COMPARATIVE TABLES.

TABLE NO. I.

Showing seriatum the number of pages of A. L. R. reported in this week with comparative references to other Journals.

ANNOTATED LAW REPORTER—Other Journals.

A L R 1934 P C

A L R	Other Journals
14	O W N 96
19	1934 M W N 33
	66 M L J 79
	A I R 1934 P C 14

A L R 1934 All

A L R	Other Journals
89	1933 A L J 1573
94	...
98	1933 A L J 1273
	143 I C 673

A L R 1934 Bom

A L R	Other Journals
29	35 B L R 1162

A L R 1934 Cal

A L R	Other Journals
49	...
50	...
52	60 C 1189
54	58 C L J 116
	37 C W N 1185
	146 I C 335 (1)
55	60 C 1073
	57 C L J 477
	37 C W N 689
	143 I C 164
57	58 C L J 453
59	60 C 1022
62	37 C W N 752
65	60 C 1176
	58 C L J 192
	37 C W N 1167
67	37 C W N 744
69	60 C 1092
	144 I C 92
71	60 C 1135
	37 C W N 769
75	...
77	60 Cal 1401
79	60 Cal 1357

A L R 1934 Lah

A L R	Other Journals
65	...
66	14 Lah. 651
	34 P L R 891
	145 I C 231
67	...
69	...
70	...
73	146 I C 261
75	146 I C 232
76 (1)	...
76 (2)	34 P L R 1057
78	...
79	34 P L R 921
	146 I C 236
80	34 P L R 261
81	34 P L R 486
	142 I C 812
82	34 P L R 999
84	34 P L R 436
	144 I C 762
86	...
88	34 P L R 518
	141 I C 659
90 (1)	34 P L R 429
	142 I C 516
90 (2)	...
91	145 I C 702
93	146 I C 34
94	...
95 (1)	34 P L R 883
	145 I C 936
95 (2)	...

A L R 1934 Mad

A L R	Other Journals
89	1934 M W N 5
90	38 L W 961
	1934 M W N 52
97	...
101	...
103	..
104	1934 M W N 94
105	39 L W 73
	66 M L J 70
	1933 M W N 1404
108	39 L W 91
	1933 M W N 1409
	A I R 1934 Mad 88

A L R 1934 Nag

A L R	Other Journals
38	...

A L R 1934 Oudh

A L R	Other Journals
49	11 O W N 78
53 (1)	10 O W N 1270
	A I R 1934 Oudh 34
53 (2)	10 O W N 1247
	A I R 1934 Oudh 10 (1)
54	10 O W N 1224
	A I R 1934 Oudh 27
56	10 O W N 1271

A L R 1934 Pat

A L R	Other Journals
33	12 Pat. 829
38	14 P L T 628
43	14 P L T 691
46	14 P L T 735
48	12 Pat. 821
	14 P L T 673

A L R 1934 Pesh

A L R	Other Journals
6	A I R 1934 Pesh 3
8	...
9	A I R 1934 Pesh 1
11	144 I C 482
12	...

A L R 1934 Rang

A L R	Other Journals
14	11 Rang 451
	A I R 1934 Rang 11
15	11 Rang 462
	A I R 1934 Rang 1
16	A I R 1934 Rang 7

[N.B.—The consolidated Comparative Table No. 2 shall appear in No. 7 dated 13-2-34.]

The third stage of the evidence dealt with by the Subordinate Judge related to the execution of the will, and his comment on this stage was "Equally suspicious are the circumstances attending the alleged execution of this will." Again their Lordships agree with the criticisms by the High Court of the learned Judge's reasons for his conclusion, and it is unnecessary to repeat them. The fourth stage related to the conduct of Lachmi Kuer and Bala Kunwar after the death of Dushashan, and their Lordships are of opinion that there are some points in their conduct that are open to legitimate comment, *viz.*, the failure of Lachmi Kuer and Bala Kunwar to rely on the will in their respective applications for mutation in 1912 and 1921 respectively, and the dilatoriness of Bala Kuer in invoking the aid of the Court for recovery of the will in 1921. But, in their Lordships' opinion, any unfavourable comments which can arise in these respects are far from being sufficient to justify the discrediting of the plaintiff's witnesses. It does not appear to have been a matter of much moment to Lachmi Kuer whether she got the estate by inheritance or under the will, and it is not certain that Bala Kunwar was personally aware of the terms of the application for mutation which was signed on her behalf by Rup Ram. As regards the third ground of comment, it should be remembered that both Courts accepted it as proved that Bala Kunwar had disclosed the fact of the will in her favour to the police on 9th January 1921.

The last matter on which the Subordinate Judge laid stress was the fact that the will was neither publicly registered nor privately deposited with the Registrar for safe custody. Their Lordships agree, as also did the High Court, that this affords ground for serious comment, especially in view of the evidence, on behalf of the plaintiffs, of Dushashan's anxiety for its safe keeping, but their Lordships agree with the High Court that such comment is insufficient to justify disbelief of the strong and substantial body of evidence on the plaintiff's behalf. Their Lordships are accordingly of opinion that the appellants have failed to produce sufficient grounds for discrediting the plaintiff's witnesses, and the appeal must therefore fail. But two further points were raised during the debate before this Board, both of which arose out of the death of Bala Kunwar since the date of the decision of the High Court, which has brought into prominence the question of the succession to the estate of Dushashan on her death. The appellants claimed that Bala Kunwar had only a life estate and that on her death the reversioners would be entitled to the property on their suing for possession. The appellants desired to have it made clear that the present suit in no way determines who are entitled to the reversionary interest, and the respondents desired to have the question of the nature and extent of Bala Kunwar's interest under the will, which they maintained to be as yet undetermined, remitted for further inquiry and decision.

In their Lordships' opinion it is clear that the present suit does not determine who are entitled to the reversionary rights in the estate of Dushashan; this is made clear by the fact that issue 2, under which the question was raised, was struck out by the Subordinate Judge as being unnecessary for the purposes of the suit. As regards the nature and extent of Bala Kunwar's interest under the will, this matter is determined by the judgment and decree of the High Court to have been a provision for Bala Kunwar during her life, and no cross-appeal has been taken by the respondents. But, apart from that, it may be noted that the second part of the issue which was tried raises the question of the plaintiff's interest under the will, and their Lordships are entitled to assume that every witness who could speak to the terms of the will, and was available, was called by the plaintiff. Their Lordships therefore see no ground for remitting the case for a further inquiry into the extent of the interest of Bala Kunwar, which must be taken as decided by the judgment of the High Court. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed and that the decree of the High Court dated 14th November 1927 should be affirmed. The appellants will pay the costs of Man Singh who alone appeared as a respondent in this appeal.

Appeal dismissed.

†† A. L. R. 1934 P. C. 14.

(FROM OUDH CHIEF COURT.)

No. 46 of 30. (Decided on 30-11-33.)

Lord Macmillan, Sir John Wallis and Sir George Lowndes.

DEBENDRA LAL KHAN ... *Appellant*

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL ... *Respondent.*

Adverse possession—meaning of—notice or knowledge of the Crown—sufficiency of—crown and subject—indulgence given to the Crown under the Act—nature of requisite possession varies with nature of subject possessed—fishery right—evidence of possession in adjoining parts of a river—admissibility of—tacking of periods—Limitation Act, Arts. 144 and 149.

The possession required, if it is adverse, must be adequate in continuity in publicity, and in extent to show that it is possession adverse to the competitor. The classical requirement is that possession should be *nec vi nec clam nec precario*. It is not necessary that the adverse possession under Art. 149, Limitation Act should be shown to have been brought to the knowledge of the Crown. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely in requiring a much longer period of adverse possession than in the case of a subject, otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession. It is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. [P. 15, C. 1, 2]

The nature of requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. The Crown in the case of a fishery belonging to it exercises its rights by granting leases or licenses to fish: it does not itself fish. Consequently the granting by a person other than the Crown of leases or licenses to fish in the case of fishery which *prima facie* belongs to the Crown is evidence of the usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of adverse possession. [P. 15, C. 2.]

Evidence of acts of possession in parts of a river adjoining the part actually in dispute is admissible provided there is a common character of locality. [P. 16, C. 1.]

The periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessor to make up the statutory total period of adverse possession. (1900) L. R. 27 I. A. 136. (1887) 12 App. Cases 544 and 1887 2 M. and W. 326. followed. [P. 15, C. 2.]

Appellant by:—*W. H. Upjohn, K. C.* and *M. A. Jinnah.*

Respondent by:—*A. M. Dunne, K. C.* and *W. Wallach.*

JUDGMENT

Lord Macmillan.—The only question which has been argued before their Lordships in these consolidated appeals is whether the High Court of Judicature at Calcutta have rightly decided that Debendra Lal Khan, the plaintiff in the suit, "has right by adverse possession to the fishery" in a portion of the river Cossye. The Secretary of State for India in Council (hereinafter referred to as "the Crown"), who is the defendant in the suit, contests in his appeal the soundness of this decision. Debendra Lal Khan (hereinafter referred to as "the plaintiff"), besides supporting the decision of the High Court in his favour, raises in his appeal certain other issues which have been decided against him. His Counsel, however, intimated that in the event of the decision of the High Court with regard to the fishery in question being upheld by their Lordships, the plaintiff did not propose to proceed with his appeal.

The river Cossye, also known as the Kangsabati, rises in the hills of Chota Nagpur, and is a tributary of the Haldi which flows into the Hoogly. It has been found both by the Subordinate Judge and by the High Court to be a "large navigable river" within the meaning of the Bengal Regulation XI of 1825. *Prima facie*, therefore, the property of the alveus and of the fishery is in the Crown. The dispute relates to the fishery in some twelve to fourteen miles of the river in the District of Midnapore, extending from Kankabati Ferry Ghat eastward and down stream to Pathra Temohani with the exception of a short stretch of the river in the vicinity of a dam known as the Midnapore Anicut, the fishery in which is admittedly still the property of the Crown.

By Section 28 of the Indian Limitation Act, 1908, it is provided that "at the determination of the period (by the Act) limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." By Article 149 of the First Schedule to the Act the period limited to the Crown for instituting a suit is 60 years from the time when the period of limitation would begin to run under the Act against a like suit by a private person. In the case of a suit by a private person for possession of immoveable property, or any interest therein not otherwise specially provided for, the time when the period of limitation would under Article 144 begin to run is the time when the possession of the defendant becomes adverse. By Section 2 (4) "'defendant' includes any person from or through whom a defendant derives his liability to be sued," and by section 2 (8) "'plaintiff' includes any person from or through whom a plaintiff derives his right to sue."

The effect of this legislation is that if the plaintiff can establish that he and those from or through whom he derives right have for 60 years been in possession adverse to the Crown of the fishery in question, any right of the Crown thereto is extinguished, and the plaintiff is entitled to succeed in his claim. The suit was instituted on the 2nd April, 1919, and the 60 years thus run from the 2nd April, 1859. The question accordingly is whether the fishery has from the 2nd April, 1859, been possessed adversely to the Crown by the plaintiff or those from or through whom he derives right.

As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi* v. *Collector of Khulna* (1), where his Lordship said that "the possession required must be adequate in continuity, in publicity and extent to show that it is possession adverse to the competitor." The classical requirement is that the possession should be *nec vi nec clam nec precario.* Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely, in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession. It may be added that it is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. Though the possession "be not proven to have continued every quarter, month or year, yet ordinary possession will be sufficient *ad victoriam causæ*, albeit it be proponed in the terms of a continual possession, *quia probaties extremis præsumuntur media*, if the distance be not great." (*Stair's Institutions of the Law of Scotland*, IV, 40. 20). "The fact of possession may be continuous though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription" (*Millar on Prescription*, p. 36). The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. The Crown in the case of a fishery belonging to it exercises its rights by granting leases or licenses to fish; it does not itself fish. Consequently the granting by a person other than the Crown of leases or licenses to fish in the case of a fishery which *prima facie* belongs to the Crown is evidence of the usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of ad-

Adverse possession against Crown.

Nature of possession.

(1) 27 I. A. 136 : 27 Cal. 943 (P. C.).

verse possession. Where a fishery is claimed in a navigable river which is open to the public for the purposes of navigation, the observations of Lord Watson in *Young* v. *North British Railway Company* (2), should be borne in mind. The claimant there sought to establish a prescriptive right to foreshore and Lord Watson (at p. 553) pointed out that

> "in estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be in the strict sense of the term exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right."

As regards the admissibility of evidence of acts of possession in parts of a river adjoining the part actually in dispute there is the high authority of Baron Parke in favour of admitting such evidence provided there is "a common character of locality"—*Jones* v. *Williams* (3).

With these preliminary observations their Lordships proceed to examine the evidence in the present case. For this purpose it is necessary to differentiate between on the one hand the fishery in the stretch of the river from Bhura to Benasuli and on the other hand the rest of the fishery claimed.

(1) Between Bhura and Benasuli the river flows at some places through and at other places along the boundary of certain lands known as the zamindary Tappe Dharenda which belonged to Raja Sri Narain Pal and which were purchased from him by the plaintiff's predecessor in 1906. It is not disputed that the plaintiff is entitled to pray in aid any acts of possession of this section of the fishery on the part of his predecessors in title in these lands.

The Subordinate Judge held that this portion of the river, including the fishery rights, formed part of the zemindary Tappe Dharenda which the plaintiff's predecessor had purchased from Raja Sri Narain Pal and that Raja Sri Narain Pal and his predecessor were in possession of this portion of the river from before 1859 onwards. He therefore declared the plaintiff's zemindary right to this portion of the river. The High Court, on the other hand, negatived the plaintiff's right to this portion of the river as part of his zemindary, but held that he had acquired a right to the fishery by adverse possession. Their Lordships would, in any event, be slow to disturb what is tantamount to a concurrent finding in the plaintiff's favour on the question of the possession of the fishery in this part of the river, but their Lordships have satisfied themselves that the evidence of possession on the part of the plaintiff and his predecessors is adequate. It starts well with a *kabulyat* of 1856 in favour of the plaintiff's predecessor by *ijaradars* of the fishery in precisely this stretch of the river, described as within Tappe Dharenda, for a term of seven years, thus extending into the 60 years limitation period. It is true that there are no other *kabulyat* of early date applicable to this portion of the river, but there is other evidence of possession which has been fully examined below, and which it is unnecessary to discuss again in detail. The criticism which their Lordships have heard of this evidence has failed to convince them of its insufficiency. Their Lordships are accordingly of opinion that the plaintiff by himself and his predecessors has had for the requisite 60 years adverse possession of the fishery in the portion of the river from Bhura to Benasuli, and that he has thereby acquired right to it.

(2) There remains for consideration the question of the fishery in the portions of the river from Kankabati Ferry Ghat to Bhura and from Benasuli to Pathra Temohani (under exception of the fishery in the short stretch at the Midnapore Anicut admittedly belonging to the Crown). Here somewhat different issues are raised. It was not contested that since 1870 the plaintiff and his predecessors, being proprietors of the lands through or along-side which the river at these parts flows, have granted leases or licenses of the fishery throughout those portions of the river and have drawn revenue therefrom. There is some evidence of members of the general public having fished in the waters in question, but such acts were in no proper sense acts of the Crown. They are characterised in the judgment of the High Court as "isolated and casual,"

(2) (1887) 12 A.C. 544.
(3) (1887) 2 M. & W. 326.

and their Lordships, having regard to the passage above quoted from the judgment of Lord Watson in *Young* v. *North British Railway Company* (2), are of opinion that they were quite insufficient to deprive the plaintiff's possession of the requisite exclusive character. Their Lordships therefore find that since 1870 the plaintiff and his predecessors have been in adverse possession of the fishery in the whole of these portions of the river.

That being so, the plaintiff starts with the advantage of 49 years' adverse possession to his credit. But he has still to prove adverse possession for the antecedent 11 years from 1859 to 1870. The main contest in the case has centred round this period.

Among the evidence relating to these years there are certain documents to which their Lordships attach special importance. It appears that in April, 1859, the Secretary to the Government of Bengal addressed a letter to the Secretary of the Board of Revenue, Lower Provinces, inquiring if there was "any obstacle or objection to the levying of a tax on the fisheries of navigable river such as the Hoogly or Ganges." The Secretary of the Board of Revenue, in his reply of the 2nd August, 1859, reported, *inter alia* that:—

> "The zemindars and others have in some way or other usurped the rents of many of the fisheries in the large navigable rivers which run by the borders of or through their estates, but the Board do not consider that they can show any good title and they see no reason why the State should not avail itself of these resources. Doubtless the zemindars will plead prescriptive rights which in many instances they will try to support by documentary and other evidence......The best plan in the opinion of the Board is to divide the fisheries in navigable rivers into convenient sections or blocks and to invite farming tenders for them. By this means the probable value of fisheries may be ascertained and the objections made by those who have usurped the rents would have to be inquired into by the local officer."

On the 12th September, 1859, the approval of this plan by the Lieutenant Governor is reported in a letter which contains the following passage:—

> "If any private person claims a right of fishery in such public waters as are described, his claim will be considered. If he can support it in the opinion of the Revenue authorities, it will be properly respected; otherwise the Courts will be open to him."

Following upon this an official investigation was made of the position of the fisheries in various rivers including the Cossye, and there is produced a document of 1861 giving the result of the investigation of the Jalkar Mehal of the river Kangsabati (Cossye) appertaining to the district of Midnapore. This contains a tabulated list of the tenants and *ijaradars* of particular portions of the river together with the rents paid. Among the sections of the rivers mentioned in the list it is possible to identify the greater part if not the whole of the portions now in dispute. There is also a report of 1861 showing the state of possession of fisheries in the Cossye in private hands, though this apparently does not include the part of the river with which this case is concerned. At the conclusion of the investigation the Collector of the Midnapore District on the 13th August, 1862, ordered all the cases relating to the *jalkar* to be struck off "as the members of the Board have ordered that there cannot be any *jalkar* settlement of any river except the Hoogly and the Bhagirathi."

The fact and the result of this investigation are highly significant. From the documents just quoted it appears that in 1859, a critical year for the plaintiff, the state of possession of the fisheries in the Cossye was officially investigated on the initiative of the Crown, with the result that a whole series of these fisheries including at least the major part if not the whole of those now in dispute were reported to be in private hands, the Crown had been specifically warned that fishing rights were being usurped and that prescriptive claims would be put forward, but so far from taking any steps in the case of the Cossye to challenge the usurpers or to vindicate its rights, the Crown appears to have acquiesced in the existing state of private possession. It is immaterial whether it did so because it was satisfied that private rights had been acquired or because it then took the view that the Cossye was not a large navigable river, and so not Crown property. In point of fact throughout the whole period from 1859 onwards there is no evidence of any attempt by the Crown to assert or exercise any fishery rights in the now disputed portions of the river. In their Lordships' opinion it is highly important that at the very beginning of the limitation period fisheries in the Cossye in the Midnapore District are found to be in private hands to the knowledge of and without challenge by the Crown. This evidence has both a positive and a negative aspect. On the one hand it vouches that private leases were in existence of fisheries in the actual waters in dispute; on the other hand it shows the Crown's acquiescence in the usurpation of its rights, if usurpation it was.

The other documentary evidence applicable to the period from 1859 to 1870 was elaborately examined by the learned Judges of the High Court and was again subjected to a searching criticism at their Lordships' bar. In the opinion of their Lordships, having regard to the position of matters as officially recorded at the beginning of this period, the subsequent records are sufficient to afford the requisite proof of continued adverse possession of the fisheries in the disputed waters down to 1870.

But the plaintiff before victory is secured has to surmount a further obstacle which the Crown seeks to place in his way. Assuming that there was adverse private possession between 1859 and 1870 of the fisheries in these portions of the river, the Crown argues that the plaintiff cannot legally avail himself of it, on the ground that the plaintiff does not derive his right to sue from or through those who enjoyed that possession. There was, it appears, a complicated episode, extending from about 1847 to 1870, in the title to the plaintiff's lands through or along which these portions of the river extend, as a result of which there was, so the Crown contends, a breach of continuity which precludes the plaintiff from "tacking" the possession had of the fisheries from 1859 to 1870 to the possession subsequently had plaintiff and his predecessors from 1870 to 1919. The history of the matter is fully set out in the judgment of the Subordinate Judge and also in the narrative of the report of the case of *Nawab Sidhee Nazhur Ally Khan* v. *Rajah Ojoodhyaram Khan* (4). This narrative, as the reporter records, and as their Lordships have verified, is quoted from the judgment delivered by Sir Edward Vaughan Williams on behalf of the Board. What happened may be stated in outline. The plaintiff's ancestor in the thirties and forties of last century borrowed largely from certain Debs of Calcutta, to whom he mortgaged his Midnapore zemindary which included the lands through or along which the portions of the river in question extend. The Debs in 1847 obtained a foreclosure decree which, as well as the property, they sold to one Abbott who dispossessed the mortgagor. Abbott made a collusive sale of the property to one McArthur, and after a further series of the transactions the property was acquired in 1851 by Nazir Ali, who was in possession throughout the critical period from 1859 to 1870. In proceedings instituted in 1848 by the plaintiff's predecessor, the then Raja, the foreclosure decree was set aside as having been irregularly obtained and "the mortgagor was restored to his original and legal relation to the mortgage title." Without further detailing the complicated course of litigation, it is sufficient to state that in 1860 proceedings for redemption and accounts were instituted by the Raja against Nazir Ali, who was then in possession and others, in which the Raja obtained a decree in his favour in 1867. An accounting ensued and it would appear that the Raja ultimately regained possession of the zemindary in 1870. It was argued by the Crown that the present plaintiff was not entitled to connect his possession with that of Nazir Ali, inasmuch as Nazir Ali had been shown to be a mere illegal interloper. It is true that the periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessor to make up the statutory total period of adverse possession—*Dixon* v. *Gayfere* (5). But Nazir Ali's position was not that of an independent trespasser. Possession acquired under a foreclosure decree is no doubt not in privity with the mortgage title, but when the foreclosure decree was set aside such title as Nazir Ali had was derived from the mortgagor, and he was held to be answerable as mortgagee in a suit for redemption and accounts. The decree pronounced against him proceeded on the footing of his being a mortgagee in possession. There can be no question that a mortgagor for the purposes of the Limitation Act can avail himself of or "tack" on to his own adverse possession the adverse possession of his mortgagee. If then the position of Nazir Ali was not that of an independent stranger but in effect that of a mortgagee, as their Lordships hold, then the plaintiff may add Nazir Ali's adverse possession to that of himself and his predecessors since 1870. On the whole case accordingly the Crown's appeal fails.

Tacking of periods.

The attention of their Lordships was drawn to a slight discrepancy between the judgment pronounced by the High Court and the terms of the formal decree in the matter of the description of the stretch of the river at the Midnapore Anicut, the fishery in which admittedly belongs to the Crown. Counsel for the parties agreed that in the event of the judgment being upheld the decree should be varied by altering the words "except the part from the Saddar Ghat at Midnapur between Stations 138 and 139 to the Lock Gates of Mohunpur" so as to read "except the part from the Saddar Ghat at Sujagunge Midnapur to the Lock Gates of Mohunpur."

Their Lordships will humbly advise His Majesty that the appeal of the Crown be dismissed and the judgment of the High Court affirmed with the variation above stated and that the appeal of the plaintiff be also dismissed. As the appeals were consolidated and the record and cases were common to both appeals, the plaintiff will have his costs in the consolidated appeals subject to a reduction of one-eighth and exclusive of the costs of his petition for special leave to appeal which he must himself bear.

Appeal dismissed.

(4) 10 M. I. A. 540.

(5) (1853) 17 Bev. 421.

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† A. L. R. 1934 P. C. 19.

(FROM THE ALLAHABAD HIGH COURT.)

Appellate Civil.

No. 134 of 1931. (Decided on 24-11-33.)

Lord Thankerton, Lord Alnes and Sir Lancelot Sanderson.

(KHAN BAHADUR MOULVI) KHALIL-UR-RAHMAN KHAN ... *Appellant*

versus

THE COLLECTOR OF ETAH ... *Respondent.*

Limitation Act (IX of 1908), S. 182 (5) Requisites under—execution application in accordance with law gives fresh starting point for limitation—bona fides of application and intention to execute decree—not relevant considerations.

Under S. 182 (5) of the Limitation Act (IX of 1908) an execution application, in order to give a fresh starting point for limitation, should satisfy the following conditions: (1) it should be in accordance with the law applicable thereto; (2) it should be made to the proper Court; (3) it should be a step in aid of execution; (4) it should be within time. The *bona fides* of the applicant or his intention merely to gain time and not to execute the decree are not relevant considerations. 52 All. 11 (F.B.) approved.

Appellant:—by Sir D. Miller, K. C. and M. A. Jinnah.

Respondent:—by L. DeGruyther, K.C. and W. Wallach.

JUDGMENT.

Sir Lancelot Sanderson:—This is an appeal from an order and judgment of the High Court of Judicature at Allahabad, dated the 24th of June, 1930, confirming the order of the Subordinate Judge of Etah, dated the 22nd of April, 1929, in the matter of the execution of a final decree for sale dated the 29th July, 1922, in a mortgage suit. The appellant is the successor of Abdul Jalil Khan, a *Zemindar* of Aligrah, who died on the 4th of October, 1923.

The material facts are as follows:— Abdul Jalil Khan in 1909 or 1910 borrowed money from various people, and several decrees were made against him.

The decrees where simple money decrees, and the property, which was attached in execution of the decrees, being ancestral property, the execution proceedings were transferred to the Collector in accordance with the provisions of S. 68 of the Code of Civil Procedure.

On the 29th of August, 1911, the Collector, as he was entitled to do, granted a lease to Habib-ur-Rahman Khan of the property belonging to the judgment-debtor, Abdul Jalil Khan, for a term of seventeen years.

During the pendency of the said lease, which expired on the 1st July, 1928, Abdul Jalil Khan on the 25th of September, 1914, executed a mortgage of the said property for Rs. 15,000 in favour of Rao Maharaj Singh.

In this appeal Rao Maharaj Singh is represented by the respondent, the Collector of Etah, who is in charge of his estate.

On the 25th of October, 1920, the Collector of Etah filed a suit, based on the abovementioned mortgage, against Abdul Jalil Khan, and obtained a preliminary decree on the 9th of March, 1921, which was made final on the 29th of July, 1922.

Both the decrees were made *ex parte* after due notice had been served upon Abdul Jalil Khan.

In the courts in India it was argued on behalf of the appellant that the mortgage was illegal, that the decree obtained on the basis thereof was not enforceable at law, that the decree was obtained in contravention of the provisions of para. 11 (1) of the Third Schedule of the Code of Civil Procedure, and that it was incapable of execution.

Though these points were taken in the appellant's case, they were not relied on before the Board by the learned counsel for the appellant, and the only arguments presented to the Board were in relation to the other point, which was based upon the Limitation Act.

The appellant alleged that the application for execution, in respect of which the abovementioned order of the Subordinate Judge, dated the 22nd April, 1929 was made, was barred by the law of limitation inasmuch as certain previous applications dated the 2nd June, 1925, and the 8th July, 1926, were not steps in aid of execution so as to save limitation.

It was further argued on behalf of the appellant that the said previous applications were not *bona fide* and were not taken with the intention of executing the said decree, but were merely for the purpose of gaining time, and that consequently the application in question was barred by the law of limitation.

The material facts in relation to this point are as follows:—

On the 2nd June, 1925, the Collector of Etah applied for execution of the decree and prayed for sale of the property. The Court ordered necessary copies to be filed. Then the *vakil* for the decree-holder, as the order-sheet show, stated on the 14th July, 1925, that he simply wanted the legal representatives of the deceased judgment-debtor to be brought on the record. Accordingly notices were issued to the proposed representatives, one of whom was Mohammad Khalil-ur-Rahman Khan. On the 14th August, 1925, it was found that the notices were unserved and as no further step was taken by the decree-holder, the execution suit was struck off on that date. Then another application was made on the 8th July, 1926, for sale of the property. The execution was sought against the representatives of the deceased judgment-debtor. This time again there was a report that necessary copies were not filed and it was ordered that notices of the legal representatives being brought on the record be issued and that copies be filed on the next date. On the next date, *i.e.*, 4th August, 1926, the notice to Mohammad Khalil-ur-Rahman Khan was returned unserved. The decree-holder took further time and again notice was issued. On the 10th September, 1926, the notices being served, legal representatives were brought on the record. As the decree-holder took no further steps in the prosecution of the execution suit, the application was struck off on the 16th September, 1926.

Facts.

On the 30th August, 1928, the Collector of Etah made a third application for execution in the court of the Subordinate Judge; and the appellant, Khalil-ur-Rahman Khan, filed objections under S. 47, C. P. C.

The learned Judge dismissed the objections by the abovementioned order of the 22nd April, 1929.

†† A. L. R. 1934 All. 89 (F.B.).

Appellate Criminal. No. 546 of 1933. (Decided on 24-10-33.)

Sulaiman, C. J. Young and King, JJ.

THE CROWN ... *Appellant*

versus

SHEO JANAK PANDE ... *Respondent.*

Criminal P. C (V of 1898), Ss. 417, 418 and 423—appeal against acquittal—conditions for High Court's interference.

In cases of appeal by Government against acquittal, if the appellate Court, after bearing in mind that there is the presumption of innocence in accused's favour, still further strengthened by his acquittal, and that the trial Court was in a better position to judge of the credibility of the witnesses examined before it and, therefore, great weight has to be attached to its view; is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong and is contrary to the weight of evidence, it would be fully justified in setting aside the order of acquittal.

The mere fact that it is not possible to hold that the lower Court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered would not be sufficient to prevent the appellate Court from allowing an appeal against an acquittal, if it were fully convinced that the Court below has been misled by the extremely clever nature of some false defence supported by a forged document.

When an appeal is preferred by Government it is unnecessary to consider whether it was proper for the Government to appeal or not.

[P. 93, Cs. 1, 2 & P. 94, C. 2.]

Appeal against the order of the Sessions Judge of Ballia.

Appellant :—by the Government Advocate.

Respondent :—by A. P. Pandey.

JUDGMENT.

Sulaiman, C. J.—Two questions have been referred to this Full Bench. They are:—

(1) What are the conditions which justify an interference with the order of acquittal passed by a lower Court?

(2) Where it cannot be said that the Judge in the lower Court has been incompetent, stupid or perverse or has come to unreasonable and distorted conclusions or has obstinately blundered, but has been deceived by the extremely clever nature of the false defence supported by forged documents, is it impossible for a Court of appeal to interfere with his decision and allow a Government Appeal?

The provisions in the Code of Criminal Procedure relating to an appeal from Government are contained in Ss. 417 to 423 of Ch. 31. Section 417 allows the Local Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court; there are no restrictions placed on this power given to the Local Government. Section 418 which was first added to the Act of 1882 further provides that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. It clearly allows questions of fact to be gone into afresh by the appellate Court. Then S. 423 (1) *(a)* lays down that the appellate Court in an appeal from an order of acquittal may reverse such order and direct that further enquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. This section also contains no restrictions on the powers of the appellate Court in reversing the finding of the Court below and setting aside an acquittal.

The reference to this Court has been made principally because of certain observations contained in the case of *Queen-Empress* v. *Gaya Din* (1) which has been followed more or less in some of the latter cases. But it has to be conceded by the learned counsel for the accused that so far as the sections of the Code themselves are concerned no distinction appears to have been drawn between appeals from acquittals and appeals from convictions. Whatever distinctions have been laid down in cases have been based on other considerations. In a criminal case the accused starts with a presumption of innocence in his favour and if the evidence is not convincing and there is a reasonable doubt the benefit of such doubt is to be given to him. In an appellate Court considerable weight has to be attached to the opinion of the trial Court which has recorded an opinion in favour of the accused. In view of these circumstances the accused is in a better position when an appeal is preferred by Government from his acquittal.

(1) 4 All. 148.

Before considering the principles which should underlie the disposal of an appeal from an acquittal it will be convenient to review briefly the cases of this Court on which reliance has been placed by counsel. In *Queen-Empress* v. *Gaya Din* (1) quoted above Straight, J., in delivering the judgment of the Court, remarked :—

"We are not prepared to say that, had it been our task to try them, as well as the persons who have been convicted, we might not have taken a view of their conduct similar to that expressed by our late colleague Mr. Justice Spankie in his judgment in the appeal of Madari and the others. But it does not appear to us that this is quite the test to be applied in determining this appeal by Government from the acquittal of Gayadin and Binda. On the contrary, we think it would be an inaccurate and inappropriate one."

The learned Judge went on to say :—

"The powers given to the Local Government by S. 272 of the Cr. P. C. are of an exceptional and unusual character ; and while we fully recognise the necessity for their existence in this country, we are equally clear that they should be most sparingly enforced ; and, in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice."

So far as this sentence goes it refers to the powers given to the Local Government by S. 272 of the Cr. P. C. of 1872 and the cases in which the Local Government should enforce such powers. It does not clearly refer to the power conferred on the High Court to interfere in appeal. The learned Judge then proceeded to remark :—

"It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it by S. 272."

It is possible that the learned Judge here again was referring to the power conferred on the Local Government and considered that the mere fact that the Local Government was of opinion that the view taken by the Magistrate was wrong did not make it incumbent upon the High Court to set aside that finding. But later passages in the judgment indicate that the learned Judge meant to apply the same principles to the interference by the appellate Court in appeals from acquittal and considered that

"the doing so should be limited to those instances in which lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and to the interests of the public."

In that particular case the Bench, finding that the Sessions Judge had not "so egregiously and foolishly erred in his conclusions", did not feel bound either to convict the accused or to order a new trial. The Bench properly remarked that the learned Sessions Judge had the witnesses before him and consequently had the best opportunity of judging their truthfulness and he appeared to have conducted the enquiry with care and patience and to have weighed and considered the facts to the best of his ability. It might be that the Bench might have arrived at a view other than that formed by him, but holding his decision to be an honest and not an unreasonable one, they unhesitatingly dismissed the appeal. It is not possible to quarrel with the conclusions of the learned Judge. The trouble has been caused by some of the observations made which indicated that there were only a few instances in which an appellate Court can intervene

With regard to this case it must be pointed out that the case arose under Act X of 1872 and the Bench had to consider the provisions of that Act. There was no provision therein similar to that contained in S. 418 of the present Code, where it is emphasised that an appeal lies on matters of fact as well as matters of law.

Gaya Din's case (1) has been referred to in a few subsequent cases including two Full Bench cases of this Court.

In the first Full Bench case, which was that of *Queen-Empress* v. *Chhotu* (2) the matter came up before the High Court on the revisional side and the Full Bench had to answer the question whether, when a Magistrate had discharged an accused person under S. 253, Cr. P. C., the High Court or Court of Session, under S. 437, had jurisdiction to direct further enquiry on the same materials. The power to interfere on the revisional side was discretionary, and it is also clear that in case of discharge the Magistrate ordi-

(2) 9 All. 52.

narily considers the evidence produced on behalf of the prosecution so flimsy and inconclusive as not to necessitate the framing of a charge or the calling upon the accused to enter on his defence. It was in connection with the provisions of that section that the Full Bench remarked at the end that the discretion of the Court should be regulated under the circumstances mentioned in *Gaya Din's case* (1). We do not think that this Full Bench case can be said to have confirmed the observations made by Straight, J., in the earlier case with regard to appeals from acquittals.

The second Full Bench case is that of *Queen-Empress* v. *Gobardhan* (3). Sir John Edge, C. J., at page 556 pointed out that he had in a previous case expressed his approval of the principle enunciated in *Gaya Din's case* (1) but he did not think that that case applied to the case before him. The learned Chief Justice did not quote the exact observation made in *Gaya Din's case* (1). At any rate, he did not consider that that observation was applicable to the case before him. No doubt Brodhurst, J., at p. 572, after quoting that

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"I can only say that when I made the observations I did on that occasion, I could not expect that they would be exhaustive of every possible condition or state of things that might arise, and I certainly had not present to my mind a case like that before me, in which as I shall by and by have to point out, the Sessions Judge has overlooked the main and crucial circumstance which goes to corroborate the evidence of the accomplice, namely, the disappearance of Gobardhan from his village contemporaneously with the undoubted murder of Nehal Singh. Under such circumstances I confess I cannot feel that I am in any way departing from, or doing violence to the principle laid down in *Queen-Empress* v. *Gaya Din* (1) by entertaining this appeal and determining one way or the other as to the guilt of the respondents."

It is, therefore, obvious that the learned Judge himself thought that the list of instances in which the appellate Court could interfere as given in *Gaya Din's case* (1) was by no means exhaustive and that he did not think that he was in any way departing from the principle laid down therein if he interfered in a case where the Sessions Court had overlooked what he considered to be a main and crucial circumstance, namely, the disappearance of the accused from the village which was corroborative of the evidence of the accomplice. In view of this expression of opinion we can only say that the use of the word "only" on page 149 in *Gaya Din's case* (1) was very unfortunate as it was certainly not intended by the learned Judge to confine the interference in appeal to cases enumerated in that judgment. The admission that the list is not exhaustive removes the restriction which has been considered to have been placed by that judgment on the power of the appellate Court to interfere. *Gaya Din's case* (1) was followed by Tyrell and Blair, JJ. in *Queen-Empress* v. *Robinson* (4) Tyrell, J. being one of the learned Judges who had decided *Gaya Din's case* (1). The observations were quoted on p. 214 and it was considered that they had been satisfactorily laid down. But in that particular case the Bench came to the conclusion that the decision of the Sessions Judge was an honest and not an unreasonable one of which the facts were susceptible. It is, therefore, not surprising that they rejected the appeal preferred on behalf of Government.

We next come to a string of cases in which the view expressed in *Gaya Din's case* (1) has been departed from to a very considerable extent. In *Queen-Empress* v. *Prag Dat* (5) Sir Louis Kershaw, C. J. and Mr. Justice Knox at p. 461 quoted the observation made in *Gaya Din's case* (1) without commenting on it and then on p. 464 they pointed out that,

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(3) 9 All. 528 (556).

(4) 16 All. 212.
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(3) 9 All. 528 (556).

(4) 16 All. 212.
(5) 20 All. 459 (461, 464).

Judge had overlooked important circumstances. Indeed it is not easy to see any distinction in the Cr. P. C. between a right of appeal against an acquittal and a right of appeal against a conviction. In both cases the appellant has to satisfy us that there does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a judge who has had all the evidence before him and has arrived at the determination with that great advantage in his favour."

Being satisfied upon the evidence that all the accused had committed the offence they felt no hesitation in convicting them. This case was followed by Knox, A. C. J. and Banerji, J. in *Queen-Empress* v. *Timmal* (6).

In *King-Emperor* v. *Ghure* (7) Richards, C. J. and Knox, J., when considering the argument on behalf of the accused, that they ought to follow the ruling in *Queen-Empress* v. *Robinson* (4) which had followed the earlier ruling in *Gaya Din's case*, (1) observed :—

"In our opinion the law is correctly laid down in the case of *Queen-Empress* v. *Prag Dat* (5)."

Following the law laid down in that case they proceeded to examine the evidence and coming to the conclusion that the Judge had not erred in acquitting the accused they dismissed the appeal,

In *King-Emperor* v. *Baldeo Koer* (8) a Bench of this Court of which one of us was a member had to consider this point again. The Bench pointed out that the plain language of S. 423, Cr. P. C. clearly indicates that the Legislature never intended to recognise any difference between an appeal against a conviction and an appeal against an acquittal, although an appeal from the verdict of the jury stands upon a different basis. They then pointed out that

"in an appeal from an order of acquittal it ought to be remembered that there is always a presumption in favour of the innocence of the accused. The presumption very materially effects the question of onus which, except within a limited range of cases, lies upon the Crown; and where the finding of the subordinate tribunal is in favour of the accused, the burden lies upon the prosecution to prove that the finding reached by the Court below was not justified by the evidence. Where the evidence against the accused is too scanty or insufficient to support the charge, the finding of the Court below cannot be displaced. Again where the case is some where on the border line or very near it or it was possible for the Court, upon the balance of probabilities, to hold a person guilty or not guilty, the reversal of the order of acquittal is not only undesirable and inexpedient but is calculated to cause a miscarriage of justice. Where, however, the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, this Court is bound to step in as much in the interest of the administration of justice as of the public generally."

The learned Judges obviously intended the expression "misappreciation of material evidence" to mean overlooking and ignoring the real significance and importance of the material evidence. By the words 'a distinct balance of evidence' they did not mean a mere balance of probabilities, but an over-weighing evidence. We fully accept the view expressed in that case as quoted above. The Bench then went on to quote passages from the previous cases including the cases of *Gaya Din* (1), *Gobardhan* (3), *Robinson* (4) and *Timmal* (6) referred to above. Then the observation made in the last-mentioned case was quoted, namely,

"The right vested in the Local Government is a right which should be exercised with care and caution, at the same time it should undoubtedly be exercised when the need for it is apparent."

and the learned Judges approved of what had been said above. We do not think that this case endorsed the view expressed in *Gaya Din's case* (1). On the other hand, the learned Judges clearly pointed out that they would accept the observations with some variation and remarked :

"If the lower Court has *obviously* blundered, we have a clear duty to interfere. It is not necessary that the lower Court should have obstinately blundered or erred in its conclusion egregiously or foolishly."

In the case of *King-Emperor* v. *Autar* (9) Walsh, J. at p. 307 observed :—

"Taking a broad view of this matter, we need only say that an appeal by Government must be considered on its merits just as any other appeal always must be. The onus is on the appellant and this onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge."

Lastly, in the case of *King-Emperor* v. *Sheo Dayal* (10) another Bench of this Court

(6) 21 All. 122 (126).
(7) 30 All. 168 : 12 A. L. J. 231 : 22 I. C. 984.
(8) 1931 A. L. J. 1002 : A. I. R 1931 All. 712 : 133 I. C. 795.
(9) 47 All. 306 (307) : 23 A.L.J. 25 : A.I.R. 1259 All. 315 : 86 I C. 52.
(10) A L R. 1933 All. 826.

pointed out that S. 418 as amended by Act XVIII of 1923 provides for an appeal on a matter of fact where an acquittal is by a Judge trying the case with assessors and that no condition is imposed on this Court in an appeal of this nature. They remarked :

"All that this Court has to see is whether the offence charged is proved against each of the accused persons and for this purpose this Court has to take the definition of "proved" given in the Indian Evidence Act."

They referred to the cases of *Gaya Din* (1), *Robinson* (4) and *Prag Dat* (5) and quoted with approval a passage in the last-mentioned judgment to the effect that it is not easy to see any distinction in the Cr. P. C. between a right of appeal against an acquittal and a right of appeal against a conviction.

This is a brief survey of the case-law so far as this Court is concerned. It is not necessary to examine the cases of the other High Courts.

No doubt the trial Court has an advantage over an appellate Court inasmuch as it is able to see the witnesses, mark their demeanour and form a first-hand impression of their credibility. This is all the more so in criminal cases where the evidence mainly consists of oral evidence except the first information report, *post-mortem* report or expert evidence. In cases of forgery and misappropriation there may, however, be considerable documentary evidence. On the other hand, in civil cases the evidence very often is both oral and documentary, and the appellate Court is able to judge the oral evidence in relation to the documentary evidence. Where the evidence is purely oral the trial Court is in an advantageous position and its opinion as regards the credibility of the witnesses must be given due weight.

Further, there is a presumption of innocence in favour of an accused person and that presumption not only continues where he has been acquitted but is considerably strengthened. It is also a well recognised principle of law that in case of doubt the benefit of doubt should be given to the accused person and, as observed above, considerable weight has to be attached to the opinion of the Court which heard the witnesses. In an appeal from an acquittal the accused starts with all these points in his favour and therefore there is no doubt that an appellate Court would hesitate and feel great reluctance in interfering with the finding of the Court below and coming to a different conclusion.

Appeal against acquittal —High Court's interference.

It is very difficult to lay down any hard and fast rule or to give an exhaustive list of all the circumstances in which an appellate Court can interfere in an appeal from an acquittal. Cases may arise where the trial Court has obviously and clearly gone wrong, where it has over-looked important pieces of evidence or has attached undue importance to insignificant circumstances or has altogether ignored important and significant matters or has committed an irregularity in procedure. In all such cases an appellate Court would be fully justified in interfering if after bearing in mind that there is a presumption in favour of the accused, that full weight should be attached to the opinion of the judge who heard the witnesses and that the benefit of any doubt that there may be in the mind of the appellate Court should be given to the accused, the Court is satisfied that the accused is guilty. If, bearing all these circumstances in mind, the appellate Court is fully convinced that the trial court has gone clearly wrong and that, without any question of doubt, the conclusion that the accused was not guilty is incorrect or erroneous, it would be the duty of the appellate Court to intervene. We think that when an appeal is preferred by Government it is unnecessary to consider whether it was proper for the Government to prefer an appeal or not. It is the duty of the Court to go into the facts and to form a definite and independent opinion on the facts, but it would not, of course, lightheartedly interfere unless satisfied that there has been a clear miscarriage of justice. If we were to confine the power of interference of an appellate Court to only those cases where, through the incompetence, stupidity or perversity of the subordinate tribunal, such unreasonable and distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice, the result would be that the provisions contained in Ss. 417 and 423 would almost become a dead letter. In most cases Courts are not incompetent, stupid or perverse, and ordinarily they do not draw unreasonable and distorted conclusions.

That it is essential for an appellate Court to attach great weight to the opinion of the trial Court is also apparent from the observations made by their Lordships of the Privy Council in a civil case in the *Bombay Cotton Manufacturing Company Limited* v. *Raja Bahadur Moti Lal Shiv Lal* (11). That observation must be quoted as it would certainly govern a criminal case as well:—

"It is doubtless true that on appeal, the whole case, including the facts, are within the jurisdiction of the appellate Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, specially in cases where the issue is simple and depends on the credit which attached to one or other of the conflicting witnesses. Nor should his pronouncement with respect to their credibility be set aside on a mere calculation of probabilities by the Court below. In making these observations their Lordships have no desire to restrict the discretion of the appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the accused should not be lightly disregarded."

These observations made by their Lordships are, in our opinion, directly in point. Where, of course, two views are possible and each view is reasonable on the evidence and the learned Sessions Judge has taken one view, then even if the appellate Court, had it been sitting as a trial Judge, would have taken the other view, it should not ordinarily interfere, unless it be shown that there was some irregularity in procedure or that there had been some other serious defect which necessitates a re-examination of the entire evidence and a fresh conclusion. But even this is a mere rule of caution and sound practice, and not any rule of law.

As remarked above, it is not possible to lay down any exhaustive list of the conditions which would justify interference with the order of acquittal passed by a lower Court.

Our answer to the first question is that if the appellate Court, after bearing in mind that there is the presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial Court was in a better position to judge of the credibility of the witnesses examined before it and therefore great weight has to be attached to its view, is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal.

