the presumption arising from the entry in the record-of-rights was rebutted by the fact of the disputed land falling within the ambit of the plaintiff's zamindari.

Held, that the plaintiff had no presumptive right generally to possession of raiyati holdings and that, therefore, there being no conflict of presumption, the burden of proof lay on the plaintiff. *Mahanth Ram Lochan Das* v. *Nandi Jha* 893

REDEMPTION, SUIT FOR—*sale under decree in suit by prior mortgagee without impleading puisne mortgagee—suit by puisne mortgagee for redemption—limitation. See* Limitation Act, 1908, no. 12 513

REGISTRATION ACT, 1908.—*Sections* 17 *and* 49—*Lease of immoveable property for five years—parwana not registered, admissibility of—induction of lessee—part-performance.* A written application or proposal was made by the naib to the proprietors stating that he had the opportunity of effecting a lease on favourable terms with certain persons for five years. The proposal contained certain suggestions with regard to the proposed lease and the naib asked for orders. An order was passed by the proprietor on this application to the effect that, " Naib will do the needful ". This was followed later by a formal letter from the proprietors to the naib definitely accepting the offer and telling him to issue a parwana to the new lessees. In pursuance of this order a parwana was issued by the naib and the lessees were put into possession. The parwana, however, was not registered. In a suit by the plaintiff-proprietor for a declaration that the defendant-lessees had not acquired any right under the lease on the ground that the document on which the defendants based their title, viz. the parwana, had not been registered under section 49 of the Registration Act, 1908, *held*, that the transaction had been completed by part-performance, viz. the induction of the lessees into actual possession, and that, therefore, the plaintiff's suit must fail. *Srimati Peari Dai Debitora* v. *Naimish Chandra Mitra* 40

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2————Section 28—*conveyance of property—property mainly within registering officer's jurisdiction—small portion outside the jurisdiction—validity of registration.* See Hindu Law, no. 8 646

REGULATION.—

1806—XI. *See* Bengal Troops' Transport and Traveller's Assistance Regulation, 1806.

1819—VIII. *See* Patni Regulation, 1819.

1872—III. *See* Santal Parganas Settlement Regulation, 1872.

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RENT DECREE.—

1————*Execution sale under, suit to set aside on ground of fraud—limitation.* See Limitation Act, 1908, no. 2 ... 759

2————*against a dead tenant—whether the rest of the decree is a nullity—tenant-joint and several liability of, to payment.* A decree against a dead person is a nullity.

But the question whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representative-in-interest of the deceased defendant on the record affects his right to proceed with the suit.

The liability of a tenant to pay rent being joint and several it is always open to a landlord to bring a suit for rent against all or any of the tenants though a decree against some of them only can be executed only as a money decee, and a sale held in execution thereof will pass only the right, title, and interest of the judgment-debtors.

Where, therefore, a decree was obtained by a landlord against his tenants, some of whom were dead at the time of the institution of the suit, and in execution thereof the holding was sold, *held*, that the liability being joint and several, only so much of the decree as affected the rights of the deceased defendants was a nullity and that the sale passed the right, title, and interest of the surviving judgment-debtors. *Maharaja Kesho Prashad Singh* v. *Shamnandan Rai* 293

RELIGIOUS ENDOWMENT.—*Math—alienation of properties by mahant—suit for recovery by successor—Limitation.* See Evidence Act, 1872, no. 19 312

See also Limitation Act, 1908, no. 14 301

REPRESENTATIVE SUIT. *See* Code of Civil Procedure, 1908, Order 1, rule 8.

RIGHT OF PRIVATE DEFENCE—*obstruction to attachment under unsealed warrant.* See Penal Code, no. 4 216

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TAL PARGANAS.—*Mortgage of land in Santal Parganas—jurisdiction of Civil Courts—Statutory restriction on interest recoverable—Interest after bringing of suit—Discretion of High Court—Santal Parganas Settlement Regulation*, 1872 (*III of* 1872), *section* 6—*Santal Parganas Settlement (Amendment) Regulation*, 1908 (*III of* 1908), *section* 5. The effect of section 5 of the Santal Parganas Settlement (Amendment) Regulation, 1908, which replaced section 6 of Regulation III of 1872, was to exclude the jurisdiction of the Civil Courts to try cases relating to land in the Santal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed.

A Civil Court exercising jurisdiction under section 5 of the Regulation of 1908 is a " Court having jurisdiction in the Santal Parganas ", within the meaning of section 6 of the Regulation of 1872, and is bound by the rules relating to usury enacted by that section.

Those rules preclude compound interest from being decreed and limit the amount which can be decreed for interest under a mortgage bond or other loan to a sum equal to the amount actually advanced less any sum which already has been paid by way of interest.

Where the High Court has refused to exercise its discretionary power under section 34 of the Civil Procedure Code, 1908, to decree interest from the date of the institution of a suit, the Judicial Committee as a rule will not interfere.

Query, whether section 6 of the Regulation of 1872 applies to and limits the discretionary power under section 34 of the Code. *Sourendra Mohan Sinha* v. *Hari Prasad* 135

SANTAL PARGANAS SETTLEMENT REGULATION, 1872.—*Sections* 5 *and* 9—" *Suit* ", *whether includes execution proceeding—suit, institution of, under Code of Civil Procedure—decree, execution of by the court which passed the decree—jurisdiction—notification under section* 9—*execution, whether can be transferred to special court in Santal Parganas—sections* 38 *and* 39(2), *Code of Civil Procedure*, 1908. Section 5, Santal Parganas Regulation, 1872 provides:

" (*1*) From the date on which under section 9 the Lieutenant-Governor declares by a notification in the *Calcutta Gazette* that a settlement shall be made of the whole or any part of the Santal Parganas until the date on which such settlement is declared by a like notification to have been completed no suit shall lie in any civil court established under the Bengal, Agra, and Assam Civil Courts Act, 1887, in regard to—

(*a*) any land or any interest in, or arising out of, land, or

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(*b*) the rent or profits of any land, or

(*c*) any village headship or their office connected with any land,

in the area covered by such first-mentioned notification nor shall any civil court proceed with the hearing of any such suit which may be pending before it.