As regards the second question, we think that the answer to the first question covers this question as well. The mere fact that it is not possible to hold that the lower Court has been incompetent, stupid or perverse or has come to an unreasonable and distorted conclusion or has obstinately blundered would not be sufficient to prevent the appellate Court from allowing an appeal against an acquittal if it were fully convinced that the Court below has been misled by the extremely clever nature of some false defence supported by a forged document.

Reference answered.

(11) 42 I. A. 110: 39 Bom. 386: 28 M. L. J. 593: 19 C. W. N. 617: 29 I. C. 229 (P. C.).

A. L. R. 1934 All. 94.

Appellate Civil.

No. 256 of 1930. (Decided on 31-10-33.)

Niamatullah and Collister, JJ.

SABIR HUSAIN and another... *Appellants*

versus

FARZAND HASAN ...*Respondent.*

(i) Mahomedan Law—Shiahs—dower—suit for, by heirs of deceased wife—husband's father contracting marriage—liability of, determination under rules applicable to contracts—'religious usage or institution' — whether applies to claims for dower—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), S. 37.

A Mahomedan father of the Shiah sect who has given his minor son in marriage cannot be made personally liable for dower, nor can his property be pursued for the dower debt by the heirs of the deceased wife under any substantive rule of Shiah law relating to marriage. His vicarious liability must be determined by the rules applicable to contracts. [P. 97, C. 2.]

Obiter: If those acting on behalf of the infant bride have reason to apprehend that the minor would not be liable to pay the stipulated dower, they should insist on the father, who acts as guardian for the marriage of his minor son

giving a personal undertaking so as to make him a surety. [P. 98, C. 1.]

The father's liability cannot be deduced from S. 37 of Bengal, N. W. P. and Assam Civil Courts as a claim for dower debt is not a matter relating to 'religious institution or usage' within the meaning of the section. [P. 96, C. 2.]

(ii) Limitation—suit for dower—institution within 3 years of wife's death—no demand—not barred.

A suit for dower brought within 3 years of the wife's death by her heirs, when no demand was made by the wife is in time. [P. 98 C. 1.]

Appellants:—by A. M. Khwaja.

Respondent:—by Aktar Husain Khan.

JUDGMENT.

Niamatullah, J.—The appeal has arisen from a suit brought by the two plaintiffs-appellants, who are husband and wife for recovery of Rs. 8,333-5-4, which represents their share of inheritance in the dower of Rs. 25,000 due to their deceased daughter, Aijaz Fatima, who was admittedly married to Farzand Hasan, defendant No. 1. They claimed a right to recover that sum from the person and property of defendant 1 and the assets left by his father, Sibte Hasan, on the allegation that defendant No. 1 was an infant in 1914, when he was married under the guardianship of Sibte Hasan, who had bound himself personally to pay the dower. In the alternative, the plaintiffs rest their case on the rule of Mahomedan law applicable to Shias that a guardian contracting marriage for his minor ward is personally liable if the child husband has no means of paying the stipulated dower. Defendants 2 to 4 are the other heirs of Sibte Hasan. They have been impleaded because they and defendant 1 are in possession of the assets left by Sibte Hasan.

Mt. Aijaz Fatima was married to defendant No. 1 in August 1914. She died in 1926 leaving a daughter, defendant 5. The suit which has given rise to this appeal, was instituted on 16th March, 1929 for the relief already stated. It was contested by all the defendants, except No. 1. It was not admitted that Sibte Hasan had acted as the guardian for the marriage of the defendant 1 with Mt. Aijaz Fatima. It was alleged that the marriage was contracted by Nurul Hasan, a grand uncle of defendant 1. It was denied that Sibte Hasan had incurred any personal liability for the dower, or that he was liable under any rule of law, even though he acted as guardian for the marriage of defendant 1. Mt. Aijaz Fatima was said to have reduced the amount of dower to Rs. 2,500, which she made a gift of to her daughter, defendant 5. Limitation was also pleaded.

The learned Subordinate Judge found that Sibte Hasan had acted as the guardian of defendant 1 on the occasion of his marriage with Aijaz Fatima. He also found that the dower of Rs. 25,000 had not been reduced by Mt. Aijaz Fatima in her lifetime, nor had she made a gift of any portion of it to defendant 5. The plea of limitation was also overruled. As regards the liability of Sibte Hasan under the rule of Shia law, relied on by the plaintiffs, the learned Judge held that his assets were not liable. He decreed the plaintiffs' claim as against defendant 1 and dismissed it as against the assets of Sibte Hasan. The plaintiffs reiterate their claim in this Court as against the assets of Sibte Hasan in the hands of the defendants.

The finding of the learned Subordinate Judge in so far as he held that Sibte Hasan acted as the guardian for defendant 1 has been assailed before us but in our opinion it is correct. Our attention has been drawn to an entry in the register in which the marriage was noted. It records the name of certain persons who were present on that occasion. The name of Sibte Hasan is not among them. It is argued that if Sibte Hasan had been present, his name would have found a prominent place in the register. This circumstance is relied on in corroboration of the evidence led on behalf of the defendants to establish their plea that the marriage had been contracted by Nurul Hasan and not by Sibte Hasan, who was not even present. We are satisfied that the reasons given by the learned Subordinate Judge for arriving at his finding on this part of this case are not affected by the omission of the name of Sibte Hasan from the register. As is pointed out by the learned Subordinate Judge, Nurul Hasan could not be a guardian under the Mahomedan law for the marriage of defendant No. 1 so long as his father was alive. In fact, for a valid marriage of defendant No. 1 in 1914 no one else could have acted as his guardian. Sibte Hasan's name was probably not noted in the register, because he acted as guardian and was not mere witness or spectator whose name could find a place in the register as one of those who witnessed the marriage. We hold that Sibte Hasan contracted the marriage of his infant son with the deceased Aijaz Fatima.

The finding of the learned Subordinate Judge that Sibte Hasan had not expressly assumed liability for the dower was not impugned before us, and the plaintiffs' claim was rested solely on his liability arising from the rule of Mahomedan law, to which reference has already been made. Shuraya-ul-Islam, which is an authority on questions of Shiah law, gives the following rule on the subject under consideration :

"If one should contract his infant son in marriage, and the child has independent means of his own, he is liable for the dower. If the child is poor, the obligation rests entirely on the father, and, in the event of his death, must be discharged out of the whole of his property, whether the child should arrive at maturity and become wealthy, or die before it. ....(Baillie, Part 2, p. 80, quoting from Shuraya Ool Islam).'

Dower claim for, against husband's father—Shiah law.

Mr. Khwaja, who argued the appellants' case with great ability, referred us to Sharah Loma which gives the same rules. We have not been referred to any book of authority on Shiah law, nor have we been able to find any, which may be in conflict with Shuraya-ul-Islam and Sharah Loma on this point. We must, therefore, take it that, if the case is governed by Mahomedan law, pure and simple, the rule given in Shuraya-ul-Islam is in favour of the plaintiffs. According to the rule laid down in Shuraya, the father makes himself a surety for the due payment of dower in case his minor son has no means of paying it. The underlying principle is that the son's inability to pay must have been known to the father and if, in spite of such knowledge, he agreed, on behalf of his indigent son, to pay what was beyond the latter's means, he should be deemed to have guaranteed the payment of the stipulated dower.

There is divergence of views between Shiah and Sunni doctors on this point. According to Sunni law, the father, if he acts as guardian for the marriage of his infant son, is personally liable only if he expressly becomes a surety for the dower stipulated for; otherwise the father merely acts on behalf of his minor son and binds the latter, and not himself personally. In the case of *Muhammad Siddiq* v. *Shahabuddin* (1) it was held by a Bench of this Court that a Mahomedan father does not, by simply giving his consent to the marriage of his minor son without making himself a surety for the payment thereof, become liable for the payment of his daughter-in-law's dower. The judgment does not mention the fact that the parties to that case were Sunnis; but we have sent for the paper book and have satisfied ourselves that it was a case in which a Sunni father had contracted the marriage of his minor Sunni son. The learned Subordinate Judge has relied on this case in holding that it is comprehensive enough to apply both to Shiahs and Sunnis; but we do not think that this view can be supported. That case must be considered to be an authority only in cases in which Sunni law is applicable.

The next question is whether the rule enunciated in Shuraya-ul-Islam must be administered by Courts in this province. All branches of Mahomedan law do not apply to cases arising between Mohamedan parties. Only such of them as have been declared by statute to be so applicable can be administered by British Indian Courts. S. 37, Bengal, N. W. P. and Assam Civil Courts Act (No. 12 of 1887) has made provision in this behalf. It runs as follows :

"(1) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. (2) In cases not provided for by Sub s. (1) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

Act XII of 1887, S. 37—'Religious usage or institution.'

If the rule quoted from Shuraya-ul-Islam be deemed to be one regarding "marriage" or any "religious usage or institution," it shall have to be given effect to in deciding the present case. We do not think that the question arising in this case can be considered, without unduly straining the language of the section, to be one regarding "religious usage or institution." Mr. Khwaja relied on the decision of Mahmud, J., in *Gobind Dayal* v. *Inayatullah* (2) which was a case of pre-emption. Mahmud, J., held that the words "religious usage or institution" should receive a liberal interpretation so as to include pre-emption even in cases in which the vendee was non-Muslim and that the Court is bound to administer Mahomedan law of pre-emption as between a Mohamedan pre-emptor and a non-Muslim vendee. The majority of the Full Bench, however, so far disagreed with Mahmud, J., that they held that the Court is not bound to administer Mahomedan law in such cases but, in the absence of statutory law to the contrary should administer Mahomedan law as embodying rules of justice, equity and good conscience. S. 24 (now S. 37), Bengal, N. W. P. and Assam Civil Courts Act, was considered by Mahmud, J., and presumably by the other learned Judge. If the ruling had been otherwise applicable, we would have felt bound by the opinion expressed by the majority of the Full Bench, specially because that opinion has been accepted in other subsequent cases: see *Abbas Ali* v. *Maya Ram* (3) and *Pir Khan* v. *Faiyaz Husain Khan* (4). Mr. Khwaja has also quoted numerous rulings in which Mahomedan law has been applied to cases involving questions of gifts, wakfs, wills, guardianship, etc. Though S. 37, Bengal, N. W. P. and Assam Civil Courts Act is not specifically referred to, it is clear that in each of them either the subject fell within the purview of the first sub-section and the Courts were bound to apply Mahomedan law, or the subject was one as to which there is no statutory law, and the Courts were at liberty to administer Mahomedan law as embodying rules of justice, equity and good conscience, the parties being Mahomedans. None of these cases is directly in point or decides a principle which may be applicable to the case before us. Howsoever liberal a construction may be placed on the words "religious usage or institution," they cannot include a case of purely pecuniary liability of a guardian contracting the marriage of his minor son.

The only contention which, in our opinion, can be put forward is that the question arising in this case is one "regarding marriage;" but it seems to us that the rule laid down in Shuraya-ul-Islam is no more than a canon of interpretation. The author is of opinion that where a guardian for marriage agrees, on behalf of his minor ward, to pay a certain amount of dower, there is an application that, in case the minor has no means to pay, the guardian would be deemed to be a surety for due payment. The Sunni doctors, on the other hand, do not construe such an agreement as implying a personal undertaking. The rule may also be considered as a rule of evidence in so far that a personal undertaking by the guardian to pay dower, in case the minor is found to have no means of paying it, should be presumed. In any view of the matter, the vicarious liability of the father arises not from any substantive rule of Shiah law relating to marriage but is the result of deduction from given circumstances, and as such British Indian Courts are to be guided not by Mahomedan law but by rules of construction generally applicable or by the Evidence Act. We entertain no doubt that a Shiah father entering into any other contract, as guardian of his minor son, involving a pecuniary obligation, cannot be saddled with personal liability by British Indian Courts. The agreement to pay dower in the same circumstances cannot be placed on a different footing. The liability, if it exists, arises from a civil contract and should be determined by the law applicable to contracts made by an authorized guardian.

There is no rule of general law in force in this Province which justifies an inference that a guardian, entering into a contract on behalf of his minor son, renders himself liable as surety in the absence of an express contract to that effect nor is there anything in the Evidence Act which justifies a presumption from the circumstances of such a case that a guardian makes himself personally liable.

If there had been a question of applying the rule of Mahomedan law under consideration as a rule of justice, equity and good conscience, we do not think that it can be regarded except in special conditions, as a rule of justice, equity and good conscience. It is quite unjust to enable the wife, and even her heirs (in this case her parents) to follow

(1) 49 All. 557 : A. I. R. 1927 All. 364 : 100 I. C. 636.

(2) 7 All. 775 : (1885) A.W.N. 182 (F.B.).
(3) 12 All. 229 : (1890) A. W. N. 93.
(4) 36 All. 488 : 25 I. C. 445.

the property of her husband's father in the hands of his heirs other than the husband. The rule will work a peculiar hardship in this province, where fabulous dowers are common. If those acting on behalf of the infant bride have any reason to apprehend that the minor would not be liable to pay the stipulated dower, they should insist on the father, who acts as guardian for the marriage of his minor son giving a personal undertaking so as to make him a surety. The question can arise mostly in those cases in which neither side applied its mind to that aspect of the matter, and in that class of cases it is not just and equitable to saddle the guardian with responsibility which he had not foreseen and which, if he had any reason to think would be enforced against him, he might not have undertaken. Accordingly we uphold the finding of the learned Subordinate Judge, though for different reasons.

Limitation. On the question of limitation it is enough to say that the suit was brought within three years of the death of Mt. Aijaz Fatima. No demand for dower had ever been made by her. Time began to run from the date of her death, and the suit having been brought within three years from that date is obviously not barred.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

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†† A. L. R. 1934 All. 98.

Appellate Civil.
No. 151 of 1931. (Decided on 1-3-33.)

Sulaiman, C. J. and Thom, J.

CHHUTAN LAL ... *Appellant*

versus

MUHAMMAD IKRAM KHAN... *Respondent.*

Civil P. C. (V of 1908), O. 21, rr. 66, 69 and 90—Irregularities in sale, allegations of—Judgment-debtor waiving fresh proclamation when sale postponed—failure to mention defects at hearing of notice under O. 21, r. 66—estoppel—waiver—failure of Court to specify hour of sale, non-mention of incumbrances in proclamation, under-valuation, sale out of order in list—when will vitiate sale held.

Ordinarily where a judgment-debtor seeking to set aside an execution sale on the ground of irregularities in the conduct of the sale either did not mention them when he was asked to appear and state his objections in obedience to a notice issued under O. 21, r. 66, C. P. C. or waived fresh proclamation when the sale was postponed at his instance in consequence of which the alleged mistakes in the original proclamation were allowed to stand uncorrected, he should be deemed to have waived the irregularities and is debarred from agitating them, 3 I. A. 230; 49 All. 788; 1930 A. L. J. 1062 *referred to.* [P. 101, C. 1]

Sale of properties out of the order in the list is not a material irregularity. 1931 A. L. J. 62 *followed.* [P. 100, C. 1.]

Failure to mention the incumbrances in the sale proclamation is not by itself injurious to the judgment-debtor, especially when they were noted in the Rubkar accompanying the proclamation, and this apart from the question of any estoppel or waiver on the part of the judgment-debtor. [P. 100, C. 2.]

The omission to notify the day and hour to which a sale is adjourned is a serious irregularity where properties other than landed properties are to be sold. But, in the case of landed properties, it is not material in view of the time published in the General Rules (Civil) Vol. II. 1927 A. L. J. 302; 129 A. L. J. 1228; 1930 A. L. J. 1062 *distinguished.* This again is apart from the question of any estoppel affecting the judgment-debtor. [P. 101, Cs. 1 & 2.]

In each case it is for the Court to decide whether the non-specification of the day and hour was a material irregularity. [P. 101, C. 1.]

Under-valuation is a material and serious irregularity, if the judgment-debtor had not waived it. But the judgment-debtor is not estopped from showing that the actual value of the property was much more than was announced in the original proclamation of sale in order to show that he has suffered substantial loss, but it would be incumbent on him to show that this substantial loss was the cause of some other material irregulariiy. He cannot be allowed to treat the under-valuation itself as a material irregularity when he had failed to object at the time when he appeared on the former occasion. [P. 104, Cs. 1 & 2.]

Appeal from the order of the Subordinate Judge of Muzafarnagar.

Appellant:—by K. N. Katju and B. L. Dave.

Respondent:—by Mukhtar Ahmad and N. A. Sherwani.

JUDGMENT.

Sulaiman, C. J.—This is a judgment-debtor's appeal from an order refusing to set aside an auction sale. The judgment-debtor alleged material irregularities and fraud in publishing and conducting the sale and substantial injury in consequence.

Facts. It appears that a simple money-decree dated July 16, 1929, had been in execution for some time. Landed properties belonging to the judgment-debtor were attached and execution was sought against them. It is not necessary to go back earlier than August, 1930. August 20 was fixed for the sale of the properties. The properties being revenue paying lands, the sale had to be conducted by the Collector. The order passed by the Subordinate Judge fixing the date, as noted in the order sheet, did not specify the hour at which the sale would take place, but the sale-proclamation which was issued mentioned the date as well as one o'clock as the hour at which the sale was to take place. It may also be noted that the incumbrances were not specified in the sale-proclamation but were specified in the order (rubkar) of the Court accompanying it when it was sent to the sale-officer.

On August 16, shortly before the date fixed, the judgment-debtor applied to the Court for the postponement of the sale. This application came up for disposal on the 20th and he made a statement that the sale should be postponed and October 24, 1930 be fixed for the sale, and that it should take place on that day without the issue of a fresh proclamation of sale. On this statement the Court postponed the sale and fixed October 24 for the next sale. As the judgment-debtor had agreed that there should be no fresh proclamation of sale issued, none was issued.

On October 24, 1930, the Collector had about 104 items of properties for sale. These were grouped together under two different headings—"Ancestral" and "Non-ancestral." In order to clear up this point the Counsel for the parties agreed that the list of sale which was before the sale-officer on that day should be sent for. That register has come and we have looked into it with the consent of the counsel for both the parties. Items 1—74 were ancestral properties and items 75 to 104 were non-ancestral properties. Rai Bahadur Babu Jagannath Prasad has stated that the sale-officer announced at the beginning of the sale that he would sell the non-ancestral properties first and the ancestral properties the next day. The judgment-debtor's properties, which were at serial No. 78, were put to auction at about 1 o'clock. Village Phulat was sold for Rs. 5,500 and village Muhammadpur for Rs. 1,543.

The judgment-debtor did not deposit the amount of the decree which was about Rs. 7,000 within 30 days and did not apply to have the sale set aside under O. 21, r. 69, but preferred to have it set aside on the ground of irregularity and fraud under r. 90.

Various objections were urged in the Court below, but, as the order of the learned Subordinate Judge shows, the following points were pressed before him:

(1) The decree-holder won over some official of the sale-officer's office and got the property sold first.

(2) The sale proclamation did not mention the incumbrances over the property.

(3) The Court when postponing the sale did not specify the exact hour at which the sale should be held.

(4) That fraud was practised inasmuch as intending purchasers were induced to go away by a misrepresentation that the sale would not take place that day or at earliest would be held late in the evening.

(5) That the estimates of the values of the properties mentioned in the sale proclamation were grossly low which misled the intending purchasers.

(6) That the actual value of the property was over Rs. 100,000.

Sale out of order in list. (1) On the first point the learned Subordinate Judge has held that there is no rule which requires that sales of properties should take place in the exact order in which they are entered in the list by the sale-officer, and that accordingly there was no breach of any rule which amounted to a material irregularity. He relied on the case of *Inamullah Khan v. Shambhu Dayal* (1), At page 63 in the case it was observed:—

"According to the sale-officer's report his practice always has been to sell first the non-ancestral properties before proceeding to sell the ancestral properties. In the absence of any rule requiring him to follow the order strictly,

(1) 1931 A. L. J. 62 (63): A. I. R. 1931 All. 159; 130 I. C. 485.

it cannot be said that there has been any material irregularity within the meaning of r. 90."

We think that the view taken by the Court below is correct.

The register or the list maintained by the sale-officer, of course, contains all the sales which have been ordered to take place by different Courts on that date, but there is no representation made that they would take place in the exact order in which they are entered in the register. Furthermore, as in the reported case so in the present case the sale officer took up the sale of the non-ancestral properties in the first instance. That is the explanation why the sale of item No. 78 came up at about 1 o'clock. We are unable to hold that this circumstance amounted to such a material irregularity as to vitiate the sale. There are rules regulating the order of sales of various lots when ordered to be sold in execution of one decree. There are also rules regulating the order of sales when the same property has been ordered to be sold by different Courts. But our attention has not been drawn to any rule which fixes the exact order in which different properties ordered to be sold by different Courts should be sold. We, therefore, see no serious objection to the sale-officer having taken up the non-ancestral properties for sale in the first instance. As a matter of fact when he had 104 items of properties to sell, he could not have sold all those properties at the exact hour at which sales were announced in advance to commence.

There was also hardly any evidence to show that the decree-holder had won over any official of the sale-officer's office. The finding of the Court below is against the judgment-debtor, and the learned Counsel for the judgment debtor has also not pressed this point before us.

Failure to notify incumbrances—estoppel.

(2) On the second point the contention of the judgment-debtor is that there was a non-compliance with the provisions of O. 21, r. 66, inasmuch as the incumbrances on the properties were not specified in the sale proclamation. As pointed out above the original sale proclamation did not contain these specifications, but the Rubkar which accompanied it did contain the specifications. An omission to mention the incumbrances in the sale proclamation would not by itself be injurious to the judgment-debtor, because it would be likely to persuade the auction-purchasers to offer a higher price. It is, however, suggested that the fact that the incumbrances were noted in the accompanying Rubkar and not in the sale proclamation might cause a sudden surprise to the purchasers. But the Rubkar had been sent along with the sale proclamation Whatever irregularity there was committed at the time of the issue of the previous sale proclamation that irregularity was distinctly waived by the judgment-debtor when he agreed that the previous proclamation of sale should suffice and that there should be no further proclamation of sale. It seems to us that in view of his agreement, it is no longer open to him to say that the sale, which took place without any fresh proclamation, is vitiated because there was some irregularity in the sale proclamation issued on the previous occasion.

In the case of *Girdhari Singh* v. *Hardeo Narain Singh* (2), the judgment-debtor had obtained a postponement of the sale for one month, "the attachment and the notification of sale being maintained". The Court accordingly ordered the postponement of the sale "without the issue of a second notification of sale." Their Lordships of the Privy Council held that the judgment-debtor could not properly take objection to that notification by stating that there was an error in it, and that there was an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead intending purchasers which could have caused substantial loss to the judgment-debtor, the property being sold at an inadequate price.

We, therefore, hold that there was no irregularity which can be considered to be material within the meaning of O. 21, r. 90, which would vitiate the sale.

Omission to prescribe hour and date of sale.

(3) As regards the third point, there is no doubt that O. 21, r. 69 prescribes that the Court may, at its discretion, adjourn any sale to a specified day and hour. It is, therefore, the duty of a Court to specify not

(2) 3 I. A. 230 (240).

only the day but also the hour to which a sale is adjourned. As noted above, no hour was specified in the order fixing August 20, 1930, for sale, nor had any hour been specified in the order fixing October 24, 1930, for the sale. In cases where properties other than landed properties are to be sold and sales take place on the spot, the specification of the exact hour is most important and an omission may be a serious irregularity, because it would not be possible for the purchasers to attend unless the time has been announced previously. But as regards landed properties General Rules (Civil) Vol. II, p. 3, App. I (B) (i), r. 2 lays down that "the sale shall commence at noon at all seasons in all districts." This may be an explanation why there was an omission of the exact hour in the two orders passed by the Subordinate Judge. As noted above, the hour was put down by the office in the proclamation of sale which was issued on the first occasion, but there being no fresh proclamation of sale on the second occasion, no hour was announced again.

The learned Advocate for the judgment-debtor has relied on the case of *Babu Ram* v. *Inamullah* (3), *Rup Kishore* v. *Collector of Etah* (4) and *Abdul Rauf Khan* v. *Qamrunnissa* (5) in support of the proposition that the omission to specify the hour is a material irregularity. In *Babu Ram's case* the properties to be sold were shops and buildings, and the sale was not made by the Collector. Similarly in *Rup Kishore's case* (4) the sale was not of revenue paying properties and was held by the Amin. In *Abdul Rauf Khan's case* (5) also the property sold was a house and the sale was not held by the Collector. The matter came up to the High Court in revision and the Bench declined to interfere holding *inter alia* that it was open to the Court below to find that there had been a material irregularity owing to the non-specification of the day and the hour.

The learned Advocate for the judgment-debtor has also relied on the case of *Gulab Singh* v. *Raghubir Saran* (6). No doubt that was a case of the sale of the zamindari property, but it appears that there the sale was adjourned not by an order of the Court but by the sale-officer himself without specifying the hour at which the sale would take place the next day. Coupled with other matters the Bench held that there had been a material irregularity. There was no question or waiver on the part of the judgment-debtor in that case and it can, therefore, be easily distinguished.

The main question before us is whether, although the omission to specify the hour may be an irregularity, it is a material irregularity when the judgment-debtor has agreed that there should be no proclamation of sale at all. Apart from the question that there is a definite rule in existence, which lays down at what time the sale is to commence, and that, therefore, the intending purchasers presumably know the usual hour, the failure to mention the exact hour in the order ceases to be a material irregularity when it is agreed that no proclamation or notice of the sale would be issued. When there was to be no fresh announcement, it is very difficult to hold that the sale is vitiated because in the order directing adjournment the Court had omitted to mention the exact hour at which the sale should take place on the next day, the omission being presumably due to the fact that there was a rule in existence which fixed the time. If the judgment-debtor had felt any doubt as to the time at which the sale would take place, it was open to him to apply to the Court to specify the hour so that he may himself take steps to notify not only the date but also the hour. But as remarked above, he agreed that there should be no proclamation of sale at all for the adjourned date. Indeed, it was on this express understanding that the sale was postponed. In these circumstances we are unable to hold that there has been a material irregularity in consequence of an omission in the order of the Court specifying the exact hour when the adjourned sale was to take place.

Waiver by judgment-debtor.

(4) With regard to the question of fact that there was a fraud or misrepresentation, there are statements of a number of witnesses on behalf of both the parties. The learned Subordinate

(3) 49 All. 402: 25 A. L. J. 302: A. I. R. 1927 All. 241; 99 I. C. 926.

(4) 1929 A. L. J. 1228: A. I. R. 1929 All. 948: 120 I. C. 545.

(5) 1930 A. L. J. 1062: A. I. R. 1930 All. 542: 124 I. C. 721.

(6) A. L. R. 1932 All. 230: 1932 A. L. J. 357: 140 I. C. 499.

Judge, who heard the evidence, was apparently not impressed with the credibility of the witnesses and has remarked :

> ' I am not satisfied that the evidence produced by the judgment-debtor on the point that any fraud was played upon the bidders by saying that the sale was on No. 76 on the list."

But the main reason given by him for disbelieving the evidence is that there is no rule which requires that the property should be sold in the exact order entered in the list. The reason may or may not be very strong, but there is no doubt that the learned Subordinate Judge did not believe the evidence.

First of all, we have the statement of the judgment-debtor, Chhutan Lal himself. He stated that on the adjournment of the sale the decree-holder's men had given out that fresh sale proclamation would go out and the sale would take place after 4 or 5 months. In cross-examination he stated that he heard from Nahar Singh and Shambhu that the decree-holder had told them like that, and therefore they were not present at the time of the auction. It is obvious that the judgment-debtor could have taken steps to notify the date on which the sale was to take place, because he knew that there was going to be no fresh proclamation of sale. His hearsay evidence that the decree-holder had himself told Nahar Singh and Shambhu Nath is not borne out by the other evidence. Apparently Nahar Singh has not been produced at all. Shambhu Nath or Shambhu Singh has been produced. It is suggested by Dr. Katju, counsel for the appellant, that he is the same individual as is referred to by the judgment-debtor. Shambhu Nath has not said that the decree-holder told him this but stated that the decree-holder's karinda, Mehdi Ali, said on the day of the sale that the item was very low on the list and the sale would come up late in the evening. It was on this statement that the witness says that he went away to the Civil Court. It is most extraordinary that a witness who was prepared to bid up to Rs. 50,000 for this property should have left the place without making any enquiry from the sale-officer on the mere statement of the karinda of the decree-holder who was himself interested in purchasing the property. The only other witness who corroborates him is Shankar Lal. This man could not have been the intending purchaser himself, because he is in service getting Rs. 17 per month.

The two others witnesses are Ramji Lal and Koma Singh. Ramji Lal says that he was prepared to bid for the property up to Rs. 45,000 but he went away to the market because he was told by other purchasers like one Bal Ram that the sale would come up late in the day. The evidence of this witness does not, in any way, connect the decree-holder with this alleged misrepresentation. The decree-holder cannot be responsible for what Bal Ram or other purchasers might have said on the occasion. Koma Singh says that he had gone to the place in order to bid for the property on behalf of Bal Ram. He says that he was sent to the city by Bal Ram saying that he himself would remain there. When his master was to remain on the spot, the absence of this witness did not matter. But when the witness returned, he was told by Bal Ram Chand that he had gone to the Munsif's Court and the property was auctioned in his absence. Bal Ram Chand has not been produced and his absence does not suggest that Bal Ram Chand was misled by any misrepresentation of either the decree-holder or the decree-holder's *pairokar*.

There is oral evidence on behalf of the decree-holder that the *pairokar*, Mehdi Ali, was not present at the place at all.

We think that the evidence produced by the judgment-debtor is too weak to be accepted. It is inconceivable that intending bidders who were prepared to offer up to Rs. 50,000 and went to the spot, would leave the place without making any enquiries from the sale-officer and before the sale actually commenced, on a mere statement of the *pairokar* of the decree-holder that the sale would take place late in the evening. It has been pointed out that the sale-officer, at the very commencement, announced that he would take up non-ancestral properties before selling the ancestral properties. We would expect that intending purchasers would either enquire from the sale-officer or at least wait till the sale had commenced and they knew in what order the sale-officer was going to sell the properties. We are wholly unable to believe the oral evidence and we cannot find that the judgment-debtor has

discharged the burden of proving that there was a fraud committed by the decree-holder or his agents which resulted in the property being sold at a low value. We agree with the Court below that this evidence must be disbelieved.

(5) and (6). The learned Subordinate Judge has come to the conclusion that the property sold appears to be worth Rs. 40,000. The judgment-debtor had alleged that the property was worth more than double the amount. In the course of the argument before us the finding of the Court below is accepted on behalf of the judgment-debtor and is no longer challenged, but the learned counsel for the decree-holder-purchaser does not accept this finding as correct. He asserts that the learned Judge has given wrong areas and not what was stated by *patwaris* produced by the judgment-debtor himself, that he has overlooked that a large part of the lands is non-culturable, that a large area is *sir* land which after sale would vest in the judgment-debtor himself as his exproprietary rights, and that the interest on the mortgage deeds on the properties were rapidly increasing. We do not think that it is necessary for us to go into the question of the actual value of the property, and we are prepared to assume in favour of the judgment-debtor that the properties sold were worth Rs. 40,000.

Under-valuation.

The under-valuation in the original proclamation of sale would then no doubt be very gross and would have been misleading to the auction-purchasers. Their Lordships of the Privy Council in the case of *Saadatmand Khan* v. *Phul Kuar* (7) considered that an under-valuation is somethig more than common irregularity for it is a mis-statement of the value of the property which is so glaring in amount as could hardly have been made in good faith and was calculated to mislead possible bidders and to prevent them from offering adequate prices. No doubt that was a case which arose under S. 287 of the old C. P. C. which did not actually provide for the issue of a notice to the judgment-debtor before the proclamation of sale was drawn up, as O. 21, r. 66 provides. But the remark made by their Lordships is equally applicable. We would have been inclined to hold that the under-estimate was a material and serious irregularity which was the cause of the property being sold for a small amount, if no question of estoppel had arisen.

It, however, appears that when the decree-holder first applied for execution, he wanted three villages to be attached, namely, the two present villages in dispute, Phulat and Muhammadpur as well as a third village, Ajitpur. The application was filed on December 19, 1929, and in it the decree-holder alleged that Phulat was worth Rs. 4,000, Muhammadpur was worth Rs. 1,000 and Ajitpur was worth Rs. 4,000. Notice was issued to the judgment-debtor to show cause before the settlement of the price for the proclamation of sale. This notice was served on him personally. He appeared and filed an objection on February 12, 1930, in which it was alleged that village Ajitpur was worth Rs. 25,000 and had been grossly under-valued. It was further pleaded that Ajitpur was an ancestral village and should not be sold by the Civil Court direct. In this objection the judgment-debtor, for some unknown reason, did not object that the value of the villages Phulat and Muhammadpur had been under-estimated. The omission was all the more surprising, because, according to him, village Phulat was really worth Rs. 100,000. It is, therefore, startling that although he took objection to the under-valuation at Rs. 4,000 of village Ajitpur said to be worth Rs. 25,000, he did not think it fit to raise objection to the undervaluation at the same figure of village Phulat which, according to him, was worth Rs. 100,000. The only explanation suggested on behalf of the judgment-debtor before us is that at that time he was concerned mainly with the exemption of village Ajitpur from sale by the Civil Court direct on the ground that it was an ancestral property. The fact, however, remains that the judgment-debtor had notice that the decree-holder had filed an affidavit in support of the application alleging that the villages Phulat and Muhammadpur were worth Rs. 4,000 and Rs. 1,000 only, and although he appeared in Court to file objections with regard to the third property, he took no steps to object to these under-valuations.

(7) 25 I. A. 146 : 20 All. 412 (417) : 2 C. W. N. 550 (P. C.).

Judge who heard th...

Apart from any general rule of estoppel as was relied upon in the case of *Mohan Lal* v. *Kali Charan* (8), there is the fact that this High Court has made the following addition to the proviso to O. 21, r. 90:—

"No such application shall be entertained upon any ground which could have been taken by the applicant at or before the date on which the sale proclamation was drawn up."

This amendment was made long before 1929. It seems quite clear to us that in view of this express addition, it is no longer open to the judgment-debtor to urge that the under-valuations amounted to a material irregularity within the meaning of that rule. Notice was expressly issued to the judgment-debtor under O. 21, r. 66, to appear and show cause. He had full opportunity of pointing out this mistake to the Court at the time. He refrained from doing it or omitted to do so. This ground should have been raised by him before the sale proclamation was actually drawn up. Not having raised any such ground he must be deemed to have waived it. He must, therefore, be estopped from now raising the same ground and urging that the under-valuations were a material irregularity in the publication of the sale. The whole object of the amendment is that judgment-debtors should not sit idle and refrain from pointing out mistakes in the sale proclamation when they are given an opportunity to do so, and then after the sale has taken place, raise an objection in order to get that sale set aside. We think that in view of the express provision in this amendment, it is no longer open to the judgment-debtor to make the under-valuations a ground of material irregularity. This was the view expressed by a Bench of this Court in the case of *Abdul Rauf Khan* v. *Qamrunnissa* (5). The judgment-debtor is not estopped from showing that the actual value of the property was much more than what was announced in the original proclamation of sale in order to show that he has suffered substantial loss, but it would be incumbent upon him to show that this substantial loss was the consequence of some other material irregularity. He cannot be allowed to treat the under-valuation itself as a material irregularity when he failed to object at the time when he appeared on the former occasion. We are therefore, compelled to over-rule this objection.

A further point against the judgment-debtor is that this alleged irregularity was committed when the previous sale proclamation was issued. He chose to waive his right for the issue of a fresh proclamation and agreed that no such fresh proclamation should be issued. Having done so, he must be deemed to have waived his objection to the irregularity in the previous sale proclamation. When no fresh proclamation was issued, he cannot be allowed to get the sale vitiated on the ground that, although no sale proclamation was issued at this time, there had been an irregularity in the preparation of the previous sale proclamation owing to the under-valuations.

There was oral evidence led on behalf of the judgment-debtor that there was no beating of drum and no due affixation of notices. But there being no proclamation of sale on the second occasion, there could, of course, be no beating of drums and no affixation of notices. So far as the evidence refers to such omissions on the occasion of the first proclamation of sale the evidence has not been believed by the Court below, and does not appear to us to be relevant. All such objections must be taken to have been waived when the judgment-debtor agreed that the sale should take place without any fresh proclamation.

Holding that the judgment-debtor is now estopped from urging that the under-valuations in the previous sale proclamation were a material irregularity, we are unable to hold that there has been any other material irregularity which has caused the property to be sold at an inadequate value. The mere fact that the price fetched was grossly low is not in itself sufficient to vitiate the sale. If the judgment-debtor has suffered, it is due to his own negligence and omission in not raising this point when he received notice under O. 21, r. 66, and to his obtaining an adjournment by agreeing to the sale taking place on October 24, without the issue of a fresh proclamation.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(8) 49 All. 788 : 25 A. L. J. 524 : A. I. R. 1927 All. 513 : 102 I. C. 126.

General rule, however, occurs, whenever the facts established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence. Whenever there is a duty cast on the defendant to excercise care, and the circumstances under which the injury happened are such that, with the exercise of the requisite care, no risk would have ensued in the ordinary course of events, the burden is shifted to the defendant to disprove his liability. Every accident does not warrant an inference of negligence but there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened. The presumption depends on the nature of the accident. (1865) 3 H & C 506 : (1863) 2 H & C. 722 ; (1870) L. R. 5 Q. B. 411 ; (1871) L. R. 6 Q. B. 759 *referred to.* [P. 25, C. 2.]

Where a motor-car was damaged by the fall of a portion of a terrace of an ornamental building and it was proved that the fall was due to the breaking of the stones in one of the two consoles and the pilasters owing to an internal flow which led to the gradual disintegration of the inside material of the stone by being soaked in rain water, which could not be easily detected.

Held, in an action for damages by the hire purchaser against the owner of the building, that there was no avoidable negligence and the owner was not liable. (1876) 1 Q. B. D. 314 ; (1917) 2 K. B. 173 ; (1866) L. R. 1 C. P., 274, 288 and (1892) 8 T. L. R., 725, *referred to.* [P. 29, C. 1.]

Plaintiffs :—by C. K. Daphtary and M. M. Thakore.

Defendants :—by Lalji Gokaldas and T. M. Guido.

JUDGMENT,

The plaintiffs have filed this suit to recover from the defendant the sum of Rs. 4,499-8-0 for the loss and damage caused by the destruction of a Taxi Ford-Car No. Y—899, on July 21, 1926. The first plaintiff says in the plaint that she was the owner of the car, and that it was insured with the second plaintiff company. The defendant is the owner of a building called 'Khalakdina Terrace' situate at Gowalia Tank Road, Bombay, and on the day in question a portion of the terrace of the said building consisting of an ornamental structure made of Porebunder stone and resting over the parapet wall on the southern side of the building gave way and fell on the said car which was stationary at the stand on Tejpal Road to the south of the building. The car was completely destroyed, and the driver received serious injuries to which he ultimately succumbed. The plaintiffs contend that the portion of the terrace fell down owing to the defendant's negligence, and that he is liable in damages. The defendant denies negligence, and says that the fall was due to an inevitable accident, and that he is not liable to pay any damages to the plaintiffs or either of them.

The principal issue in the case is one of negligence. Generally speaking, it is for the plaintiff in an action for negligence to establish (*a*) that the defendant was under a duty to take care towards the complaining party to avoid the damage complained of, (*b*) that there was a breach of that duty on the party of the defendant, and (*c*) that the breach was the direct and the proximate cause of the damage complained of. The onus of proving negligence is on the plaintiff, and the mere proof of the happening of an accident is not as a general rule sufficient evidence to support the action. An exception to the general rule, however, occurs whenever the facts established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence. Whenever there is duty cast upon the defendant to exercise care, and the circumstances under which the injury happened are such that with the exercise of the requisite care no risk would have ensued in the ordinary course of events, the burden is shifted to the defendant to disprove his liability. Every accident does not warrant an inference of negligence, but there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened. The presumption depends upon the nature of the accident. It is usual to refer to such cases under the maxim *res ipsa loquitur.* A leading illustration of such cases is *Scott* v. *London and St. Katherine Docks Co.*, (1) in which the plaintiff, a customs officer, went to the defendants' docks on business, and in passing from one door-way to another was injured by six bags of sugar which were hung by a chain falling upon him. The rule was thus stated by Erle, C. J., at p. 601 :—

Negligence —Onus of proof.

(1) (1865) 3 H. & C. 596 (601.)

"There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."

It was held in *Byrne* v. *Boadle* (2) that there was *prima facie* evidence of negligence where a person going along a high way was injured by the fall of a barrel of flour from out of the window of the defendant's warehouse, and that such evidence was sufficient to cast upon the defendant the onus of proving that the accident was not caused by his negligence. In *Kearney* v. *London, Brighton, &c., Railway Co.* (3) the plaintiff was injured by the fall of a brick from the defendant's bridge. Cockburn, C. J., laid down the rule at p. 415, as follows:—

"Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incombent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen. Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts:...".

This case was confirmed in appeal (4). All these cases have been discussed by Pollock, in his Law of Torts, 13th Edn., and at p. 539, he states the rule as follows:—

"Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."

It follows, therefore, that if the cause of the injury is explicable, the explanation must be given by the defendant. An application was made to me in this case that liberty should be reserved to the plaintiffs to call their evidence in rebuttal after the defendant had led his evidence to disprove his liability, but I was not referred to any case in which evidence in rebuttal was allowed to be led. It is for the plaintiff to lead whatever evidence he wants to with regard to the facts and circumstances relating to the defendant's neglience. There must be some reasonable evidence of negligence. The plaintiff may rely on the undisputed facts and ask the Court to draw the presumption of negligence in his favour, or he may in addition lead such evidence as he likes relating to the defendant's negligence, but he should not as a rule be allowed to lead evidence in rebuttal and closed his case. That, however, will not in any way lessen the burden that may be held to lie upon the defendant. If there is some reasonable evidence of negligence, and there are also facts supporting the presumption of negligence, it is for the defendant to prove facts inconsistent with the negligence or facts which rebut the presumption.

The next question is whether the first plaintiff was at all material times the owner of the car in suit. The first plaintiff entered into a hire-purchase agreement in respect of the car with the Otto Supply Company, Ltd., on October 28, 1925, and under the agreement she agreed to pay to the company Rs. 686-8-0 before delivery of possession of the car, and the balance by twelve monthly instalments of Rs. 125 each. She however, paid in all, at first Rs. 1,000-8-0 which included the sum of Rs. 686-8-0, the excess amount being paid for insurance premium and other charges, and passed twelve hundis of Rs. 125 each in favour of the company, the first being payable one month after date, the second payable two months after date, and so on. She paid in all eight instalments before the date of the accident, and got back the eight hundis which have been put in. After the accident the Otto Supply Company recovered on October 9, 1926, the sum of Rs. 1,537-8-0 from the second plaintiff company with which the car had been insured, and deducting Rs. 500 in respect of the remaining four hundis, the

(2) (1863) 2 H. & C. 722.
(3) (1870) 5 Q. B. 411 (415.)
(4) (1871) 6 Q. B. 759.

Otto Supply Company paid the balance to the first plaintiff on or before October 18, 1926. The suit was filed on November 25, 1926. Under the hire-purchase agreement the first plaintiff was entitled to terminate the agreement before the car became her property, and it could become her property only after payment of all the instalments per month or on payment of all of them or those that remained payable in a lump. Until then the first plaintiff acknowledged the Otto Supply Company, Ltd., as the owners of the car. She had admittedly not paid all the instalments before the date of the accident, *viz.*, July 21, 1926, so that at that date the car was not her property, and in fact the Otto Supply Co., carried on correspondence with her as owners. On the day of the accident the car was smashed and was a total wreck, and was disposed of on October 6, 1926, by the Otto Supply Co., on behalf of the second plaintiff company for a sum of Rs. 50, which sum counsel for the defendant admitted was the best price that could be obtained for the salvage. On October 18, 1926, the first plaintiff's solicitors on her behalf purported to assign all rights in, and the ownership of the car to the second plaintiff company. The first plaintiff was, therefore, not, strictly speaking, the owner at the date of the accident, and though she paid off the remaining instalments by October 18, 1926, the car had been sold off and did not belong to her at the date of the suit. The first plaintiff was, therefore, not the owner, strictly speaking, at the date of the suit either. The cause of action, however, accrued to her on the date of the accident, and at that date she was in the position of a bailee. As such she is entitled to maintain an action against a third party who does not claim under the bailor according to S. 180 of the Indian Contract Act. As a bailee she is not the agent of the bailor, and she can sue and claim the full damages for loss due to the alleged negligence of the defendant without prejudice to the rights of the bailor to adjust with her the amount of damages when recovered: see Halsbury, Vol. 1, 2nd Edn., pp. 766, 777; *Ramanath Gagoi* v. *Pitambar Deb Goswami* (5). Counsel for the defendant argued that it was not pleaded in the plaint that the first plaintiff was a bailee, but her legal position is a point of law. Even if she was merely the hirer, she had engaged a chauffeur and purchased accessories to ply the car for hire in Bombay, and under the circumstances, as was pointed out in *Croft* v. *Alison* (6) she could be properly described in the plaint as the owner of the car. As bailee she was in possession. Possession is a title against the wrong-doer, and the presumption of law is that the person who has the possession has also the property. I, therefore, hold that the first plaintiff could maintain this suit as "the owner" of the car.

Hire-purchases—right of suit for damages.

I will now deal with the important question in the suit, *viz.*, whether the fall of the ornamental structure on the terrace of the defendant's building was due to the defendant's negligence. It is a rule of the English common law that an owner or occupier of property must keep it in a reasonably safe condition and repair as regards the persons being or passing near the property as of right, and he is liable for negligence to person or property or both if the injury is caused by want of such condition and repair. He is liable if the injurious agency is entirely under his control, and especially if that agency is inanimate. I have already held that it was for the plaintiffs to lead all their evidence first, if they relied on any relating to the defendant's negligence. Plaintiffs led all their evidence accordingly, and apart from the facts they sought to establish, there is, in my opinion, a presumption of negligence against the defendant according to the maxim, *res ipsa loquitur*. It has been said that "buildings properly constructed do not fall without adequate cause", and it is therefore, for the defendant to rebut the presumption and give a reasonable explanation for the collapse which caused the damage. In the course of the correspondence that passed between the first plaintiff and the defendant after the suit the first plaintiff was asked to give

Res ipsa loquitor, doctrine of

(5) 43 Cal. 733, (742) 22 C. L. J. 339: 21 C.W.N 632; 31 I. C. 430.
(6) (1821) 4 B. & Ald. 590.

particulars of the defendant's negligence, and by her attorney's letter, dated February 9, 1927, she gave some of the particulars of negligence on which she wished to rely, *viz.*, (*a*) neglect to supervise to keep the ornamental structure in proper condition, (*b*) neglect to keep it safe for those lawfully using the road, (*c*) absence of dowels (iron pieces) by which two stones can be held together, and (*d*) weakness of the joints between the stones and also want of proper cementing of the stones. The first plaintiff promised to send further particulars, but failed to do so. An issue was raised, whether the fall of the portion of the terrace was due to the defendant's negligence particulars whereof are given in the said letter, and counsel for the defendant argued that the plaintiffs must be confined to the said particulars. The plaintiffs, however, raised an additional issue, whether the fall of the portion of the terrace was due to the defendant's negligence, meaning the defendant's negligence generally. It was contended that the evidence led by the plaintiffs went beyond those particulars, but, in my opinion, it only contains details which can be ultimately referred to the particulars given in the letter. According to the doctrine of *res ipsa loquitur* it is for the defendant to show some cause for the collapse consistent with reasonable care on his part, and even his evidence has travelled beyond the allegation contained in the written statement. Moreover, all the evidence is now before the Court, and it has to be considered in order to ascertain the liability of the defendant.

There were in all nine such ornamental structures on the terrace, of which four were on the south side, and the structure that fell was the eastern-most on the south side. The length of the structure that fell was about twelve to thirteen feet. Its total height was ten feet six inches from the terrace level. Its thickness or width at the top was about three feet. Its thinnest part was only ten inches in width. It rested on a parapet wall which was three feet high and about ten inches thick. Its shape appears from the figure enclosed in red pencil in the south side elevation plan, Ex. K., and also from a rough drawing put in by the defendant's engineer which is Ex. 12. It was not exactly in the form of an arch, but it had an arch effect as the two uppermost cornices which are also called winged consoles or flying consoles were worked up in the form of an arch. The central stone of the arch or the key of the arch is called the cartouche. The structure lay between two pillors going up from the first floor level. Two pilasters or square columns at each end were built in the parapet wall, and the outside face of the pilasters was carved out into S. shape projections called consoles. These pilasters supported the arch. Each stone directly over the pilaster is the springing of the arch. The stones between the springing and the cartouche are called boussoirs. The stones forming the arch radiated towards the centre. The springing of the arch was supported by an abutment on each side. Each pilaster was sixteen inches wide. The thinnest part of each console is six inches in width, and its thickest part from the back of the parapet wall up to the front is about twenty and a half inches. On each side of the pilasters is a corbel or bracket resting on the parapet wall.

[The judgment then discussed the oral evidence relating to the real cause of the collapse and proceeded.] All the causes mentioned were suggested as probable causes, but the evidence shows that the cause deposed to by Mr. Batley is the only probable cause and nearest the truth, *viz.*, the breaking of the stones in one of the two consoles and the pilasters due to an internal flaw which led to the gradual disintegration of the inside material of the stone by being soaked in rain water. This inward disintegration could not be easily detected, especially if the stones were oil painted, as in fact they were. In the case of *Kearney* v. *London, Brighton, &c., Railway Co.* (3), referred to before, in which the brick fell from a railway bridge built only about three years before the date of the accident, the plea of *res ipsa loquitur* put forward by the plaintiff was not met by any evidence on the side of the defendants at all, and one of the Judges who disagreed with the majority went so far as to say that it was for the plaintiff to have proved facts to show that any one might have seen on inspection that the

brick was loosened and about to fall. In *Tarry* v. *Ashton* (7) the overhanging lamp weighed forty or fifty pounds and projected several feet across the pavement, and three or four months before it fell defendant was made aware that it was getting out of repair. In *Pritchard* v. *Peto* (8), a piece of projecting cornice fell on the plaintiff who went to the defendant's house to collect money due to him, and it was held that the defendant was not liable, as it was not shown that she was aware or ought to have been aware of the defect. That was, however, the case of a duty of the owner or occupier of a house towards an invitee, and that duty has been defined by Wills, J., in *Indermaur* v. *Dames* (9), as follows, *viz.*, to use reasonable care "to prevent damage from unusual danger." I have already stated that it was for the defendant to show that the happening of the accident was consistent with reasonable care on his part. In *Fawkes* v. *Poulson* (10) the plaintiff was injured by the fall of one bale out of several which were let down by a crane, and Lindley, L. J., held that he did not mean to say that it might not be possible to prevent the bales from slipping "if the lowering was conducted with all the care which would be applied to a scientific experiment, but the question was whether, looking at the matter from a business point-of-view, the slipping of the bale could have bren prevented with any amount of reasonable care, whatever might have been the cause of the slipping...". It was held in that case that the defendants were not liable. In my opinion, the defendant in this suit has answered the *prima facie* case made out against him, and discharged the burden that lay upon him to disprove his liability. It was really unfortunate that the accident led not merely to loss of property but to the loss of human life; but it was an inevitable accident which could not have been prevented by the exercise of reasonable care, caution and skill.

In view of my finding on the issue of negligence, it is not necessary to go into the question of damages. The plaintiffs have annexed to the plaint a statement of the particulars of the damage caused by the collapse but its correctness is disputed by the defendant.

The suit must, therefore, be dismissed.

I have now heard counsel on the question of costs. The main issue in the suit was one of negligence, and substantially the suit has been decided in favour of the defendant. With regard to the first issue counsel for the defendant argued in the beginning that the suit was not maintainable as the first plaintiff was not the owner, she was in the position of a bailee, and could be described as "owner" and thus maintain the action. That position, however, is not clearly indicated in the plaint, nor was it set up from the commencement of the hearing. Taking everything into consideration, the suit, in my opinion, must be dismissed with costs.

Suit dismissed.

(7) (1876) 1 Q. B. D. 314.
(8) (1917) 2 K. B. 173.
(9) (1866) L. R. 1 C. P. 274, (288)
(10) (1892) 8 T. L.R. 725.

A. I. R. 1934 Bom. 29

Original Civil.
No. 593 of 1931 (Decided on 29-11-1932.)

Mirza, J.

NARAYANDAS SUNDERLAL RATHI ... *Applicant*

versus

TEJMAL MOHANLAL ... *Defendant.*

(i) Civil P. C. (V of 1908), S. 146 O. 21 r. 16—decree assigned in part, not executable—Assignment of principal and interest, reserving costs—S. 146 not applicable—part assignee, not a joint decree-holder.

A part assignee of a decree, e. g. for principal and interest but without costs cannot be regarded as a joint decree-holder, and cannot execute the decree in whole or in part. A decree for purposes of execution must be regarded as a whole and indivisible. When it is sought to be executed, it must be executed as a whole and not split up into parts.

S. 146 C. P. C. does not apply.

English rule and practice followed. 35 All. 29 and 2 L. L. J. 1. referred to.

17 Cal. 341 and 44 Mad. 919 dissented from. [P. 32, C. 2.]

(ii) Civil P. C. (V of 1908), O. 21 r. 16—assignee of decree—substitution application not allowed.

An assignee of a decree has no right, in law, to be brought on the record, in substitution of the decree-holder. He can only proceed in execution under O. XXI r. 16, C. P. C. [P. 32, C. 2.]

Proceedings in Execution of decree on the original side.

Applicant :—by N. P. Engineer,
Defendant :—by S. R. Tendolkar,

JUDGMENT.

On October 14, 1931, a decree was made in the above suit in favour of the plaintiffs for Rs. 6,590-11-0 with interest at six per cent. per annum from October 14, 1931, till payment and the costs of the suit. By a deed of transfer dated February 29, 1932, the plaintiffs assigned to the applicant their right, title and interest under the decree in respect of Rs. 6,590-11-0 and interests without assigning to the applicant the plaintiff's further right, title and interest under the decree in respect of the payment of costs when taxed. The applicant has now applied under the provisions of Order XXI, rule 16 of the Code of Civil Procedure, calling upon the plaintiffs and the defendants to show cause, if any, they have, why the decree dated October 14, 1931, in favour of the plaintiffs and transfered by them to the applicant should not be executed by the applicant against defendants Nos. 1, 2 and 5. Defendants Nos. 1 and 2 contend that the decree which has been assigned cannot be executed as it is only partially assigned to the applicant.

Order XXI, rule 16, provides that where a decree is transferred by assignment in writing, as here, 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. There is no provision in this rule for a decree being partially transferred by assignment.

Civil P. C. O. XXI, r. 16.

Where a decree is passed jointly in favour of two or more persons, the rule provides that the interest of any decree-holder in the decree may be transferred by assignment. In the present case there was no joint decree in this sense. The decree is in favour jointly of two plaintiffs, plaintiff No. 1 being the father and plaintiff No. 2 his minor son, the two being co-parceners of a joint and undivided Hindu family which trades under the name and style of Shaligram and Narayandas at Bombay. Plaintiff No. 1, as manager of the joint family, has assigned to the applicant the interest of both plaintiffs in the decree except as to costs awarded under the decree. Order XXI, rule 15, regulates the procedure regarding execution of decrees passed jointly in favour of more persons than one. In such cases unless the decree imposes a contrary condition one or more of such joint decree-holders may apply for the execution of the whole decree for the benefit of all the joint decree-holders. Such is not the case here. The application here is for the execution of the decree restricted to the interest transferred by assignment to the applicant.

Counsel have not found any reported case of our High Court on the point which has now arisen. The practice of the English Courts is governed by Order XLII, rule 23, cl. (*a*), of the Supreme Court Rules. This rule provides *inter alia* that where change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution, to the Court or Judge for leave to issue execution accordingly. In application made on behalf of transferees of decrees by assignments the English Courts have held that the transfer should be of the whole decree and not merely of a part of it. In *Forster* v. *Baker* (1) a judgment-creditor had assigned part of the judgment for valuable consideration; the assignee applied for leave to issue execution. The original Court and the Court of appeal concurred in holding that the assignee was not entitled to such leave: the original Court on the ground that there cannot be an absolute assignment within S. 25, sub-S. (6) of the Judicature Act, 1873, of a definite part of an existing debt or other legal chose in action; and the Court of Appeal on the ground that as the original judgment-creditor could only issue a single execution upon his judgment and could not split up the judgment debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment-debt a right which he did not himself possess. Vaughan Williams L. J., in delivering the judgment of the Appeal Court, observed :—

"A judgment creditor could not before the coming into operation of the Judicature Act, 1873, have issued a series of small executions, upon his judgment making in the whole the total amount of the judgment debt; he had only one judgment, and upon that judgment he could issue only one execution; he has only the same right now. And if a judgment creditor assigned part of his judgment debt, he could not then, and cannot now, give to his assignee any better right than he had himself. The result is, therefore, that the assignee of part of a judgment debt is not in a position to issue execution upon it, which is what the plaintiff in the issue wishes to do in the present case."

This case was followed by the Court of Appeal in *Rothschild* v. *Fisher* (2) See the observations of Lord Sterndale M. R. at p. 252 of his judgment and of Scrutton L. J. at p. 255.

A Similar point came up for decision before the Calcutta High Court in *Kishore Chand Bhakat* v. *Gisborne & Co.* (3) in construing the corresponding S. 232 of the Code of Civil Procedure, 1882. The Division Bench there held that there was no legislative prohibition to the transfer of a portion of a decree; and that provided the whole decree was executed and the rights of all parties interested were cared for, there was no objection to the transferee being allowed to carry on the execution proceedings. They dissented from an earlier decision in *Seetaput Roy* v. *Syud Ali Hossein* (4). The attention of the learned Judges does not appear to have been called to the English practice and the only case which was cited before them was that of *Seetaput Roy* v. *Syud Ali Hossein* (4). With great respect I am unable to agree with this decision.

The same point came up next before the Allahabad High Court in *Ram Chandra Naik Kalia* v. *Abdul Hakim* (5). The head-note there is :

"*Held* that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree-holder cannot transfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded."

Mr. Engineer on behalf of the applicant has questioned the accuracy of the head-note and has called my attention to the judgment. From the judgment it appears that the lower Court had refused leave to the transferee of a part of a decree to execute the same *inter alia* on the ground that the transferee was not entitled in law to apply as a transferee of a part of the decree free execution of that portion only. Mr. Engineer has relied upon the following remarks appearing in the judgment (p. 206) :—

"As regards the second point, assuming that there is nothing in law to prevent the transfer of a portion of the decree, and assuming that the transferee can apply for the execution of the whole decree, in the present case the transferee is not entitled to apply for execution of a part of the decree, as the original decree-holder herself could not have done so. The decree appears to us to be one and indivisible, for recovery of the dower plus the costs incurred in the suit."

I am unable to agree with Mr. Engineer that the head-note in this case does not correctly represent the judgment of the Divisional Bench. This case was followed by the Lahore High Court in the case of *Ahmad Shah* v. *Faujdar Khan* (6).

The Madras High Court has taken a view on this subject somewhat similar to that of the Calcutta High Court. In *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (7) the Madras High Court has held that under S. 146 of the Code of Civil Procedure it would be permissible to recognise the validity of the transfer of a part of the decree and allow execution thereof by the transferee, and that Order XXI, rule 16, is no bar to the application of that section. They held that such transferee is like a joint decree-holder and can, under Order XXI, rule 15, protect his rights either by executing the decree himself or by joining or by intervening in the execution by his transferors. Wallis C. J., in construing S 146 of the Civil Procedure Code, observes :—

"The section should, I think, have a beneficial interpretation, and be read as supplementing the rules, and, as a part transferee is a person claiming under a decree-holder, I think it sufficiently authorises applications in execution by such a part transferee. Further, section 232 of the old

(1) [1910] 2 K. B. 636.

(2) (1920) 2 K. B. 243. (252, 255)
(3) 17 Cal 341 :
(4) 24 W. R. 11.
(5) 35 All. 204 : 11 A. L. J. 249 : 19 I. C. 304.

(6) 2 L. L. J. 1 : 28 P. L. R. 1920 : 55 I. C. 983.
(7) 44 Mad. 919 : 41 M. L. J. 316 : 14 L. W. 287 : 69 I. C. 337 (F. B.)

Code, which was held to authorise such an application, is reproduced in Order XXI, rule 16, and the fact that the case of the interest of any decree-holder being transferred is now expressly provided for in the rule does not, in my opinion, show that part transfers are not covered by the rule, and still less that the rule prohibits an application by a part transferee of the decree so as to make section 146 inapplicable."

Spencer J. at p. 927 of his judgment observes :—

"I can see no objection to the assignee of a portion of a decree being allowed to come in and execute it on behalf of himself and his co-decree-holder under Order XXI, rule 16, of the Code of Civil Procedure, provided that the Court imposes under rule 15 such terms for the conduct of the execution proceedings as may be necessary for the protection of the interests of others, such as a direction for payment into Court of sums realised under the decree".

Kumaraswami Sastri, J. at p. 932 of his judgment observes:—

"Section 146 of the Code is very general, and provides that where proceedings may be taken or applications made by or against any person then the proceedings may be taken or the application may be made by or against any person claiming under him. Order XXI, rule 15, provides for applications for execution by one or more joint decree-holde s in a case where a decree has been passed jointly in favour of one or more persons. Rule 15 provides for the interest of any decree-holder in the decree being transferred and empowers the Court to execute the decree on the application of the transferee in the same manner and subject to the same conditions as if the application was made by such decree-holder.

"If assignment of part of a decree is valid, I do not see why the assignee should not apply to be allowed to execute the decree jointly with the decree-holder interested in the remainder on the analogy of a joint decree-holder applying for execution under rule 15. The words of section 146, which are very general, do not prohibit this and so long as there is nothing in Order XXI, rules 15 and 16, cutting down the right, section 151 will empower the Court to grant relief by applying principles analogous to rules 15 and 16 and give him relief, even assuming that the rules would not in terms apply. Where rights are conferred by the sections of the Code and so provision is made for a particular set of facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of section 151 is to give such power to Courts and to prevent a failure of justice. In cases of transfer of part of a decree pending execution, I think the proper course is to allow the transferee to be brought on record in execution proceedings and to treat further proceedings as if it was a joint petition by the transferor and transferee."

With great respect I am unable to agree with the decision in *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (7). In my judgment S. 146 of the Civil Procedure Code can have no application here. There can be no question that the transferee of the decree has the same rights as the decree-holder himself. The reason why the transferee cannot be permitted to execute a part of the decree only is this, that the decree-holder himself would not be so permitted. A decree for purposes of execution must be regarded as a whole and indivisible: when it is sought to execute it it must be executed as a whole and not split up into parts. Even in the case of a joint decree the joint decree-holder is required under the provisions of Order XXI, rule 15, to apply for the execution of the whole decree on behalf of himself and his joint decree-holders. A part assignee, in my judgment, cannot be regarded as a joint decree-holder.

Mr. Engineer sought to draw a distinction between the transfer of a decree and an application by the transferee for leave to execute the decree. He urged that the present application is not for leave to execute the decree, but is one for the assignee being brought on the record in substitution of the transferor. This argument, in my judgment, is not correct. After the decree is made the suit is at an end, and no transferee by assignment of the decree is entitled to be brought on the record of the suit in substitution of the decree-holder. He can proceed in execution only under Order XXI, rule 16. The present application is clearly one in execution. It is taken out in Form No. 23 appended to the High Court Rules (see p. 246). The corresponding form in the Code of Civil Procedure is Form No. 7 in Appendix E. The latter form also provides that cause is to be shown by the judgment-debtor why execution should not be granted to the transferee by assignment of the decree.

In my judgment the applicant is not entitled to execute the decree as the transferee by assignment of a part of the decree herein. The notice must be discharged with costs. Counsel certified.

Order accordingly.

A. L. R. 1934 Cal. 49

Revisional Criminal.

No. 783 of 1933 (Decided on 21-12-33.)

Mukherji and Bartley, JJ.

HEEN CHANDRA DAS and others ... *Petitioners*

versus

SUBODH CHANDRA DAS GUPTA ... *Respondent.*

(i) Bengal Municipal Act (XV of 1932), S. 28 (1) and (2) and S. 34 (c)—Notification 5717 M., dated 1-12-1932, O. 4—revising authority, liability of, under S. 28 (1)—whether falls under S. 28 (2).

The revising authority appointed under Order 4 of the orders under Notification No. 5717-M, dated 1-12-1932 to revise the preliminary electoral roll are not persons to whom S. 28 (1) of the Bengal Municipal Act applies and cannot be proceeded against under that clause, nor are they a Municipal officer or servant under clause (1) of S. 28. [P. 49. C. 2.]

(ii) Bengal Municipal Act (XV of 1932), S. 34 (c)—Deposit, a condition precedent.

Under S. 34 (c) of the Act, the deposit is a condition precedent to the entertaining of a complaint, though, if dismissed for non-payment, it can be revived on subsequent payment. [P. 50. C. 1.]

Petitioners :—by Santosh Kumar Basu, and Prafulla Chandra Nag.

Respondent :—by D. N. Bhattacharyya, and Himanchu Ray Chauduri.

JUDGMENT.

Mukherji, J.—The first two petitioners are pleaders practising in the Court of the Munsiff at Sherpur and the third petitioner is a taluqdar and merchant of the Sherpur town. In connection with the first general election of the commissioners of the Sherpur Municipality which was to be held under the Bengal Municipal Act (Bengal Act XV of 1932), a committee consisting of the Chairman and two Commissioners was appointed under S. 21 of the Act. The said committee appointed the three petitioners as the Revising Authority under order 4 of the orders issued under Notification 5717-M., dated the 1st Dec. 1932, to revise the preliminary electoral roll.

The complainant who is a rate-payer of the said Municipality instituted a complaint against the three petitioners and the three members of the committee on January 21 this year alleging that certain malpractices had been committed on them in regard to the revision of the preliminary electoral roll. The deposit of Rs. 50 contemplated by S. 34, cl. C. of the Act was not made at the time. The complaint was filed before an Hon. Magistrate who was not willing to deal with it and so forwarded it to the Sub-divisional Magistrate for action. The Magistrate Mr. Trivedi dismissed the complaint under S. 203, Cr. P. C., observing as follows : " No case under Sec. 28 (2) of the Bengal Municipal Act XV of 1932 is made out. The Revising Authority is alleged to have rejected the objections. This is not sufficient for showing any offence...The cost of Rs. 50 required to be deposited by law was not deposited."

Facts.

The complainant then moved the Sessions Judge who ordered a further enquiry into the complaint on the complainant's depositing Rs. 50. When the case came back to the file of the Sub-divisional Magistrate, a date was fixed within which the complainant was to make the deposit. On the deposit being made when the Magistrate was about to hold the enquiry an objection was taken on behalf of the petitioners that they are not persons who can come under cl. 2 of S. 28. The complainant then took up the position that his case as against the petitioners fell within cl. 1 of S. 28. The Magistrate then proceeded to hold a judicial enquiry in which the complainant was to adduce evidence 'for the purpose of proving that the omission of the names of certain rate-payers from the electoral roll was procured deceitfully by the petitioners.'

The complainant then examined certain witnesses on his behalf and the magistrate issued summonses against the petitioners for an offence under S. 28 (1) of the Act. The present rule is directed against the summonses so issued and the proceedings following therein.

We are of opinion that the petitioners are not persons to whom cl. 1 of S. 28 can possibly apply. They are revising authority who are vested with the powers of holding summary enquiry into the claims and objections preferred in connection with the revision of the preliminary electoral roll and their orders allowing or disallowing claims and objections are to be

Bengal Municipal Act, S. 28 (1)

mechanically followed in amending the said roll. (*Vide* orders 12 and 13 of the Notification). The words of the clause "who by claiming a qualification" apply only to the case of claimant: the words "by using false documents or by a false declaration or by any other deceitful means procures" indicate a person who practises a deception and thereby obtains from some other body an improper entry etc. The clause in our opinion cannot possibly include the Revising Authority from whom the order is procured.

Bengal Mun. Act. Ss. 28 (2) & 34 (c)

It had been contended before us on behalf of the complainant that the present case is covered by cl. 2 of S. 28. We are unable to hold that a member of the Revising Authority is either a Municipal officer or servant. We desire also to point out that the words of cl. (c) of S. 34 clearly indicate that the deposit of Rs. 50 is a condition precedent to the entertaining of a complaint though of course a complaint dismissed merely on the ground of such non-deposit may be revived on the deposit being subsequently made, if it is otherwise in order.

The rule is made absolute. The proceedings complained of are quashed and the complaint of the opposite party is dismissed.

Rule made absolute.

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†† A. I. R. 1934 Cal. 50 (F. B.)

Appellate Criminal Nos. 23 and 728 of 1933. (Decided on 27-11-33.)

Mukherji, Bartley and Roy, JJ.

SHEIK MANDAL ... *Appellant*

versus

THE CROWN ... *Respondent.*

Penal Code (XLV of 1860), Ss. 302, 304—Criminal P.C. (V of 1898), S. 303—Sessions trial—accused charged with murder—Jury's verdict under S. 304—Jury questioned on their opinion of the intention for committing murder—re-summing up on Jury's statement that they did not consider that question—improper—fresh verdict under S. 302—duty of Judge—High Court Rules and Circular Orders Vol. I (Crl.) Ch. I, R. 74 (b), P. 28.

Where, on a charge under S. 302, I. P. C. the Jury bring in a verdict under S. 304 without indicating under which of the 2 parts of the latter section their opinion falls, it is the duty of the judge, both under S. 303, Cr. P. C. and under the High Court's Circular Rules and Orders, to question them about it, but the questions should be restricted only to find out whether their verdict was under the first or second part of S. 304. It is improper for the Judge to question them generally with what intention they considered that accused committed the act. The duty of the Judge is to put to the Jury the elements mentioned in the High Court Rules, either one by one or as a whole and get their special verdict thereon. He could only explain to them the law again and again. The questions should be specially framed to elicit from them their special verdict only. General questions, the effect of which may be to enable the Jury to travel outside S. 304, I. P. C., should be avoided.

Where, after return of verdict under S. 304, the Judge questioned the Jury as to their opinion about the accused's intention and made a fresh summing up of the whole case, after which the Jury returned fresh verdict under S. 302.

Held, that the conviction based on the said latter verdict was illegal. 4 Rang. 488 explained. [P. 51, C. 2. & P. 52, Cs. 1, & 2.]

Death Reference and Appeal by accused against death sentence.

Appellant:—by Manindra Nath Mukherjee.

Crown:—by Khundkar, Deputy Legal Remembrancer.

JUDGMENT.

This case is before us on a reference under S. 374 of the Cr. P. C. and an appeal by the prisoner Sadok Mondal who has been sentenced to death on a verdict under S. 302 of the I. P. C.

The prisoner was charged with an offence under S. 302. The Sessions Judge in the course of his charge to the Jury explained the offence of murder, culpable homicide not amounting to murder and grievous hurt, as he had to do. What transpired when the Jury brought in their verdict would appear from the following record made by the learned Judge.

"The Jury retired at 4-50 p.m. The Jury returned at 5-15 p. m. To Foreman of the Jury:—

Q. Are you unanimous?

A. Yes.

Q. What is your verdict?

A. We find the accused Sheik Mandal, guilty under S. 304, I. P. C.

Q. With what intention was the act committed?

A. We have not considered the question of intention.

Q. With what knowledge was the act committed?

A. We have not considered the question of knowledge.

Q. Would you care to be charged again in respect of the law?

A. Yes.

(The Jury is charged once again in respect of the law)

The Jury retired at 5-45 p.m. The Jury returned at 5-52 p.m.

Q. Are you unanimous?

A. Yes.

Q. What is your verdict?

A. We find the accused guilty under S. 302, I. P. C."

The learned Judge has made a note that the questions which he put to the Jury after the verdict had been brought in under S. 304, I. P. C., were asked by him in accordance with the instructions laid down in the Rules and Circular Orders of the High Court Vol. 1 (Criminal) Chapter 1, Rule 74 (b), Page 28. That Rule is in these terms:—

"The Sessions Judge shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death or with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death. And in cases tried by Jury they should be careful to obtain a specific verdict on those points."

As already stated, as the result of the questioning the learned Judge was able to get from the Jury a fresh verdict, namely one under S. 302, I. P. C.

The question which has to be determined at the outset is whether the fresh verdict is one which may be regarded as a verdict obtained in accordance with law.

Now, it must be conceded that when the jury brought in a verdict under S. 304, I. P. C. that was not an unambiguous or complete verdict, because the verdict did not indicate under which of the two parts of that section the case in their opinion fell. The ambiguity or incompleteness such as it was, however, was in respect of this matter only. Under S. 303 Code of Criminal Procedure, therefore, it was open to the learned Judge to put questions to the Jury to ascertain what exactly their verdict was, but only to find out whether it was under the first or the second part of S. 304, I.P.C. And under the Rule quoted above it was his duty to put such questions to the jury as would enable him to obtain specific verdict of the points enumerated in the Rule. The Rule comes under a heading "Remarks to be made in reference to convictions under S. 304, I. P. C." and can only be used except for the purpose of recording a proper verdict under that section. The Rule cannot possibly have any other meaning, for if it bears any other interpretation it would militate against S. 303 of the Code of Criminal Procedure and so would be *ultra vires* the statute.

Verdict under S. 304, I. P. C.

This being the position the question that has to be considered is, was the first question, which the learned Judge put to the Jury, namely, "with what intention was the act committed", a proper question which the Judge was entitled to put under the law? In our opinion it was not. The question, apart from being a leading one, presupposes that there was an "intention" which formed an ingredient of the offence of which the prisoner was guilty, while it is true that for an offence of culpable homicide not amounting to murder intention is not a *sine qua non*. The question was not one which may be regarded as justified either by S. 303 of the Code or by the Rule under which the learned Judge purported to act. The proper way to question the Jury for the purpose of finding out under which part of S. 304 of the I. P. C., the prisoner was guilty was to put to them the elements enumerated in the Rule, either one by one or as a whole, and to get their special verdict thereon. As the verdict under S. 302, I. P. C. was obtained as the result of questioning which cannot be justified as being in accordance with law, we are unable to regard that verdict as one on which a conviction could be based.

Fresh summing up and fresh verdict under S. 302, I. P. C.

9642

The learned Judge made it perfectly plain in his summing up that, in his opinion, the prisoner's intention was to cause death, though he very properly and fairly warned the Jury that they were at liberty to come to a different opinion. In one part of his summing up he said:—

"A person who inflicts an injury upon another which almost separates the head from the body and who inflicts another injury that cuts through a bone, can have but one intention, and a ruthless intention, that is, an intention to cause death. In my opinion, which you may neglect, to hold otherwise would be merely ridiculous. You, however, are the sole judges of the facts and I leave it to you."

If upon a verdict under S. 304, I. P. C. being brought in a Judge thinks that the verdict is not correct but that it should be under Section 302, I. P. C. and questions the Jury to find out whether the question of intention has been duly considered, such questioning would not be warranted either by S. 303, Cr. P. C., or by the Rule referred to above. If he disagrees with the verdict under S. 304, I. P. C. being of opinion that it should be under S. 302, I. P. C. his proper course would be to make a reference to this court under S. 307, Cr. P. C. and for that purpose it would be open to him to question the jury in order to find out their reasons for the verdict that they brought in. If while trying to get a special verdict as regard the particular part of S. 304, I. P. C. under which the Jury desired to find the prisoner guilty a Judge comes to be of opinion that the Jury have not properly understood the law as to the offence of culpable homicide not amounting to murder he would be justified in explaining that law to them again and indeed it would be his duty to do so. But such summing up will have to be confined to that offence only and the questions to be put to the Jury should be carefully framed to elicit from them their special verdict only. General questions, the effect of which may be to enable the Jury to travel outside S. 304, I. P. C., should be avoided.

Duty of Court.

We are of opinion that in the present case the questioning after the record of the verdict under S. 304, I. P. C. was not proper, and that the second verdict under S. 302, I. P. C. therefore, was not one on which a conviction could be based. We have also reasons to suspect that the Jury had not applied their mind in understanding the law to be applied, and for that reason too their verdicts are not such as can be relied on.

Amongst the cases which the learned Deputy Legal Remembrancer has referred to in support of the procedure adopted by the learned Judge the one that has a resemblance to the present case is the case of *King-Emperor* v. *Nga Tin Gyi*, (1). In that case in a High Court Sessions trial for murder the Jury at first brought in a verdict of "culpable homicide not amounting to murder," the Judge then put questions to the Jury to ascertain what degree of that offence they intended and their answer revealed the fact that they had not understood the law on the subject, the Judge then explained the law to them over again and ultimately they brought in a verdict of guilty of murder. On a Reference under the Letters Patent it was held that the verdict of murder was proper and could be accepted. One main point of difference between that case and the present case is that in that case it was held that the questions that were put were such as could properly be asked.

In our judgment the verdict of the Jury on which the prisoner's conviction is founded cannot be acted upon. We accordingly, without expressing any opinion on the merits of the case, set aside the verdict and order that the prisoner be tried again

Appeal allowed.

(1) 4 Rang. 488 : A. I. R. 1927 Rang 68 ; 99 I. C. 1013 (F. B.).

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A. L. R. 1934 Cal. 52.

Appellate Civil.
Nos. 1152 to 1167 of 1932. (Decided on 28-4-33.)

Guha and Bartley, JJ.

SANATKUMAR MUKHERJI ... *Appellant*

versus

NARAYANCHANDRA GHOSH ... *Respondent.*

Bengal Tenancy Act, (VIII of 1885) Ss. 3 & 50 (2)—statutory presumption of tenancy at a fixed rent on proof of payment of rent at a uniform rate for 20 years before suit arises even in cases of tenancy in estates permanently settled after 1793.

There is nothing in S. 50 of the Bengal Tenancy Act to show that the tenancy in question must be situate within an estate which was permanently settled at the time of the Permanent Settlement of 1793. The fact of the estate within which the tenancies in question are situate, having been permanently settled in 1805 does not make any difference and the statutory presumption under S. 50 (2) on proof of payment of rent for 20 years at a uniform rate before the institution of suit arises in favour of the tenants. 4 C. W. N. 513 *followed.* [P. 54, C. 1.]

Appeals against the decrees of Special Judge of 24 Parganas.

Appellants:—by Amarendranath Basu and Rupendrakumar Mitra.

Respondents:—by Nasim Ali and Forhad Ali.

JUDGMENT.

These appeals are by the defendant landlord in suits instituted by the plaintiffs tenants under the provisions of section 106 of the Bengal Tenancy Act, for correction of entries regarding the status of the tenants as finally published. These tenants had been recorded as *râiyats* with occupancy rights, and the case made before the settlement officer in their plaints, filed under Section 106 of the Bengal Tenancy Act, was that they were *râiyats* at fixed rates. The claim so made in the suits by the plaintiffs tenants was resisted by the defendant landlord, and the question in controversy was whether the plaintiffs tenants were *râiyats* at fixed rates or *râiyats* with occupancy rights. It may be stated, at the very outset, that, for the purpose of these appeals, regard being had to the judgments of the courts below, it may be taken to be established that the *jamâ-wasilbâkis*, filed by the defendant landlord, in the suits on which he based his case that the tenants had merely rights of occupancy and that they were not *râiyats* at fixed rates, related to the *mouzâ* in which the tenancies forming the subject-matter of the suits under Section 106 of the Bengal Tenancy Act were situate, although it is apparent that the decision arrived at by the courts below in this behalf is, to say the least, inconclusive in its nature. The courts below found, on the materials placed before them by the tenants and by the landlord, that the defendant landlord had not succeeded in rebutting the presumption arising in favour of the plaintiffs' tenants, under Section 50 (2) of the Bengal Tenancy Act. It was held that the tenancies in question were all *râiyatis* held at fixed rates. The Assistant Settlement Officer, who dealt with the cases in the first instance, came to the definite conclusion that the plaintiffs had succeeded in establishing their cases. Their status as recorded in the finally published Record-of-rights seemed to be incorrect and that they should be recorded as *râiyats* at fixed rates. The plaintiffs' suits were, accordingly, decreed. The learned Special Judge, on appeal, has affirmed the decision arrived at by the Assistant Settlement Officer. He has come to the definite conclusion that the presumption, arising out of the 20 years' payment of the same rent, was entirely unrebutted and, in that view of the case, held that the plaintiffs' tenants, in the suits under Section 106 of the Bengal Tenancy Act had made out their case before the court, and, agreeing with the decision arrived at by the Assistant Settlement Officer, dismissed the appeals by the landlord defendant in the suits.

In this appeal by the landlord, the first point raised relates to this that the court of appeal below ought to have held that the term "Permanent Settlement" mentioned in S. 50 of the Bengal Tenancy Act, meant the "Permanent Settlement of 1793". So far as the question is concerned, it is not very clear to us that the Special Judge, in the court of appeal below, has held anything to the contrary. The learned Judge has referred to the definition of "Permanent Settlement" contained in the Bengal Tenancy Act, and has not said anything in his judgment, which can lead to the supposition that the Permanent Settlement, mentioned in S. 50 of the Bengal Tenancy Act, was taken by him to be anything but the Permanent Settlement of the year 1793. In our judgment, there is no substance in the first contention urged in support of these appeals.

In the next place, it has been urged before us that the court of appeal below, having found that the tenancies in question came into existence after 1210 B. S. (1805) and that none of them were in existence at the time of the Permanent Settlement of 1793, ought to have held that the presumption of fixity of rent under Section 50 of the Bengal Tenancy Act, by reason of the payment of the same rent for the 20 years, had in law been rebutted. The clear implication of the contention thus raised in support of the appeals, is that S. 50 applied only to tenancies forming part of an estate permanently settled by the Permanent Settlement of the year 1793. As observed by Maclean, C. J., in the case of

Tamasha Bibi v. *Ashutosh Dhur* (1), there is no reason for restricting the operation of the section; there are no words in the section which would justify such a restriction. Nor is there any reason for incorporating such words. As has further been observed by Banerjee, J., in the case referred to above, there is nothing in S. 50 to show that the tenancy in question must be situate with an estate which was permanently settled at the time of the Permanent Settlement as defined in Section 3 of the Bengal Tenancy Act, that is, the Permanent Settlement of 1793. The fact of the estate within which the tenancies in question are situate having been permanently settled in 1805 and not in the year 1793, does not make any difference; and in our judgment, the tenants respondents, in these appeals, were entitled to the benefit of the presumption under S. 50 (2) of the Bengal Tenancy Act. The statutory presumption, as mentioned there, arose in their favour on proof of payment of rent at a uniform rate for 20 years before the institution of the suits, and the presumption was of the same nature and character, as if the rent in respect of the tenancies had not been changed from the time of the Permanent Settlement of the year 1793. This presumption has not been rebutted, as found by the court of appeal below. It may be mentioned that we find nothing in the decision of this Court in the case of *Osman Mondal* v. *Radhika Mohon Roy* (2), on which reliance was placed on behalf of the appellants, which expressly militates against the view expressed by Maclean, C. J. and Banerjee, J., in the case of *Tamasha Bibi* v. *Ashutosh Dhur* (1), referred to above, with which we are in entire agreement. It is to be further noticed that, from the judgments of the courts below, it appears to be clear that the defendant landlord, appellant in the appeals before us, failed to bring any materials before the court which could disprove the fact that the tenants respondents held the tenancies in question at a uniform rate from the time when they came into existence. In the above view of the case, the conclusion arrived at by the courts below, holding that the tenancies in question were tenancies held at fixed rates by the tenants plaintiffs in the suits under S. 106 of the Bengal Tenancy Act, must be affirmed. The appeals, accordingly, fail, and are dismissed with costs, one set of hearing fee being allowed in all these appeals. We assess the hearing fee at three gold mohurs.

S. 50 of the B. T. Act.

Appeal dismissed.

(1) 4 C. W. N. 513.
(2) 50 Cal. 135: 27 C. W. N. 647: 67 I. C. 294.

A. L. R. 1934 Cal. 54.

Revisional Criminal.
No. 446 of 1933. (Decided on 3-7-33.)

C. C. Ghose, A. C. J. and Malik, J.

JAFAR ALI and others ... *Petitioners*

versus

Messrs. JAMES FINLAY & CO., LTD. ... *Respondents.*

Merchant Shipping Act (XXI of 1923) S. 63—dismissal of application under S. 63 of the Merchant Shipping Act—whether competent under S. 203, Cr. P. C.—Criminal P. C. Act (V of 1898), S. 203.

The Code of Criminal Procedure does not apply to an application filed under S. 63 of the Indian Merchant Shipping Act and consequently the Chief Presidency Magistrate cannot dismiss the same under S. 203 of Cr. P. C.

Criminal Revision against the Order of the Chief Presidency Magistrate of Calcutta.

Petitioners:—by Khitish Chandra Chakravarty and Panchanan Ghosal.

Respondent:—by Suresh Chandra Talukdar.

JUDGMENT.

We are of opinion that the Order of the Magistrate must be set aside. The complaint was not under any provisions of the Penal Code or of the Code of Criminal Procedure. The complaint, such as it was, assuming that the word "complaint," can rightfully be applied to the application made by the Petitioners before the Magistrate, was under the provisions of the Merchant Shipping Act of 1923. It had to be enqurïed into in accordance with the provisions of the Act and it cannot be dismissed in the way in which it has been done under the provisions of the S. 203, Cr. P. C., that section is not attracted at all to the application or the disposal thereof. In that view of the matter, the case will go back in order that the Magistrate may enquire into the matter himself under the provisions of the Merchant Shipping Act and pass such orders as he may be advised

Case remanded.

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† † A. L. R. 1934 Cal. 55. (F.B.)

Appellate Civil.
No. 47 of 1932. (Decided on 13-3-33.)

Rankin, C.J., Pearson and Mukerji, JJ.

JEEBANKRISHNA CHAKRABARTI ... *Appellant*

versus

ABDUL KADER CHAUDHURY ... *Respondent.*

Bengal Tenancy Act (VIII of 1885), S. 49 (b)—Amending Act (IV of 1928), S. 48 (c) Cl. (d)—distinction between the Old Act and the Amending Act as regards notice to quit—a notice to quit according to the old law when the old law was in force is good even though at the time of ejectment the new law has come into force.

Where before the end of the year 1927-1928, namely, 12th April 1928, the defendant was duly served with a notice to quit, so that he became liable under S. 49 of the Bengal Tenancy Act to be ejected on 13th April 1929, that is on the expiry of the agricultural year, 1928-29.

Held, that S. 49 of the Bengal Tenancy Act, governed the case and that the Amending Act (IV of 1928) which came into operation on the 21st of Feb. 1929, *i.e.*, about two months before the date, on which the plaintiff became entitled to evict the defendant under the previous law, did not govern the case. Under the Amending Act (IV of 1928) S. 49 of the Old Act was repealed and was replaced by a new S. 48, C., S. 49 of the Old Act did not prescribe that the notice should be a notice for any given period. As long as it was a notice to quit, and whether it specified any period or not, the landlord would be entitled at the end of the following agricultural year to eject the tenant; but in no circumstances could the tenant be ejected before that time. A complete failure to specify the period within which the under-*raiyat* was required to quit did not make the notice bad. What the landlord has to do, under the new Act is to give one year's notice expiring at the end of the agricultural year. It is more than probable that many notices were given in the course of 1928, which could not be held to be good notice under the new law. But the Amending Act did not affect the rights of the parties in the present case, and consequently the notice to quit that was given according to the old law, when the old law was in force was good. [P. 55, C. 2: P. 56, C. 1, 2.]

Second Appeal from order of Additional District Judge of Chittagong.

Appellant: by Radhabinode Pal and Narendrakumar Das.

Respondent: by Gopendranath Das.

JUDGMENT.

Rankin, C. J.—In this case the learned Judges of a Division Bench hearing the appeal have differed in opinion upon a question of law, which has been stated and referred to us under clause 36 of the Letters Patent.

The suit was a suit for ejectment and for certain other reliefs, with which we are not now concerned. It was found by the trial court that the plaintiff was a *râiyat* and that, though he had purported to grant a permanent interest to the defendant by a registered *pàttà*, this instrument was, at the date of its execution, invalid by reason that it offended against the provision of S. 85 of the Bengal Tenancy Act, so that for purposes of ejectment the position of the defendant was that he was an under-*râiyat* without any written lease; and that, accordingly, under S. 49, he was liable to be ejected at the end of the agricultural year, provided that, in the previous agricultural year, the plaintiff had served upon him a notice to quit.

Facts.

The facts alleged by the plaintiff and found by the trial court to have been proved are: that, before the end of the agricultural year 1927-28, namely, on the 12th of April, 1928, the defendant was duly served with a notice to quit, so that he became liable under S. 49 to be ejected on the 13th of April, 1929, that it to say, on the expiry of the agricultural year, 1928-29.

Amending Act IV of 1928.

The foregoing references to the Bengal Tenancy Act refer to that Act, as it stood before it was amended by Bengal Act IV of 1928, which came into operation on the 21st of February, 1929, about two months before the date, on which the plaintiff became entitled to evict the defendant under the previous law. By the Amending Act, S. 49, together with certain other provisions governing the ejectment of under-*râiyats*, was repealed and was replaced by a new Section *viz.*, Section. 48 C. In lieu of the provisions that an under—*râiyat* shall not be liable to be ejected by his landlord when holding otherwise than under a written lease except at the end of the agricultural year next following the year, in which notice to quit is served upon him by his landlord, the provision under the amending Act is that an under-*râiyat* shall, subject to the provisions of this Act, be liable to ejectment on the ground that the tenancy has been terminated by his landlord by one year's notice expiring at the end of the agricultural year, when he holds the land otherwise than under a written lease, provided that an under-*râiyat* shall not be liable to be ejected on this ground, if he has been admitted in a document by the landlord to have a permanent and heritable right to his land or been in possession of his land for a continuous period of 12 years or has a homestead thereon. Moreover, under the new Act, he cannot be ejected, even if he does not come within the terms of this proviso, unless the landlord satisfies the court that he requires the land for his own homestead or for cultivation by himself or by members of his family, or by hired servants, or with the aid of partners. The amending Act does not contain any provision giving to it retrospective effect.

In the trial court, the case was treated as arising under the old law and on the assumption that the new Act did not affect it. The lower Appellate Court held that the case must be governed by the provisions of the new Act and remanded it to the trial court to be dealt with thereunder. In this Court Mr. Justice Mitter has taken the view that the new Act does not apply to the case. Mr. Justice M. C. Ghose, is of opinion, that the new Act does apply to the case. This is the question for our decision.

Now it will be noticed that clause (*d*) of the new Section 48 C is expressed somewhat differently from clause (*b*) of the old Section 49. Section 49 did not prescribe that the notice should be a notice for any given period; as long as it was a notice to quit, and whether it specified any period or not, the landlord would be entitled at the end of the following agricultural year to eject the tenant, but, in no circumstances could the tenant be ejected before that time. A complete failure to specify the period, within which the under-*râiyat* was required to quit, did not make the notice bad: *Mohendra Nath Sarkar* v. *Biswanath Haldar* (1), *Naharullah Patwari* v. *Madan Gazi* (2), *Dwarka Nath Santra* v. *Rani Dassi* (3), *Harifullah Gani* v. *Binode Behary Mandal* (4), *Purna Chandra Das* v. *Ali Mahammad* (5) and *Chandi Charan Nath* v. *Samla Bibi* (6). It seems to me that the new Act cannot safely be interpreted in the same way. What the landlord has now to give is one year's notice expiring at the end of the agricultural year. It is more than probable that many notices were given in the course of 1928, which would not be held to be good notice under the new law. The clause having been redrafted, I do not think that, in the absence of an express provision, we can hold that, after February, 1929, no under-*râiyat* is to be ejected on the ground of notice to quit, unless he has had the notice, which the new Act requires. If the new provision as to notice had been exactly the same as the old, it may well be that a different view could be taken, it may well be also that the case of a written lease for a definite term expiring after the commencement of the new Act, that is the case contemplated by the old Section 49, Clause (*a*) and new Section 48 C, Clause (*c*) will require to be decided upon other lines. On this point, I desire to say that, when that question comes up for decision, I am not, as at present advised, prepared to say that the reasoning of Mr. Justice Mitter in the present case will conclude the matter. I am of opinion, however, that, in the case before us, whatever be the form of the notice which was actually given by the plaintiff to the defendant, the amending Act does not affect the rights of the parties and I would, therefore, agree with Mr. Justice Mitter in his conclusion and in the order which he proposes to make. I propose that the costs of the hearing before us be made in the appeal. Hearing fee three gold mohurs.

Difference between old and new Law.

Case governed by old Law

Pearson, J.—I agree.

Mukerji, J.—I agree.

Appeal allowed.

(1) 29 Cal. 231; 6 C. W. N. 183.
(2) 1 C. W. N. 133.
(3) 28 Cal. 308.
(4) 17 C. W. N. 932: 19 I. C. 557.
(5) 37 C. L. J. 548: 70 I. C. 999.
(6) 22 C. W. N. 179: 28 C. L. J. 91: 44 I. C. 254.

A. I. R. 1934 Cal. 57.

Appellate Civil.

Nos. 1883 to 1889 of 1931. (Decided on 24-8-33.)

Guha and Bartley, JJ.

HABIBULLA GAZI ... *Appellant*

versus

ANNADA CHARAN KAJARI and others ... *Respondents.*

Decree—execution—suit for rent against *mutwalli* as registered tenant—description as *mutwalli* omitted in plaint—whether decrees passed against defendant and sale in execution a nullity—Bengal Tenancy Act.