" (*2*) Between the dates referred to in sub-section (*1*), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Santal Parganas Act, 1855, or section 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct, and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Held, that the term " suit " in this section does not include a proceeding in execution.

Where, therefore, a decree was passed by the Bhagalpur court long before the notification directing a settlement to be made under section 9 of the Regulation had been published but the execution application for the sale of one of the properties situate in the Santal Parganas was filed in the court which passed the decree after the publication of the notification, and the judgment-debtor objected to the execution on the ground that the Bhagalpur court's jurisdiction was barred by section 5 of the Regulation,

held, (*i*) that section 5 did not bar the institution of the execution proceeding in the Bhagalpur court; and

(*ii*) that the suit having been instituted under the Code of Civil Procedure, the decree-holder was bound to take out execution in the court which passed the decree and that court could transfer the decree to another court for execution only on an application by the decree-holder under section 39(*1*) of the Code or suo motu, to a subordinate court, under section 39(*2*) of the Code; but that the decree could not be transferred by the Bhagalpur court under section 39(*2*) of the Code to the officer referred to in section 5(*2*) of the Regulation, inasmuch as that officer was not subordinate to the Bhagalpur court. *Upendra Chandra Singh* v. *Sardar Chranjit Singh* 714

2———*Section* 6, *effect of—interest, power of court to award, on decretal amount—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 34. Section 6 of Santal Parganas Regulation, III of 1872, as amended by Regulations V of 1893 and III of 1908,

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SANTAL PARGANAS SETTLEMENT REGULATION, 1872—*concld.*
provides, " All courts.....in the Santal Parganas shall observe the following rules, namely (*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two *per cent. per mensem* notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed; (*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt of loan ". " The expression intermediate adjustment of account.....means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when without the passing of fresh consideration the original claim is increased by such renewal." (Explanation to section 6.)

Held, that section 6 of the Regulation does not limit the power of a court under section 34, Code of Civil Procedure, 1908, to award interest on the decretal amount until realization.

Per Foster, J.—Query whether section 6 of the Regulation overrides the law of contracts in the Santal Parganas so as to nullify *bona fide* contracts of novation, where the claim or debt at the time of the novation is an adjusted amount comprising principal and interest and some fresh consideration, for instance, rescission of the previous bond or forbearance to sue, has passed from the mortgagee to his debtor. *Basudeo Bhagat* v. *Sheikh Kadir* ... 433

3————*Section* 6. *See* Santal Parganas 135

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1————*Liability of, to be sued. See* Muhammadan Law 539

2————*whether can be a trustee. See* Muhammadan Law 539

SHAFI-I-KHALIT—*meaning of. See* Pre-emption 96

SPECIFIC RELIEF ACT, 1877—*sections* 45 *and* 50—*Mandamus, power of High Court, as to. See* Government of India Act, 1919 595

SUCCESSION ACT, 1865.—*Administrator, whether is a legal representative in respect of properties held in trust. See* Mineral Rights 80

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SUITS VALUATION ACT, 1887.—*Section* 11, *meaning of—under-valuation, appeal to the District Judge by reason of—Second Appeal to High Court—Valuation increased beyond the pecuniary jurisdiction of District Judge—order of District Judge, whether without jurisdiction.* The plaintiff valued the present suit, for the purposes of jurisdiction, at Rs. 2,550. The defendants in their written statement contended that the suit was under-valued and the court-fee paid was insufficient. Upon this plea the Subordinate Judge framed an issue which, however, was not pressed at the trial and was accordingly decided in favour of the plaintiff. The suit was decreed and on appeal to the District Judge by the defendant the plaintiff did not object to the valuation of the appeal or to the jurisdiction of the District Judge to entertain the appeal. The decree of the first court was reversed and the plaintiff preferred a second appeal to the High Court which, however, held that the valuation of the suit, and, therefore, of the appeal, should have been Rs. 8,000. The appellant made good the deficiency in the court-fee, but on the strength of this order contended that the appeal to the District Judge was incompetent and his order without jurisdiction.

Held, that the under-valuation prejudicially affected the disposal of the appeal on the merits within the meaning of section 11(*1*)(*b*) of the Suits Valuation Act, 1887, and, therefore, that the order of the District Judge was without jurisdiction. The High Court treated the appeal as an appeal from an original decree, disregarding the appellate decree passed by the District Judge. *Mahanth Rukmin Das* v. *Deva Singh* 505

TALAB-I-ISH-HAD—*delay in performance of, effect of. See* Pre-emption 96

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TENANT.—*Joint and several, liability of—decree for rent against dead tenant, effect of. See* Rent Decree 233

TRANSFER OF CRIMINAL CASE.—

1———*Proceedings on application for, is not an enquiry See* Code of Criminal Procedure, 1898, no. 21 229

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1———*application to withdraw suit with permission to bring a fresh suit—order permitting withdrawal only, effect of. See* Code of Civil Procedure, 1908, no. 17 28

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1———*Character of—another court's opinion as to irrelevant. See* Evidence Act, 1872, no. 1 777

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