Where a decree was obtained in a rent suit against a mutwalli, as the registered tenant of a permanent tenure and sale held in execution,

Held, that the *mutwalli* fully represented the tenancy so far as the landlords were concerned and the omission to describe him as *mutwalli* did not render the decree passed against him or the sale in execution thereof a nullity. [P. 57, C. 2.]

Second appeals against the decrees of the Subordinate Judge of Khulna.

Appellant:—by Nasim Ali and Radhikaranjan Guha.

Respondents:—by Brojolal Chakravarti, Panchanan Ghosal and Mukunda Behari Mullick.

JUDGMENT.

The plaintiffs in the suits out of which these appeals have arisen, prayed for khas possession of the lands in suits, on declaration of their title to the same. Halves of the lands cover the subject-matter of the suit in which Second Appeals Nos. 1884, 1885 and 1887 have arisen, while the other halves were covered by suits giving rise to second appeals Nos. 1883, 1886 and 1888. The claims made by the plaintiffs in the suits were resisted by the contesting defendants, whose case was that the plaintiffs were not entitled to get khas possession of the lands in suit. According to the defendants the decrees in execution of which the lands in suit were purchased by the plaintiffs were not rent decrees, and the sales held in execution of those decrees were not rent sales, and did not pass the tenures to which the lands in suit appertained. The defendants further contended that they had protected interests in the lands in suit, and their interests were not affected by the sale of the tenures.

Facts.

The Court of first instance dismissed the suits giving rise to Second Appeals Nos. 1884, 1885 and 1889 on the ground that regard being had to the proceedings in execution of rent decrees obtained against Mafizuddin in which there was an amendment of the decree sought to be executed, the amendment having been *ultra vires*, it rendered the sale in execution of the decree a nullity. There was, therefore, no sale under the law, in which the plaintiffs could be said to have purchased the lands in suit. The decision come to by the trial Court was reversed on appeal, and the learned Subordinate Judge in the Court of Appeal below held on the materials before him, that the amendment made at the instance of Mofijuddi against whom the decree for rent was obtained, had not the effect of making the sale in execution of the decree a nullity. On the merits of the case, the Court of Appeal below, came to the conclusion on evidence before it, that the defendants had not established that they had protected interests in the lands in suit, and passed decrees for khas possession against the contesting defendants.

Rent decree against mutwalli not described as such.

The position which is clear from the judgments of the Courts below is that rent decrees were passed against Mofijuddi, the registered tenant in respect of a permanent tenure; and this Mofijuddi who was the Mutwalli of a Wakf estate created by his father, fully represented the tenancy in question, so far as the landlords were concerned. Mofijuddi was sued as the tenant responsible for payment of rent due in respect of the tenancy which according to the case of the contesting defendants appertained to the Wakf estates of which Mofijuddi was the Mutwalli. If the tenancy was represented by Mofijuddi, as it was the case, upon the findings arrived at by the Court of Appeal below, the tenancy passed at the sale held in execution of the decrees for rent payable by Mofijuddi in respect of the same. The fact that Mofijuddi was not described as the Mutwalli, was of no consequence seeing that the tenancy was completely represented by Mofijuddi. The position created by Mofijuddi's own acts, he having been anxious to have the decree for rent executed against him as the Mutwalli, could not change the nature of the rent decree passed against him representing the tenancy. In the above view of the cases, the suits in which Second Appeals Nos. 1884, 1885 and 1887, and the other suits giving rise to Second Appeals Nos. 1883, 1886 and 1888 stand on the same footing. The decrees for rent obtained by the landlords against Mofijuddi, without the addition of the description Mutwalli, were effective rent decrees, and the sales held in pursuance of those decrees were sales in execution of rent decrees as contemplated by the Bengal Tenancy Act. The sales held, passed the interest of the contesting defendants, unless it was in the nature of protected interest which could not be avoided by purchasers in the position of the plaintiffs in the different suits in which these appeals have arisen. So far as the nature of the interest of the contesting defendants was concerned the Court of Appeal below has on a review of the materials on the record came to the conclusion on facts that the contesting defendants in the suit had failed to establish their case before the Court that they had any interest which could be called protected interest under the law, in any portion of the lands in suit, excepting so much of the C. S. plot No. 1707 as is covered by P. S. plot No. 104. The above exception relates to the lands in suit in which Second Appeals Nos. 1885 and 1886 have arisen.

The conclusion based on findings of fact arrived at by the Court of Appeal below, could not be challenged; but it was argued in support of Second Appeals Nos. 1884, 1885 and 1887, that the lower appellate Court having reversed the decision of the trial Court on a preliminary point, should have sent the case back to the Court of first instance for decision on the merits. In view of the connection of the different suits before the Court with each other, and regard being also had to the position that the evidence on the record was complete in regard to all the cases, no useful purpose could have been served by directing a remand; and we are convinced that the procedure adopted by the Court of appeal below was the correct procedure, regard being had to the facts and circumstances of the cases before us. The conclusions arrived at by the Court of appeal below on the evidence before it, appear to us to be unimpeachable in second appeal.

A point was raised in support of Second Appeals Nos. 1884, 1885 and 1887, that there was no justification for the Court below in the matter of reception of additional evidence at the appellate stage. It appears that records in execution proceedings were before the Court, and parts of those records were admitted in evidence and marked as exhibits by the lower appellate Court. All this was done with a view to ascertaining the real position so far as the so-called amendment of the decree for rent passed against Mofijuddi in which he was not described as the Mutwalli. In view of the decision arrived at by us on the question of the representation of the tenancy in question by Mofijuddi as indicated above, we do not attach any importance to the state of things showing clearly that it was at Mofijuddi's instance that the amendment of the description was made by the Court executing the decree for rent. In our judgment, the reception of additional evidence of the nature mentioned above, did not vitiate the decision of the lower Court in any way, and we are not also of opinion that the additional evidence referred to by the Court below could affect the right decision of the question of representation of the tenancy in question. The result of the conclusions arrived at by us, on the question raised in support of the appeals is that the appeals fail, and are dismissed with costs to the plaintiff-respondents. The hearing-fee is assessed at one gold mohur in each of the six appeals.

S. A. 1889. This appeal has arisen out of a suit for rent, in which the question in controversy between the parties concerned, was, whether the relation of landlord and tenant existed as between the plaintiffs and the defendants in the suit.

The question so raised was dependent on the decision of the question of title to the lands in respect of which rent was claimed as raised in the suits out of which Second Appeals 1883 to 1888 of 1931, arose. In view of our decision in those appeals, and regard being had to the concurrent findings of fact arrived at by the Courts below against the plaintiffs-appellants to this Court, this appeal must be dismissed; and we direct accordingly.

There is no order as to costs in this appeal.

Appeals dismissed.

A. I. R. 1934 Cal. 59.

Original Civil.

No. 1932 of 1930. (Decided on 9-3-33).

Ameer Ali, J.

NAGARMULL CHAUDHURI ... *Plaintiff*

versus

JHABARMULL SUREKA ... *Defendant.*

(i) Tort—malicious prosecution—civil suit—perjury—proceedings under S. 476, Cr. P. C. instituted in the civil suit at the instance of the defendant is tantamount to prosecution of the plaintiff—subsequent proceedings in Police Court—arrest of plaintiff—prosecution of plaintiff—Criminal P.C. (V of 1898), S. 476.

Though proceedings under S. 476, Cr. P. C. are taken in the civil suit, they are criminal proceedings and constitute a prosecution for the purpose of founding an action for malicious prosecution. 11 Q. B. D. 674; 17 C. W. N. 554-557; 19 C. W. N. 935; 49 Cal. 1035; 56 Cal. 432, *referred to.* [P. 60, C. 2.]

Where the magistrate in pursuance of the complaint under S. 475, Cr. P. C. issued the warrant and the warrant was executed, there is no doubt that the proceedings in the Police Court constituted a prosecution such as to found an action for malicious prosecution. [P. 61, C. 1.]

(ii) Tort—malicious prosecution—proceedings under S. 476, Cr. P. C and subsequent proceedings in the Police Court—prosecution by a private individual or not.

So far as proceedings for malicious prosecution are concerned, in a proper case such proceedings can be regarded as a prosecution by the individual notwithstanding that the Judge has granted sanction and notwithstanding that the Judge has signed the complainnt, where sanction has been obtained maliciously and without reasonable and proper cause, and by false evidence, the prosecution which ensues must be regarded as a prosecution by the individual. 142 E. R. 199 *referred to.* [P. 61, C. 2.]

(iii) Tort — malicious prosecution — order under S 476 Cr. P.C at the instance of defendant against plaintiff, subsequently set aside in appeal—plaintiff discharged—whether proceedings have terminated in favour of plaintiff.

Where the plaintiff in pursuance of the order of the first Court under S. 476, Cr. P. C. was arrested and kept in custody for 24 hours, and subsequently released on bail, and where the order passed by original side under S. 476, Cr. P. C. was set aside in appeal and the plaintiff was discharged as there was no complaint on which the Magistrate could proceed,

Held, that the proceedings must be deemed to have terminated in favour of the plaintiff and the situation was simply analogous to that arising where the complaint fails by reason of some technical defect, or where the Magistrate himself refuses to proceed with the prosecution. [P. 62, C. 1.]

Plaintiff:—by Khaitan.

Defendant:—by N. N. Bose.

JUDGMENT.

In this case there must be a decree for the plaintiff, and I assess the damages at Rs. 3,000.

Paragraph (1) of the plaint reads as follows:—

"The defendant, on January 3rd, 1930, maliciously and without reasonable or probable cause, preferred a charge of perjury against the plaintiff before this Honourable Court and made the application—copy whereof is filed herewith and obtained a Rule, copy whereof is filed herewith, and, on the 18th March, 1930, obtained the order, copy of which is filed herewith, and caused the plaintiff to be sent for trial on the charge referred to in the said order of the 18th March, 1930, abovementioned. in the Court of the Chief Presidency Magistrate, Calcutta, and to be arrested and imprisoned, and caused wide publicity to be given to the same in order to cause loss and damage to the plaintiff. The plaintiff was kept in custody until the plaintiff was released on bail and furnishing security to the extent of Rs. 500 on the 7th April, 1930."

Paragraph (2) refers to the appeal from the order of 18th March, 1930. Paragraph (3) mentions the discharge of the plaintiff as the result of the decision of this Court on appeal.

The short facts are as follows:—

The plaintiff gave certain evidence on the 2nd December, 1929, in an examination under S. 36 of the Presidency-towns Insolvency Act, the insolvency being that of one Khemkarandas Khemka. The plaintiff had previously, as the *gomasta* of Kanhayalal Sureka, the grand-father of the present defendant, verified the plaint in a suit in the High Court upon certain *hundis*. The evidence in the proceedings in insolvency was connected, in a manner which need not be discussed, with the facts mentioned in the plaint. The defendant applied before this Court, on the Original Side, on the 3rd January, 1930, setting out some of the answers given by the plaintiff in the examination under

S. 36 of the Insolvency Act and setting out paragraph 5 of the plaint, to which I have referred, and prayed for a rule under S. 476 of the Cr. P. C., calling upon the plaintiff to show cause why a complaint should not issue against him for perjury. A rule was issued and the plaintiff filed an affidavit in opposition, in which, among other things, he set out various incidents from which the hostility of the present defendant to the plaintiff might be gathered and contended, that no *prima facie*, or any case of perjury could be founded upon the materials placed before the Court.

The Court, on the 18th March, 1930, made an order, the formal part of which was, according to the form now in use, to the following effect:

"That the Court being of the opinion that it is expedient in the interests of justice that an enquiry should be made upon the offences, *etc.*, which appear to have been committed by the said Nagarmull Chaudhuri, *etc.*, this Court doth hereby record a finding to that effect and doth hereby order that a complaint in respect thereof be made in writing signed by the Hon'ble Mr. Justice Lort-Williams."

I imagine that a complaint was drawn up and signed by the Judge and forwarded to the Police Court. In some cases, I believe, that the original order is used as a complaint. In my view, it makes no difference.

The police Magistrate, on receipt of the order or a complaint in pursuance of the order, took action and issued a warrant for the arrest of the plaintiff. This appears from the written statement. How a warrant came to be issued in this case does not appear, but it is in evidence that the defendant accompanied the police officers and, in fact, identified the plaintiff and gave him in charge.

In this connection, I enquired whether Mr. Khaitan, who appears for the plaintiff, desired to take the alternative line of "false imprisonment" and pointed out that, although the fact was stated, such a cause of action should be separately pleaded. Moreover, the concise statement describes the suit as one for "wrongful and malicious prosecution." In the result, Mr. Khaitan, although he desired not specifically to abandon any cause of action which might appear in this plaint, proceeded before me on the basis of malicious prosecution.

The issues which normally arise in a case of malicious prosecution are as follows:

1. Was the plaintiff prosecuted?

2. Was the plaintiff prosecuted by the defendant?

3. Did the proceedings come to a conclusion and to a conclusion in favour of the plaintiff?

4. Had the defendant reasonable and probable cause?

5. Was the defendant actuated by malice?

If any of these elements are absent, the suit fails.

Mr. N. N. Bose, who appeared for the defendant, raised one issue only and that by way of demurrer, namely, "Does the plaint disclose a cause of action?" He did not desire to contest the case on the other issues.

It soon became apparent that Mr. Bose, under the one issue raised by him, really desired to argue the first three issues above indicated, *i.e.*,—

1. that the plaintiff was not prosecuted;

2. that the defendant was not the prosecutor;

3. that the proceedings did not terminate in an acquittal.

I allowed this course.

(1) WAS THE PLAINTIFF PROSECUTED?

On the first point, Mr. Khaitan contended that there was a prosecution in two places, first in the High Court and secondly in the police Court.

Proceeding under S. 476, Cr.P.C. in a civil suit amount to prosecution.

With regard to the High Court, it is clear that there were proceedings under S. 476 of the Cr. P. C. It is true that these proceedings were in a Civil Court. Mr. Khaitan contended that notwithstanding this, they are criminal proceedings, and, though not a prosecution within the strict language of the Cr. P. C., they can yet constitute a prosecution for the purpose of founding an action "for malicious prosecution." He has referred me to the following cases which I give in order of date: The old English case

Quartz Hill Gold Mining Company v. *Eyre* (1), *C H. Crowdy* v. *L. O. Reilly* (2), *Bishun Persad Narain Singh* v. *Phulman Singh* (3), *Narendra Nath De* v. *Jyotish Chandra Pal* (4), *Rabindra Nath Das* v. *Jogendra Nath Deb* (5).

I notice that in *Nagendra Nath Ray* v. *Basanta Das Bairagya* (6), Mr. Justice Mukerji, without differing from the earlier decisions, was not prepared, without further consideration, to endorse the view therein expressed, namely, that proceedings of the nature in question can found an action. I propose to follow them and to hold that the proceedings before Mr. Justice Lort-Williams in this Court constitute a "prosecution" in the sense indicated.

As to the proceedings in the police Court, Mr. Bose was inclined to contend that, until further steps were taken, they could not be considered to be a prosecution, but in point of fact his argument on this point became lost in his argument on the next issue, *i. e.*, that the defendant was not the prosecutor.

Proceedings in police Court in pursuance of complaint under S 476, Cr. P. C.

Mr. Khaitan cited *Bishun Persad Narain Singh* v. *Phulman Singh* (3), *Musa Yakub Mody* v. *Manilal Ajitrai* (7). In my view, after the Magistrate issued the warrant was executed, there is no doubt that the proceedings in the police Court constituted a prosecution such as to found an action for malicious prosecution (see Clerk & Lindsell on Torts, 582, 583, *etc.*) I must not be taken to hold that these proceedings might not equally be considered a prosecution before the issue or execution of the warrant. It is not in this case necessary to decide.

(2) WAS THE DEFENDANT THE PROSECUTOR?

As regards the High Court proceedings, there is no question. As regards the police Court proceedings, the matter is more difficult. In this connection, Mr. Khaitan has cited the rulings of the Judicial Committee in *Gaya Prasad* v. *Bhagat Singh* (8) and in *Balbhaddar Singh* v. *Badri Sah* (9) also in *Gagineni Venkatappayya* v. *Yerramneni Ramakrishnamma* (10). Mr. Bose relies upon *De Rozario* v. *Gulab Chand Anundjee* (11) and *Golap Jan* v. *Bholanath Khettry* (12), both on the first issue that there was no prosecution and also read with the S. 476 for the argument that at any rate, since the change in procedure which took place in 1923, the proceedings after the Civil Court has sanctioned the prosecution cannot be regarded as a prosecution by a private individual.

Prosecution by individual or not.

In my opinion, so far as proceedings for malicious prosecution are concerned, in a proper case such proceedings can be regarded as a prosecution by the individual, notwithstanding that the Judge has granted sanction and notwithstanding that the Judge has signed the complaint. I hold that, in case where sanction has been obtained by the defendant maliciously and without reasonable and proper cause and by false evidence, the prosecution which ensues is to be regarded as a prosecution by the individual.

In this connection I consider portions of the judgment in *Fitzjohn* v. *Mackinder* (13) to be very much in point.

There *A*, a party to a suit in a Civil Court, gave evidence, suggesting that his opponent *B* had committed perjury. The Judge believed *A* and ordered *A* to enter into a recognisance to prosecute *B* for perjury (this being the practice obtaining under the relevant statute). *B* was tried and acquitted. *B* brought an action for malicious prosecution against *A*. *A*'s defence was based upon the contention that the prosecution was not the prosecution of the party but that of the Judge. On this point, there was some difference of opinion, but all agreed that, if the original order for

(1) (1883) 11 Q. B. D. 674.
(2) 17 C. W. N. 554, 557: 17 C. L. J 105: 18 I. C. 737.
(3) 19 C. W. N. 935: 20 C. L. J. 518: 27 I. C. 449.
(4) 49 Cal. 1035: 27 C. W. N. 385: 67 I. C. 705.
(5) 56 Cal. 432: 114 I. C. 796.
(6) 57 Cal. 25, 35: 125 I. C. 667.
(7) 29 Bom. 368: 7 Bom. L. R. 20.
(8) 35 I. A. 189: 30 All. 525: 12 C. W. N. 1017.
(9) 1 Luck. 215: 43 C. L. J. 521: 51 M. L. J. 42: 95 I. C. 329 (P. C.).
(10) A. L. R. 1932 Mad. 135: 62 M. L J. 107: 135 I. C. 619.
(11) 37 Cal. 358: 6 I. C. 877.
(12) 38 Cal. 880.
(13) (1861) 9 C. B. (N. S.) 505: 142 E. R. 199.

prosecution is obtained by the false evidence or fraud of the party, with the intention that a prosecution should follow, then the prosecution is to be regarded as that of the party. I find, therefore, that the prosecution not only in the High Court, but in the police Court, was by the defendant.

(3). DID THE PROCEEDINGS COME TO A CONCLUSION IN THE PLAINTIFF'S FAVOUR?

Appellate Court setting aside order, S. 476, Cr. P. C.—proceedings terminate in plaintiff's favour.

The plaintiff was arrested and kept in custody for 24 hours and then released on bail. After his release, the Court, on appeal, set aside the order of the Court on the Original Side. Therefore, there was no complaint upon which the Magistrate could proceed, and the plaintiff was discharged. It was contended that this is not a termination of the proceedings in favour of the plaintiff such as is required by law. I am not of that view. In my opinion, the situation is analogous to that arising where the complaint fails by reason of some technical defect, or where the Magistrate himself refuses to proceed with the prosecution.

These findings dispose of the issue raised on behalf of the defendant in its widest possible form.

The plaintiff has given evidence, which roughly corresponds with the statements contained in the original affidavit before this Court. I accept it. I find that the defendant in this case acted both maliciously and without justification or reasonable and probable cause.

I have already mentioned the damages which I am prepared to allow. The suit will be decreed for that sum with costs.

Suit decreed.

A. I. R. 1934 Cal. 62.

Appellate Civil.

No. 252 of 1932. (Decided on 28-2-33.)

Mitter and M. C. Ghose, JJ.

LALIT MOHAN ROY and others ... *Appellants*

versus

SARAT CHANDRA SAHA ... *Respondent*

(i) Civil P. C. (V of 1908), O. 21, r. 22 notice under—defendant failing to appear —attachment under O. 21, r. 54—subsequent objection as to the executability of the decree on the ground of limitation, not permissible—*res judicata*.

Where a notice was issued to the judgment-debtor under O. 21, r. 22 to show cause why execution should not issue and the notice was served on him, and on his failing to appear an order directing attachment under O. 21, r. 54 was passed.

Held, that as the order was passed directing attachment after service of notice on the judgment-debtor and as he could have appealed against the said order under S. 47, it was final and it was not open to him at a subsequent stage when a notice was issued to him under O. 21, r. 66 for the settlement of proclamation, to object to the execution of the decree on the ground that it is barred by limitation. 8 Cal. 51 (P. C.): 48 I. A. 45 *followed*; 28 Cal. 122: 40 M. 1016 *distinguished*. [P. 63, C. 2.; P. 56, C. 2.]

(ii) *Res judicata*—execution proceedings—party given an opportunity to raise objection, not availing himself of it—barred.

Parties should not be allowed to agitate the same question after it was once decided and this principle also applies where the parties having notice had opportunity to object to the decision but did not avail themselves of it. [P. 65, C. 1.]

Appeal against the order of the District Judge, Mymensingh.

Appellant:—by Paresh Lal Shome.

Respondent:—by Prafulla Kamal Das.

JUDGMENT.

Mitter, J.—The question raised by this appeal relates to the finality or otherwise of certain objections made in the course of execution. It is necessary to state the facts of the case in order to appreciate the contention raised by the appellants. It appears that a suit for dissolution of partnership was pending in the Court of the Subordinate Judge (second Court) of Mymensingh and a receiver was appointed in that suit. The receiver obtained a decree against the present respondent Sarat Chandra Saha in January, 1921, for debts due to their firm in respect of which the dissolution proceedings have been started. The receiver made several attempts to have the decree satisfied by execution. His last application for execution was filed on the 7th July, 1926 and was dismissed on the 3rd September, the same year. On the 2nd April, 1929, this decree which is sought to be executed was allotted to the present respondent. The respondent filed an application for execution on the 21st

Facts.

May, 1930, alleging payment of certain interest in Sravan 1336 and certain other subsequent payments in Pous 1336 and later. That application for execution was registered subject to the case of limitation. The notice under O. 21, r. 22 of the C. P. C., was ultimately served on the 10th August, 1930, and there is an order in the order sheet of that date showing that the notice was served and that the service was proved. The present appellant did not appear on that date and the Court directed an attachment under O. 21, r. 54 of the Code. On the 3rd of December, 1930, a further notice was issued under O. 21, r. 66 of the Code for settlement of price to be mentioned in the sale proclamation, and this notice was served on the 12th December, 1930. On the 12th December, 1930, the present appellant appeared and he obtained an adjournment to enable him to put in his objection. On the 20th idem the present appellant filed an objection. He denied in the objection payments alleged by the decree-holder and he pleaded limitation. The Subordinate Judge who dealt with the matter in the first instance upheld this objection of the judgment-debtor and dismissed the execution case on the ground that it was barred by limitation.

Against this order an appeal was taken to the Court of the District Judge of Mymensingh and the learned District Judge was of opinion that the execution was in effect time-barred when the present application for execution was filed. But he was of opinion that having regard to the order of the Court, dated the 22nd August, 1930, directing the issue of attachment under O. 21, r. 54 of the Code, it was not open to the present appellant to raise the contention at a subsequent stage of the execution proceedings that the application was not barred by the statute of limitation. In this view he set aside the order of the Subordinate Judge and directed that further proceedings in execution should be allowed.

Against this order, the judgment-debtors have preferred this appeal and it has been contended and very strenuously, on behalf of the appellants that there has been no decision on the question of limitation by the order of the 22nd August, 1930 and that the principle analogous to the principle of *res judicata* which has been applied by the learned District Judge should not have been applied to the present case. In our opinion, this contention has really no substance in it. It has been decided by their Lordships of the Judicial Committee so far back as in the very well known case of *Mungal Persad Dichit* v. *Girija Kant Lahiri* (1) that where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation, as in the present case, does not do so and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage in the said execution proceedings. It has been sought to distinguish the facts of the present case from those of *Mangal Pershad Dichit's* case (1) on the ground that the question of limitation was not determined in the present case as it was not raised, the present appellant not appearing after the service of notice. It is difficult to distinguish the facts of *Mangal Pershad's* case (1) from the facts of the present case for, there, as here, there was a service of notice on the judgment-debtor as to why attachment should not issue and the order for attachment was made by the Subordinate Judge on the 8th October, 1874. As I have pointed out, notice was served on him to show cause why the decree should not be executed against him. With reference to this order their Lordships of the Judicial Committee observed this:—

> "The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made."

Here also, as in *Mangal Pershad's case* (1), the present appellant did not appear in pursuance of the notice to show cause why execution processes and processes for attachment should not issue and in his absence the order was made for issue of attachment and execution processes on the 3rd December, 1930, when notice under O. 21, r. 66 of the Code was served. The present appellants came in and took time to file an objection and the objection was actually filed on the 20th December, 1930. It is not, in our opinion, open to them

(1) 8 I. A. 123 : 8 Cal. 51.

now to raise it when they did not raise it when the notice to show cause was issued on them. Their Lordships of the Judicial Committee have also considered in a subsequent case, namely, in the case of *Raja of Ramnad* v. *Velusami Tevar* (2) questions similar to the one with which we are dealing in the present case; and it is instructive to quote from their Lordships' decision a portion of the remarks made by their Lordships in the said case as it is pertinent to the present controversy. Their Lordships said this:—

"In these final proceedings he permitted the defendants to raise again the plea that the above order of December, 1915, did not preclude the defendants from raising the plea that the defendants were barred by limitation. Their Lordships are of opinion that it was not open to the learned Judge to admit the plea. The order of December 13th, 1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation, if pleaded, would according to the respondent's case have been a complete answer, and therefore it must be taken that a decision was given against the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon. No appeal was brought from the order then made, and therefore it was not competent for the Subordinate Judge to admit the plea on subsequent proceedings or to consider it in his order of March 31st, 1917, and the same remark applies to the judgment of the High Court on March 7th, 1918, from which this appeal is brought."

Applying these remarks to the facts of the present case, it is absolutely clear that it was open to the present appellants to prefer an appeal against the order made on the 22nd August, 1930, directing attachment to issue. That order could only be sustained by holding that the Court decided by the plainest implication that the decree was still subsisting and that it was not barred by the statute of limitation. That order could not be sustained unless that was the view which was taken on the previous occasion; and against such order there is no doubt that an appeal would lie as between the parties in the suit, under S. 47 of the Code and no appeal having been taken at any stage prior to the execution, the order passed must be taken as final between the parties in the matter.

It remains to notice a few cases on which reliance has been placed on behalf of the appellants. The first of these cases is the case of *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhery* (3). An examination of that case will show that although notice was issued to the judgment-debtors before the decree was actually transferred to another Court in consequence of change of jurisdiction, it does not appear that before the order for attachment was issued by the second Court that notice was served again on the judgment-debtors. The second Court had, by the transfer of jurisdiction, been given the power to execute the decree. But the notice was given by the first Court. Besides there is another point of difference and that is this: that the application for execution was ultimately dismissed by reason of default and the judgment-debtors after the attachment order had been made by the second Court, came in and objected to the execution on the ground that it was barred by limitation. After several adjournments principally at the instance of the decree-holder, when the case came on for hearing, neither parties had appeared and the Court refused the application for execution and disallowed the objection of the judgment-debtors. The facts, therefore, are distinctly dissimilar to the facts of the present case. Another case which has been relied on is the case of *Subramania Ayyar* v. *Raj Rajeswara Dorai* alias *Muthuramalinga Sethupathi* (4). An examination of that case will show that the notice which was issued before the order of attachment was not a notice to show cause why execution should not issue but was notice to show cause why his heirs should not be brought on the record as the legal representatives of the deceased judgment-debtor for the purpose of execution and the legal representatives had no notice that any particular property of theirs was going to be attached. On the other hand, there are observations of Mr. Justice Seshagiri Ayyar which would support the view which we are taking. The learned Judge says this:

"At the same time as pointed out by the Judicial Committee parties should not be allowed to agitate the same question after it has been once decided; and this dictum of their Lordships has been extended to cases where the parties had an opportunity to object to the decision, but did not avail themselves of that opportunity. One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision."

These conditions were fulfilled in the present case and according to the view of the learned Judge just referred to the objection of the appellants is not tenable.

The result is that the appeal fails and must be dismissed with costs. The hearing-fee is assessed at one gold mohur.

M. C. Ghose, J.—I agree.

Appeal dismissed.

(2) 48 I. A. 45 : 25 C. W. N. 581 : 40 M. L. J. 197 : 59 I. C. 880.

(3) 28 Cal. 122 : 5 C. W. N. 80.

(4) 40 Mad. 1016 : 38 I. C. 627.

A. I. R. 1934 Cal. 65.

Appellate Civil.

No. 201 of 1932. (Decided on 28-4-33.)

Mitter and M. C. Ghose, JJ.

JATINDRA KUMAR DAS ... *Appellant*

versus

MOHENDRA CHANDRA BANIKYA and others ... *Respondents.*

Limitation Act (IX of 1908), Art. 185, Cl. (5) —execution application—proper Court—meaning of—decree transferred to another Court for execution—execution application made to the Court which passed the decree subsequent to the transfer of the decree and before the decree was returned under S. 41, C. P. C., is not made to proper Court—Civil P. C (V of 1908), Ss. 39, 41, O. 21, r. 16.

Where an application for execution was made to the Court which passed the decree, after the decree was transferred to another Court for execution, but it was kept on file and subsequently registered, after the decree was returned with certificate of non-satisfaction under S. 41, C. P. C., to the Court which passed the decree.

Held, that such an application was not an application for execution in accordance with law made to the proper Court, within the meaning of Art. 185, Cl. (5) of the Indian Limitation Act and consequently will not save limitation. The mere fact that the Court which passed the decree retains jurisdiction for certain limited purposes such as dealing with applications for assignment of decree under O. 21, r 16 and applications against the legal representatives of the judgment-debtor under O. 21, r. 22, does not show that the transferring Court has jurisdiction to entertain application for execution of decrees after transfer. 39 M. 640 *followed*; 35 C. W. N. 77 *distinguished*. [P. 65, C. 2. & P. 66, C. 2.]

Proper Court in Art. 185, Cl. (5) means the Court whose duty it is to execute the decree. [P. 66, C. 2.]

Appeal against the order of the District Judge of Mymensingh.

Appellant:—by Ramesh Chandra Sen for Rajendra Chandra Guha.

Respondents:—by Tarapada Mukerji for Radha Benode Pal.

JUDGMENT.

Mitter, J.—This is an appeal by the decree-holder from the order of the District Judge of Mymensingh, dated the 22nd February, 1932, reversing the order of the Munsiff of Tangail, dated the 2nd October, 1931.

The question of law which falls for determination in this appeal is whether the application of the decree-holder, now appellant, is barred by the statute of limitation. The learned District Judge has answered the question in the affirmative. The Munsif has taken the contrary view. The question in this appeal is which view is right.

The relevant facts are not in dispute and may be briefly stated. It appears that the appellant obtained a decree against the respondent in the Munsiff's Court at Dacca on the 2nd August, 1926.

Facts.

That decree was transferred to the Munsiff's Court at Tangail for execution. Execution proceedings were started and on the 29th August, 1927, they were eventually dismissed by the Tangail Court. On the 25th January, 1929 the appellant filed another application for execution in the Court of the Munsiff at Dacca. The application remained pending in that Court for sometime. On the 2nd March, 1929, the decree together with the certificate for non-satisfaction was returned by the Tangail Court to the Dacca Court. The appellant's application for execution, dated the 25th January, 1929, was registered and an order for issue of notice was passed. Notice was, however, not issued and the execution proceedings were dismissed.

The execution proceedings which have led to the present appeal were started on the 1st June, 1931.

The learned District Judge has held that as the appellant's application, dated the 25th January, 1929 was not made to the proper Court as the Dacca Court had no jurisdiction on that

Art. 182 (5), Limitation Act.

date to entertain the application, the application could not be regarded as an application made in accordance with law within the meaning of Art. 182 (5) of the Indian Limitation Act, and he relies on a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Maharaja of Bobilli* v. *Narasaraju* (1) in support of his view.

The fact on which the present case has been sought to be distinguished from the facts of the case before the Judicial Committee referred to is that on the date when the Dacca Court dealt with the application made on the 25th January, it had acquired jurisdiction as the decree together with the certificate of non-satisfaction had been returned to the Dacca Court by that date. It is said that it is true the application was made at an earliar date when the Court had no jurisdiction to entertain it but as it remained on the file of the Dacca Court and no orders were passed on it, there is no reason why it should not be regarded as an application which was presented to the proper Court on the date when it was registered. If it is so regarded, the present application for execution made on the 1st June, 1931, was within three years from the date of the final order on the application registered after 2nd March, 1929 and would be in time. It becomes necessary to examine with care the facts of *Bobilli case* (1). There the decree was passed by the District Judge in 1904 and the first application for execution of December, 1907, was not made to the proper Court which was the Court of Munsiff of Parbatipur to whom the decree had been transferred and it was held that that could not save limitation the decree being of 1904, and the second application for execution was made on the 27th April, 1910, to the Court of the District Judge (which passed the decree) which had already transferred the decree for execution to another Court before the return to the said Court of the copy of the decree and the certificate of non-satisfaction according to the provisions of S. 41 of the C. P. C. It was in August, 1910, that the copy of the decree and the certificate of non-satisfaction was sent to the District Judge and it was held in such circumstances that the application of the 27th April, 1910, was not made to the proper Court. Proper Court means the Court whose duty it is to execute the decree. See Exp. II, Art. 182. It would thus appear that in *Maharaja of Bobilli's case* (1) the application of December, 1907 which was made before the District Judge was held not to have been presented to the proper Court as the decree had been transferred to the Munsiff's Court at Parbatipur and as the decree and certificate of non-satisfaction were not sent to the Court of the District Judge till August, 1910, and on the further ground that the Court of the District Judge of Vizagapatam was not the Court which could execute the decree by sale of immoveable property outside its jurisdiction. It would seem that the application of 27th April, 1910, was held not to be made to the proper Court on the same ground.

In the present case, it is true that the application of 25th January, 1929, was presented to a Court which had no jurisdiction and it remained pending on the file of the Court of District Judge till it acquired jurisdiction. But that was the case also in *Maharaja Bobilli's case* (1) and it was held that the application of 27th April, 1910 was not made to a proper Court, although the application remained pending in the file of the District Judge till it acquired jurisdiction by the return of the decree and the certificate of non-satisfaction. from the transferee Court and yet the District Judge held that the application was not made to proper Court and the Judicial Committee agreed in this view. See *Maharaja of Bobilli's case* (1) where their Lordships say :—"Further their Lordships agree with the District Judge that the application of April 27th, 1910, was not made to the proper Court." The learned District Judge in the present case has pointed out that there was no subsequent application for execution when the Court at Dacca acquired jurisdiction to execute the decree after the 2nd March, 1929, and it was the Munsif's Court which *suo motu* proceeded to deal with the application, which was not made to a proper Court and which was ultimately dismissed. It is difficult to distinguish the case in any material respect from the decision in *Maharaja of*

(1) 43 I. A 238 : 39 Mad. 640 : 24 C. L. J. 478 : 21 C. W. N. 162 : 36 I. C. 682.

(2) 58 Cal. 832 : 52 C. L. J. 569 : 35 C. W. N. 77 : 132 I. C. 149.

Bobilli's case (1) and we are compelled to come to the conclusion that the decree is barred by limitation, as the application of the 25th January, 1929 was not made to the proper Court.

The Munsif has relied on a decision of this Court in the case of *Sreenath Chakravarti* v. *Priya Nath Bandopadhya* (2) to which I was a party as supporting the view that the transferring Court retains jurisdiction for certain purposes. It does only for limited purposes, *e.g.*, dealing with applications for recording assignment of decree under O. 21, r. 16 of the C. P. C. and application against the legal representatives of the judgment-debtor. See O. 21, r. 22. But this is not the case here.

For the reasons given above this appeal must be dismissed but there will be no order as to costs.

M. C. Ghose, J.—I agree.

Appeal dismissed.

A. I. R. 1934 Cal. 67.

Appellate Civil.

No. 104 of 1931. (Decided on 27-3-33.)

Mitter, J.

GOPAL CHANDRA PODDAR ... *Appellant*

versus

LAKSHMI KANTA SAHA ... *Respondent.*

Contract Act (IX of 1872), S. 23—compounding of a non compoundable offence—reference to arbitration—award void.

Where it was an implied term, among other terms of the settlement to refer to arbitration that the complaint under S. 408, I. P. C. (a non-compoundable offence) would not be further proceeded with, the consideration for the reference to arbitration is unlawful within the meaning of S. 23 of the Contract Act and the award is consequently invalid. 57 I. A. 117, *followed*.

The effect of such an agreement is to take the administration of the law out of the hands of the Judges and to put it in the hands of private individuals and as such it is opposed to public policy. [P. 68, C. 1. : P. 69, C. 1.]

Appeal against the order of the Subordinate Judge of Zillah Tipperah.

Appellant:—by Gopal Chandra Das and Probhas Chandra Chatterjee.

Respondent:—by Surendra N. Das Gupta.

JUDGMENT.

This is an appeal on behalf of the Plaintiff and arises out of a suit brought by him to enforce an award on an arbitration without the intervention of the Court. The Subordinate Judge has dismissed the suit mainly on the ground that the agreement for reference to arbitration on which the award is founded is opposed to public policy and is illegal under the provisions of S. 23 of the Indian Contract Act. It appears that a criminal proceeding was pending against the defendant Lakshmi Kanta Saha under S. 408 of the Indian Penal Code. A settlement was reached in the course of that proceeding on the 20th December, 1928. A petition was made on behalf of the accused in which the terms of the settlement were set forth. That petition discloses that under orders of the Court the house of the Defendant was searched and an iron safe, with documents, unused stamps and pledged articles of gold and silver within it and also documents, pledged articles, etc., found outside the safe were brought to the Court. It was stated in that petition that Gopal Chandra Poddar who is the plaintiff and who was the complainant in that case had brought a case against the Defendant, claiming the said articles and papers as his own. It is further stated in that petition that depending on the sense of justice and award of Gopal Chandra Poddar and his youngest brother Rai Mohan Poddar so far as regards his claims and ownership in respect of the iron safe and all the documents and pledged articles found within the safe were concerned, possession was given up in respect of those articles which had been recovered on search in favour of the complainant. It is further stated that Lakshmi Kanta Saha would be bound to abide by whatever decision Gopal Chandra Poddar and his youngest brother Rai Mohan Poddar would come to in respect of his claims of ownership in these articles and in respect of a cloth business owned by the complainant now defendant and managed by him as his *gomastha*. The award of these two persons, it was further stated, would be completed within 90 days and if it was not completed within the said 90 days on account of the laches of the complainant and his brother, then the accused would not be bound by any term of

Facts.

settlement. A further reference was made to a mortgage suit to which it is not necessary to refer, having regard to the fact that the plaintiff has already got the mortgage decree in respect of his claim. On this petition being filed on the same day the criminal proceedings which were started under S. 408, the said proceedings were dropped. It is to be noticed that an offence under S. 408 of the Indian Penal Code is a non-compoundable offence. The award was duly made by the two arbitrators and it is to be found at page 19 of Part II of the paper-book. Upon that the plaintiff filed the award in Court on the 28th August, 1929 and wanted to have a decree on the said award. Defendant No. 1 field a written statement on the 19th November, 1929. Amongst the numerous defences to the suit it is necessary to notice the defence which was founded on the illegality of the agreement for reference to arbitration and the issues based on the other defences have all been found in favour of the plaintiff. The Subordinate Judge, on this issue with regard to the illegality of agreement for reference to arbitration, came to the conclusion that it was opposed to public policy and it was illegal under S. 23 of the Indian Contract Act and therefore the award as the outcome of an illegal reference was also invalid and found that the award cannot be acted upon. He accordingly dismissed the suit.

S 23, Contract Act.

Against this decision the plaintiff has brought this appeal and it is contended on his behalf that the Subordinate Judge has committed an error of law in treating the agreement to refer to arbitration as void under the Indian Contract Act. It is contended that as there was a civil liability independent of the liability for an offence under S. 408 of the I. P. C., the agreement cannot be said to be one which is contrary to public policy. It is difficult to accept this contention in view of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Kamini Kumar Basu* v. *Birendra Nath Basu* (1). In that case, as in the present, the real question involved was as to whether any part of consideration for the reference to arbitration was illegal. It appears clear from the facts which had already been stated that it was an implied term among other terms of the settlement to refer to arbitratiou that the complaint under S. 408 of the I. P. C. would not be further proceeded with. As a matter of fact, the order-sheet of the same case leaves no room for doubt that the proceeding was dropped in consideration of the fact that the accused who is the present defendant agreed to refer the question of ownership of the several articles to arbitration. That being so, the facts fall within the purview of the decision of the case which has been referred to. It is necessary to quote a few lines from the judgment of their Lordships of the Judicial Committee which was delivered by Sir Binod Mitter. Sir Binod Mitter observed thus: "If it was an implied term of reference under the *ekrarnama* that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the *ekrarnama*, as the case may be, is unlawful and the award or the *ekrarnama* was invalid, quite irrespective of the fact whether any prosecution in law had been started." In support of this view Sir Binod Mitter referred to the decision of *Jones* v. *Merionethshire Permanent Benefit Building Society* (2). In that case the secretary of a building society, who had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the society, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some deeds of collateral security to the society. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution and that was known to the directors of the society; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes in the Queen's Bench Division, and the plaintiffs brought an action in the Chancery Division to set

(1) 57 I. A. 117: 57 Cal. 1302: 34 C. W. N. 89: 59 M. L. J. 82: 123 I. C. 187.

(2) (1892) 1 Ch. 173.

aside the promissory notes and the collateral securities on the ground that they were made for illegal consideration. It was held by the Court of Appeal in this state of facts that it was an implied term of the agreement that there should be no prosecution; that the agreement was, therefore, founded on an illegal consideration, and void, and that the society could not recover on the promissory notes or enforce the securities; and the society not opposing, they were ordered to be delivered up to the plaintiffs. This decision shows that the Court could not support the agreement which was intended to avoid prosecution. As I have already stated, the policy underlying this is that an agreement to stifle prosecution is distinguishable from the lawful compounding of compoundable offences. As the offence is not compoundable under the law, the compounding of it must be held to be illegal and opposed to public policy. The effect, in my view, of the agreement in the present case was to take the administration of law out of the hands of the Judges and to put it into the hands of private individuals to determine what is to be done in a particular case and as such it is opposed to public policy. Reliance has been placed by the learned Advocate for the appellant on a decision of my learned brother Mr. Justice Guha and my learned brother Mr. Justice M. C. Ghose who was, also a party to that decision. That was the case of *Deb Kumar Roy Choudhury* v. *Anath Bandhu Sen* (3). It is sufficient to say for the purposes of the conclusion to which I have reached that the case is distinguishable from the present one, as it has been pointed out at p. 28 of the said report that in that case there was a pre-existing civil liability based upon an adjudication of accounts between the parties concerned. That fact is wanting in the present case. Therefore this decision cannot govern the present case. For this reason I am of opinion the Subordinate Judge has reached a correct conclusion.

This appeal must, therefore, be dismissed.

As has been pointed out by the Judicial Committee in the decision referred to above the defence in the case cannot be commended but we are compelled to give effect to it on the ground of public policy. In these circumstances we do not think it right to allow any costs to the present respondent.

M. C. Ghose, J.—I agree that this appeal should be dismissed. The defendant was a servant of the plaintiff. The plaintiff's case was that the defendant as his servant dishonestly misappropriated the funds of the plaintiff which came to his hands. The plaintiff instituted a suit against the defendant in the Court of the Subordinate Judge at Comilla. At the same time he made a complaint before the Magistrate of Comilla under S. 408 of the I. P. C. and the defendant was brought before the Magistrate in Court to answer the charge of embezzlement. His house was searched and an iron safe and various properties were seized and they were brought into the Magistrate's Court. It is on those circumstances that the defendant agreed with the plaintiff to refer the dispute between the parties to an arbitration. I am clearly of opinion having regard to the decisions in the cases of *Kamini Kumar Basu* v. *Birendra Nath Basu* (1) and *Jones* v. *Merionethshire Permanent Benefit Building Society* (2) that in this case the plaintiff cannot succeed as it was clearly an agreement to stifle the criminal proceeding and the defendant was not a free agent but entered into a contract under threat of a criminal conviction.

Appeal dismissed.

(3) 35 C. W. N. 26 (28): A. I. R. 1931 Cal. 421: 131 I. C. 133.

A. I. R. 1934 Cal. 69.

Appellate Civil.
No. 634 of 1930. (Decided on 24-3-33.)

Mallik and Jack, JJ.

PARAB BIBI ... *Appellant*

versus

BEERENDRANATH SARKAR ... *Respondent.*

Landlord and tenant — patni tenure — whether zamindar can interpose an intermediate tenure between himself and Patnidar?

A Zamindar who has carved out a tenure is competent to interpose between himself and his tenants an intermediate holder, who may realise the rent payable to himself by the original tenant, provided he does not thereby prejudice the first tenant. By the mere transfer of the rent by the Zamindar by an ijara, the position of the patnidar is in no way prejudiced. 14 C. W. N. 389 *not followed*; 50 Cal. 146; 34 C. L. J. 79 *referred to.* [P. 70, C. 2.]

Second appeal from the decree of Subordinate Judge of Jessore.

Appellant :—by Brajalal Chakrabarti Shastri and Ramdas Mukherji.

Respondent :—by Shreeshchandra Datta and Parimal Mukherji.

JUDGMENT.

Mallik, J.—This appeal arises out of a suit for recovery of arrears of rent for the years 1330 to 1333 B. S. The defence *inter alia* was a denial of relationship of landlord and tenant. This defence was negatived by both the Courts below and the Courts below gave a decree to the plaintiff. Some of the defendants are appellants before us.

On behalf of the appellants, it was contended that, as the defendants are *patnidras* under the *zemindar* defendant No. 20 and as the plaintiff based his claim on an *ijara* obtained by him from that *zemindar* defendant No. 20 and as the *zemindari* interest of defendant No. 20 was sold away before the period for which the rents were claimed, the plaintiff was not entitled to realize any rent from the defendants. There are two points which are involved in this argument advanced on behalf of the appellants. The first one is whether the *zemindari* interest of defendant No. 20 had been sold away before the period in suit, and the second one is whether the defendant No. 20, the *zemindar*, could create a tenure intermediate between his *zemindari* interest and the *patni* interest of the defendants.

As regards the first point noted above, an attempt was made on behalf of the respondent to show that the *zemindari* interest of defendant No. 20 had not, in reality, been sold away. But the lower appellate Court distinctly found that the *zemindari* interest of defendant No. 20 had been sold away on 21st November, 1923. In second appeal we cannot go behind this finding, which is a finding of fact.

In support of his contention that defendant No. 20 could not create a tenure intermediate between his *zemindari* interest and the *patni* interest of the defendants. Mr. Shastri relied mainly on two decisions of this Court: *Jarao Kumari* v. *Hanifuddin Akand* (1) and *Rajendra Narain Chowdhury* v. *Abu Nasor Ahiya* (2). The learned Judges in the case of *Jarao Kumari* (1), no doubt, made an observation to the effect that they were inclined to take the view that a *zamindar* could not create such an intermediate tenure. But this observation, as has been noted in a later decision of this Court, was only an *obiter*. Besides, it is significant that the attention of the learned Judges was not drawn to an earlier decision of this Court in the case of *Raj Kumar Mazumdar* v. *Probad Chandra Ganguli* (3) in which a contrary view had been taken.

Then, as regards the decision in *Rajendra Narain Chowdhury'* (2), it would appear that that was a case in which a *patni* was created by the *zemindar* intermediate between his *zemindari* interest and another *patni* that had been created before and the learned Judges held that, in view of the peculiar incidents of a *patni taluk*, such a thing could not be done. On the other hand, there have been three decisions of this Court, where the view has been accepted that a *zemindar* can create a tenure intermediate between his *zemindari* interest and a *patni*. First of all, there is the case referred to above, namely, the case of *Raj Kumar Mazumdar* (3). Then, there is the case of *Nilambar Ghosh* (4) where it was held that a *zemindar* can create a tenure between a *zemindari* interest and a *patni*, which had already been created under it. Lastly, there is a decision in the case of *Johar Mull Bhutra* v. *Jatindra Nath Bose* (5) where it was held that a *zemindar*, who has carved out a tenure is competent to interpose between himself and his tenant, an intermediate holder, who may realize the rent payable to himself by his original tenant, provided that he does not thereby prejudice the position of the first tenant. The creation of the *ijara* by the defendant No. 20 in the present case in favour of the plaintiff cannot, in my opinion, be said to have prejudiced, in any way, the position of the defendants *patnidars*. The defendants *patnidars* were liable to pay their rent to the *zemindar* and, if the *zemindar* transferred his right to realize rent from the *patnidars* to the plaintiff by the document that was created in favour of the latter, the position of the defendants *patnidars* was not prejudiced in any way.

(1) 14 C. W. N. 389 : 4 I. C. 471.
(2) 50 Cal. 146 : 27 C. W. N. 189 : 71 I. C. 327.
(3) 9 C. W. N. 656.
(4) 34 C. L. J. 77.
(5) 49 Cal. 495 : 34 C. L. J. 79 : 67 I. C. 108.

Holding, therefore, that a *zemindar*, who has carved out a tenure, is competent to interpose between himself and his tenants an intermediate holder, I am of opinion that the defendants *patnidars* could not, in the present case, escape from their liability to pay rent to the plaintiff.

In the result, I would dismiss the appeal with costs to the plaintiff-respondent only.

Jack, J.—I agree.

Appeal dismissed.

†† A. L. R. 1934 Cal. 71.

Appellate Civil.
No. 15 of 1932. (Decided on 24-4-33.)

Pearson, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL ... Appellant

versus

PARIJAT DEBEE ... Respondent.

(i) Succession Act (XXXIX of 1925), Ss. 104, 212, 214, 302—Administrator-General's Act III of 1913, S. 23—residuary estate—not a debt until residue ascertained—no necessity take out succession certificate for the heirs of the residuary legatee if he dies.

One *P* died leaving a will by which he appointed the Administrator of Bengal as the Executor. By this will he gave certain legacies and finally directed that one half of his estate will go to his 3 nephews and that the other half was to be divided between his daughters and his son in the proportion of 1 to 2. The Administrator-General applied for probate. Thereupon, the widow entered a caveat. Ultimately a compromise was entered into among the beneficiaries by which the division in the will was slightly modified Afterwards, one of the residuary legatees, the son died and the mother (widow) became his heiress She applied to the Court by summons for directing the Administrator-General to make over the share of the son to her as the heiress The Judge in chambers ordered as prayed for, directing the Administrator-General to reserve in his hands, a sum sufficient to cover the fees in the event of its being held that she ought to have taken a succession certificate as a condition precedent. The Secretary of State and the Administrator General of Bengal than appealed.

Held (i) that the widow as the heiress of her son can invoke S. 104 of the Indian Succession Act in her favour. The mere fact that the terms of the will were modified by agreement between the parties will not in any way affect the applicability of S. 104 as the administration of the Estates was not superseded under the agreement. As the heir of the deceased residuary legatee, the mother was entitled to apply under S. 104 of the Indian Succession Act as under S. 104 the Estate of the residuary legatee passes to his representatives.

(ii) that it is unnecessary for her to file a suit, as all the parties were before the Court and there were no intricate questions of fact to be decided and she can apply either under S. 302 of the Indian Succession Act or S. 28 of the Administrator-Generals' Act.

(iii) that it is unnecessary to obtain letters of administration, or succession certificate under S. 211 of the Indian Succession Act the heiress being a Hindu, as she sufficiently represents the Estate of the deceased. [P. 72, C. 2.]

(ii) Succession Act (XXIX of 1925), S. 214—Residuary Estate—not a debt-meaning of debt in S. 214, pointed out.

Until the claims against the estate have been established, the residue does not come into existence. Debt in S. 214 of the Indian Succession Act is to be construed as meaning a sum of money which is now payable or will become payable in future by reason of a present obligation. Consequently the legacy due to a residuary legatee after the administration of the estate is not a debt for which Succession Certificate is necessary, if the residuary legatee dies and his Estate passes to the heirs under S. 104 of the Indian Succession Act. 1897 A. C. 11 ; 1921 A. C. 1: *referred to.*

Letters Patent Appeal from the decision of Costello, J.

Appellant :—by S. S. Hodson, Government Solicitor.

Respondent :—by Dutt and Sen.

JUDGMENT.

This matter has been referred to me under Cl. 36 of the Letters Patent, upon a difference of opinion between the Acting Chief Justice and Mr. Justice Mitter, sitting in appeal, against an order of Mr. Justice Costello, upon an application made to this Court in its Testamentary and Intestate Jurisdiction.

The facts are not in dispute. Pasupati Mukherji died on the 9th May, 1919, leaving a will of the same date. By that will, he made bequests of substantial amount in legacies and annuities: he also provided for expenses of his daughters, marriage and for

Facts.

certain rights of residence for the ladies of his family. He appointed the Administrator-General of Bengal his executor. And he directed that, as regards the residue, one-half should go among the sons of his deceased elder brother, and the other half between his own son and daughter, Teerthapati and Pratima Debee, in the proportion of two-thirds and one-third.

The Administrator-General applied for probate Caveat was entered by the widow, Sreemati Parijat Debee, and protracted contentious proceedings went on until, after 11 days' hearing, in 1928, an arrangement was arrived at. This arrangement was embodied in a memorandum of agreement, dated the 3rd March, 1928. The caveat was withdrawn. The decree in the probate proceedings was made on the 8th June, 1928, by which probate of the last will and testament of the testator was granted to Administrator-General of Bengal, and the agreement was ordered to be recorded: and it was annexed to the decree.

By the terms of the agreement, the payment of the pecuniary legacies was confirmed; the main alteration was in the shares of residue. Instead of the shares given by the will, as stated above, these were now, under the agreement, to be as follows: Teerthapati-ten annas (in place of five annas eight pies under the will): Pratima Debee—two annas (instead of two annas four pies): and the three sons of the testator's predeceased elder brother—one anna four pies each (in place of two annas eight pies each).

On the 20th August, 1928, Teerthapati died. Admittedly Parijat was left as his heiress, being entitled to the estate of a Hindu mother.

In 1930, the summons in the present proceeding was taken out on behalf of Parijat in the Testamentary and Intestate Jurisdiction of this Court, asking for an order that directions should be given to the Administrator-General of Bengal, as executor, directing him to make over to Parijat Debee "the portion of the residuary estate of that testator in his hands to which (under the decree mentioned in the petition) the applicant's son Teerthapati Mukherji was entitled or that such further or other orders may be given to the Administrator-General of Bengal in relation to the administration and final distribution of the estate as to this Court may seem fit."

The application has all along proceeded on the footing that what is involved in the language used is the ten annas share of Teerthapathi.

Mr. Justice Costello ordered that the Administrator-General should make over to Parijat Debee Teerthapathi's share of the residuary estate, after retaining in his hands a sum sufficient to cover the fees in the event of it being held that she ought to have taken out a succession certificate as a condition precedent.

The Secretary of State for India in Council and the Administrator-General of Bengal have appealed.

In these circumstances, the points, upon which the Acting Chief Justice and Mr. Justice Mitter differed, are thus formulated—

(i) Whether, in the circumstances which have happened in this case, the applicant Sm. Parijat Debee can invoke S. 104 of the Indian Succession Act in her favour?

(ii) Whether it is incumbent upon Sm. Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji?

(*iii*) Whether any relief can be granted to her, on an application such as she made to the High Court on its Original Side or whether she must be relegated to a suit?

I shall deal with these points in the order mentioned.

S. 104 of the Succession Act.

(*i*) Section 104 of the Indian Succession Act, 1925 comes under Chapter VI of the Act, which deals with the construction of wills. It provides that if a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives. That is as much as to say, in the present case, that Teerthapati would take a vested interest in his residuary share under the will, and since he died without it, it passes to his mother Parijat Debee. Mr. Justice Mitter, however, is of opinion that S. 104 can have no application in the present case, and I think his reason may be put in this way, that

S. 104 could only apply if Parijat Debee was asking for the handing over of the residuary estate in terms of the will, whereas, in fact, her application is based on the family arrangement: Parijat's application has reference to the ten annas share of residue under the agreement, not to the five annas four pies share of residue under the will. Or, as he puts it in another part of the judgment, Parijat Debee has travelled from the realm of bequest into the realm of contract, and it is from the latter region that she makes her application to the Court. With the greatest respect, I am not able to agree with this point of view. It is true that Parijat Debee may be claiming in part under the agreement between the parties, so far as the quantum of the share is concerned. But what is it that gives her the right to claim at all? That right appears to me to have its roots in the will, in the testator's appointment of the Administrator-General as executor, and in the decree granting probate to the executor. The administration of the estate under the will is not superseded by the agreement; otherwise there would have been no reason for the grant of probate. The executor holds title to the property under the will and the probate, and so far as he is concerned he has to carry out his administration according to what the law lays down. The decree contains a declaration that the testator rightly and duly executed the will of 9th May, 1919, and "did will give and bequeath devise and dispose and do "all things as therein contained". It is the estate under that will which the executor is authorised to administer. So far as the agreement is concerned, it is to be observed that the Administrator-General is no party to it himself. No doubt, where all the parties have agreed he has consented to give effect to the agreement in his administration of Pashupati's estate. Disputes between the parties might have resulted in the executor being driven back on the strict terms of the will itself, and in the parties being driven to a civil suit for determination of their rights under the agreement; but for determination of a question of the destination of a share of residue under the will, I do not see why S. 104 should not be resorted to, though the amount of the share has been augmented under the agreement. I think the executor may and should refer to S. 104 for the due administration of the estate in his charge. Upon this point of difference, therefore, I would hold that, in the circumstances which have happened in this case, the applicant, *Sreemati* Parijat Debee, can invoke S. 104 of the Indian Succession Act in her favour.

Compromise—effect of.

(ii) The second point of difference is as to whether it is incumbent upon *Sm.* Parijat Debee, to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji.

Debt meaning of.

It is admitted that the necessity for letters of administration does not exist in the present case, having regard to S. 212 (2) of the Indian Succession Act, and to the fact that the parties are Hindus. The question then is whether, in the present application, what Parijat Debee is seeking to recover is a "debt" within the meaning of S. 214 of the Indian Succession Act: if it is, then it is said a succession certificate must first be taken out by Parijat Debee and produced to the Court.

Teerthapati's share was a share of residue and it does not seem to me to be of assistance to consider the position of an executor in regard to a specific bequest to which he has assented. A residuary share is on a different footing. In *Trethewy* v. *Helyar* (1), Sir George Jessel says,—

"It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle."

It is with reference to that passage that Younger L. J. says in *Rex* v. *Commissioners for Special Purposes of Income Tax. Ex parte Dr. Barnardo's Homes National Incorporated Association* (2), the principle is that

"Until the residue is ascertained, and until its existence as net residue has been acknowledged by the executor either by payment to the residuary legatee, or, if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that moment of time arrives, subject of course to any *interim* distribution, to have the estate administered in due course."

(1) (1876) 4 Ch. D. 53.
(2) (1920) 1 K.B. 468, 484.

In the same case before the House of Lords, in *Special Income Tax Commissioners* (3) the same principle was upheld, following the case of *Lord Sudeley* v. *Attorney General* (4). It is laid down that the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained: and Lord Atkinson says (at p. 11) the case of *Lord Sudeley* v. *Attorney General* (4) conclusively established that, until the claims against the testator's estate have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. The case of *Attenborough* v. *Solomon* (5), referred to in argument before me, does not appear to me to bear on the present case: that was a case where the circumstances were such that the true inference to be drawn from them was held to be that, in pledging certain chattels belonging to the residury estate, the executors were not acting as such, because the residuary estate had, at that time, become vested in the trustees as trustees. In the present case, the residuary never became so vested in the Administrator-General as trustee, either under the agreement or otherwise.

I have already said that, in my judgment the Administrator-General of Bengal was administering the estate under the will and his title to the property was under the will—that also seems to be a fact recognised by the agreement; he is not a party to the agreement and is not even brought into it in any capacity of trustee. Now, in regard to Teerthapati's share of the residuary estate in the present case, I find the Acting Chief Justice says "It was admitted on all hands at the hearing before us that the costs, debts and peculiary legacies have not been paid." Mr. Justice Mitter, on the other hand, says in one passage "it is not the case of either party that the residue of Teerthapati's estate has not been ascertained at the date of the application". Mr. Justice Mitter further refers to various statements that the share of Teerthapati *may* come up to twenty-five lakhs. He refers to a statement of the Administrator-General in a letter that the estate has not been completely administered, as the residuary estate had not been divided among the different residuary legatees: and he adds that that is a very different thing from saying that the residuary estate of Teerthapati had not been ascertained. Later on he again refers to the twenty-five lakhs "which may be allocated to the share of Teerthapati," and then he goes on to say that the amount of the residue was ascertained after his (Teerthapati's) death and that it was a debt in the hands of the Administrator-General. Now I find that, in his letter of the 30th May, 1930, the Administrator-General says that the estate of Pashupati Mukherji has not been completely administered. On the 21st June, he writes that all the costs have not yet been paid nor has the residue been allocated. And in paragraph 5 of his affidavit he refers to the fact that the share of Teerthapati in the residuary estate may, on allocation, come up to twenty-five lakhs. In this position of affairs and upon the authorities referred to above, it seems clear enough that the residuary estate has never yet been ascertained and that in that event there can be no question of any debt in respect of it. Nor do I see any reason for saying that "debt" in S. 214 of the Indian Succession Act is to be construed in any wider or other sense than the meaning given in *Webb* v. *Stenton* (6), as a sum of money which is now payable or will become payable in the future by reason of a present obligation. In these circumstances, it is unnecessary to discuss the further argument that, under the Indian Securities Act, 1920, and S. 370 of the Indian Succession Act, Teerthapati's share is a debt in so far as it consists of Government securities, from the point of view that these are debts by Government to the holder. Upon this point, therefore, I find myself in agreement with the Acting Chief Justice, and that it is not incumbent upon *Sm.* Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji.

(iii) The last point of difference is upon the question whether any relief can be granted to Parijat Debee on an application such as she has made to the High Court on its Original Side or whether she must be relegated to a suit. The Acting Chief Justice held that the procedure by application was unobjectionable by reason of the fact that all the parties were before the Court, and that there was no dispute on the facts. Mr. Justice Mitter holds that the procedure under S. 302 of the Indian Succession Act by application in the Testamentary Jurisdiction is not strictly available because the matter is no longer under the will but under the agreement. I have already given my reasons for not accepting this latter view. The Administrator-General still must rest primarily on the will and the grant of probate for his authority for administration of the estate. The administration is not yet complete, and I apprehend that, for these reasons and so long as the administration is alive, the procedure by application under S. 302 (or under S. 28 of the Administrator-General's Act) would be available to the Administrator-General if he required directions "in regard to the estate or in "regard to the administration thereof." And if, as I think, that procedure is open to him, I can see no reason why it is not available to any one of the parties to the administration, including Parijat Debee. I would, therefore, hold that relief can be granted her on such an application as she has made, and that she need not be relegated to a suit.

Remedy by summons open to the party.

The result on the whole appeal is that I am in agreement with the Acting Chief Justice upon all three points. The order must be made as proposed by him: the appeal will be dismissed. The Administrator-General will pay his own costs. The costs of the Secretary of State for India in Council will come out of the estate. Srimati Parijat Debee will pay her own costs.

Appeal dismissed.

(3) (1921) 2 A. C. 1.
(4) (1897) A. C. 11.
(5) (1913) A. C. 76.
(6) (1883) 11 Q. B. D. 518.

A.L.R. 1934 Cal. 75

Revisional Criminal.
No. 1060 of 1933. (Decided on 2-1-34).

Mukherji and Bartley, JJ.

BASANTA KUMAR DAS ... *Petitioner*

versus

THE CORPORATION OF CALCUTTA ... *Respondent.*

Calcutta Municipal Act, S, 363, Sch, XVII r. 65—Sanction to construct building, revocation of, for misrepresentation—jurisdiction of Municipal Magistrate to decide on legality of revocation order—notice to applicant of revocation proceedings necessary—exercise of discretion by Court—delay in confirming revocation after completion of structure, effect of.

It is competent to the Municipal Magistrate in proceedings under s. 363 of the Calcutta Municipal Act to decide whether an order of the Municipality revoking a sanction for constructing a building under R. 65 of Sch. XVII was properly made and for this purpose, to enquire whether there was such material misrepresentation on the part of the applicant as to justify the order.

The order of the Corporation under R. 65 is not final. [P. 76, Cs. 1 & 2.]

It is necessary that the party should be given notice of the revocation proceedings and be asked to show cause against revocation before the order revoking sanction is made. This is a principle of natural justice though not expressly provided by Rule 65. [P. 77, C. 1.]

In determining the legality of the revocation order, the Court should take into consideration the length of time that has elapsed since the completion of the structure which, on account of the revocation, must be deemed to be unauthorised.

Where the revocation order was not confirmed till after the lapse of two years from the date of completion of the structure, the Magistrate should not make an order for demolition. [P. 77, C. 1.]

Revision against the order of the Municipal Magistrate, Calcutta.

Petitioner:—by L. P. E. Pugh and Dinesh Chandra Roy.

Respondent:—by Narendra Kumar Basu and Satindra Nath Mukherji.

JUDGMENT.

The rule is directed against an order of demolition passed by the Municipal Magistrate of Calcutta under S. 363 of the Calcutta Municipal Act. The Magistrate has ordered that certain structures said to be unauthorised in premises No. 62 Baranoshi Ghosh Street be demolished by the Corporation at the expense of the owner.

Facts.

The facts shortly stated are the following: The petitioner was the owner of the western portion of the said premises. In February 1928 he asked for sanction to erect certain structures in his part of the premises submitting with his application a plan showing the entire premises. The District Building surveyor refused sanction upon certain grounds and on that the petitioner preferred an appeal which was heard and decreed by the District Building Craft.

mittee on the 14th June, 1926. Their order was that the appeal should be allowed and that formal sanction should issue on the petitioner opening out some proposed spaces as shown in the plans. The condition being fulfilled and a report to that effect being made by the Building Inspector on the 6th June, 1927, a formal sanction issued on the 8th of that month. On the 15th August, 1927 a motion was tabled for revocation of the sanction. On the 27th February, 1928 the District Building Committee revoked the sanction. This revocation was confirmed on the 6th August, 1930. Three days after the usual notice under S. 363 of the Act was given to the petitioner and thereafter on the 24th October 1930 the Corporation resolved to move the Magistrate for demolition of the structures. As the result of the proceedings thus started, the order complained of in this case has been passed by the Magistrate.

Calcutta Municipal Act, Sch XVII R. 65

One of the contentions urged in support of the rule relates to the validity of the revocation of the sanction. The revocation was in accordance with Rule 65 of Schedule XVII and purported to be on the ground that the permission was granted in consequence of a material misrepresentation or fraudulent statement contained in the petitioner's application for sanction. Under the rules it may be pointed out, "when such permission is cancelled any work done thereunder shall be deemed to have been done without permission." The misrepresentation as far as can be gathered was this that while in August, 1929 a partition of the entire premises was effected by arbitration held at the instance of all the owners, the plan submitted for sanction in February, 1926 did not show any sign of that partition. The Magistrate has stated in his explanation that the revocation proceedings show that this omission and perhaps some other facts also were considered as material misrepresentation and that if the true state of things were known the decision of the District Building Committee in the matter of granting of the sanction would have been otherwise.

The Magistrate has held that Rule 65 of Schedule XVII makes the Corporation the final authority to decide whether there was material misrepresentation or not and that he had no authority to go into that question. He therefore held that the structures erected under the sanction must be taken as erected without sanction. There was a complaint on behalf of the petitioner that no notice had been given to him of the revocation proceedings. On this point the Magistrate held that no notice was necessary as the rule did not speak of any and he found also that the petitioner was present during the consideration of the revocation matter. On these findings and also upon the finding that the structures infringed Rules 3, 23, 29 and 32 of Schedule XVII, a fact which does not seem to have been disputed, the learned Magistrate has made the order of demolition.

Revocation of sanction- Jurisdiction of Court.

The learned Magistrate in our judgment was in error in supposing that once he arrived at the findings aforesaid nothing else was necessary for him to consider in order to justify the order that he made. It is true that under Rule 65 of Schedule XVII the power of the Corporation to cancel permission on the ground of material misrepresentation by the applicant is absolute. But it is so only from the sense that no other authority can reverse the order of revocation or restore the permission so cancelled. In the Court which has to make the order of demolition there is a discretion which the word "may" used in S. 363 of the Act in reference to this matter plainly indicates. For a proper exercise of that discretion it is absolutely necessary for the Court to go into the question as to what the exact circumstances were under which the revocation was made or the extent to which the misrepresentation or fraudulent statement, if any, could have affected the granting of the permission. Unless a consideration of these matters were open to the Court its existence can hardly be justified and it would not be possible for it to shape its order in the light of those principles which have to be borne in mind by a Court issuing an injunction for demolition, the powers and duties of which are *pari passu* with those of the Municipal Magistrate in a matter of this description.

So far as notice is concerned the rule does not speak of any. But it can hardly

Notice of revocation.

be expected that the rules framed under the Acts should embody and have incorporated into themselves such an elementary and fundamental principle of natural justice which no individual or body corporate can be permitted to forget namely that when a party has acquired a valuable right in the shape of a permission to build that permission should be withdrawn behind his back on a charge that he has been guilty of fraud or misrepresentation and without an opportunity allowed to him to say what he may have to say in his defence. In the present case however this omission has not resulted in prejudice to the petitioner for the finding is that he was present at the deliberations relating to the revocation.

To determine whether the discretion which the law vests in the court should be exercised in favour of the Corporation in this case, one of the matters that must be taken into consideration is the length of time that has elapsed since the completion of the structures which on account of ths revocation must now be deemed to be unauthorised. On this point the evidence stands thus. An officer of the Corporation has said definitely that the erection was completed by March or April 1927. Mr. Basu, appearing on behalf of the Corporation, has asked up to regard this statement as a mistake because the petitioner in his petition to this court has stated that the constructions were made after the formal sanction was obtained that is to say after the 14th June, 1927. Speaking for events nearly five years old one is not unlikely to make mistakes, and the petitioner is not less likely to make such a mistake than the Corporation officers. But the constructions must have been completed in any event within a short time of the sanction that is to say sometime about the end of 1927. It is a wonder that though the sanction was revoked on the 27th February, 1928 the revocation was confirmed till the 6th August, 1930 that is to say that the matter was left hanging in the air for two years and a half, this matter not being considered of any sufficient importance for any decisive action being taken. In such circumstances it would, in our opinion, be quite wrong to make an order for demolition. The deviations from the rules such as they are in the present case were all condoned by the District Building Committee on the petitioner fulfilling certain requirements. Such misrepresentation if any, as these may have been had little bearing on the question of safety of the building or its sanitation though there may have been some inconvenience to the petitioner's co-owner or it may as well be that the rights of the latter have been infringed. With that however we are not concerned in the present case.

The rule is made absolute and the order complained of is set aside.

Rule made absolute.

A. L. R. 1934 Cal. 77

Appellate Civil.

No. 2103 of 1931 (Decided on 4-7-33).

Guha and Bartley, JJ.

NAJIBAL ISLAM MOLLA ... ... *Appellant*

versus

GOLAM ASFAR MOLLA ... *Respondent.*

Civil P. C. (V of 1908), S. 47—Bengal Tenancy Act (VIII of 1885), S. 148-A—rent decree against tenant co-sharer landlord joined as *pro-forma* defendant—purchase at court auction by decree-holder—subsequent suit for *khas* possession against co-sharer, the *pro-forma* defendant in prior suit—whether barred by 47 C. P. C.

In a suit for rent against a tenant, the planitiff impleaded his co-sharer landlord as *pro forma* defendant. The suit was decreed and the plaintiff become the purchaser at the court sale. The plaintiff brought a subsequent suit for *Khas* possession against his co-sharer landlord, the *pro-forma* defendant int he prior rent suit and others. On the plea that the suit was barred under the provisions of S. 47, Civil P. C.

Held, that S. 47 Civil P. C. did not operate as a bar as the liability to satisfy the rent decree was on the tenant and there was no question relating to the execution, discharge or satisfaction of the rent decree. 53 Cal. 781 (F. B.) held to be not applicable to this case, [P. 79, C. 1.]

Second Appeal from the order of the Additional District Judge, 24th Pergannahs.

Appellant:—by Brajalal Chakrabarti and Heeralal Chakrabarti.

Respondent :—by Nasim Ali, Farbat Ali, Saroje Kumar Maiti, and Birajmohan Majumdar.

JUDGMENT.

Guha and Bartley, JJ:—The plaintiff in the suit, in which this appeal has arisen, prayed for *khâs* possession of the lands in suit, appertaining to a tenancy held at one time by Gândhâri Bewa, predecessor-in-interest of the defendants Nos. 2 and 3 According to the plaintiff, the lands appertaining to the tenancy were sold in execution of a rent decree obtained by him, in which the defendant No. 1 in the present suit was made a defendant, as a co-sharer landlord, with a view to the plaintiff's obtaining an effective rent decree, in execution of which the tenancy could be sold. The defendant No. 1, it appears, obtained a *kabâlâ* from Gândhâri Bewâ, the tenant, before the tenancy was put to sale in execution of the decree for rent obtained by the plaintiff against Gândhâri Bewâ. It further appears that a suit brought by the defendant No. 1 for a declaration that the sale in execution of the decree for rent obtained by the plaintiff was not binding on him was dismissed. The defendant No. 1, however, succeeded in getting possession of the lands in suit, after they were sold in execution of the rent decree against the tenant, Gândhâri Bewâ. The sale in execution of the decree in favour of the plaintiff, at which the plaintiff was the purchaser, was held on the 16th July, 1919, and it was confirmed on the 4th September of that year. The suit, out of which this appeal has arisen, was instituted by the plaintiff on the 6th October, 1928. In view of the question for consideration in this appeal by the plaintiff, whose suit has been dismissed by the courts below, on the ground that S. 47 of the Code of Civil Procedure was a bar to the same, it is not necessary to consider the defence of the contesting defendants in the suit, other than the one raised by the defendant No. 1. The defence raised by this defendant was that the plaintiff as a decree-holder auction-purchaser should have come in under S 47 of the Code of Civil Procedure for possession of the lands in suit, and as such, the suit as instituted by the plaintiff was not maintainable. The courts below have, on the authority of the decision of a Full Bench of this Court in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (1), held that the question for determination in the present case was a question arising between parties to the suit for rent brought by the plaintiff, and was also a question arising between parties relating to the execution, discharge or satisfaction of the decree obtained by the plaintiff; and, as such, it was incumbent upon the plaintiff, the decree-holder auction-purchaser, to come in by a proceeding under S. 47 of the Code of Civil Procedure, for delivery of possession, and he not having done so, the suit, as instituted, was not maintainable, and was, in that view of the case, dismissed.

Civil P. C. S. 47.

There is no doubt that the suit, as between the plaintiff and the defendants Nos. 2 and 3 was concerned, was clearly barred, as they were the representatives of Gândhâri Bewâ, the tenant against whom the decree for rent was obtained by the plaintiff, and the lands appertaining to which were in due course purchased by the plaintiff at a sale in execution of the rent decree. The question, arising for consideration in this appeal, is whether the defendant No. 1 in the suit could raise the defence that the plaintiff's suit for possession against him was not maintainable, regard being had to the provisions contained in S. 47 of the Code of Civil Procedure. In the absence of any authority of decided cases bearing on the subject, the point has to be decided as a question of first impression, the decision depending mainly upon the statutory provision as contained in S. 47 of the Code of Civil Procedure. The position has to be kept in view that the defendant No. 1 was made a party defendant in the suit for rent, brought by the plaintiff against the tenant Gândhâri Bewâ, for the purpose of obtaining an effective decree for rent, regard being had to the provisions contained in S. 148-A of the Bengal Tenancy Act. There is no doubt that the defendant No. 1 was a party to the suit for rent, and a necessary party too, according to the provisions of the law, to which reference has just been made. The question arising for determination in the present case, therefore, was a question between the parties to

(1) 53 Cal. 781.

the suit for rent or their representatives. The material question then is whether the relief claimed by the plaintiff related to execution, discharge or satisfaction of the decree for rent, as contemplated by S. 47 of the Code of Civil Procedure. In our judgment, the answer to the question must be in the negative. As between the plaintiff, who succeeded in obtaining a decree for rent against the tenant, and the defendant No. 1—a co-sharer landlord, who was joined as a party defendant in the suit for rent for satisfying the requirements of law, as contained in S. 148-A of the Bengal Tenancy Act—there could not be any, and there was no question relating to the execution of the rent decree, nor was there any question relating to the discharge or satisfaction of the rent decree. The decree was for rent, and the liability to satisfy the decree was in the tenant defendant or her representatives, and not in the defendant No. 1, the co-sharer landlord. If therefore there was no liability in the defendant No. 1 to satisfy the decree for rent, as there was none no question of execution, discharge or satisfaction of the decree could possibly arise as between the plaintiff on the one hand, and the defendant No. 1 on the other. In the above view of the point arising for consideration in the case before us, the decision of the Full Bench of this Court in *Cailash Chandra Tarapdar's* case (1), referred to above, has no application; and we fail to appreciate how reliance could be placed on the same by the courts below.

As indicated above, the suit for *khâs* possession, as brought by the plaintiff, so far as it was directed against the defendant No. 1, could not be held to be one barred by the provisions contained in S. 47 of the Code of Civil Procedure. The decision given against the plaintiff, appellant in this Court, dismissing his suit, must, accordingly, be set aside, and we direct that the plaintiff's suit be tried out, on the merits, in accordance with law.

In the result, the appeal is allowed, and the case is remanded to the court of first instance for trial.

The plaintiffs appellants are entitled to get their costs in the litigation up to the present stage, including the costs in this appeal. Future costs after remand will be at the discretion of the trial court.

Case remanded.

A. L. R. 1934 Cal. 79

Appellate Civil.

No. 30 of 1932 (Decided on 13-6-33.)

Mitter and Henderson, JJ.

ANILKUMAR GHOSH ... *Appellant*

versus

HEMANTA KUMAR GHOSH ... ... *Respondent.*

Limitation Act (IX of 1908), Art. 182—Attachment of decree held by judgment-debtor—if a step-in-aid of subsequent execution—Civil P. C., O. 21, r. 53.

Where a decree-holder attaches a decree held by his judgment-debtor against a third party, the order of attachment is not a step-in-aid for subsequent execution of that decree. It rather arrests the execution of the decree and will not be a starting point for limitation.

Appeal against the order of the Subordinate Judge of Khulna.

Appellants :—by Neeradbandhu Ray.

Respondents :—by Bijankumar Mukerjee and Jaygopal Ghosh.

JUDGMENT.

Mitter J :—This is an appeal by the decree-holders and arises out of an order dismissing their application for execution of a decree which they have attached. It appears that the decree, now under execution, was obtained by Munshi Mobarak Ali Sardar and others against Hemantakumar Ghosh and others in the High Court in Appeal from Original Decree No. 25 of 1925. This decree was obtained on the 12th December, 1927, and the total amount of the decree including costs and interest came to Rs. 1,500 odd. This decree was attached at the instance of the present appellants Anilkumar Ghosh and others in execution of their own decree against the decree-holder of the High Court's decree on the 10th December, 1930. The order of attachment was passed by the Munsif's Court at Khulna, on that date and was communicated to the court where the decree now sought to be executed, *i.e.*, High Court's decree, was pending for execution and the attachment was duly noted in the register of that court. On the 11th April, 1931, the present appellants applied for the execution of the decree which was obtained by Mobarak Ali Sardar and others against Hemantakumar Ghosh and others, in respect of which the order of attachment was made. Obviously, application for execution by the appellants was made more than three years from the date of the decree, which was the 12th December, 1927, and it is admitted that limitation could only be saved provided it could be successfully contended that the order of attachment or the application for attachment, which was made on the 10th December, 1930, in the Munsif's Court at Khulna, was a step-in aid of the execution of the original decree of the High Court. The judgment debtors contended that it was not a step-in-aid of the execution of the original decree. This contention prevailed with the Subordinate Judge, who has dismissed the application of the present appellants, on the ground of limitation.

Against this order the present appeal has been brought and it has been contended before us that it should be held that the step taken by the appellants for attachment of the decree now sought to be executed was a step-in-aid of execution of the said decree which is now sought to be executed, *i.e.*, the High Court's decree. Under Article 182 of the schedule to the Limitation Act, an application must be made within three years from the several starting points one of which is the date of the original decree or order and the other is the date of some steps which are taken in aid of the execution of the decree. It can hardly be said that the order for attachment of the decree now sought to be executed by the appellants was a step-in-aid of the original decree; and, if one looks to the provisions of Order XXI, rule 53 of the Code of Civil Procedure, it will appear that if the decree sought to be attached was passed by another court, then the attachment of such decree is to be made by the issue to such other court of a notice by the court which passed the decree sought to be executed, *i.e.*, in this case, Khulna court, requesting such other court to stay the execution of its decree unless and until the two conditions mentioned in sub-clauses (1) and (2) of clause (*b*) are fulfilled. So the order of attachment of the original decree instead of being a step-in-aid of the execution of such original decree, was really a request to stay the execution of the original decree of the High Court. Instead of being a step-in aid of execution of the original decree, it rather arrests the execution of the decree, of the High Court. Of course the effect of the stay was only this: that it was a limited stay and it would not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree. The appellants in the present case are themselves to blame if they did not apply to execute the attached decree within the period of limitation. The appellants cannot have any higher rights than the original decree-holder, *i. e.*, the person against whom he obtains the decree, *i. e.*, their judgment-debtor.

Limitation Act, Art. 182.

Accordingly, we are of opinion that the Subordinate Judge has taken the right view of the matter and this appeal must be dismissed with costs. The hearing fee is assessed at one Gold mohur.

Henderson, J. I agree.

Appeal dismissed.

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execution proceedings he agreed with the decree-holder to pay Rs. 750 in full satisfaction of the decree by instalments with the proviso that if default be made in the payment of any instalment the whole of the balance out of Rs. 750 would become recoverable by execution of the decree. The decree-holder agreed to these conditions and relinquished the difference between the original amount of the decree and Rs. 750. This arrangement was duly presented in writing to the Court and on both the parties agreeing to it it was attested by the Court and the execution proceedings filed. Default having been made in the payment of the instalments by Santa Singh, the decree-holder presented an application for execution of the decree as varied against him, and the learned District Judge has held that the only remedy of the decree-holder is by means of a civil suit and that the decree could not be executed because the arrangement mentioned above was an adjustment of the decree, as that expression is understood in law. He has relied on certain authorities in support of this view, but I do not think it is necessary to mention them or to discuss them.

The agreement between Santa Singh and the decree-holder was for the payment of an amount smaller than the decretal amount payable by instalments and, as I have already stated, this arrangement was attested by the Court. It is not now open to the executing Court to go behind that adjustment or arrangement. Under O. 20, r. 11, it is open to the Court, with the consent of the parties, to vary the terms of a decree, and this was done in the present case. Moreover, the order attesting the terms of the compromise having been passed by the Court in the presence of the parties and with their consent it is not now open to either of them to contend that the Court was not competent to attest it. I accordingly accept this appeal with costs throughout, set aside the order of the District Judge and restore that of the executing Court.

Decree-holder entitled to execute.

Appeal allowed.

A. L. R. 1934 Lah. 65.

Appellate Civil.

No. 128 of 1933 (Decided on 15-11-33.)

Dalip Singh, J.

Rai JAGAT CHAND .. *Appellant*

versus

HAKU AND OTHERS .. *Respondents.*

Punjab Tenancy Act. S. 4 (1)—'Land', definition of—not to be applied to Land Revenue Act.

The definition of 'land' in the Punjab Tenancy Act is not applicable to the Land Revenue Act.

103 I. C. 501 *referred to*

Second Appeal against the decree of the District Judge, Hoshiarpur.

Appellant:—by Gullu Ram.

Respondants:—by Fakir Chand.

JUDGMENT.

The appeal was accepted on three grounds. 1. That the land had ceased to be land at the time of the application to the Revenue Officer within the meaning of the Punjab Tenancy Act. The learned counsel for respondents has not been able to show me why the definition in the Punjab Tenancy Act should be applied to the Land Revenue Act. He relies on a ruling *Muhammad Ali* v. *Gulab* (1). With all deference I am unable to agree with that ruling. The 2nd point was that Khasra No. 904 cannot be ascertained. I am unable to see why not and learned counsel has not been able to show me any reason for this finding. Article 32 of the Limitation Act has no bearing. The appellant applied either within 7 months or 1 year and 7 months to the Revenue Officer. His suit would have been in time, even assuming that Article 32 applied. Hence I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

(1) 103 I.C. 501; A.I.R. 1927 Lah. 615 (1).

A. L. R. 1934 Lah. 66.

Appellate Civil.

No. 488 of 1928 (Decided on 4-4-33.)

Harrison and Addison, JJ.

GHULAM MOHAMMAD and another *Appellants*

versus

Mst. ZAINAB BIBI .. *Respondent.*

Custom (Punjab)—Succession—Sonless proprietor dying—daughter versus agnates—Arains of village Karol, Sheikhupura District.

Held, that by custom among Arains of village Karol, Sheikhupura District, daughters exclude agnates in the absence of sons.

28 P. R. 1893 *distinguished*

[P. 67, C. 2.]

First appeal from the decree of the Sub-Judge, Lyallpur.

Appellants:—by R. C. Manchanda and S. C. Manchanda.

Respondent:—by Mohammad Amin and Balkishan Mehra.

JUDGMENT.

Facts.

One Sattar died leaving self-acquired land in Chak No. 441 G.B. Tahsil Samundri, District Lyallpur. This land was first mutated by the revenue authorities in favour of *Mst.* Zainab Bibi, daughter of Sattar, plaintiff, but on appeal the Collector directed that the name of Mohammad Yar, brother of Sattar, should be entered in the revenue papers. Mohammad Yar, has died and the plaintiff has sued his two sons for possession of the land in question. The family is an Arain one and it migrated from village Karol, near Lahore to the Lyallpur Colony. It still possesses its ancestral land in village Karol and in the neighbouring village Aino Bhatti. In these two villages Sattar's land has been mutated in favour of his daughter, the plaintiff, and so far no suit has been brought as regards that land.

Village Karol is an Arain village about six miles from Lahore city. A short time ago owing to re-distribution of districts it was taken out of Lahore district and included in Sheikhupura district. The only question in this appeal is what is the custom of these Arains of village Karol as regards succession to the land in question.

In the introduction to the Customary Law of Lahore district compiled in 1916 by Mr. Bolster occur the following remarks:

"In 1856 daughters were absolutely excluded from inheritance by collaterals; twelve years later in the 1868 settlement there appears among the Arains of the Lahore and Kasur Tahsils and the Awans and Rajputs of the Lahore Tahsil a relaxation in their favour allowing parents to make them gifts of small areas; finally in the 1892 settlement and now among Rajputs, Dogars and Arains, daughters are held entitled to exclude collaterals five degrees remote while in the neighbourhood of Lahore, where disturbing causes naturally have largest play and customs change much more rapidly than among the Arains of the Sutlej Bank, Arain daughters exclude their cousins in the first degree"

The Wajibularz of this village of the year 1856 is printed at p. 46 of the second paper book. In those days the Wajibularz contained a statement of customs in the village, but this is no longer the case, the Riwajiams of the Tahsil and district alone now recording the customs of the people. In this Wajibularz of 1856 it is said that:

"If any proprietor by reason of having no male issue gifts his property to his daughter during his lifetime, she of course will be the owner. Otherwise the brothers or other near kindred will be the owners of the estate, and the daughters will live with them, but if there be no one in his family then of course his daughter can become the owner."

It follows from this extract that in 1856 gifts could be made to daughters by their fathers in this village but they were excluded by near collaterals though they were not excluded by the proprietary body in the absence of sons. In the settlement of 1894 a Customary Law of the district was prepared by Mr. G. C. Walker. At p. 10 of this volume it is stated that:

"Rajputs, Dogars and Arains say that a daughter or sister succeeds to the property if there is no male collateral nearer related than in the fifth generation."

This is an advance on the Wajibularz of 1856. On the latest Customary Law of the Lahore district compiled by Mr. Bolster in 1916 the answer to question 61 is as follows:

"Among Jats daughters are also excluded by male lineal descendants through males however distant. All other tribes follow the same custom except that (1) among Arains in the proximity of Lahore (villages of Harbanspura, Salamatpura, Mahmud Buti, Koti Abdulrahman, Fateh Garh, Baghbanpura, Begampura, Maiu Mir, Ganj, Tajpura, Doaich, Shadipura, Babu Sabu, Bhadru, Kot Kamboh. Jhug Nangrai Saidpura, and Kot Kanjri), daughters of sonless proprietor exclude agnates . . . ."

The answer to question 62 shows that no distinction is made between self-acquired and ancestral property. The above answer means that among Arains in the proximity of Lahore the custom is that daughters of sonless proprietors exclude agnates however near they are. In para 3 of the introduction to this volume the compiler stated that the present English volume was a brief abstract of the vernacular compilation designed to assist Courts to a decision on the general principles of the local Customary laws. The vernacular copy of the Riwajiam however does not contain the list of villages given in the English edition. All that the vernacular copy says is that in the proximity of Lahore, daughters of Arains succeed to their father in preference to agnates. It follows that the list of villages given in the English Edition must not be taken to be exhaustive but was added by way of example when the English Edition was prepared and the correct statement of custom must be held to be that given in the vernacular copy.

Coming now to the oral evidence, we find that most of the witnesses who give evidence in favour of the plaintiff either belonged to Karol or migrated from Karol while only one such person gives evidence in favour of the defendants. For this reason the evidence of the plaintiff's witnesses is of more weight than that of the defendants.

Again documentary evidence is in favour of the plaintiff's allegation that in village Karol, which is in the proximity of Lahore, she is entitled to succeed to her father in preference to her first cousins. In 1891 there were two mutations in favour of daughters. In each of the years 1919, 1921 and 1922 there was one mutation in this village in favour of daughters. In 1924 there was another mutation which is of importance. One *Mst.* Begam described as a daughter of Sairan was succeeded by her sons. There were other co-sharers in the holding. From this and from the fact that *Mst.* Begam is described as daughter there can be no doubt that she succeeded to her father's land as daughter in the presence of collaterals though it is not known in what year this happened. There are thus six mutations from 1891 to the date of suit in favour of daughters while there is no evidence that in this period collaterals have excluded a daughter in this village. It is not without significance that on the death of Sattar, the father of the plaintiff, the plaintiff was recorded as an owner as had been done in similar cases in this village when there were no sons.

Daughters *versus* collaterals.

An attempt was made to rely upon *Chiragh Din* v. *Mamman* (1), but that relates to Arains of village Behni and there is no evidence on the record to show where that village is and whether it is in the proximity of Lahore. Similarly certain other mutations were mentioned but there is no evidence as to where the villages are situated to which they refer. It must therefore be held that in this village since 1891 daughters have always excluded agnates when there are no sons. The village is in the proximity of Lahore and the statement of the Customary Law is also thus in favour of the plaintiff. There is no proof that agnates have ever excluded daughters in this village. In these circumstances it must be held proved that by custom in this village daughters exclude agnates in the absence of sons. For the reasons given, the appeal must be dismissed with costs.

Appeal dismissed.

(1) 28 P. R. 1893.

A. L. R. 1934 Lah. 67.

Revisional Criminal.

No. 1322 of 1933. (Decided on 1-12-33.)

Jai Lal, J.

JUGAL KISHORE .. *Petitioner*

versus

THE CROWN .. *Respondent.*

Criminal P. C. (V of 1898), S. 145—dispute over vacant strip of land—police report to Magistrate—no mention, therein, of imminent danger of a breach of the peace—action of Magistrate under S. 145, *ultra vires.*

In a dispute over a narrow strip of vacant land among Hindus and Mc·-mmadans, the

Mohammadans claiming that it was theirs and the Hindus on the other hand claiming that it belonged to one J., the Police made a report to the Magistrate. Though in the report it was incidentally mentioned that there might be a remote possibility there was at the time absolutely no imminent danger of a breach of the peace. The police report was also silent on the fact of possession.

Held, that, in the circumstances it was *ultra vires* of the powers of the Magistrate to have started proceedings under S. 145, Criminal P. C.

Case reported by the Additional District Magistrate, Delhi.

Petitioner :—by Shamair Chand.

Respondent :—by Zahur-ud-Din.

REPORT.

Facts.

This is a dispute over a narrow strip of vacant land measuring about 28' x 25' in village Patperganj in the Shahdara *Ilaqa*. The plot referred to is shown as No. 154 on the plan attached. Adjoining this strip of land a mosque is situated in plot No. 153. A dispute arose among Hindus and Mohammadans. The Mohammadans claimed that possession of this narrow strip of land was theirs and that possession had been with them for many years in connection with their funeral ceremonies and was also used by them to take the overflow from the mosque on certain occasions. On the other hand the Hindus claimed that this land belonged to one Jugal Kishore. He had planted a flag on it and intended to build a *dharamsala*. The Mohammadans objected to this construction and hence some dispute arose. The police intervened and sent up a report to the Magistrate of the *ilaqa*. He thought it desirable to take some action. He took proceedings somewhere in August, 1932, and directed the parties to put in their respective claims. These claims were filed and evidence was also recorded between the 9th of November, 1932, and 21st of January, 1933. After that arguments were heard on the 29th of March and eventually orders were passed by the Magistrate on the 10th of May, 1933. In his finding the Magistrate came to the conclusion that the possession of this plot of land rested with the Mohammadans and ordered that possesn should be restored to them, that is, ld that the original possession of the s with them.

Now in the first place I should like to point out that when the original police report went to the Magistrate there was no mention in it that there was a likelihood of the breach of the peace. It was in the report incidentally mentioned that there may be a remote possibility of this happening at some later date, but at the time there was absolutely no imminent danger of the breach of the peace. The police report is silent on the fact that possession was with the Mohammadans or that the Hindus had forcibly taken possession of the land. In spite of this the Magistrate seems to have gone out of his way completely to have commenced proceedings under section 145 of the Criminal Procedure Code. By his order the Magistrate has taken away the possession of this plot of land from the Hindus and delivered it to the Mohammadans. There is no reliable evidence anywhere on the file to show that as a matter of fact possession was with the Mohammadans. On the contrary Jugal Kishore places on the record a copy of the judgment of Allahabad High Court in appeal No. 316 of 1909. In this suit Jugal Kishore was a *pro forma* defendant and the plaintiff asked for declaration that they as *Zamindars* were owners in possession of 111 plots of land including certain area in the village *abadi* of *Patperganj*. This included the area in dispute. The suit was dismissed in the original Court but on appeal a declaratory decree was granted to the plaintiff and the *pro forma* defendant Jugal Kishore and the order of the Additional District Judge was maintained by the High Court. Since then Jugal Kishore has remained in possession of this plot of land. The map that has been filed in that civil case shows a flag flying on this plot of land. However the fact remains that Jugal Kishore has kept his possession over this plot of land ever since and it is most unfair that he should be ousted in this summary fashion and specially so since there is no evidence at all to show that the Mohammadans were forcibly dispossessed two months before the Magistrate started proceedings.

Grounds for revision

That the Magistrate has acted *ultra vires* in ousting Jugal Kishore from possession. Further it is recommended that possession should be restored to Jugal Kishore.

ORDER OF THE HIGH COURT.

For reasons recorded by the Additional District Magistrate, I set aside the order of the Magistrate First Class dated the 10th May, 1933. The possession of the land in dispute shall be restored to the person from whom it was taken.

Order set aside.

A. L. R. 1934 Lah. 69.

Appellate Criminal.

No 1111 of 1933. (Decided on 14-11-'33.)

Rangi Lal and Abdul Quadir, JJ.

ALI MOHAMMAD *alias* ALI .. *Appellant.*

versus

THE CROWN .. *Respondent.*

Evidence Act, (I of 1872), Ss. 114 (b) & 133—Approver, evidence of—corroboration by deceased's wife who was in criminal intrigue with accused charged with murder—wife herself an accomplice—accused's confession to wife of deceased—admissibility—Penal Code (XLV of 1860) S. 302.

Where the evidence of an approver in the trial of the accused on a charge of murder was corroborated by the wife of the murdered person who was in criminal intrigue with the accused and knew all about the proposal to murder and was a consenting party to the commission of the crime,

Held, that the wife's evidenee should not be accepted either as corroboration of the approver's evidence, or, as sufficient, apart from independent evidence, to justify conviction of the accused, she herself being in the position of an accomplice. 20 P.R. 1919 *followed.* [P. 70, C. I.]

Criminal Trial—procedure—examination of approver after the corroborating witnesses—improper.

The approver should be examined before the witnesses who are cited to corroborate him. [P. 70, C. I.]

Appeal from the order of the Sessions Judge, Gujranwalla.

Appellant :—by Abdul Hye.

Respondent :—by Sundar Das, for the Government-Advocate.

JUDGMENT.

Rangi Lal, J.:—On the 25th of January, 1933, at about 2 p.m., the dead body of one Charagh was seen at the Shatoda well near Sodhra by Hayat Mohammad. He went and made a report about the matter at the Wazirabad police station at 6-30 p.m. The *post mortem* examination of the dead body was conducted next day in the afternoon and it was found that death was due to the cutting of the throat. A stab wound was also found in the abdomen. Ali, accused was said to have an intrigue with the wife of the deceased and suspicion therefore fell on him and he was arrested on the 27th of January. His house was searched on the following day and a blood-stained shirt was found. A few days later, one Hussain who was believed to be a friend of the accused was arrested at Lahore and he turned King's witness. A blood-stained *chadar* was then found from his sister's house at Phangat and a knife was brought out by a diver from the well close to which the dead body was found. The accused was then sent up for trial. He has been convicted under section 302, Indian Penal Code, and has been sentenced to death. He has appealed through Mr. Abdul Haye who has addressed us on his behalf. The case is also before us under section 374, Criminal Procedure Code.

Facts.

The case for the prosecution as disclosed mainly by the approver is briefly as follows:— He and the accused were great friends as the latter had helped the former in the abduction of one *Mst.* Resham Bibi on two occasions. The accused was in love with Charagh's wife *Mst.* Allah Rakhi and easily persuaded Hussain to join him in killing Charagh. It was ascertained from *Mst.* Allah Rakhi that her husband would go to Sodhra on a particular day. The accused and the approver met by appointment at the Fakiranwala well and followed Charagh and killed him near the Shatoda well shortly after night-fall. The accused overpowered the deceased by twisting the latter's turban round his neck and knocked him down. The approver then held the legs of the victim while the accused cut his throat with a knife which was afterwards thrown into the well close by. The accused then went to his village and told his sweetheart what he had done and proceeded at once to have sexual intercourse with her. The approver went to his sister's house at Phangat and spent the night there. Next morning when he was leaving, he noticed some blood-stains on his *chadar* and got his sister to wash it. He could not, however, wait till it dried up and left it with her, taking another *chadar* from her instead.

[His Lordship after examining the evidence in detail proceeded to examine the confession said to have been made by the accused to his sweetheart, *Mst.* Alla Rakhi.]

This seems to have impressed the learned Sessions Judge very much: but he failed to realize that according to the prosecution *Mst.* Allah Rakhi was practically an accomplice in the crime and her statement could not therefore be used to corroborate that of the approver. In *Shahrah* v. *the Crown* (1) it was held that a wife who knew all about the proposal to murder her husband and was a consenting party to the commission of the crime is in the position of an accomplice and her evidence should not ordinarily be accepted either as corroborative of the evidence of an approver or as sufficient, apart from independent corroboration, to justify the conviction of any of the accused. *Mst.* Allah Rakhi stated that she was once seen co-habiting with the accused by her husband's sister (P.W. 20). Her statement in regard to this incident is contradicted in important particulars by the statement of P.W. 20 and Dewan Singh (P.W. 15). It is somewhat unsatisfactory feature of this trial that the approver was examined after all the witnesses who were supposed to corroborate his statement had been examined. The assessors could not have appreciated the corroborative evidence when it was given and the Court and the counsel could not have been in a position to question the witnesses properly. The opinion of the assessors, therefore, loses much of its value in this case.

Approver—corroboration.

Improper procedure.

After carefully considering the material on the record, I am of opinion that the case against the accused has not been proved beyond doubt. I would, therefore, accept the appeal and acquit the appellant.

Abdul Qudiar, J:—I agree.

Appeal allowed.

(1) 20 P.R. 1919 : 49 I.C. 607 (Cr.).

† A. L. R. 1934 Lah. 70.

Appellate Criminal.

No. 940 of 1933 (Decided on 9-11-33.)

Jai Lal and Bhide, JJ.

BAL KISHEN *alias* DARI ... *Appellant*

versus

THE CROWN .. *Respondent.*

(i) Evidence Act (I of 1872), S. 32—Dying declarations—discrepancies in, affect value of evidence and not admissibility.

Discrepancies in dying declarations can only affect their value and not their admissibility under S. 32 of the Evidence Act.

[P. 71, C. 2.]

(ii) Penal Code (XLV of 1860) Ss. 302, 304 (I)—Causing injuries with knife of size of ordinary pen-knife—accidental infliction of injury on abdomen proving fatal—absence of guilty intention—likelihood of knowledge that death would result—conviction under S. 304 (II) appropriate.

Where the accused, a youth, struck the deceased with a knife of the size of a pen-knife on some parts of the body, none of which were vital, and in the course of the scuffle hit on the abdomen which proved fatal,

Held, that the accused could not be held to have the intention to cause death so as to bring the case under S. 302 I.P.C., but, at any rate he must be held to have the knowledge that a blow with a weapon of that kind was likely to cause death, and the offence, therefore, fell under S. 304, Part II, I.P.C. 99 I.C., 119 *followed.*

[P. 72, C. 2.]

(iii) Punjab Borstal Act. S. 5—Conviction under S. 302, I. P. C. altered to one under S. 304 Part II—sentence of detention in the Borstal Institute maintained.

Where the accused, a youth, was convicted under S. 302, I. P. C. and was sentenced to be detained in the Borstal Institution for 7 years, but the conviction was, on appeal, altered to one under S. 304 Part II, I.P.C.

Held, that though the sentence of detention in the Borstal Institution was illegal for an offence under S. 302 I.P.C., the sentence could be maintained as the finding was altered to one under S. 304 Part II.

Appeal from the conviction and sentence passed on accused by the Sessions Judge, Lahore.

Appellant:—by Amar Das.

Respondent:—by Din Muhammad, Assistant Legal Remembrancer.

JUDGMENT.

Bhide J:—The Sessions Judge of Lahore has found Bal Kishen *alias* Dari, a youth aged about 15, guilty of the murder of one Mohindar, under section 302, Indian Penal Code, and in lieu of passing a sentence of transportation for life under that section has ordered him to be detained in a Borstal Institution for seven years, under section 5 of the Punjab Borstal Act, 1926. The convict has appealed and a petition for revision has been filed on behalf of the Crown on the ground that the order of detention passed under the Punjab Borstal Act is illegal.

The facts of the case are simple. It appears that there was longstanding enmity between Ghunna Mal, maternal grandfather of the appellant (with whom he was living) and his brother Ramji Das. Recently there had been disputes between the appellant and the children of Ramji Das and the appellant had beaten *Mst.* Warni, a daughter of Ramji Das. Ramji Das spoke about this to one Duni Chand and said that he was going to report the matter to the police. Duni Chand said he would speak to Ghunna Mal himself and put the matter right. But Ghunna Mal asked him not to interfere in his affairs. Later on Ghunna Mal went to the shop of Ramji Das and took him to task for complaining to strangers and Roshan son of Ramji Das and the appellant threatened to see to him when he went to his house. In the evening when Ramji Das passed by the house of Ghunna Mal on his way to his own house he was assaulted by Roshan and Raja Ram sons of Ghunna Mal and Dari inflicted injuries on his legs with a knife. Ghunna Mal himself is said to have been present and inciting them. The daughters of Ramji Das and his son-in-law Charan Das came out of his house and *Mst.* Shakuntala, one of the daughters, abused the assailants, whereupon the appellant went to assault her but was stopped by Mohindar, who was amongst the persons who were attracted to the spot by the noise. The appellant dealt him three or four blows with a knife, inflicting a serious injury in the abdomen. Ramji Das and Mohindar were immediately taken to the hospital and the matter was reported to the police. The Police Sub-Inspector took down the statements of both and as the condition of Mohindar was precarious, his statement was recorded later by a Magistrate also. Mohindar succumbed to his injury in a few days.

The above story is supported by the evidence of Ramji Das, the dying declarations of Mohindar and the statements of three eye witnesses, *viz.*, Charan Das, Sohan Lal and Piare Lal. The learned Counsel for the appellant has criticised the discrepancies in the dying declarations of Mohindar as recorded by the Sub-Inspector and the Magistrate and has urged that these discrepancies render these declarations inadmissible in evidence. But the contention seems untenable. The declarations are clearly admissible under section 32 of the Indian Evidence Act and the discrepancies can only affect their value and not their admissibility. In the present instance, however as the learned Sessions Judge has shown the discrepancies do not really affect materially the merits of the prosecution case. The main discrepancy on which stress was laid was that in the statement before the Sub-Inspector the deceased said that he was assaulted by the appellant when he was going to rescue Ramji Das while in the later statement before the Magistrate, he said that he was attacked by the appellant when he tried to prevent the appellant from assaulting *Mst.* Shakuntala. But this discrepancy appears to be merely due to lack of some details in the earlier statement. It cannot obviously make any difference as far as the offence is concerned, whether the appellant assaulted the deceased while attempting to rescue Ramji Das or his daughter and it cannot therefore be said that this alteration in the story must have been an innovation deliberately introduced. Another discrepancy to which reference was made was the fact that in his earlier statement Ramji Das stated that Roshan also had a knife; but the injuries on his person were from the outset attributed to the appellant and hence this discrepancy also does not appear to be material.

Dying declaration, discrepancies in, effect of.

It was urged next that the fatal injury on the person of the deceased could not have been caused by the knife which was produced in Court and which is said to have been seized from the appellant by Charan Das. This contention is, however, not supported by the evidence on the record. Dr. Partab Singh (P. W. 2) has clearly stated that the injury could be caused by this knife and even Dr. Quick, on whose evidence, the learned counsel for the appellant relied, had to admit that the injury could be caused by the knife, if it was moved in the wound, as it easily might have been, while being taken out.

The appellant pleaded not guilty and stated that he was not even present on the scene of the fight but no evidence was produced in defence. The appellant had an abrasion on his person of which no satisfactory explanation was given and it is an indication of his presence on the spot. In my opinion the evidence on the record leaves no room for doubt that it was the appellant who inflicted the fatal injury on the abdomen, and there seems no good ground for believing that the injury was inflicted by some other person and the name of the appellant was substituted for the real culprit. There is, however, reason to think that all the facts relating to the offence have not been disclosed by the prosecution witnesses. The deceased stated before the Sub-Inspector that he, Sohan Lal and Piare Lal had gone out for a stroll and went to the spot only on hearing the noise. In the statement before the Magistrate he said that he was going to the house of his sister to take his meals, but that house seems to be in a different direction. It seems also somewhat doubtful if these men could have heard the noise of the altercation between Ramji Das and his assailants from the place where they are supposed to have been. The medical evidence shows that Ghunna Mal and Raja Ram had also abrasions on their persons though these were not of a serious character. It seems, therefore, possible that these men had gone to help Ramji Das by a prior arrangement and the attack on Ramji Das was not so unprovoked as is represented. It appears further from the evidence of Sohan Lal and Piare Lal that the appellant struck the deceased with a knife, when he caught hold of him by the neck. The deceased stated that he was struck four times in the abdomen but this is not borne out by the medical evidence. It appears from the evidence of Dr. Pratab Singh that out of the four injuries of the deceased one was an abrasion, which was due to a *blunt* weapon, while another was a slight incised wound on a finger of the right hand. The latter might easily have been caused in the attempt of the deceased to ward off the blow. Another injury which was on the 8th left costal cartilage was only skin deep. The remaining injury, a punctured wound in the abdomen, was the only serious injury and this was the injury which proved fatal. The medical evidence does not, therefore, show that four blows were deliberately aimed or inflicted in the abdomen as stated by the deceased. It seems quite possible that when the appellant was caught by the neck by the deceased, he accidentally hit him in the abdomen, without really intending to inflict an injury in a vital part. I feel fortified in this conclusion by the fact that Ramji Das against whom the appellant and his relations had a grudge was only wounded in the legs by the appellant. The deceased was admittedly a stranger and there was no ill-feeling between him and the appellant. It may also be noted that the knife used was not a formidable weapon being of the size of an ordinary pen-knife.

In view of the above facts, I do not think it can be safely held that the appellant had the guilty knowledge or intention required by section 300, Indian Penal Code. There is, however, no doubt that in inflicting an injury with a knife as he did he must be held to have, at any rate, had the knowledge that a blow with a weapon of this kind was likely to cause death. His offence would, therefore, fall under section 304, part II, Indian Penal Code. The case seems to stand on the same footing as *Jagat Singh v. Emperor*: (1) in which a similar view was taken by a Division Bench of this Court. As regards the sentence, the appellant is an immature youth and very likely acted under the influence of his elders. In my opinion a sentence of five years' rigorous imprisonment would have been sufficient to meet the ends of justice in the circumstances of the case, but in view of the age of the appellant it would be, I think, preferable to order his detention in a Borstal Institution for the same period.

I would accordingly accept the appeal and altering the conviction to one under section 304, part II, Indian Penal Code, order the appellant to be detained in a Borstal Institution for five years under section 5 of the Punjab Borstal Act.

(1) 27 P. L. R. 6: 99 I. C. 119.

The petition for revision was based on the ground that no order of detention under the Punjab Borstal Act could be passed on a conviction for an offence under section 302, Indian Penal Code, and this was conceded by the learned counsel for the appellant also (*vide* definition of an "offence" as given in that Act); but that objection now disappears as the conviction is being altered to one under section 304, part II, Indian Penal Code. The petition for revision consequently becomes infructuous and must be dismissed.

Jailal, J:—I agree.

Appeal accepted.

A. L. R. 1934 Lah. 73.

Appellate Criminal.

No. 1328 of 1932. (Decided on 13-1-33.)

Abdul Qadir, J.

ABDUL HAMID and another.. *Appellant*

versus

THE CROWN .. *Respondent.*

Criminal P. C., (V of 1898), S. 239 (g)—accused charged of counterfeiting coins—joint trial—offences quite separate and not concerning the same coin—misjoinder of charges—trial vitiated.

Where three accused persons were jointly tried on a charge of counterfeiting coins and uttering them, but while the charge against the one accused was of uttering a coin, the charge against the second was of possession of different coins altogether and the third was supposed to be the manufacturer of counterfeit coins working at quite a different place, with whom no direct touch of the former accused was shown by the evidence on the record.

Held, that cl. (g) of S. 239, Cr. P. C., did not apply to such a case as the offences for which the three men were tried did not form part of the same transaction and that the trial was vitiated by the misjoinder of charges and the joint trial of the accused.

[P. 74, C. 2.]

Criminal Appeal from the order of the Magistrate First class, Jullundur.

Appellant:—by Abdul Aziz.

The Crown:—by M. L. Batra.

JUDGEMENT.

Abdul Hamid, Abdul Razaq and Ahmad Ullah have been jointly tried and convicted and have appealed to this Court. The question raised by Mr. Abdul Aziz, who represents Abdul Hamid and Abdul Razaq, is that the joint trial of the three persons was not justified by law and vitiates their convictions and should be set aside. The merits of the case have not been argued before me and the arguments have been confined to this preliminary objection.

Facts. The facts that led to this trial are briefly as follows. Abdul Razaq, who is a young man and a student in a school, was seen having an altercation with a shopkeeper in Jullundur, who was accusing him of having given him a suspicious looking rupee, which was subsequently found to be a counterfeit coin. This was seen by a constable who had received information against Abdul Razaq and Abdul Hamid that they were putting some counterfeit rupees in circulation. He took hold of Abdul Razaq and took him to the police station with the rupee that he had passed to the shope-keeper, Ramzan. The accused were searched at the police station and some more coins, afterwards found to be counterfeits of King's coins, were found in his possession. Abdul Hamid is the uncle of this young man. His house as well as his person was searched and some more coins including some counterfeit coins were found in his possession. It is said that through one of these accused in Jullundur, a clue was obtained to Ahmad Ullah, who has a shop at Delhi. The police went to Delhi twice. On the first occasion they met Ahmad Ullah and searched his house but nothing incriminating was found. On the second occasion Ahmad Ullah produced a pair of dies Ex. P.2 and Ex. P.3 and four blanks, Exs. P. 5 to P. 8, from a place in the Company garden; and it was found later on by the Mint Master, who examined the articles produced, that a number of coins produced from the possession of the accused were counterfeit coins, which could be produced or had probably been produced by using dies Ex. P.2 and P.3. After investigation the three accused named above were sent up together to take their trial at Jullundur. Abdul Razaq being charged under S. 240, I. P. C. for being in possession of counterfeit coins knowing them to be counterfeits of King's coins and Ahmad Ullah under Ss. 240, 243, 109 I. P. C. The Court below is of the opinion that there was a conspiracy between Ahmad Ullah on the one hand and Abdul Hamid and Abdul Razaq on the other, in consequence of which Ahmad Ullah used to pass on counterfeit coins manufactured by him to the other two, who used to utter them in the bazaar at Jullundur.

Counsel for the appellant contends that so far as he can see there is no evidence as to the existence of conspiracy between Ahmad Ullah of Delhi and Abdul Hamid and Abdul Razaq of Jullundur, or as to the passing of counterfeit coins by him to any of the other two accused. He urges further that there has been a misjoinder of charges in this case, even so far as the joint trial of Abdul Razaq with Abdul Hamid is concerned, inasmuch as Abdul Razaq was charged under S. 240, I. P. C., and Abdul Hamid under S. 243, I. P. C., and the offences committed by each of them were distinct and separate and should not have been tried together. Mr. M. L. Batra, on behalf of the Crown, meets the first objection by urging that the accused could be tried jointly under Ss. 235 and 239 (d), because the various offences attributed to the three accused practically form one transaction or a series of transactions amounting to one transaction. With regard to the conspiracy or the passing of coins by Hamid Ullah to the two accused who reside in Jullundur, he admits that there is no definite evidence to that effect on the record, but he says that conspiracy is a matter of inference and he says that the inference in this case may be drawn from the fact that one of the accused in Jullundur is said to have mentioned the name of Ahmad Ullah. In answer to the second objection relating to the misjoinder, so far as the joint trial of Abdul Razaq and Abdul Hamid is concerned, Mr. Batra refers to S. 239 (g). In conclusion Mr. Batra admits that the charges as framed are not free from defects but he argues that these defects are covered by S. 537, Cr. P. C.

The reply of Mr. Abdul Aziz to this last point is that the case of his clients has been prejudiced by the three men being tried together and evidence against Ahmad Ullah has influenced the judgment of the learned Magistrate regarding his clients. He points out that the several offences said to have been committed by the three accused are quite distinct and have been committed on different occasions and cannot be treated as one transaction. With regard to Cl. (g), S. 239, Cr. P. C., he says that if Abdul Razaq and Abdul Hamid had been on their trial concerning an offence as to one and the same coin, Cl. (g) would have been applicable, but it cannot apply to a case where the charge against Abdul Razaq is that of uttering a coin, while the charge against Abdul Hamid is of possession of different coins altogether and Ahmad Ullah is supposed to be the manufacturer of counterfeit coins working at Delhi, with whom no direct touch of his clients is shown by the evidence on the record. After giving due consideration to the arguments on both sides, I think that there is force in the contentions advanced on behalf of the appellants and in my opinion the trial has been vitiated by the defects pointed out by the appellants' counsel. I do not think the offences for which the three men have been tried form part of the same transaction and, if they did not, I do not see how the offences could have been tried jointly. I therefore quash the convictions and set aside the sentences awarded against the accused and direct that they may be tried afresh according to law, either separately for the various offences with which they are charged or together on a proper charge of conspiracy if the prosecution is in a position to substantiate it and is advised to adopt this course.

Misjoinder of charges.

Appeal accepted.

A. I. R. 1934 Lah. 75.

Revisional Criminal.

No. 1366 of 1932 (Decided on 19-1-33)

Tek Chand, J.

GIAN CHAND .. *Petitioner*

versus

THE CROWN .. *Respondent.*

Arms Act, S. 19 (f)—revolver found in shed not in exclusive possession of accused on latter's pointing out—accused not guilty.

Where it was the accused who led the police to the shed and pointed the place where the revolver was lying and it was found that the shed was not in the exclusive possession of the accused, but was open and accessible to outsiders,

Held, that the mere knowledge of the fact that ths revolver was lying in the shed, or pointing out of the place from which it was actually found, without proof that that place was in the exclusive possession of he accused, is not sufficient to bring home the offence under S. 19 (f), Arms Act to the accused. [P. 75, C. 2.]

Revision against the order of the Sessions Judge, Rawalpindi.

Petitioner:—by L. M. Patta.

Crown:—by Chandar Gupta.

JUDGMENT.

The petitioner has been convicted under S. 19 (f) Arms Act, having in his possession a revolver without a license. He has been sentenced to undergo rigorous imprisonment for two years. The facts found are that the petitioner, who is a military reservist, came to his village about three months before the occurrence and was living in his house which is occupied by his father. The police came to search this house on suspicion that it contained certain property which had been stolen in a burglary. They failed to find the stolen property in the house but were able to recover a holster containing a number of cartridges buried under the floor of the house. After finding these cartridges, they further questioned the petitioner and he led them to a cattle shed, which is situated at a short distance from the house, and from there he produced a revolver from underneath a heap of firewood. He was prosecuted under S. 19 (f), Arms Act, in two separate cases for possession of the revolver and the cartridges respectively. The trial Magistrate convicted him in both cases. On appeal the learned Sessions Judge set aside the conviction in the case relating to the alleged possession of catridges on the ground that that they were not proved to be in the exclusive possession of the petitioner as the house in which the cartridges were found concealed was used by the petitioner as well as by his father and brother, and there was nothing to show that the cartridges had been placed there by the petitioner rather than by his father or brother. The learned Judge however upheld the conviction in the case of the revolver.

Facts.

The petitioner has preferred a petition for revision to this Court and, after hearing both counsel and examing the record, I am of opinion that the petition must succeed. As pointed out already the revolver was found in a cattle shed and not in the house in which the petitioner was actually living. It was admitted by the prosecution that the cattle-shed was open and accessible to outsiders. There is, moreover, nothing to indicate that the shed was in the exclusive possession of the petitioner. His father actually lives in the house and the petitioner had come on leave to the village only a short time before. It is also in evidence that his younger brother is in the police and had lived in this house a few days before the recovery of the revolver. In these circumstances the revolver cannot be said to have been in the exclusive possession of the petitioner or to have been placed in the shed by him. It is no doubt true that it was the petitioner who led the police to the shed and pointed out the place where the revolver was lying but the mere knowledge of the fact that the revolver was lying in the shed or the pointing out of the place from which it was actually found, without proof that that place was in the exclusive pessession of the petitioner, is not sufficient to bring home the offence to the petitioner. In my opinion the prosecution has failed to establish the case satisfactorily against the petitioner. I accept the petition for revision, set aside the conviction and direct that the petitioner be set at liberty forthwith.

No offence committed.

Conviction set aside.

†A. L. R. 1934 Lah. 76 (1).

Appellate Civil.

No. 282 of 1933 (Decided on 17-11-33.)

Bhide, J.

PARTAP SINGH .. *Appellant*

versus

Firm KHAN CHAND—
RADHA KISHEN .. *Respondent.*

Civil P.C. (V of 1908) S. 60 (c)—House inside abadi occupied by agriculturist—granted for flour mill—not exempted from attachment.

A house inside the *abadi*, granted to a tenant for purposes of flour-mill is not exempt from attachment under S. 60 (c) Civil P.C., unless the house is used *bona fide* for the purpose of agriculture. 12 Lah. 367 *followed.*

Miscellaneous First Appeal from the order of the Senior Subordinate Judge, Ferozepore.

Appellant:—by Dr. Nand Lal.

Respondent:—by Fakir Chand.

JUDGMENT.

The appellant raised objection under section 60 (*c*) of the Civil Procedure Code to the attachment and sale of two of his houses. One of the houses is inside the *abadi* and is occupied by him, while the other is outside the *abadi*. The objection was dismissed by the learned Subordinate Judge without giving any finding as regards the house within the *abadi*. The evidence clearly shows that the appellant is an agriculturist and the contention of the learned counsel for the respondent that the appellant parted with all his land and cannot therefore be considered to be an agriculturist is not established. As regards the second house, it is in evidence that that house was given to a tenant for the purposes of a flour-mill. As laid down in *Mirza* v. *Jhanda Ram* (1) exemption cannot be claimed under section 60 (*c*) Civil Procedure Code, unless the house in question is used or occupied *bona fide* for the purposes of agriculture. This condition does not appear to be fulfilled in the present case.

I accept the appeal to the extent of exempting the house inside the *abadi*, which is occupied by the appellant from attachment and sale. The appellant will get half the costs of this appeal.

Appeal accepted.

12 Lah. 367; 31 P. L. R 842: A. I. R. 1930 Lah. 1034 : 130 I. C. 419.

A. L. R. 1934 Lah. (76) 2.

Appellate Civil.

No. 756 of 1932 (Decided on 12-7-33.)

Jai Lal and Munroe, JJ.

KHAIRATI RAM .. *Appellant*

versus

CHUNNI LAL and others .. *Respondents.*

Court-fees Act (VII of 1870). Art. 17, cls. (iii) and (vi)—Mortgage suit—decree providing for payment to puisne mortgagees out of the balance of sale proceeds—mortgagor's appeal against that part of the decree—Court fee.

Subsequent to the institution of a mortgage suit by the mortgagee against the mortgagor, certain persons who claimed to be the puisne mortgagees of the same property were impleaded as defendants to the suit on their own application. The mortgagor pleaded *inter alia* that the puisne mortgage did not exist and the Court after framing an issue on the point found that the mortgage existed, and directed that out of the sale proceeds of the property in suit, if anything remained after satisfaction of the prior mortgagee's claim, Rs. 2,400 should be paid to the puisne mortgagees.

Held, that the decree of the trial Court must be interpreted to be a decree for the payment of Rs. 2,400 to the puisne mortgagees by sale of the mortgaged property and that on an appeal from such a decree, *ad valorem* Court fee must be paid.

[P. 77, C. 2.]

Second appeal against the decree of the Additional District Judge, Amritsar.

Appellant :—by Nand Lal.

Respondents :—by Nand Lal.

JUDGMENT.

Jai Lal, J.—One Bakhshi Ram instituted a suit for sale of mortgaged property. Defendant No. 1 was Khairati Ram, the mortgagor. Defendants Nos. 2 to 4 were the purchasers of the property from Khairati Ram after the mortgage. Subsequent to the institution of the suit, on their own application defendants Nos. 5 to 7, who claimed to be the puisne mortgagees of the same property, were impleaded. Khairati Ram, defendant, pleaded *inter alia* that the mortgage in favour of defendants Nos. 5 to 7 did not exist. The trial Court framed an issue: was no mortgage-deed executed in favour of defendants Nos. 5 to 7 or whether that mortgage-deed did not subsist? After recording the evidence of the parties it is found in

favour of defendants Nos. 5 and 7, that is to say, it held that the mortgage existed and was enforceable and passed a preliminary decree in the following terms:

"Decree for Rs. 5,252-4-0 with cost and further interest at the rate of 6 per cent. per annum till the realization of the decree under Order XXXIV, rule 4 in favour of the plaintiff against defendant No. 1. The money to be paid within two months, in default of which one-fourth of the house and one-fourth of the shop mortgaged will be sold and I further order that if any money is lfet behind after the satisfaction of the decree of the plaintiff then that money will be first paid to defendants Nos. 5 to 7 who are the subsequent mortgagees of the shop in dispute and the surplus money, if any, will be given to the judgment-debtor Khairati Ram."

I should have mentioned that the amount found due to defendants Nos. 5 to 7 is Rs. 2,400. The decree that was prepared in pursuance of the decree of the trial Court follows closely the wording of the judgment as set out above. The decree of course is in the wrong form, as it should have been as provided in form No. 9 of appendix D, Schedule III, Civil Procedure Code. It does not, however, in my opinion, affect the question which is before us. Against the decree passed by the trial Court the defendant Khairati Ram presented an appeal which substantially was against the decision of the Court about the existence of the mortgage in favour of defendants Nos. 5 to 7. In the grounds of appeal, however, the question of the interpretation of the mortgage-deed in favour of the plaintiff mortgagee was also raised. On our pointing out this to Dr. Nand Lal the learned Counsel has stated that this ground was "foolishly" taken and he has undertaken to withdraw it and he has actually done so by means of a written application. The appeal was preferred to the District Judge who was of opinion that a Court-fee stamp of Rs. 10 paid by the appellant on the memorandum of appeal was insufficient and that *ad valorem* Court-fee should have been paid by the appellant. The appellant, however, was not prepared to make good the deficiency. The learned Judge, therefore, dismissed the appeal. Khairati Ram has consequently presented this second appeal and the only question before us is whether the decision of the District Judge that *ad valorem* Court-fee should have been paid by appellant on Rs. 2,400 is correct?

We have of course now assumed that the appeal before the District Judge was merely against the decision in favour of defendants Nos. 5 to 7. Dr. Nand Lal for the appellant has relied upon article 17, clauses (*iii*) and (*vi*), schedule II, Court Fees Act, and has contended that the relief that he really claims is a declaration that the mortgage in favour of the contesting respondents does not exist. The trial Court, however, has directed that out of the sale proceeds of the property in suit, if anything remains after the satisfaction of the plaintiff's claim, the balance should first be paid to defendants Nos. 5 to 7 in satisfaction of their mortgage which has been found by him to subsist. It may be that the whole of the amount due to defendants Nos. 5 to 7 may not be realized out of the property in dispute or no part of it may be realized, still there may be the question of the personal liability of the appellant. In any case at present as it stands the decree of the trial Court must be interpreted to be a decree for the payment of Rs. 2,400 to defendants Nos. 5 to 7 by sale of the mortgaged property and there can be no manner of doubt that on an appeal from such a decree, *ad valorem* Court-fee must be paid. I am unable to distinguish the present case from the case if defendants Nos. 5 to 7 had instituted a suit for the sale of the mortgaged property and a decree had been granted to them as prayed for by them. The question of the sufficiency or otherwise of the property mortgaged to satisfy the decree does not affect the question of Court-fee. A number of authorities were cited on both sides. None of them, however really covers the present case though some observations made in them might be useful in deciding the appeal. I do not, however, consider it necessary to discuss those rulings because it appears to me that the matter is so clear that it does not require any further discussion.

Court-fees Act, Art. 17.

I would, therefore, dismiss this appeal with costs.

Monroe, J.—I agree.

Appeal dismissed.

†A. L. R. 1934 Lah. 78.

Appellate Civil.

No. 297 of 1933 (Decided on 18-11-'33.)

Bhide, J.

Lala DAT MAL and another .. .. *Appellants*

versus

Lala HANS RAJ and others .. .. *Respondents.*

(i) Provincial Insolvency Act, S. 53—Alienation, a few months before insolvency—pre-emptor holding decree against transferee—both transfers liable to be set aside under S. 53.—Pre-emption, right to, nature of.

Where properties were alienated by an insolvent a few months before insolvency, in respect of which the pre-emptors obtained a decree against the transferee,

Held, in proceedings by the Official Receiver under S. 53 of the Provincial Insolvency Act challenging the alienation as fraudulent wherein both the insolvent's alienee and the pre-emptors were made parties, that both transfers were liable to be set aside.

Case-law referred to and distinguished.

If the original alienation by the insolvent is challenged and falls through, subsequent transfers are also liable to be set aside, where the transferees are made parties to proceedings under S. 53.

The right to pre-emption is merely one of substitution and not of re-purchase, and where the original transfer by an insolvent is found to be fictitious, the title of the pre-emptor cannot be sustained. 32 P. L.R., 283 *referred to.*

[P. 78, C. 2.]

(ii) Provincial Insolvency Act, S. 53—Decision under—second Appeal—conversion of second appeal into revision practice.

No second appeal lies against a decision under S. 53 of the Provincial Insolvency Act. But it is competent to the High Court to treat the second appeal wrongly preferred as a Revision petition.

[P. 79, C. 1.]

Miscellaneous First Appeal from the order of the District judge, Jhang.

Appellants:—by J. L. Kapur.

Respondents:—by Fakir Chand.

JUDGMENT.

One Hoshnak Rai was adjudicated insolvent on the 30th of July, 1928. During the pendency of the insolvency proceedings but a few months before the order of adjudication was passed the insolvent sold his property to one Chanan Das for Rs. 2,000. Thereafter an application was made by the Official Receiver under Section 53 of the Provincial Insolvency Act for the sale being set aside. While these proceedings were pending, an uncle and brother of the insolvent brought a pre-emption suit with respect of the sale in favour of Chanan Das and obtained a decree on the 24th of April, 1930. The pre-emptors were made parties to the proceedings under Section 53 of the Provincial Insolvency Act and eventually the sale was set aside both as against Chanan Das and the pre-emptors. The pre-emptors appealed to the District Judge but the appeal was dismissed. They have now come up to this Court in second appeal.

Facts.

No Second appeal appears to be competent from a decision of the Insolvency Court under Section 53 of the Provincial Insolvency Act; but it is urged that the order passed by the Court below is illegal and therefore is liable to be set aside in revision. The two points urged before me were that the learned District Judge has erred in holding that the doctrine of *lis pendens* applied to the pre-emption decree in favour of the appellants and secondly that the transfer in favour of the appellants did not fall within the scope of Section 53 of the Provincial Insolvency Act, and could not be set aside under that Section.

As regards the first contention, reliance was placed on *Bhag* v. *Ujagar Singh* (1) *Mahomed Khan* v. *Khuda Baksh* and (2). These authorities appear to lend support to the contention that the transfer to a pre-emptor being in recognition of his right which existed before the suit the doctrine of *lis pendens* cannot apply. Assuming this to be so, however, it has still to be seen whether the transfer could not be set aside under Section 53 of the Provincial Insolvency Act when the original transfer to Chanan Das was found to be fictitious and fraudulent. The latter finding being one of fact cannot be challenged. The learned counsel, however, contended that under Section 53 of the Provincial Insolvency Act only an alienation by the insolvent can be set aside and as the present appellants derived their title from Chanan Das and

(1) 32 P. L. R. 283 : A. I. R. 1931 Lah. 435.
(2) 26 P. R. 1908.

not from the insolvent, the transfer in their favour could not be challenged. In support of this contention *Sudha* v. *Nanakchand Daulatram* (3), *Ponnammal Ammal* v. *District Official Receiver, Tinnevelly* (4), *Gobind* v. *Sonba* (5), *Kanaya Lal* v. *Official Receiver* (6) were referred to, but none of these rulings appears to me to support the wide proposition that a second alienation like the one in favour of the present appellants could in no case be challenged under Section 53. The facts in some of these cases have not been set forth clearly and it does not appear from the reports whether the original alienation by the insolvent was at all challenged by the Receiver as required by Section 53 in these cases. If the original alienation is challenged and the subsequent alienees are also made parties as in the present proceedings, I see no good reason why the subsequent transfers also should not be set aside when the original transfer fails through. The subsequent transfers cannot have any greater validity than the original transfer. It was urged that the right of pre-emption arises as soon as a sale is made and its subsequent avoidance at the instance of the Receiver cannot affect the rights of the pre-emptors. But this argument does not appear to be sound. It is well established that a right of pre-emption is merely one of substitution and not of purchase (see *Gobind Dayal* v. *Inayathullah* (7), and when the original transfer has been found to be fictitious and has been set aside, I fail to see how the title of the present pre-emptors can be sustained. In *Bhag* v. *Ujagar Singh* (1) upon which much stress was laid by the learned Counsel for the appellants, the pre-emptors were not made parties to the declaratory suit by the reversioners and the pre-emptors' title was perfected before the declaratory decree was obtained. In the present instance, however, the pre-emptors were made parties to the proceedings under Section 53 of the Provincial Insolvency Act and the present case is thus clearly distinguishable. In *Lal* v. *Milkhi* (8) it was held that a sale by a person governed by custom could be challenged by reversioners even when the original sale was pre-empted and the property was in the hands of the pre-emptors. I see, therefore, no reason for holding that the transfers in favour of the appellants could not be set aside in the proceedings under Section 53 to which they were parties, and which they had every opportunity of defending. Moreover even if there were any doubt about the powers of the Insolvency Court to set aside the transaction under Section 53 of the Provincial Insolvency Act, the Court certainly had very wide powers to do so under Section 4 of that Act. I see, therefore, no reason to interfere with the decision of the Courts below and dismiss the appeal with costs.

Provincial Insolvency Act, S. 53.

Appeal dismissed.

(3) 88 I. C. 89 : A. I. R. 1925 Lah. 295 (1).
(4) 51 M. L. J. 228 : A. I. R. 1927 Mad. 58 : 97 I. C. 918.
(5) 121 I. C. 663 : A. I. R. 1930 Nag. 34.
(6) 110 I. C. 742 : A. I. R. 1928 Lah. 750.
(7) 7 All. 775 (F. B.),
(8) 54 P. R. 1918.

A. L.R. 1934 Lah. 79.

Appellate Civil.

No. 618 of 1929 (Decided on 24-1-33.)

Broadway, Ag. C. J. and Monroe, J.

HAR PARSHAD .. *Appellant*

versus

COMMITTEE OF MANAGEMENT, GURDWARA HERAN and another .. *Respondents.*

(i) Punjab Sikh Gurdwaras Act (VIII of 1925), S. 18 (1) (g)—and descending from Mahant to chela—presumption—rebuttable.

Where it is proved that the land in dispute descended from Mahant to the successor-in-office as such, the presumption created by or S. 18 (1) (g), Sikh Gurdwaras Act applies, and it must be presumed that the land belongs to the Gurdwara. This presumption however, is rebuttable by production of evidence to the contrary.

[P. 80, C. 2.]

(ii) Punjab Sikh Gurdwaras Act (VIII) of 1925), S. 3—Government declaring an institution to be Sikh Gurdwara—High Court cannot consider it.

Held (Per Monroe, J.) That it is not open to the High Court to consider whether a Government declaration that a certain institution is a Sikh Gurdwara is justified by the circumstances. [P. 80, C. 1.]

First appeal from the decree of the Sikh Gurdwara Tribunal, Lahore.

Appellant:—by J. N. Aggarwal Mehr Chand and S. L. Puri.

Respondents:—by Bhagat Singh.

JUDGMENT.

Monroe, J.—This is an appeal from an order of the Sikh Gurdwara Tribunal dismissing the appellant's claim that certain specified parts of the property described in Notification No. 182-G, dated 1st August 1927, belongs to him and not to Gurdwara No. 168, situate at Heran. Coldstream, J., has set out all the evidence presented to the Tribunal and it would serve no useful purpose to recapitulate it. It is admitted by the appellant that the property in dispute descended from one Mukat Ram, Mahant, to his chela Sarup Das, and from him, as Mahant, to Har Parshad, the appellant. The presumption created by the Sikh Gurdwaras Act 18 (1) (g) therefore applies. To rebut the presumption it is argued that in this case we are not concerned with a single institution only but with two, one the Gurdwara declared so to be under the provisions of the Act, the second an institution having no connection with Sikhism to which the statutory presumption is inapplicable. This theory is not supported by any evidence—the line of Mahants goes back through ten generations and the various properties have all descended together, and in all the documents there is nothing whatever to suggest that there were at any time separate institutions in existence.

The second line of attack taken by the appellant was that he had acquired a title by limitation: again, there is no evidence to support him and before us, the claim that the possession of the appellant has been adverse was not pressed. The claim of the appellant was in this case concluded by the Government's declaration that the institution with which we are concerned was a Sikh Gurdwara. It is not open to us to consider whether that declaration is justified by the circumstances. We must accept it and give to it its full effect. Accordingly I would dismiss this appeal with costs.

High Court cannot consider Government declaration.

Broadway, Ag. C.J.—Admittedly the property now in question was at one time in possession of Mukat Ram. Some of the property devolved upon Mukat Ram as a successor to his Guru Mahant Gursarn Das. The remainder of the property he himself acquired. It has been further admitted that this property devolved first upon Mukat Ram's chela Sarup Das and then on the death of Sarup Das on his chela Har Parshad the present appellant. That these devolutions of the succession to the property in question were from office holder to the successor-in-office as such has not been seriously contested. In fact the appellant himself practically admits this in his statement at p. 19 of the printed book where he says that had his rival chela Gopal Das become Mahant he would have got the land. In these circumstances the presumption created by S. 18, sub-cl. (1) (g), Sikh Gurdwaras Act of 1925, applies and it must be presumed that this land belongs to the Gurdwara. This presumption is no doubt a rebuttable one but the evidence on the record cannot be said to rebut it. Indeed the learned counsel for the appellant did not claim that this this presumption had as a matter of fact been rebutted. I therefore concur in the order proposed.

Presumption.

Appeal dismissed.

A. I. R. 1934 Lah. 80.

Appellate Civil.

No. 1892 of 1927 (Decided on 31-1-33)

Bhide, J.

AHMAD and others .. *Appellant*

versus

Mst. ALLAH BIBI and others .. *Respondent.*

Punjab Limitation (custom) Act (I of 1920)—alienation—includes testamentary disposition—bequest of ancestral property—declaratory suit by reversioners—limitation.

Held that according to Punjab Act I of 1920, an alienation includes testamentary disposition of property and that therefore a suit for declaration by a reversioner that a bequest of ancestrial property shall not be binding on the plaintiff after the death of the alienor must be instituted within six years of the date of registration, when the bequest is made by a registered deed and the fact that the suit is brought after the death of the alienor does not affect the limitation in any way.

Second appeal from the decree of District Judge, Jhelum.

Appellants:—by Dev Raj Sawhney.

Respondents:—by Shamair Chand.

JUDGMENT.

This second appeal arises out of a suit for a declaration that the bequest of certain landed property by one Ahmad, a Kingra Jat of Sadhowal in the Jhelum district, shall not affect the reversionary rights of the plaintiffs. The bequest was made by Ahmad in favour of his daughters by virtue of a registered deed dated the 13th November 1918. The defendants pleaded *inter alia* that the suit was time-barred and that Ahmad was competent to make a bequest in favour of his daughters according to the custom governing the parties. The trial Court decreed the suit, but on appeal the learned District Judge has held that the suit was time-barred and also that Ahmad was competent to make a valid bequest in favour of his daughters. The appeal was accordingly accepted and the suit dismissed. From this decision the plaintiffs have preferred an appeal supported by a certificate on the point of custom under S. 41, Punjab Courts Act.

Facts.

The first point urged before me was that of limitation. The learned District Judge has held that the suit was governed by Art. 120 of the Indian Limitation Act, and that the period of limitation having commenced to run from the date of the will, namely the 13th November 1918, the present suit, which was instituted on 9th October 1926, was barred by time. The learned counsel for the appellants urged that the will could not take effect till the death of the testator, which occurred in 1924, and, therefore, the view taken by the learned District Judge was not correct. The learned counsel for the respondents did not accept the view taken by the learned District Judge but urged that the suit was really governed by Art. 1, of the Schedule to Punjab Act 1 of 1920 and was time-barred according to that Article. According to Punjab Act I of 1920 an alienation included a testamentary disposition of property and Art. 1 in the Schedule of the same Act lays down that a suit for a declaration that an alienation of ancestral immoveable property shall not be binding on the plaintiff after the death of the alienor must be instituted within six years of the date of registration when the alienation is made by a registered deed. The learned counsel for the appellants urged that the present suit is not governed by that article inasmuch as the suit was instituted after the death of the alienor. This contention appears to me to have no force. The facts of the case are practically on all fours with those of *Harnoman* v. *Mst. Tabi* (1), a Division Bench ruling of this Court and the suit appears to be clearly time-barred in accordance with the view taken by the Division Bench in that case. In the circumstances it is unnecessary to go into the question of custom raised by the plaintiffs.

Limitation.

I, therefore, confirm the decree of the learned District Judge and dismiss this appeal. In view of all the circumstances, however, I leave the parties to bear their costs in this Court.

Appeal dismissed.

(1) 13 Lah. 22: 32 P. L. R. 556; A. I. R. 1931 Lah. 702: 134 I. C. 1040.

A. I. R. 1934 Lah 81.

Appellate Civil.

No. 1022 of 1932. (Decided on 7-1-33.)

Jai Lal, J.

JAI KISHAN DASS .. *Appellant*

versus

CHIRAGH DIN and others . . .*Respondents.*

Provincial Insolvency Act, (V of 1920), S. 28 (5)—agricultural land of insolvent sold and amount realized distributed among creditors—application for discharge granted—subsequent time-barred application that sale of land void under Punjab Land Alienation Act—not entertainable.

The Insolvent's land was sold and the amount realised distributed among the creditors. He applied for an order of discharge alleging that the amount paid to the creditors out of the sale proceeds of his land was sufficient to entitle him to such an order. The Insolvency Court granted the petition and the discharge. Subsequently he made an application that the sale of the land be set aside as it could not be sold under the provisions of the Alienation of Land Act. This application was made considerably after the expiry of the period of limitation provided for such applications.

Held, that though the land could not be sold in insolvency proceedings, but; the application being belated and improper, the insolvent was not, under the circumstances, entitled to have the sale set aside. 12 Lah. 367 *referred to*.

[P. 82, C. 1.]

Second appeal from the order of the District Judge, Sialkot.

Appellant:—by Hazara Singh.

Respondents:—by Abdul Aziz.

JUDGMENT.

Chiragh Din has been adjudicated an insolvent, his land was sold on 31st December 1928, and the amount realized was distributed among the creditors. He then applied for an order of discharge alleging that the amount paid to the creditors out of the sale proceeds of his land was sufficient to entitle him to such an order. The Insolvency Court granted the petition and the discharge. Subsequent to this he made an application that the sale of the land be set aside as it could not be sold under the provisions of the Alienation of Land Act. This application was made considerably after the expiry of the period of limitation provided for such applications and the Insolvency Court declined to entertain it. The District Judge on appeal however came to the contrary conclusion.

Facts.

The creditors have presented this appeal against the order of the District Judge and the only respondent present before me is the auction-purchaser who supports the appellant's contention. The insolvent has been personally served but has not appeared before me. It seems to me that though in view of the decision of this Court in *Mirza* v. *Jhanda Ram* (1) the land of the member of an agricultural tribe could not be sold in insolvency proceedings the contrary view was held by this Court when the sale actually took place and the application objecting to the sale was not only beyond time but was also belated and improper as relying upon the payment of the sale proceeds to the creditors, the insolvent applied for his discharge and obtained such an order. In my opinion, under the circumstances he was not entitled to any special consideration. I therefore accept this appeal and, setting aside the order of discharge, restore that of the trial Court, leaving the parties to bear their own costs.

Sale not to be set aside.

(1) 12 Lah. 367; 31 P.L.R. 842; A.I.R. 1930 Lah. 1[illegible]4: 130 I.C. 419.

Appeal accepted.

A. I. R. 1934 Lah. 82.

Appellate Civil.

No. 1274 of 1932. (Decided on 26-1-33.)

Bhide, J.

RUP CHAND and others .. *Appellants*

versus

HAR NAND and others .. *Respondents.*

(i) Punjab Land Revenue Act, S. 44—later entries in revenue records—presumption of correctness—burden of proof.

Held, that there is a presumption of correctness attaching to the later entries in the revenue records though there is nothing to show how the change in the entries had taken place and that it is upon the persons challenging these entries to show that the later entries are not correct.

[P. 83, C. 1.]

(ii) Punjab Land Revenue Act, S. 44—Entry as to relationship—valuable piece of evidence.

Held, that even if an entry as regards relationship be held not to fall strictly within the purview of S. 44, Punjab Land Revenue Act, it would still be a valuable piece of evidence, as it is an entry made by a public servant in the ordinary course of his duties.

[P. 83, C. 2.]

Second appeal from the decree of the District Judge, Delhi.

Appellant:—by Kanshi Nath Aggarwal.

Respondents:—by Nand Lal.

JUDGMENT.

This was a suit for a declaration that the plaintiffs were entitled to one-third share in the land which was the subject-matter of the suit. There had been an application for partition of the property. The plaintiffs claimed one-third share, but the Revenue Records showed that their share was only one-fourth. The plaintiffs were therefore directed to establish their claim in a Civil Court and thereupon instituted the present suit. The decision of the claim made by the plaintiffs rested on the question whether their father, Bhag Mal,

Facts.

was adopted by Ranjit as alleged by them: *vide* pedigree table attached to the judgment of the trial Court. The learned District Judge has held on appeal that the plaintiffs had failed to prove that Bhag Mal was adopted by Ranjit and has consequently declared that they are entitled to one-fourth share only in the land in suit. From this decision the plaintiffs have preferred a second appeal.

The learned District Judge's finding that Bhag Mal was not proved to be an adopted son is one of fact, but the learned counsel for the appellants has urged that the finding of the learned District Judge is vague, that it is based on inadmissible evidence and that he has misconstrued certain documents. After carefully considering the facts on the record I do not think that there is any force in these contentions. The learned District Judge has held after considering the entries in the Revenue Records and the conduct of Bhag Mal that no formal adoption had taken place. It is admitted before me that according to the custom prevailing in the Rohtak District forms and ceremonies are necessary for adoption. It is also admitted that Bhag Mal has succeeded to the property of his natural father and that such succession is not allowed under custom when a formal adoption takes place. The learned counsel for the appellants has urged that the learned District Judge should not have relied on the later entries in the Revenue Records as there was nothing to show how the change in the entries had taken place, but there was a presumption of correctness attaching to these and it was, in my opinion, upon the plaintiffs to show that the later entries were not correct. The next contention of the learned counsel that the learned District Judge has misconstrued the judgments in two cases in which Bhag Mal was sued by the predecessors-in-interest of some of the defendants is also not borne out by the record. I have perused the judgments in those cases and it appears therefrom that Bhag Mal did claim therein that he was entitled to succeed to his natural father's property. The trial Court had taken the view that these judgments showed that Bhag Mal's claim was based only on adverse possession, but the judgments do not seem to me to support that view.

Onus.

The learned counsel finally urged that there was no presumption of correctness attaching to the entry in the Revenue Records that Bhag Mal was the son of his natural father Birjia. But even if the entry in question did not fall strictly within the purview of S. 44, Punjab Land Revenue Act, as contended by the learned counsel, it would still be a valuable piece of evidence as it is an entry made by a public servant in the ordinary course of his duties. Besides, if this entry were held to be of no value, the previous entries showing that Bhag Mal was an adopted son of Ranjit, on which the learned counsel for the plaintiffs wishes to rely, will have to be considered to be equally valueless. In my opinion, there is no good ground for interference with the findings of fact of the learned District Judge. There appears to be however a slight mistake in the judgment of the learned District Judge. In the end of his judgment the learned District Jugde remarked that he accepted the appeal and granted the plaintiffs a declaration that they were entitled to a quarter share only of the land in suit, with costs in both Courts. The judgment reads as though the costs were awarded to the plaintiffs although in reality their suit was dismissed. This was however apparently only a clerical error and the decree rightly directs that the costs will be paid by the plaintiffs to the defendants who were the appellants before the District Jugde. The decree, as it stands, is correct and therefore it is unnecessary for me to make any alteration. I dismiss the appeal with costs.

Entry as to relationship.

Appeal dismissed.

A.L.R. 1934 Lah 84.

Appellate Civil.

No. 1232 of 1932 (Decided on 8-2-33).

Tekchand, J.

S. SUNDAR SINGH SACHAR. *Appellant*

Legal Representative of *Mst.* Bhagwanti.

versus

BAKHSHI SHIV RAM and another .. .. *Respondents.*

(i) Evidence Act (I of 1872), S. 115–Some of creditors applying for adjudication—certain mortgage attached as fraudulent preference, but allegation subsequently withdrawn—adjudication order on other acts of insolvency—application by Official Receiver under S. 54, Provincial Insolvency Act, for setting aside the mortgage—Official Receiver not estopped by statement of petitioning creditors.

The petitioning creditors, basing their application for adjudication on other acts of insolvency, alleged also that a certain mortgage by the debtor in favour of the appellant was made with the view of giving her fraudulent preference over other creditors, but this allegation was subsequently withdrawn. The debtor was adjudicated on the strength of other acts of insolvency. More than two years later, the Official Receiver presented an appplication under S. 54, Provincial Insolvency Act, for annulment of the mortgage. It was contended that he was estopped by the statement of the petitioning creditors from repeating the same allegation.

Held, that as the statement referred to was made by the petitioning creditors only, it was not binding on the Official Receiver, who represented the entire body of creditors.

[P. 85, C. 1]

(ii) Provincial Insolvency Act, (V of 1920), S. 54—cases falling under—onus probandi on Official Receiver.

Held, that in cases falling under S. 54, Provincial Insolvency Act, it is not the transferee who is to prove that a certain transfer is not fraudulent, but the onus lies on the Official Receiver to establish the necessary elements which would make that section applicable, 30 B.L.R. 290 ; 110 I. C. 824 relied upon.

[P. 85, C. 1.]

(iii) Provincial Insolvency Act, (V of 1920), S. 54—transfer made in imminent expectation of bankruptcy—no intention to give fraudulent preference—"preference"—meaning of—significance of transfer made under threat of legal proceeding—not voluntary.

Held, that the fact that a transfer was effected by the debtors when they were in imminent expectation of bankruptcy is not by itself sufficient to prove the intention to give fraudulent preference. The word "preference" imports a free choice, and it is necessary for the receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the creditors.

Where, therefore, the threat of legal proceedings was not a mere *brutum fulmen* but was real and effective and were taken seriously by the debtors who agreed to secure the debt by entering into the mortgage transaction in question, *Held*, that transfer could not be said to have been made voluntarily. 43 Cal. 640 followed.

[P. 85, C. 1.]

Second appeal from the Order of the District Judge, Rawalpindi.

Appellants :–by M. C. Mahajan, Achhru Ram and Badri Das.

Respondent :–by J. N. Aggarwal.

JUDGMENT.

Facts.

On 27th May 1927, a mortgage was effected by the firm Thakar Singh-Sewa Singh, in favour of *Mst.* Bhagwanti, appellant for Rupees 23,000, the consideration being prior debts due by the mortgagor to the mortgagee. Within three months of the date of the mortgage, *i.e.*, on 23rd August 1927, an application by certain other creditors for adjudication of firm Thakar Singh-Sewa Singh, as insolvents was presented before the Insolvency Judge at Rawalpindi. The petition was based on various alleged acts of insolvency having been committed by the debtors, one such act being the mortgage in favour of Mt. Bhagwanti, which was described as having been made with a view to giving her fraudulent preference over other creditors. On 15th October 1923, the petitioning creditors made a statement withdrawing the allegation that the mortgage in favour of Mt. Bhagwanti, had been made with a view to giving her fraudulent preference, and praying that the application be tried on the strength of the other alleged acts of insolvency. This was allowed, the inquiry proceeded on the other allegations; and eventually an adjudication order was passed. More than two years later, on 21st November 1930, the Official Receiver presented an application under S. 54, Provincial Insolvency Act, urging that the aforesaid mortgage in favour of Mt. Bhagwanti was void as against him and that it be annulled by the Insolvency Court, inasmuch as it had been effected with a view to giving her fraudulent preference over the other creditors. After inquiry the Insolvency Judge dismissed the petition, but on appeal by the Official Receiver the learned District Judge has annulled the mortgage.

No estoppel.

The mortgagee Mt. Bhagwanti has preferred a second appeal and the first contention raised on her behalf is that the petitioning creditors having stated on 15th October 1928, that the mortgagor in question did not "fraudulently prefer" the appellant and that it did not amount to "an act of insolvency," the Official Receiver was "estopped" from repeating the same allegation and applying under S. 54. In my opinion, this contention is without substance, and I have no hesitation in over-ruling it. In the first place, the statement referred to was made by the petitioning creditors only and is not binding upon the Official Receiver who represents the entire body of creditors. Secondly, as stated already, the petitioning creditors had originally applied for the adjudication of the debtors as insolvents on the strength of numerous alleged acts of insolvency, but in order to obtain a speedy decision they thought it advisable to limit their case to the less contentious allegations, and dropped those, inquiry into which would have delayed the passing of the adjudication order. Further, it has not been shown that Mt. Bhagwanti was misled to act to her detriment by reason of the aforesaid statement made by the petitioning creditors on 15th October 1928, and for this reason also the plea of estoppel cannot be sustained. The next contention, that the learned District Judge has approached the case from a wholly erroneous legal stand-point, is however well-founded and in my opinion must succeed. A perusal of his judgment shows that the learned District Judge has dealt with the case as if the onus lay upon the mortgagee to prove that the transfer in question was not fraudulent. It is however well-settled that in cases falling under S. 54, Provincial Insolvency Act, the onus lies upon the Official Receiver to establish the necessary elements which would make that section applicable: *Sime Darby & Co.* v. *Official Assignee* (1) *and Ram Chand* v. *Parmanand* (2).

Onus.

'Fraudulent preference.'

Now the only substantial fact found against the appellant is that the transaction in her favour was effected by the debtors when they were in imminent expectation of bankruptcy. But this by itself is not sufficient to prove the intention to give fraudulent preference. The word "preference" imports a free choice, and it is necessary for the Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the creditor. It is admitted that the transferee is not related to the debtors and it has not been shown that there were any special reasons for them to give preference to her over the other creditors. On the other hand, the facts found are that the debt due by the debtors to the appellant was unsecured, that she was anxious to have it repaid and she made a demand. The debtors did not have sufficient cash to pay and a meeting was held at the house of a mutual friend, and was attended by the debtors and a number of persons on behalf of the appellant. In this meeting the debtors were threatened with a suit, in case the amount due to the appellant was not paid or got secured forthwith. The appellant's son is admittedly a practising lawyer and her husband is a petition-writer, and there can be no doubt that the threat of legal proceeding was not a mere *brutum fulmen* but was real and effective and must have been taken seriously by the debtors who agreed to secure the debt by entering into the mortgage transaction in question. These facts clearly show that the transfer was not made voluntarily, but was made under pressure and the case falls within the rule laid down in *Nripendra Nath* v. *Ashutosh Ghose* (3).

The learned District Judge appears to have been largely influenced by the argument that the debtors made "numerous" alienations, and he has observed that they had adopted a "reckless course of paying off" some of their creditors in spite of the fact that it was patent to them that by so doing they would be unable to pay others. But as admitted by Mr. Jagan Nath Aggarwal, counsel for the Receiver all the other alienations were made subsequent to the transaction in question and it has not been shown that the debtors had acted "recklessly" before the mortgage in favour of the appellant. It is further significant that there is no

(1) 30 Bom. L. R. 290 : 54 M.L.J. 337 : 47 C.L.J. 339 : A.I.R. 1928 P.C. 77 : 107 I.C. 233 (P.C.).

(2) 110 I.C. 824 : A.I.R. 1928 Lah. 744.

(3) 43 Cal. 640 : 20 C.W.N. 420: 33 I.C. 548.

finding by the District Judge, nor is there any evidence on the record, that at the time of the mortgage in question the appellant was aware that the mortgagors were practically insolvents and the transaction in their favour would result in giving them undue preference to other creditors. In my opinion the Official Receiver has failed to bring the case within S. 54, Provincial Insolvency Act, and the judgment of the learned District Judge cannot be sustained. I accordingly accept the appeal, set aside the order of the learned District Judge and restore that of the Insolvency Judge. The appellant shall get her costs from the Official Receiver in all Courts.

Appeal accepted.

A. L. R. 1934 Lah 86.

Appellate Civil.

No. 2741 of 1927, (Decided on 8-11-33).

Shadi Lal, C. J., and Abdul Rashid, J.

Sardar BALWANT SINGH.. *Appellant*

versus

Mst. SARDARNI KESAR KAUR and others .. *Respondents.*

(i) Custom (Punjab)—alienation—agricultural land ceasing to be such, alienation of, by Hindu widow—reversioner, right of, to impugn—Gujranvala town.

The rule of Custom prevailing in Gujranwala town which allows a reversioner to challenge an improper alienation by a Hindu widow of ancestral land applies to agricultural land and not to land which has ceased to be agricultural and has acquired the character of urban property. [P. 87, C 1.]

(ii) Hindu Law—alienation by widow—antecedent debts—sale of land on pressure by creditors, to prevent accumulating interest and expenses of threatened suit.

A Hindu widow is justified in selling ancestral land to pay off antecedent debts of her husband to prevent accumulating interest, and to ward off pressure by creditors which could only entail unnecessary Court expense. When the only method of discharging the debts is by effecting a sale of the property which is less prejudicial than a mortgage, it is an act of prudent management on the part of the widow. The reversioners cannot under such circumstances, question the alienation. [P. 88, C. 2.]

(iii) Hindu Law—alienation by widow—necessity for small fraction of consideration not established, effect of—duty of purchaser.

Where the necessity for a small fraction of the consideration for a sale by a Hindu widow is not established, the sale itself cannot be challenged. If the purchaser paid a fair price and made enquiry as to the necessity for the sale, the mere fact that a part of the price was not proved to have been applied for necessary purposes would not invalidate the sale. [P. 87, C. 1.]

Appeal from the decree of the Senior Subordinate Judge, Gujranwala.

Appellant:—by J. N. Aggarwal and Asa Ram.

Respondents:—by *Dewan* Mahar Chand, *Sodhi* Charan Das and Badri Das.

JUDGMENT.

On the 18th April, 1920, Ranjodh Singh, a *Jat* of the village of Mananwala in the district of the Sheikhupura, mortgaged a plot of land measuring about 24 *kanals* to *Mst.* Jiwan Kaur for Rs. 24,000. The mortgagor died on the 4th April, 1922, and his widow *Mst.* Kesar Kaur sold the land on the 22nd February, 1925, to Shankar Shah and Atma Ram for Rs. 46,000.

In May, 1925, Balwant Singh, the brother of the deceased Ranjodh Singh, brought two actions impeaching the alienations on the usual ground that they were made without consideration and necessity and should not affect his right to succeed to the estate after the death of the widow. The trial Judge has upheld both the transactions, and dismissed the suits. Against the decree dismissing his suits the plaintiff has preferred two appeals which may conveniently be dealt with in one judgment.

Gujranwala town Agricultural land Custom.

It may be stated at the outset that the property is situate in the town of Gujranwala, and, though nominally agricultural land, it is no longer used for agricultural purposes. It is beyond dispute that on the 7th March, 1903, Ganga Singh (the father of the mortgagor and the plaintiff), along with his brother and nephew, granted a lease of a large plot of land, including the property in question, for a period of twenty years to two merchants of Gujranwala, the rent reserved being Rs. 210 per annum. The evidence on the record shows that the lessees used the land for constructing a factory and for building houses. Indeed, the property was too valuable to be

applied to agricultural purposes, and the sole reason for its fetching an abnormally high price at the time of the sale in February, 1925, was that it was situate within the Municipal limits of a growing town, and had been, or was going to be, employed for industrial and residential purposes. Now, the rule of custom which allows a reversioner to challenge an improper alienation of ancestral land ordinarily applies to agricultural land, and it was hardly intended that the custom should restrict the alienation of land which has ceased to be agricultural and acquired the character of urban property. It is significant that during the period of fourteen years from 1911 to 1924 there have been more than seven hundred alienations of land in the town of Gujranwala, but that not one of them has been successfully impeached. In view of the nature of the property involved in this case, and of the number of alienations which have remained uncontested, the trial Court has decided that the plaintiff is not entitled to impeach the alienations in question.

Assuming, however, that the custom restricting an alienation of agricultural land governs the transactions in dispute, the question arises whether they were made for necessary purposes. A perusal of the mortgage deed executed by Ranjodh Singh shows that out of Rs. 24,000 borrowed by him, Rs. 23,500 were required for discharging the debts due by him to various creditors named in the deed, namely, Manak Chand, Badri Nath, Sahib Singh, Ganesha Singh, Narain Singh, the Zamindars Bank and Chandi Ram. The balance, Rs. 500, was borrowed for defraying the expenses of the mortgage deed and for personal necessities.

Of the creditors specified in the deed. Manek Chand was paid, on the 19th April, 1920, Rs. 14,400, which sum was due to him on a mortgage dated the 3rd February, 1917. The mortgage was for Rs. 10,000 and the interest thereon amounted to Rs. 4,400. This mortgage has not been contested by the plaintiff, and it must, therefore, be held that necessity for Rs. 14,400 has been established.

There is also evidence to show that Rs. 1,700 were paid to Sahib Singh, a first cousin of the plaintiff as well as the mortgagor, and Rs. 2,959 to Narain Singh and his brother Ganesh Singh. These debts were due to the creditors from the mortgagor on bonds and pronotes. Rs. 1,048 was paid to the Zamindars Bank, Rs. 2,000 to Badri Nath and both of them were previous creditors. The total of these items including the money paid to Manak Chand exceeds Rs. 22,000 and the remaining sum which is less than Rs. 2,000 was used for defraying the cost of executing the mortgage deed and for other expenses.

Antecedent debts—pressure by creditors.

The proposition of law is firmly established that the payment of antecedent debts constitutes necessity for an alienation, and the plaintiff cannot therefore offer any serious opposition to the validity of the transaction. He has however, made an attempt to show the mortgagor was a profligate and drunkard and was also addicted to gambling. The witnesses produced by the plaintiff have indulged in exaggerations, and the only thing which has been established is that he drank moderately and also entertained his friends. Considering his status and the society to which he belonged, it can hardly be said that he did anything which was considered to be improper by the members of his brotherhood.

In the circumstances described above, the trial Judge was justified in holding that the mortgage in question was a valid transaction. And if the mortgage cannot be impeached, the sale, which was probably the only reasonable method of discharging the debts incurred by Ranjodh Singh, may be regarded as a necessary consequence. Ranjodh Singh died in April, 1922, and his widow was confronted with the task of satisfying the claims of her husband's creditors and struggled for some time until she found that the only mode, in which she could avoid the payment of interest on the debts and also litigation, was to effect a sale of the mortgaged property. It is to be observed that the income from the property was a small sum of money realised as rent, and it could fetch a large income only if the widow could find a considerable sum of money for building houses thereon. The creditors were pressing for payment, and the pressure on the estate could be avoided only by effecting a sale of the land. There can be little doubt that the sale was less prejudicial to the estate than the mortgage, and it should, therefore, be held to be an act of good management on the part of the widow.

The price realised was Rs. 46,000, out of which Rs. 33,500 were paid to the mortgagee Jiwan Kaur or her representatives on account of principal and interest due upon her mortgage. The balance, 12,500, which was paid to the widow, was utilised by her for discharging the debts due to other creditors of her husband and for performing the marriage of her only daughter. It appears that Rs. 2,897-9-6 were paid to the Zamindars Bank, Rs. 1,250 to Chandi Mal, Rs. 800 to Mula Mal, Rs. 500 to *Mst.* Bhagwanti, Rs. 1,975 to Kehr Singh and the two sums of Rs. 2,000 and Rs. 1,500 to Narain Singh; and these were all debts which were due by the last male holder of the estate. Rs. 450 were paid to the broker Ram Singh who brought about the transaction, and some money was spent in celebrating the marriage of the daughter.

It may be that necessity for a small fraction of the consideration has not been established, but as observed by their Lordships of the Privy Council in *Sri Krishan Das* v. *Nathu* (1) the real question to be considered is whether the sale itself was justified by necessity. If the purchaser has paid a fair price for the property sold, and made due enquiry as to the necessity for the sale, the mere fact that a part of the price is not proved to have been applied to necessary purposes would not invalidate the sale.

It was contended that the widow received some income from the other property left by her husband, but she was not bound to apply the whole of the income to the payment of his debts. Nor was the income sufficient to meet the pressure on the estate. It is clear that an alienation of some immoveable property belonging to the estate was necessary in order to discharge the debts. It seems that the sale of the land in question, which yielded hardly any income but fetched a good price, was probably the best arrangement which could be made to satisfy the creditors.

(1) 54 I. A. 79; 49 All. 149 : 25 A. L. J. 80 ; A. I. R. 1927 P. C. 37 : 100 I. C. 130.

Having regard to all the circumstances of the case, including the peculiar feature of the property alienated, I have reached the conclusion that there is no adequate ground for dissenting from the judgment of the trial Court. I would accordingly affirm the decision of the Lower Court and dismiss both the appeals with costs.

Abdul Rashed, J;—I agree.

Appeal dismissed.

A. L. R. 1934 Lah 88.

Revisional Criminal.

No. 1166 of 1932 (Decided on 4-1-33.)

Jai Lal, J.

HARI RAM and others .. *Petitioners*

versus

THE CROWN .. *Respondent.*

(i) Public Gambling Act (III of 1867), Ss. 5 and 6—Provisions of S. 5 not complied with—presumption under S. 6 cannot be raised.

The Magistrate professed himself to enter the house, to take into custody the persons whom he found therein and to seize the instruments of gaming found on search of the room. He did not conduct the search personally, he did not even enter the house, but sent the Sub-Inspector of Police to conduct the search thereof.

Held, that this was not in compliance with the provisions of S. 5 of the Gambling Act, so as to entitle the Court to raise a presumption under S. 6. [P. 89, C. 2.]

(ii) Criminal trial—presumption—events leading to—must be proved.

Held, that where on the happening of certain events, a legal presumption is to be raised against the accused, it is the duty of the prosecution to prove that such events happened strictly as required by law. [P. 89, C. 2.]

Petitioners:—by Jagan Malhotra.

JUDGMENT.

Facts.

The petitioners—Hari Ram, Kanhaya Lal and Mukand Lal—have been convicted under the Public Gambling Act: the first named person under S. 3 for owning or keeping a common gaming house and the other two under S. 4 being found in a common gaming house. It appears that a Sub-Inspector of Police reported to Diwan Kahan Chand, a Magistrate of the First Class at Simla, that a raid was

proposed to be made in a house where it was suspected that gambling was going on. The Magistrate therefore accompanied by some police officers and others went to the house in question and divided his party into three groups so as to enter the house by the three possible means of access to or exit from the same. The house was entered into and the petitioners were arrested from inside. A room of the house was then searched by the Sub-Inspector of Police who, it may be assumed, was deputed for the purpose by the Magistrate, who himself remained outside at the time of the search. During the search conducted by the Sub-Inspector of Police instruments of gaming were found in the room, which were produced before the Magistrate and those arrested were then sent up for trial.

It is admitted by the Magistrate in his evidence at the trial that he did not see any of the accused actually gambling at the time of the raid. The conviction of the petitioners, therefore, rests on the presumption which has been raised against them under S. 6, Public Gambling Act. That section provides that when instruments of gaming are found in any house or room, etc., entered or searched under the provisions of S. 5 of the Act, it shall be evidence, until the contrary is made to appear, that such house or room, etc., is used as a common gaming house and the persons found therein were there present for the purpose of gaming, although no playing was actually seen by the Magistrate or police officer, or any of his assistants. This presumption, it would be observed, arises only if the house or the room is entered or searched under the provisions of S. 5. Now, S. 5 provides that if *inter alia* an officer invested with the full powers of a Magistrate upon credible information, and after such inquiry as he may think necessary, has reason to believe that any house or room, etc., is used as a common gaming house, he may either himself enter, or by his warrant authorize the specified police officers to enter such house or room, etc., and may either himself take into custody or authorize such other officer to take into custody, all persons whom he or such officer finds therein, and also may seize or authorize such officer to seize all instruments of gaming, etc., reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and further, may search or authorize such officer to search all parts of the house, room, etc., and may seize or authorize such officer to seize and take possession of all instruments of gaming found upon such search.

There is no contention that Diwan Kahan Chand, was invested with the full powers of a Magistrate so as to entitle him either himself to enter the house or the room, or by his warrant to authorize the police officer concerned to do so and generally to do all the acts mentioned in S. 5 of the Act. It is obvious that he did not by his warrant authorize any police officer to take action under S. 5. He therefore professed himself to enter the house, to take into custody the persons whom he found therein, and to seize the instruments of gaming found on search of the room. According to law however it was his duty personally to conduct the search of the room in which the instruments of gaming are subsequently alleged to have been found, but he did not conduct the search personally; on the other hand, he admits that he did not even enter the room but sent the Sub-Inspector of Police to conduct the search thereof. This, in my opinion, was not a compliance with the provisions of S. 5 of the Act, so as to entitle the Court to raise a presumption under S. 6.

No presumption under S. 6.

In cases like the present, where on the happening of certain events a legal presumption is to be raised against the accused, it is the duty of the prosecution to prove that such events happened strictly as required by law. In the present case, in the absence of strict compliance with the provisions of S. 5, the presumption under S. 6 could not be raised against the petitioners, and as the conviction is based only on the legal presumption that the house or the room in question is a common gaming house and that the persons found therein were assembled for the purpose of gambling, the conviction of the petitioner cannot be sustained. I accordingly accept this petition and, setting aside the convictions of the petitioners, acquit them and direct that the fines, if paid by them, be refunded.

Petition accepted.

A. L. R. 1934 Lah 90 (1).

Revisional Criminal.

No. 1455 of 1932 (Decided on 4-1-33.)

Coldstream, J.

JAMNA DAS .. *Petitioner*

versus

NOTIFIED AREA COMMITTEE, SHAHDRA .. *Respondent.*

Punjab Municipal Act, Ss. 170 and 81—Money due under is for ground floors and not over-hanging structures—rent for balcony—S. 81 not applicable.

Held, that the money due under S. 170, Municipal Act, is for ground floors ad not for overhanging structures. Therefore sum due on account of rent of a balcony is not money due and S. 81 being inapplicable, its penal provisions should not be used for recovery of such rent. [P. 90, C. 2.]

Criminal Revision from the order of Magistrate, I class, Delhi.

Petitioner: by Kishan Dayal.

Respondent: by Nemo.

REPORT.

This is a revision from the order of Rai Sahib Bakhshi Pindi Das, Magistrate, First Class, Delhi. An application was made to him under S. 81, Municipal Act, by the Notified Area Committee of Shahdara; asking for the recovery of a sum of Rs. 2-15-0, due to them on account of rent of a balcony by Lala Jamna Das, Advocate. The amount of Rs. 2-15-0, plus a process fee of Re. 1-8-0 was recovered. Against this procedure Lala Jamna Das has put in a petition for revision and urges that the penal provision of S. 81, Municipal Act, should not have been applied because the section is wholly inapplicable. S. 81, Municipal Act, lays down that

Facts.

> "any arrears of income-tax, water rate or fee or any other money claimable by a committee under this Act may be recovered on application made to a Magistrate having jurisdiction within the limits of the Municipality."

One of the contentions raised is that this rent is money claimable by the Committee under the Act, but this contention cannot hold good because this rent is not money due to the Committee under the Act. It is not a tax or water rate or any sum due under the Act. On behalf of the Committee it is also contended that this rent is claimable by them under S. 170, Municipal Act, but this is not correct.

The money due under S. 170, Municipal Act is for ground floors and not for overhanging structures. S. 81, Municipal Act, does not therefore apply. See in this connection: *Mana Ram* v. *Crown* (1), *Maya Dass* v. *Municipal Committee, Chiniot* (2) and *Abdullah* v. *The Municipal Committee, Delhi* (3). The penal provisions of the Act should not have been used in recovering this rent.

Ground for revision.

ORDER OF THE HIGH COURT.

For the reasons stated by the Additional District Magistrate in his order of reference, I accept the recommendation and quash the order of the Magistrate dated 23rd March 1932, and set aside the attachment proceedings. The money concerned was claimed as rent and not as money claimable under the Act.

Revision accepted.

(1) 7 Lah. 568: 27 P. L. R. 840: A. I. R. 1926 Lah. 518 (1): 96 I. C. 224.
(2) 99 I. C. 1030: A. I. R. 1927 Lah. 161.
(3) 32 P. L. R. 172: A. I. R. 1931 Lah. 315: 133 I. C. 278.

A. L. R. 1934 Lah 90 (2).

Appellate Criminal.

No. 753 of 1933 (Decided on 17-11-33.)

Rangi Lal, J.

AHMAD HASSAN .. *Appellant*

versus

THE CROWN .. *Respondent.*

Penal Code (XLV of 1860), S. 411—possession of property stolen at six different places and at six different times—no proof of receiving at different times—conviction for only one offence legal.

Where the accused was found in possession of property stolen at six different times and in six different places and there was no proof that he recived them at different times.

Held, that accused was guilty of only one offence and could not be tried again and again for the same offence after his first conviction. [P. 91, C. 1.]

Appeal against the order of the Sessions Judge, Lyallpur.

Appellant:—by Mohammad Amin Khan.

Respondent:—by Hem Raj Mahajan, for the Government Advocate.

JUDGMENT.

This judgment will dispose of Criminal Appeals Nos. 753 to 758 of 1933.

Properties stolen from six different places and at six different times were found in possession of Ahmad Hassan at one and the same time. He has been convicted under section 411, Indian Penal Code, in six different cases and a total sentence of twenty-four years' rigorous imprisonment has been imposed on him. The learned counsel appearing on his behalf merely urged that his client was guilty of only one offence and that he could not be tried again and again for the same offence after his first conviction because there was no evidence to show that he had received the stolen property at different times. There is ample authority in support of this contention and the learned counsel on behalf of the Crown could only refer to *Pars Ram* v. *Manja Khan* (1) which was considered and disapproved in *Hayat* v. *Emperor* (1). The first case was that out of which appeal No. 757 has arisen. The counsel for the appellant did not challenge the correctness of the conviction in that case. There are no grounds for interfering with the sentence of ten years' rigorous imprisonment imposed on the appellant in view of the several previous convictions against him under Chapter VII of the Indian Penal Code, which have been duly proved. I, therefore, dismiss appeal No. 757. The remaining appeals are accepted and the accused is acquitted.

Appeals allowed except No. 757.

(1) 26 P. R. 1885:
(2) 29 P. L. R. 541: A. I. R. 1928 Lah. 637: 110 I. C. 673.

A. L. R. 1934 Lah. 91

Appellate Criminal.

No. 1282 of 1932 (Decided on 5-1-'33.)

Agha Haidar, J.

SHARIF .. .. *Appellant*

versus

THE CROWN .. .. *Respondent.*

(1) Penal Code (XLV of 1860), S. 34—two persons firing at an individual—shot hitting the latter—section applicable.

Held, that if two persons fire at a particular individual and a shot hits with the result that an offence is committed, then the case of both would come within the purview of S. 34, Penal Code, provided, of course, there is common intention. [P. 92, C. 1.]

(ii) Penal Code (XLV of 1960), Ss. 324 and 307—accused, a soldier, losing head in a quarrel and firing at his grandmother—simple injury caused—offence under S. 324 committed.

There was a quarrel over a plot of land, and the accused—a soldier, and practised in the use of arms—lost his head and in order to make impression and to cause some injury to the opposite party, took out a pistol and fired it. One bullet hit a fleshy part of his maternal grandmother's body, causing simple injury.

Held, that the accused was guilty of an offence under S. 324, Penal Code and not under S. 307, Penal Code, for, had the accused intended to murder his grandmother, he would have chosen a more vulnerable and vital part of the body. [P. 92, C. 2.]

Appeal from the order of the Magistrate, First class, Attock.

Appellant:—by S. R. Sawhney.

Crown:—by Hem Raj Mahajan.

JUDGMENT.

Two persons, namely, Arsala and Sharif, were placed before the Additional District Magistrate, exercising powers under S. 30, Cr. P. C., at Campbellpur, to take their trial on a charge under S. 307, Penal Code. Arsala has been acquitted, but Sharif has been found guilty and has been sentenced to a term of five years' rigorous imprisonment. Against his conviction and sentence Sharif has preferred the present appeal to this Court through Mr. S. R. Sawhney. The trial Magistrate has written an unnecessarily long judgment in which he has set out the facts leading to the commission of the offence in great detail. For the purposes of this case it is only necessary to point out that there was some-

Facts.

dispute in respect of a plot of land situated towards the north of the house of one Mir Afzal. On 25th May 1932, i.e., the day of the occurrence, Mir Afzal happened to be away from his house. The party of the accused came and started levelling the disputed plot of land and uprooting some of the shrubs growing thereon. Mt. Mughlani, P. W. 6, the wife of Mir Afzal, protested against these acts. There was a dispute between the parties when Pir Suleman Shah, P. W. 3, arrived at the spot and tried to bring about an amicable settlement. In fact he proceeded to demarcate the land, but the party of the accused took exception to his mode of demarcation and there was a recrudescence of trouble. There is overwhelming evidence on the record that Arsala and the accused Sharif each took out a pistol and fired shots, one of which hit Mt. Mughlani. There is a certain amount of exaggeration in the evidence of the witnesses for the prosecution as to the number of shots, many of them saying that as many as 10 or 12 shots were actually fired. Making allowance for the exaggeration there cannot be any doubt that at least two shots were fired, though it is not clear as to who was the person actually responsible for the shot which went home and hit Mt. Mughlani. Mr. S. R. Sawhney, who has argued the case for the appellant at considerable length, has put forward the theory, and has stuck to it all along, that it was only one man who had fired the two shots.

Apart from the question of Arsala's acquittal by the trial Magistrate, we have ample evidence on the record which in spite of exaggerations, there is no reason to disbelieve on the point that the two accused fired shots one of which hit Mt. Mughlani. The law on this point is quite clear. If two persons fire at a particular individual and a shot hits with the result that an offence is committed then the case of both would come within the purview of S. 34, Penal Code, provided, of course, there is common intention. The argument put forward by Mr. Sawhney was that the witnesses for the prosecution should not be believed when they implicate his client and that, although only one man actually fired a shot which hit Mt. Mughlani, it was not his client but some body else whose name has been kept back and is not being disclosed. In the face of the evidence on the record I am afraid I cannot accept this version. The affair took place in broad daylight and I do not see any reason why the witnesses for the prosecution, some of whom are related to the party of the complainant, should try to protect the real culprit from the consequences of his act and implicate the accused Sharif who is himself related to *Mst.* Mughlani as her daughter's son. In my opinion, having regard to the evidence on the record and making allowance for the exaggeration, the fact emerges that the accused along with another did, as a matter of fact, fire a shot and Mt. Mughlani was hit.

Firing by two persons.

The question, which remains to be considered, is as to what offence was committed. In order to bring an offence under S. 307, Penal Code, the act must be done with the intention or knowledge and under such circumstances that, if death had occurred, the accused would be guilty of murder. I doubt very much whether the accused intended to murder his own grandmother. The bullet hit a fleshy part of the woman's body and she appears to have recovered from its effects and, according to the medical evidence, only simple injury was caused. If the accused who is a soldier and practised in the use of firearms had intended to murder the old lady, he would have chosen a more vulnerable and vital part of the body. In my opinion, what really took place is that there was a quarrel over the disputed plot of land and the accused, who is a young man of 22, lost his head and, in order to make impression and to cause some injury to the opposite party, took out a pistol and fired it. In my judgment it would be safer to convict him of an offence falling under S. 324, Penal Code. I therefore alter the conviction of Shariff accused from S. 307 to one under S. 324, Penal Code, but having regard to the serious nature of the crime, give him the maximum punishment provided thereunder, i.e., three years' rigorous imprisonment. With this modification I dismiss this appeal.

Offence committed.

Order accordingly.

A.I.R. 1934 Lah 93.

Appellate Criminal.
No. 1329 of 1932 (Decided on 13-1-33.)

Currie, J.

MOHAMMAD SHAFI .. *Appellant*

versus

The CROWN .. .. *Respondent.*

Penal Code (XLV of 1860), Ss. 304 (2) and 100—deceased a notorious bully—attacking accused with fists—accused sustaining slight injuries and stabbing deceased—right of private defence exceeded—sentence.

The accused was attacked by the deceased, a notorious bully, and another man with fists. After a scuffle for a short period, the accused drew a knife and stabbed the deceased. On medical evidence, it was found that the accused had received slight injuries.

Held, that there was nothing to show that the accused had any grounds for thinking that the consequence of the assault on him by the deceased might be grievous, that there was no justification for drawing a knife and striking the deceased with it; that the accused had exceeded the right of private defence and was guilty of the offence under s. 304 (2) Penal Code, but that considering the circumstances, sentence of three years' rigorous imprisonment would be sufficient. [P. 94, C. 1.]

Appeal from the order of the Sessions Judge Sialkot.

Appellant :—by Ferozuddin.

Crown :—by Bhagwan Das.

JUDGMENT.

The appellant has been convicted by the Sessions Judge, of Sialkot under S. 304-2, I.P.C., for causing the death of one Ahmad Din *alias* Chunj. The facts of the case are really not in dispute. The appellant was going home from his work in the evening when he passed a shop where Ahmad Din Chunj, Firoz (P.W. 5) and Mohammad Shafi *alias* Tai (P.W. 8,) were sitting. The prosecution evidence shows that the deceased challenged the appellant by asking him whether he would beat Firoz again. What exactly this remark referred to appears to be somewhat doubtful. In any case, the parties came to blows and Ahmad Din and Firoz attacked the appellant with their fists. After a scuffle, which according to one witness lasted for ten or fifteen minutes, the appellant drew a knife and stabbed the deceased Ahmad Din. The doctor found two stab wounds but all the witnesses agree that only one stab was given by the appellant, whether this is due to a desire to minimize the case against the appellant cannot be said. Ahmad Din died on the way while he was being carried to the hospital on a charpoy. The appellant stated that he was attaked by Ahmad Din who struck his head against his face thereby lacerating his lip and then bit his finger and that Firoz also beat him with fists. Ahmad Din then drew a knife and was about to stab the appellant who gave him a push in consequence of which he fell into the drain while the appellant ran away. A certain amount of evidence was produced in support of this story which however was rightly disbelieved by the learned Sessions Judge. The learned counsel for the appellant has not attempted to support this version, but has argued that the appellant acted in the right of private defence and was justified in doing what he did. In support of this contention he urges that in the concluding portion of his judgment the learned Sessions Judge remarks:

Facts.

"I find that in the evening he was compelled to use it (i.e. knife) in a *bona fide* exercise of the right of private defence."

He contends that on this finding the learned Sessions Judge should have acquitted the appellant as he does not say that the appellant exceeded the right of private defence. These remarks however must be read with the preceding portion of the judgment in which the learned Sessions Judge came to the conclusion that in his opinion,

"the conduct of the accused would be covered by Excep. 2, S. 300. It might even be covered by Excep. 4."

From this it is clear that the conclusion arrived at by the learned Sessions Judge was that the appellant had acted *bona fide* in the exercise of the right of self-defence and that his act came within the second exception to S. 300, which provides that culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without pre-meditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Mr. Ferozuddin

Ahmad for the appellant has argued further that the appellant's action might be considered to come within the scope of S. 100, II, Indian Penal Code, as the circumstances were such that he might reasonably have the apprehension that grievous hurt would result to him as a consequence of the assault. This is based on the fact that the deceased was apparently a notorious bully, but there is nothing in the present case to show that the appellant had any grounds for thinking that the consequence of the assault on him by the deceased, and Firoz might be grievous hurt. An attempt has been made to argue that the deceased's intention was to break the accused's nose by butting it with his head, but I see no reason for accepting that contention. The appellant, as the medical evidence shows received some slight injuries and these in themselves would not form any justification for drawing a knife and striking the deceased with it. I therefore consider that the appellant has been rightly convicted under S. 304-2, I.P.C.

Right of private defence exceeded.

Looking to the circumstances of the case however I think the sentence is somewhat excessive. The aggressor in the first instance was clearly the deceased and he was joined in the assault by Firoz. The deceased apparently was a notorious bully and an older man than the accused. I therefore reduce the sentence to one of three years' rigorous imprisonment.

Sentence.

Sentence reduced.

A. L. R. 1934 Lah 94.

Appellate Criminal.

No. 985 of 1933 (Decided on 1-12-33.)

Rangi Lal, J.

HAIDAR and others .. *Appellants*

versus

THE CROWN .. *Respondent.*

Penal Code (XLV of 1860), S. 96—accused apprehending grievous hurt—death caused while defending—no offence.

The accused, while in search of the bullock belonging to a relation of theirs, went towards the pla[ce] where the bullocks were tethered. The persons in possession of the bullocks attacked the accused while the latter were at a distance. The injuries inflicted by the attacking party were such as to raise an apprehension in the minds of the accused that grievous hurt would be caused to them if they did not defend themselves. A fight therefore issued in which injuries were inflicted on the raiding party and one, out of which, died as a consequence.

Held, that as the accused could not be expected to weigh their blows in the excitement of the moment, it could not by any means be said that they exceeded the right of private defence, and that therefore they were guilty of no offence. [P. 95, C. 1.]

Appeal from the order of the Sessions Judge, Shahpur, at Sargodha.

Appellants :—by Shamair Chand.

Respondent :—by M. L. Batra for the Government Advocate.

JUDGMENT.

The appellants in this case have been convicted under S. 325 read with S. 34, Indian Penal Code, and sentenced to undergo seven years' rigorous imprisonment each.

The findings of fact arrived at by the learned Sessions Judge, and which are not disputed, are as follows :—

Facts.

1. Two bullocks belonging to one Ali were stolen.

2. Three days later the accused, who are relations of Ali, went towards the sugarcane field of Walli where the bullocks were tethered.

3. Walli and his sons were in possession of the bullocks knowing them to be stolen property.

4. When the accused were at a considerable distance from the bullocks Walli and his sons came and attacked them. A fight then ensued in which Sardara was killed and his brother Sahiba and his father Walli were injured. and all the three appellants were also injured. The final conclusion reached by the learned Judge was that the accused were guilty because there was a free fight between the parties. I am, however, of opinion that there is nothing to show that the accused had gone with the determination to fight. The learned Judge has taken the following circumstances into consideration in arriving at his conclusion :—

(1) The bullocks did not belong to the accused. This is, in my opinion, immaterial. They certainly belonged to a relation of theirs.

(2) The accused had no right to take possession of the bullocks by force. There is nothing to show that the accused did want to take possession of the bullocks by force. They had not gone near the bullocks when they were attacked.

(3) The accused went armed with *dangs*. They had to be armed when they were going in search of stolen property and might well have expected to meet with some resistance.

The medical evidence shows that Ghulam Mohammad accused received five injuries, including one on the head; Bahadur accused received seven injuries, including four on the head and Haidar received three injuries, including one on the eye-brow. These injuries must have clearly raised an apprehension in the minds of the accused that grievous hurt would be caused to them if they did not defend themselves. They caused three injuries to Sardara deceased, seven to Walli and two to Sahiba. One of the injuries caused to Sardara proved fatal, but the accused could not be expected to weigh their blows in the excitement of the moment. It cannot by any means be said that they exceeded the right of private defence.

No offence committed.

I, therefore, accept the appeal and acquit the appellants.

Appeal accepted.

A. L. R. 1934 Lah 95 (1).

Revisional Criminal.

No. 1383 of 1932 (Decided on 13-1-33.)

Addison, J.

SARDAR KHAN .. *Petitioner*

versus

THE CROWN .. *Respondent.*

Penal Code (XLV of 1860), S. 405—supurdar—ready to produce cattle in custody—no offence.

Where the Supurdar once brought the cattle made over to his custody to the Tahsil and was still willing to produce them. *Held*, that it could not be said that he had dishonestly used them in violation of the terms of the supurdnama and therefore he could not be convicted under S. 405, I. P. C. 16 A. L. J. 600 relied upon.

Petitioner :—by M. A. Ghani.

Crown :—by Abdul Rashid.

JUDGMENT.

The only question in this case is whether the petitioner dishonestly used the cattle in violation of the terms of the Supurdnama entered into by him.

The petitioner once brought them to the Tahsil and is still willing to produce them. On the facts it is difficult to hold that he has dishonestly used them in violation of the terms of the Supurdnama and this was the only clause of S. 405, I. P. C., within which the learned Assistant Legal Remembrancer sought to bring the case. In my judgment therefore he should be acquitted. A similar view was taken in *Harnam Singh* v. *Emperor* (1). I would therefore accept this petition and acquit the petitioner. The fine, if paid, will be refunded.

No offence committed.

Petition accepted.

(1) 16 A. L. J. 600: 47 I. C. 875.

A. L. R. 1934 Lah 95 (2).

Appellate Criminal.

No. 580 of 1933 (Decided on 16-10-33).

Abdul Qadir and Rangi Lal, JJ.

KHUSHI MOHAMMAD and others .. *Appellants*

versus

THE CROWN .. *Respondents.*

Penal Code (XLV of 1860), S. 302—sentence extenuating circumstances—murdering a kinswoman who had eloped and lived openly with her seducer—provocation—capital sentence not appropriate.

Where a Mahomedan woman eloped with a Sikh, and after changing her religion married her seducer and afterwards returned to her village openly living with him, and her kinsmen, immature youths, killed her.

Held, that capital sentence was not appropriate under the circumstances of the case but that the lesser sentence of transporation for life would meet the ends of justice in view of the strong provocation which the accused, immature youths and kinsmen of the deceased, must have received on account of the deceased living openly as the wife of her abductor. [P. 96, C. 2.]

Appeal from the order of the Additional Sessions Judge, Lyallpur.

Appellants :—by Mohamad Munir and Shah Nawaz.

The Crown :—by Des Raj Sawhney, Public Prosecutor.

JUDGMENT.

There are four appellants in this case. Three of them, namely, Khushi Mohammad, Ibrahim and Chiragh, have been convicted under section 302 read with section 34 of the Indian Penal Code, and each of them has been sentenced to death. The fourth, namely, Mohammad, has been convicted under sections 302, 114, Indian Penal Code and sentenced to transportation for life. Chiragh and Khushi Mohammad have appealed through Mr. Mohammad Munir, the remaining two have appealed through Mr. Shah Nawaz, and Mr. Des Raj Sawhney has appeared on behalf of the Crown. The case is also before us under section 374 of the Code of Criminal Procedure.

Facts.

The case for the prosecution was briefly as follows :—

Mst. Gian Kaur deceased was formerly a Mohammadan and was the wife of Chiragh accused. She had a *liaison* with her husband's landlord Baga Singh and eventually eloped with him. He took her to Amritsar and formally married her after she was made to go through a ceremony of conversion to the Sikh religion. She was then named Gian Kaur and went about with her new husband from place to place. On the 28th July 1932, she made a petition before a Magistrate in which she prayed for action being taken against her relations, including the four accused under section 107, Criminal Procedure Code. This application was dismissed in default on the 12th November 1932. Shortly after *Mst.* Gian Kaur and Baga Singh returned to their village and settled down quietly. About two months later, on the 30th January, 1933, she went to village Lurki, accompanied by *Mst.* Roshan, wife of Allu, and another *Mst.* Roshan, wife of Salariya, to pay a condolence visit to Bahadur who had recently lost his son. These three ladies were coming back from Lurki along the bank of a canal minor and had just sat down to wash their hands and feet when the four appellants suddenly appeared and attacked *Mst.* Gian Kaur, Ibrahim being armed with a hatchet and the others with *dangs*. [His Lordship after dealing with the evidence and giving the benefit of doubt to Chiragh and Mahammad proceeded :]

Extenuating circumstances.

The question of sentence in a case of this kind is not free from difficulty. It has to be borne in mind that Khushi Mohammad and Ibrahim are hot-blooded youths and were smarting under the disgrace brought on the family by *Mst.* Gian Kaur, who was their first cousin, eloping with a Sikh and marrying him after renouncing her faith. Khushi Mohammad gave his age as 12 and Ibrahim as 13 or 14, but the committing Magistrate and the learned Sessions Judge were both of opinion that Khushi Mohammad was about eighteen years old and Ibrahim about nineteen. The accused did not choose to produce any evidence in regard to their ages. The opinion formed by the committing Magistrate and the learned Sessions Judge must, therefore, be accepted as correct. Even so, Khushi Mohammad and Ibrahim are both immature youths and some allowance has to be made for the strong provocation which they had received. In the case *Siraj* v. *Emperor* (1) a deliberate murder was committed out of revenge but the accused had good cause to be angry with the deceased who had not only helped one Teja Singh to abduct the wife of one of them but used to put them up in his *haveli* from time to time when they came to the village. For these reasons the death sentence imposed by the Sessions Judge was set aside. In the present case the conduct of *Mst.* Gian Kaur in coming back to the village to live openly as the wife of her abductor must have naturally offered the greatest provocation to her kinsmen. It has also to be borne in mind that she had gone to the length of starting proceedings against the present appellants and several others under section 107 of the Criminal Procedure Code.

(1) 120 I. C. 6: A. I. R. 1929 Lah. 788.

be wrong are exceedingly difficult; but in this matter, I have been considerably helped by my learned brother Bardswell who in *Shanmuga Mudaliar* v. *Subbaraya Mudaliar* (2), has covered the same ground and collated the authorities. I subscribe to his conclusion on p. 936 that when a Court or a similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of the law, a writ will be issued, but that there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses.

Writ of certiorari.

Applying this rule to the present case, the Commissioner undoubtedly possesses jurisdiction either to appoint the claimant or to order a fresh election. Acting in the exercise of that jurisdiction he has made a mistake in overlooking that the votes cast for the disqualified candidate will be thrown away, but that mistake is not sufficient to warrant the issue of writ by this Court.

There is nothing to negative this conclusion in my judgment reported in *Pulakam Ramakristnareddy* v. *Nooney Panakalu* (3). There on the bare calculation of figures, it was found that the petitioner headed the poll, and no one suggests that an arithmetical mistake is not subject to revision.

The subsequent paragraph is only by way of general precept, just as in this present case I should not hesitate to say that there ought to have been a fresh election. This in fact is clearly laid down in *Gopala Ayyangar* v. *Ebrahim Rowther* (4), but that decision is no authority for interference by way of writ.

The petitions accordingly dismissed and in the circumstances the parties will pay their own costs.

Petitions dismissed.

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(2) A. L. R. 1933 Mad. 700 (2): 63 M. L. J. 932 140 I. C. 540.

(3) 110 I. C. 342: A. I. R. 1928 Mad. 1129.

(4) 48 Mad. 509: 49 M. L. J. 606: 90 I. C. 759 (F. B.)

†† A. L. R. 1934 Mad. 89 (F.B.)

Miscellaneous Civil.

No. 4021 of 1932 (Decided on 9-10-33.)

Beasley, C. J. Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ.

ZAMINDARINI OF MANDASA ... *Petitioner*

versus

SENAPATHI JAGANNAYAKULU and others ... *Respondents.*

(i) Practice — procedure—High Court — same matter subject of two proceedings, agitated in the alternative—discretion exercised by one Bench—not binding on another Bench—order an application for writ of *certiorari*—not binding while matter in revision before another Bench.

Where the same matter is agitated in two proceedings, the discretion exercised by one Bench in one proceedings will not bind another Bench in the disposal of the other unless the matter is *res judicata*.

The considerations that prevailed with one Bench in the order on an application for a writ of *certiorari* need not prevail with an other Bench when the matter is before it in a civil revision petition. [P. 90, C. 1]

(ii) Letters Patent, (Mad.), Cl. 39,—leave to appeal to Privy Council from order on revision—jurisdiction—C. P. C. (V of 1908), S. 109.

The High Court's revisional jurisdiction is a part of the appellate jurisdiction within the meaning of cl. 39 of the Letters Patent and the High Court can, under S. 109, C.P.C., grant leave to appeal to the Privy Council from an order passed in revision. [P. 90, C. 1]

Petition for leave to appeal to the Privy Council.

Petitioner :—by K. S. Champakesa Aiyangar.

Respondents:—by B. Jagannadha Das.

ORDER.

The Zamindarini of Mandasa (Ganjam district) filed two applications in this Court against an order of the Board of Revenue under the Estates Land Act. One was for a writ of *certiorari* and that came on before Ramesam and Pakenham-Walsh, JJ., who refused the writ. The Zamindarini therefore applied for leave to His Majesty in Council and leave was granted.

The other petition is one under S. 115, C. P. C. It came on before a

Full Bench of five Judges and was dismissed on the ground that the Board of Revenue, though it may be described as a tribunal, did not act as a Court The present application is for leave to appeal to His Majesty in Council against that order.

On the merits, the same matter is the subject of both these proceedings and the object of the petition is to agitate the same question in the alternative. The value of the subject-matter is found in the other order to be Rs. 10,000 or more. There are important questions of law stated in the other order. In this matter, one question is whether the order of the Board of Revenue was passed by the Board as a Court.

Leave having been granted in the other matter, we would *prima facie* think that it ought to be granted in this application also. But the respondent contends that even if the Judicial Committee sets aside the main grounds of the High Court and remits the case back, it is useless for the petitioner. It is said that as Ramesam and Walsh, JJ. refused to interfere on the merits, the High Court should also refuse to interfere in the civil revision petition. This does not follow. The discretion exercised by a Bench does not necessarily bind another Bench unless the matter is *res judicata*. It is conceded that it is not *res judicata*, for, whereas the order was passed in an application for a writ of *certiorari*—an unusual writ, the jurisdiction being extraordinary—the same consideration may not prevail when the question is one of interference in a civil revision petition.

It is next contended that the order sought to be appealed against is not an "order made on appeal" within the meaning of the last part of cl. 39 of the Letters Patent. Under S. 109 of the C. P. C., we can give leave against any order, if it is certified to be fit and against any order passed by any Court of final appellate jurisdiction and it has been always held under this clause that revisional jurisdiction is a part of appellate jurisdiction.

Letters Patent, cl. 39.

Leave will therefore be granted.

Leave granted.

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† A. L. R. 1934 Mad. 90

Appellate Civil.

No. 671 of 32. (Decided on 13-9-33.)

Ramesam, Offg. C. J. and Venkatasubba Rao, J.

BANK OF HINDUSTAN, LIMITED, MADRAS ... *Appellant*

versus

N. GOVINDARAJULU NAIDU ... *Respondent.*

Negotiable Instruments Act, (XXVI of 1881), S. 37—accommodation note—maker is principal debtor and payee a surety—contract to the contrary—whether knowledge to the contrary sufficient.

As per S. 37 of the Negotiable Instruments Act, the maker of a note is the principal debtor and the payee is only a surety until a contract to the contrary appears. The Section makes no distinction between accommodation note or bill and other notes and bills. One rule of law is laid down for all kinds of notes and bills. The only method of, changing the position of the parties is by "a contract to the contrary." Mere knowledge on the part of the endorsee of the fact that the bill or note is an accommodation note or bill, whether the knowledge is at the time of the endorsement or afterwards, is absolutely irrelevant. Not knowledge but actual contract to the contrary is the only thing that will effect a reversal of the *prima facie* position. English cases discussed. 13 Mad. 172 considered. [P. 93, C. 1.]

(ii) Negotiable Instruments Act (XXVI of 1881), S. 39—Reservation of right against surety—section applies only to bill of exchange—other negotiable instruments affected by the section—provision in the section is *ex abundanti cautela*.

Entering into an agreement with a principal debtor granting him time will not discharge the surety if the right against the surety is reserved. The mere fact that S. 39 of the Negotiable Instruments Act provides in respect of a bill of exchange for such reservation, does not show that the main principle recognised as part of the law of contract does not apply to other negotiable instrument. S. 39 is a provision inserted *ex abundanti cautela*. 56 Mad. 625, referred to, [P. 94, Cs. 1 & 2.]

Appeal against the decree of the District Judge, North Arcot at Vellore.

Appellant :—by S. Parthasarathy and V. K. Thiruvenkatachariar.

Respondent :—by K. Rajah Ayyar for K. Subramanian.

JUDGMENT.

Ramesam, Offg. C. J.:—The facts of this second appeal may at first be stated. The 1st defendant executed a promissory note dated the 28th April 1930 in favour of the 2nd defendant for

Rs. 2,500 payable 74 days after date, *i.e.* on or after the 11th July 1930. The 2nd defendant endorsed it to the plaintiff, the Bank of Hindustan Limited, on the 1st May 1930. The plaintiff's case is that he paid full consideration and that he is a holder in due course. He presented the note (which is described as a hundi in the judgment of the lower Courts) to the 1st defendant for payment after the due date but the 1st defendant dishonoured it, hence the suit under appeal. The District Munsif gave a decree against both the defendants. On appeal by the 1st defendant alone, the appeal was allowed so far as the 1st defendant is concerned. The plaintiff files this second appeal against the 1st defendant. The 1st defendant's plea was that the suit hundi was an accommodation note, that no consideration passed under it and he was only a surety for the 2nd defendant that as the plaintiff entered into a composition deed with the 2nd defendant he was exonerated from liability in the transaction. To this argument the plaintiff's reply was that the 1st defendant was not merely a surety and that, even if he was, under the composition deed of the 2nd defendant the rights against the 1st defendant were reserved. The District Munsif decided in favour of the plaintiff on the second plea. On appeal the District Judge also found that the money was really taken by the 2nd defendant and that therefore the note was really an accommodation note; and he therefore held that the 2nd defendant was the principal debtor and the 1st defendant was the surety. He next held, differing from the District Munsif, that S. 39 of the Negotiable Instruments Act does not apply to the case of a note and that therefore the reservation in the composition deed does not help the plaintiff. He refers to three cases *viz.*, a decision of the Oudh Chief Court *Bellow, F. W. v. Bank of Upper India Limited* (1), a decision of this Court *Ramakrishnayya v. Kassim* (2) and the decision of the House of Lords in *Liquidators of Overend Gurney & Co. v. Liquidators of Oriental Financial Corporation* (3) and he finally observes in para. 5:

Facts.

"This case although it relates to English Law, does, in my opinion, govern the present case and it has not been shown that on this point there is any difference between the English and Indian Law."

In Second Appeal it is contended for the plaintiff that the 1st defendant is the principal debtor and the 2nd defendant is the surety and that therefore the composition with the 2nd defendant cannot have the effect of discharging the 1st defendant who is the principal debtor. The respondent's reply to the argument is substantially the same as the reasoning of the District Judge, namely, that the principle of English Law applies to this case, that the English Law does not differ from the Indian Law in this matter, that under the English Law the 2nd defendant would be the principal debtor and the 1st defendant the surety and that, if so, he is discharged by the further transaction between the plaintiff and the 2nd defendant. The respective contentions about the plaintiff's rights against the 1st defendant being reserved urged in the lower Court have also been repeated here.

Taking up the first point, it is desirable now to notice what the English Law on the subject is and to see how far if at all, the Indian Law differs from the English Law. It seems to me that on the question who is the principal debtor and who is the surety in an accommodation note or accommodation bill the English Law has fluctuated through five different stages. The earliest case is the decision in *Mallet* v. *Thompson* (4). In that case the endorsee of the payee for whose accommodation the note was made knowing that it was an accommodation note entered into a composition deed with him. It was held by Lord Ellenborough that the maker was not discharged. But soon after Lord Ellenborough seems to have arrived at a different conclusion in two *nisi prius* cases. In *Laxton* v. *Peat* (5) the endorsee of a bill received it knowing that it was accepted for accommodation of the drawer and he then gave time to the drawer when it became due upon his paying a part. It was held by Lord Ellenborough that the

Case law discussed.

(1) 13 O. C. 207 : 7 I. C. 727.
(2) 13 Mad. 172.
(3) L. R. 7 H. L. 348.
(4) (1804) 5 Esp. 178.
(5) (1809) 2 Camp. 185.

acceptor was discharged. He held that, as the bill was an accommodation bill to the knowledge of the endorsee, the acceptor should be considered only as a surety for the drawer and he was therefore discharged by the endorsee giving time to the principal debtor. Again in another case, *Collet* v. *Haigh* (6) Lord Ellenborough held that the acceptor is a surety and the drawer is the principal debtor and giving time to the acceptor would not discharge the drawer. The doctrine of Lord Ellenborough was soon doubted by Gibbs J, in *Kerrison* v. *Cooke* (7) and by Lord Mansfield in *Raggett* v. *Axmore,* (8) and *Fentum* v. *Pocock* (9) and held not to apply where the acceptor promised to pay the bill when demand was made at maturity. The decision in *Fantum* v. *Pocock* (9), was in, the Court of Common Pleas and up to 1853 this judgment of Lord Mansfield was regarded as the settled doctrine of the courts of Common Law in England, the last of such decisions being the one in *Manley* v. *Boycot* (10), decided just before the introduction of equitable pleas. All the decisions between 1813 and 1853 being noticed in the footnote 't' at page 5 of Rowlatt on 'The Law of Principal and Surety.' The doctrine of the Common Law was only limited to cases where the creditor at the time of taking the instrument agreed to regard the drawer of the maker or the bill or the note as surety and the acceptor or the payee as the principal debtor. In equity a wider rule of law prevailed according to which the creditor was constrained to regard the drawer or the maker as a surety only even when there is no express contract but by notice of the fact that it is an accommodation bill or note; and it was also held that notice even after the endorsement in favour of the principal debtor will do. One such decision is the case in *Edwin* v. *Lancaster* (11) In the course of the argument (Crompton, J., observed that the decision of Lord Mansfied in *Fantum* v. *Pocock* (9) must be regarded as virtually over-ruled. In this case the holder knew by the time of the composition that the note was

(6) (1812) 3 Camp. 281.
(7) (1813) 8 Camp. 362.
(8) (1813) 4 Taunton 730.
(9) (1813) 5 Taunt 192.
(10) 2 E and B. 46.
(11) (1865) 6 Best and S. Q. B. 572.

really an accommodation note. All the cases are noticed at page 5 of Rowlatt's book. This state of uncertainty with some conflict between the Common Law and the Equity seems to have continued in England until 1894, when *Rouse* v. *Bradford Banking Co.* (12) was decided by the House of Lords finally establishing the law. Until that decision as Rowlatt, J. observes: (At page 6, Principal and Surety).

> "It was doubtful whether a notification to the creditor, after the contract, of the fact that one of a number of debtors had since the contract become, as between himself and the others, a surety only, would bind the creditor to respect his position as a surety, if it could not be made out that the creditor had consented to a modification of the original position and actually agreed to regard him as surety."

See, *Swire* v. *Redman* (13). Meanwhile the Indian Legislature passed the Negotiable Instruments Act in 1881. What rule did the Indian Legislature adopt in this state of uncertainty which prevailed in England? An attempt must have been made to adopt the better of the two doctrines. In Daniel on Negotiable Instruments in paragraph 1334 (Vol. II) it is observed:

> "And even where the holder knew that the apparent principal party was really signing for the accommodation of another, at the time when he received the instrument, the better opinion is that that the circumstance does not alter his rights or duties, as such party has held himself out and obligated himself in a certain character and has no just ground to demand or expect greater consideration than that legally incident to that character which he has assumed. If he intended to insist on the privileges of a surety, he should have refused to bind himself except in a recognised form of suretyship. Furthermore, it may be observed, that while the indulgence or release of an acceptor (or other principal) materially affects the remedies of the drawer (or other surety) who is thereby delayed or entirely deprived of recourse against the acceptor upon the bill itself, to which he would be entitled and upon which he might sue the acceptor on making payment. No such injury can possibly be inflicted on the acceptor for accommodation by indulgence to or release of the drawer. The acceptor may at any time at or after maturity of the bill pay it, and no matter what may be the arrangements between the holder and the drawer, sue the latter not upon the bill but for money paid to his use."

Again in para. 1335 it is observed:

> "There is strong authority for what seems to us the better doctrine, that even if the holder knew at the time he received the bill or note that it was accepted or made for accommodation, his rights and duties are in no respect altered; and no indulgence to or release of a drawer or indorser will discharge the acceptor or maker."

(12) (1894) A. C. 586.
(13) (1876) 1 Q. B. D. 536.

That is, so early as 1873, when the first edition of Daniel was published, in spite of weighty English and American decisions to the contrary, this view was considered the better doctrine. This was also opinion of Story on "Promissory Notes" S. 418 and Story on "Bills" S. 253. Now let us turn to what the Indian Legislature has done. S. 37 of the Negotiable Instruments Act says:

> "The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance and the acceptor are, in the absence of a contract to the contrary respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor as the case may be."

This section makes no distinction between an accommodation note or bill and other notes and bills. One rule of law is laid down for all kinds of notes and bills. It sweeps away the distinction which seems to have troubled the English Courts between accommodation notes and bills and other notes and bills. The second circumstance which appears in the section is that the only method of changing the position of the parties is by a "contract to the contrary."

S. 37, Negotiable Instruments Act—principle.

This provision sweeps away the doctrine of notice prevailing in the English Courts. Mere knowledge on the part of the endorsee of the fact that the bill or note is an accommodation note or bill whether the knowledge is at the time of the endorsement or afterwards has become absolutely irrelevant. All that we have got to see is whether there is "a contract to the contrary." Knowledge at the time but not amounting to such contract has got the same result as if there is no knowledge at all or if the knowledge is sometime after the endorsement. It is obvious in the face of S. 37 that the rule of law prevailing in the English law Courts prior to 1853 was adopted by the Indian Legislature and if we are left to conjecture perhaps because it was thought to be better doctrine by eminent jurists. But whatever the reason may be, that the Indian Legislature adopted the common law doctrine of Lord Mansfield in *Fantum* v. *Pocock* (9), is plain from S. 37. It is noticeable that so far as the application of the law of guarantee to the relations between parties to negotiable instruments is considered the subject has not been codified in England there being no sections like Ss. 37 and 39 of the Negotiable Instruments Act or the Bills of Exchange Act. So that, though the law of negotiable instruments is now codified in the Bills of Exchange Act of 1882, so far as the application of the Law of Suretyship to parties to negotiable instruments is concerned it is left open for evolution and development by case law; and we have seen that it was finally settled only by the decision of the House of Lords in 1894 by adopting the doctrine of the Equity Courts. But long before 1894, the Indian Legislature has adopted the doctrine of the Common Law Courts. Not only has it not adopted the doctrine that even if the fact relating to accommodation is not known it is immaterial but it has also gone to the extent that even if it is known at the time of the endorsement it is equally immaterial. Not knowledge but actual contract to the contrary is the only thing that will effect a reversal of the *prima facie* position, namely, that the maker of the acceptor is the principal debtor and the payee or the drawer is the surety. A perusal of S. 37 plainly shows that in this matter the Indian Law differs from the English Law and that the conclusion of the learned District Judge that there is no difference between the two is erroneous. The decision in *Ramakriskanayya* v. *Kassim* (2), appears on a superficial reading to support the respondent but, if the judgment of Shephard, J. is carefully perused, it is plain that he was perfectly alive to the change made in the Indian Law. In that case at the time of the endorsement all the facts were known to the endorsee and the circumstances appearing from the evidence were such that the learned Judge was able to infer that the endorsee agreed to regard the maker as the surety and the payee as the principal debtor. He actually found that there was "a contract to the contrary". At p. 175 the learned Judge observed:

"It is for the defendant to show that he is not, as he *prima facie* appears to be, the principal debtor.

I think he has sufficiently provided this."

The learned Judge states on the basis of S. 37 and finally finds a "a contract to the contrary" and that by reason of that contract the position of creditor and principal debtor is reserved. At p. 177 he observes:

"That section (S. 135 of the Contract Act) has to be read with the provisions of the Negotiable Instruments Act; and, as here there was—within the meaning of the Negotiable Instruments Act S. 37—"a contract to the contrary" making defendant a surety instead of principal debtor, the defendant is entitled to be discharged if he can bring the case within the terms of S. 135 of the Contract Act."

It seems to me that these observations in Shephard, J's. judgment in *Ramakishnayya* v. *Kassim* (2), far from being an authority in favour of the respondent are really an authority against him. That decision conclusively shows that we must start with the position that the maker of an accommodation note is the principal debtor and the payee is only a surety and that until "a contract to the contrary" appears that is the *prima facie* position. In that case there was "a contract to the contrary" found on the facts. There is no such "contract to the contrary" that has been pleaded or that can be found in this case. The decision of the lower appellate Court must, therefore, by reason of my conclusion on the first point be reversed and the plaintiff given a decree against the 1st defendant also with costs here and in the lower appellate Court and the decree of the District Munsif restored.

Coming to the second point I observe that my learned brothers Venkatasubba Rao and Reilly, JJ. held in *Annadana Jadayya* v. *Kanammal* (14) that entering into an agreement with a principal debtor granting him time will not discharge the surety if the right against the surety is reserved. Mr. Rajah Ayyar has not contended that the decision is erroneous. He only relies on S. 39 of the Negotiable Instruments Act. The mere fact that S. 39 of the Negotiable Instruments Act provides in respect of a bill of exchange

S. 39, Neg. Ins. Act.

(14) A. L. R. 1933 Mad. 165: 56 Mad. 625: 64 M. L. J. 386: 141 I. C. 852.

for such reservation, does not show that the main principle recognised as part of the law of contracts does not apply to other negotiable instruments. S. 39 would, therefore, seem to be a provision inserted *ex abundanti cautela*. On this point also the appeal has got to be allowed.

Venkatasubba Rao, J:—This second appeal has been referred to a Bench by Krishnan Pandalai, J. on the ground that it raises important questions of law. The lower Courts have found, and quite rightly, that the promissory note executed by the 1st defendant in favour of the 2nd is an accommodation note. The note was endorsed by the payee (the 2nd defendant) in favour of the plaintiff-Bank. At the time when it was so endorsed, the Bank had no notice that it was an accommodation note; but on a later date they obtained knowledge of the true character of the note. Subsequent to their obtaining such knowledge, the plaintiffs entered into an arrangement with the second defendant, the effect of which was that the Bank agreed not to proceed against him but reserved their rights against the maker of the note. The 1st defendant's plea is that by reason of the agreement referred to above, he became discharged. The trial Court has disallowed his plea and passed a decree in favour of the plaintiffs; but the learned District Judge has reversed the trial Court's decision and dismissed the suit. The plaintiff-Bank have filed the present second appeal.

The question raised is, whether if the holder of an accommodation note having no notice of its true character at the time of his taking the note, but after notice thereof gives indulgence to the payee, (the party accommodated), he thereby discharges the maker (the accommodation party.)

S. 37 of the Negotiable Instruments Act runs thus:

"The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be."

Under this section the maker of a promissory note is, in the absence of a contract to the contrary, liable to the

holder as principal debtor and the payee is surety. Mr. Rajah Ayyar has most strenuously contended that where between the parties to the note, the normal position is reversed (*i.e.* where the payee is the principal debtor and the maker, the surety as in the case of an accommodation note) the holder by giving time to or releasing the payee, discharge the surety. The short question to be decided is, whether this is the true effect of S. 37.

To sustain his position, Mr. Rajah Ayyar has had to contend that the words "a contract to the contrary" in the section refer to a contract between the maker and the payee. The section deals with the rights of the holder and provides that at his instance the maker shall be liable as principal debtor. What then, can the contract to the contrary mentioned in the section, have reference to? It must refer to a contract which displaces the normal right which the holder possesses in law. Moreover, according to this contention, the section goes further than even the rule as understood in English law, for under the English decisions, a contract between the maker and the payee is not by itself sufficient, but further the holder must have notice of it. If Mr. Rajah Ayyar's argument be accepted, the question of notice on the part of the holder becomes immaterial, as the moment a note is shown to be an accommodation note, the payee *vis-a-vis* the holder becomes the principal debtor. As the section stands, it does not provide that in the case of an accommodation note a different rule shall prevail; it recognises no exception but enacts in general terms, that at the instance of a holder the maker shall be liable as principal debtor and the other parties "the payee being one such party" as sureties.

The learned counsel contends that the section must be interpreted in the light of the English law on the point. This cannot be done for two reasons; first, the terms of the section being plain and unambiguous, it is not desirable or proper to turn to the English law for guidance and secondly, it is difficult to say with any degree of certainty what the English law was understood to be by the framers of the Act.

The English Law was fluctuating and the text-books treat the doubts on the point as having been entirely removed only recently, by the House of Lords in *Rouse* v. *Bradford Banking Company* (12). There are four stages noticeable in the development of the law, so far as the English decisions go. It was held by Lord Ellenborough at *nisi prius* that where a bill was accepted for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and, therefore, that time given to the drawer by a holder with knowledge of the accommodation acceptance would discharge the acceptor, but time given to the acceptor would not discharge the drawer: *Laxton* v. *Peat* (2) and *Collott* v. *Haigh* (6). This marks the first stage. But this view was afterwards overruled at law, the acceptor even in the case of accommodation bills being considered as the principal debtor, though the holder, at the time of making the agreement (giving the indulgence), or even of taking the bill, knew the acceptance to have been without value. *Fentum* v. *Pocock* (9), See also *Harrison* v. *Courtauld* (15), *Price* v. *Edmunds* (16). It was otherwise where the holder at the time of taking the instrument *actually agreed* to treat the accommodation party as surety only. *Manley* v. *Boycot* (17). This marks the second stage. But the equitable doctrine slowly gained ground, that the holder discharges the accommodation party, if after knowledge of his true character he gives indulgence to the party accommodated; in other words, "the creditor was constrained to regard the position of the surety not by contract but by notice only." (Rowlatt on Principal and Surety, Second Edition, p. 5) Vide *Davies* v. *Stainbank* (18), *Pooley* v. *Harradine* (19), *Greenough* v. *M'Clelland* (20) and *Overend Gurrey & Co.* v. *Oriental Finance Co.* (21). This marks the third stage. The last and the fourth stage was reached, when the decision was given by the House of

(15) (1832) 3 B. & Ad. 36.
(16) (1830) 10 B. & C. 578.
(17) (1853) 2 E. & B. 46.
(18) (1855) 6 De. G. M. & G. 679.
(19) (1857) 7 E. & B. 431.
(20) (1860) 30 L. J. Q. B. 15.
(21) (1874) L. R. 7 L. L. 348.

Lords in *Rouse* v. *Bradford Banking Co.* (12), alread y referred to. Owing to the loose reporting of *Oakley* v. *Pasheller* (22) and the decision in *Swire* v. *Redman* (13), it was regarded doubtful whether a notice to the holder given not at the time of his taking the bill but later would bind him to respect the position of the accommodation party as surety only. But the doubt seems to have been set at rest finally by the decision in *Rouse* v. *Bradford Banking Co.* (12). It is now indisputable that, irrespective of any actual assent by the holder, any indulgence given by him after obtaining knowledge of the real position to the party accommodated, has the effect of discharging the accommodation party, whether the knowledge was obtained at the time of his taking the note or later. (See *Byles* on *Bills of Exchange* (23), where the subject is most lucidly treated; see also *Rowlatt* on *Principal and Surety* (21).

At the time of the enacting of the Negotiable Instruments Act, the English Law was thus in a state of flux; that being so, it is difficult to impute to the legislature an intention which is not strictly in accordance with the wording of the section. As I have shown above, the strict doctrine at common law was, that there should be an *actual agreement* by the holder at the time of taking the instrument to regard the accommodation party as surety only. (See *Rowlatt* on *Principal and Surety* (24). The plain construction of S. 37 of the Negotiable Instruments Act leads one to suppose that it was this view of the English law that was adopted by the framers of the Act. It must be remembered that in the present case the creditor obtained knowledge that the note was an accommodation one, not at the time of his taking it but subsequently. In any event, where the obtaining of the knowledge was after the taking of the note, it cannot be said that the English law at the time of the passing of the Indian Act, could be regarded as having been finally settled: *Swire* v. *Redman* (13).

I may in passing refer to S. 132 of the Contract Act although that section, as it refers to joint debtors, does not apply to the case in hand for the purpose of showing that the framers of the Indian Acts have not, as regards the law of suretyship, always adhered to the English principles.

(22) (1836) 4 C. & F. 207.
(23) (1931) 19th Edn. p. 276.
(24) (1926) 2nd Edn. pp. 4 to 6.

I therefore hold that the agreement entered into between the plaintiff Bank and the payee of the note did not have the effect of discharging the 1st defendant, the maker.

I have so far held that by reason of S. 37 the maker, even in the case of an accommodation note, remains liable as principal and the payee as surety only, from the point of view of the holder's rights. If that be so, as a discharge of the surety does not result in a discharge to the principal, it follows that the maker, the 1st defendant, continues liable. Granting however, that Mr. Rajah Ayyar's contention is well founded, that the position is inverted in the case of an accommodation note, that is to say, that the 2nd defendant (the payee) must be treated as the principal it is conceded that under the agreement in question, the holder's right to proceed against the maker (on this hypothesis the surety) has been reserved. In such a case by giving indulgence to the principal, the creditor does not discharge the surety. I dealt with this point at length recently in *Annadana Jadayya* v. *Konammal* (14) decided by Reilly, J. and myself. Mr. Rajah Ayyar accepts the correctness of this decision, but contends that the general law as to the reservation of remedies has no application to the case of negotiable instruments, except to the limited extent recognised in S. 39 of the Act. That section runs thus:—

"When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under S. 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged."

Why the legislature has thought fit to enact a special section in these terms, it is not easy to tell; but I am not prepared to hold that S. 39 by necessary implication abrogates the law as to the reserving of rights in the case of all negotiable instruments other than bills of exchange dealt with by it. I think that the proper canon of con-

struction is that contended by Mr. Parthasarathi, the learned counsel for the plaintiffs, (appellants). Maxwell states this rule of interpretation thus:—

"Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), in that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence, and any legislation founded on such a mistake has not the effect of making that law which the legislature erroneously assumed to be so."

Maxwell on the Interpretation of Statutes, 7th Edn., p. 268.

I therefore hold that even assuming that the payee is the principal debtor and the maker surety only, the plaintiffs are entitled to a decree against the 1st defendant, their rights having been expressly reserved by the agreement in question.

In the result, the second appeal is allowed and the suit is decreed with costs throughout.

Order accordingly.

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††A. L. R. 1934 Mad. 97 (F.B.)

Miscellaneous Civil. No. 3479 of 1933 (Decided on 29-11-33.)

Madhavan Nair, Jackson and Krishnan Pandalai, JJ.

PANJAM V. TIRUMALAI REDDI ... *Petitioner*

versus

ANAVEMAREDDI and others ... *Respondents.*

Limitation Act (IX of 1908), S. 12—'Time requisite, meaning of—appeal—decree copy on later application filed with appeal memo while earlier copy barring appeal withheld—limitation,

The 'time requisite' in S. 12 of the Limitation Act is the time beyond the appellant's control occupied in obtaining the copy which accompanies the decree. The appellant is not bound to use the copy obtained by him on an earlier application, the effect of which will be to make the appeal time-barred. 6 Rang. 302 explained. [P. 99, C. 1.]

Miscellaneous Petitions to the High Court in appeal preferred against the decree of the Subordinate Judge of Cuddapah.

Petitioner:—by K. Bhimasankaran.

Respondents:—by A. Raghunatha Rao, S. Ramaswami Iyengar, N. Muthswami Aiyar, N. Ramasami Aiyar, A. Venkatasubba Mudaliar, B. Satyanarayana and O. Rajamlu Chettyar.

JUDGMENT.

Madhavan Nair, J.—I entirely agree with the judgment which my learned brother Jackson, J. will presently deliver and I have nothing useful to add to it.

Jackson, J.—The 9th respondent takes a preliminary objection that this appeal is out of time. The date of the decree and judgment of the lower Court is 24-2-27. On 1-3-27 the plaintiff applied for copy and obtained it after 34 days had been occupied by the copying department. He has since died, and it is not known what he did with that copy.

He applied again for copy on 20-4-27, and since the recess intervened, the time occupied by the department was 82 days. The appeal was filed on 13th August, and if this 82 days be reckoned as the time requisite for obtaining copy, the appeal is within time. But on behalf of 9th respondent it is argued that the appellant himself has demonstrated the time requisite to be only 34 days, and if that figure be taken the appeal is time-barred.

The time requisite for obtaining a copy of the decree mentioned in S. 12 of the Indian Limitation Act is the time beyond the applicant's control occupied by the copyist department after an application for copy has been duly made. It is no concern of the Courts to ask when the application was made. A party may apply immediately the suit is decreed, or if he cares to take the risk he may wait till the 90 days allowed him by statute is almost exhausted. Then the

Limitation Act, S. 12.

time requisite for obtaining a copy of the decree will be deducted, and so long as he is within his 90 days the appeal will be in time. But the respondent would have it that the applicant must discover within these 90 days at what time the copyist department can most expeditiously produce a copy, and the time requisite for obtaining a copy is this minimum period, and nothing more. Such a system would be intolerable to the parties, unworkable by the Courts, and is certainly not derived from our statutory law. For example suppose that a suit is decreed on 15th December, and the intending appellant applies for copy at once. He will be involved in the Christmas holidays and it may take 40 days before his copy is ready. He then takes full advantage of his 90 days allowed him by statute, and files his appeal just within 130 days, 90 plus 40. Meanwhile the other party has applied for copy for his own purposes after Christmas, and has obtained a copy in 30 days. Is he to be allowed triumphantly to exhibit this copy and plead that "the time requisite for obtaining a copy" in S. 12 of the Indian Limitation Act is 30 days, and his opponent's appeal is time-barred. Obviously not: but that is precisely the argument advanced by the present respondent. It makes no difference whether the minimum time for obtaining copy has been demonstrated as in this appeal by the appellant himself, or, as in the above example, by the respondent. In neither case is the Court concerned with the ideal minimum. The only concern of the Court is the time occupied in obtaining the copy which is filed with the appeal; not the time which might have been occupied in obtaining some other copy which is not filed with the appeal.

There is no case directly in point. The respondent relies strongly upon an observation of the Privy Council in *Jijibhoi N. Surty* v. *T. S. Chettiar* (1).

"The word requisite is a strong word"...... it means "properly required and it throws upon the pleader for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

This affirms the rigid practice of our Courts, which insists that the only period to be deducted is that occupied by the Official department: *Denopudi Subrahmaniam* v. *Narasimham* (2). No excuses will be heard about inability to apply, or to furnish papers, earlier than has been done. It could never be the "default" of the party in the example given above that he applied before, instead of after Christmas, and there is nothing to the contrary in this ruling.

The argument advanced before us that the time ideally requisite had already been demonstrated by the appellant is not directly met by the ruling in *Aminuddin Sahib* v. *Pyari Bi* (3), although no doubt that ruling assists the present appellant by affirming that the copy actually filed with the decree is the copy with which the Court is concerned when assessing the time that has run. When the essentials of this question have been clearly grasped, *Pramatha Nath Roy* v. *William Arthur* (4), upon which the respondent also relies is really of more assistance to the appellant. On p. 1003 a distinction is drawn between periods which were and periods which were not within the appellant's control.

"No period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree."

In our present case the second application on April 20th was a reasonable and proper step, and the period of 82 days then occupied by the department was beyond the appellant's control. Can it be said (yet this is the argument before us) that the only reasonable course was to have applied in time to avoid the recess, or that the fact of his applying abortively before the recess instead of sitting still and doing nothing at all, has made the appellant's application of 20th April irrational and improper? There is nothing in *Pramatha Nath Roy* v. *William Arthur* (4), to support such an argument: there the facts are

(1) 55 I. A. 161: 6 Rang. 302 (313): 54 M. L. J. 696: 32 C. W. N. 845: A. I. R. 1928 P. C. 103: 109 I. C. 1.

(2) 43 Mad. 640: 38 M. L. J. 465: 56 I. C. 67.
(3) 43 Mad. 633: 38 M. L. J. 340: 56 I. C. 73.
(4) 49 I. A. 307: 49 Cal. 999 (1003): 43 M.L.J. 765: 68 I. C. 900.

that the appellant had needlessly dalayed before filing his application for copy. *Kamruddin Hyder* v. *M. N. Mittar* (5), is on lines similar to the case in *Pramatha Nath Roy* v. *William Arthur* (4).

'Time requisite.'

It must be held that the time requisite in S. 12 of the Act is the time beyond the appellant's control occupied in obtaining the copy which accompanies the decree, and not an ideal lesser period which might have been occupied if the application for copy had been filed at some other date.

The appeal therefore is not barred by limitation. C. M. P. No. 347 of 1933 is dismissed with costs.

Krishnan Pandalai, J.:—I agee that the preliminary objection fails, but wish to briefly add my reasons, as I was first inclined to take the opposite view. The date of the decree is 24-2-1927. The appellant obtained two copies of the decree, both statedly for filing an appeal, by applications respectively dated 1-3-1927 and 20-4-1927. He did not file the appeal using the copy which he got on the former application, and there is nothing on record to show what happened to it. If he had used it for appealing, the last day for filing the appeal after making the usual allowance for the period taken by the copying department would have been 30th June 1927, which date being within the vacation of this Court, the appeal should have been filed on the re-opening on 18th July 1927. The appeal was filed on 13th August 1927 using the copy obtained on the second application according to which after making the corresponding allowance the last date for filing the appeal would be 18th August 1927. The appeal would thus be out of time if the computation be made on the first copy but would be in time on the second copy.

The objection is that the appellant having in his possession a copy of the decree granted on his first application, no more time was in fact requisite for him to get a copy for filing the appeal and the allowance given by S. 12 of the Limitation Act must in this case be only that which was attributable to getting the first copy and therefore that the appeal should have been filed on 18th July 1927 and is barred as it was only filed on 13th August 1927. The time requisite for obtaining a copy mentioned in S. 12 of the Limitation Act is not the time requisite for obtaining the copy actually used but the time requisite for obtaining an earlier copy, at least in cases where the appellant has obtained one.

The objection is really an attempt to use certain observations of the Privy Council in *Jijibhoi N. Surty* v. *T. S. Chettiar* (1), in a manner not intended by the Board. The real point decided in that case was merely that the allowance of the time requisite for getting copies of judgment and decree given by S. 12 of the Limitation Act was not confined to appeals under O. 41, r. 1 of the Code of Civil Procedure under which it is necessary to produce such copies, but applied also to appeals from the original jurisdiction of High Courts by whose rules copies of judgments and decrees are not required to be produced with the appeal memorandum. After deciding this point as above, their Lordships proceeded to refer to an observation of the High Court of Rangoon, which had upheld the contrary view, that.

"the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioners."

Their Lordships observe with respect to this that they would be unwilling to discourage any such effort, but point out that all that can be done, as the law stands, is for the High Courts to be strict in applying the provision of exclusion. They further observe that the period to be excluded is that which is "requisite" and explain that word as meaning "properly required" and throwing upon the pleader or Counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default. These observations were made in a case in which the application for copies was made on the very day on which the judgment was pronounced and therefore apply only to dilatoriness of an applicant for copy after his application and in doing things necessary for obtaining them. What the P-

(5) 52 Cal. 342: A. I. R. 1925 Cal. 735; 89 I. C. 277.

Council meant was that if such dilatoriness be alleged, the applicant (appellant) must show that in promoting his application and getting copies he did every thing that the rules of the Court require to enable him to do so. The Board was clearly referring to the time taken for obtaining the copy on which the appeal was actually filed and not to any default such as the present 9th respondent is now urging against the appellant consisting of having another copy in his possession, on which also the appeal might have been filed but was not. This case therefore does not furnish any support to the objection.

No decision supporting the objection has been cited. In *Pramatha Nath Roy* v. *William Arthur* (4), the appeal was from a decree on the Original Side of the Calcutta High Court. The time for appealing was 20 days from the date of the decree or order which was 26th July 1918. No application for a copy was made within the 20 days, nor did the appellant (defendant) promptly take the necessary steps to have the order drawn up, which were necessary according to the practices of the Court. When subsequently the draft order was drawn up on the application of the plaintiff, the appellant (defendant) retained the draft in his hands for several days before returning it. Finally, on 30th August he filed the appeal without a copy of the judgment or decree which were required to be produced with every memoraudum of appeal by the rules of that Court. At the hearing the appellant urged that the excess over 20 days which had elapsed before he filed the appeal must be allowed as requisite for obtaining copies of the judgment and order under S. 12 of the Limitation Act. The High Court held that delay was due to the appellant's laches in not taking the steps necessary to have the order drawn up and signed without which no copy could be granted. It is to be noted also that the copy application in that case was made long after the appeal was itself filed, namely, 9th September 1918. All that this case decided was that where before a copy can be given, certain steps are to be taken by the appellant for preparing the original, if he does not take the necessary steps to have the original prepared and signed according to the practice of the Court, the time consumed by his laches cannot be allowed as being requisite for obtaining the copy. This opinion was affirmed by the Privy Council. It does not touch the present case which is from the mofussil where the parties are not required to take any such steps. The decision in *Kamaraddin Hyder* v. *M. N. Mittur* (5) follows *Pramatha Nath Roy* v. *William Arthur* (4); the only difference is that in the *Kamaruddin Hydery* v. *M. N. Mittur* case (5), a copy application had been made 3 days after the judgment but the default occurred afterwards by the appellants not taking the necessary steps to have the order drawn up and signed before a copy could be prepared. It was held that the time during which this default occurred could not be allowed as requisite for obtaining the copy. In *Aminudeen Sahib* v. *Pyari Bi* (6). It was held by a Bench of this Court that where an appellant had filed within the prescribed period for appealing an application for copy of the decree but allowed the application to be dismissed for non-payment of copying charges, he could subsequently file the appeal with a copy of the decree obtained by another party and claim a deduction under S. 12 of the Limitation Act for the time taken in obtaining that copy. It was also held that reading O. 41, r. 1 of the Code of Civil Procedure with S. 12 of the Limitation Act, allowance for time for getting the copy mentioned in S. 12 of the Limitation Act is the time required for getting the copy which actually accompanies the memorandum of appeal. In the case of appeals under the Code of Civil Procedure governed by O. 41, r. 1 that rule requires copies of the judgment and decree to accompany the memorandum of appeal. In appeals not so governed and for which according to the rules of certain High Courts such copies are not required to accompany the memorandum of appeal, it is now decided by the Privy Council that the time for obtaining copies of judgments and orders is, where they are obtained, to be likewise allowed. It stands to reason that in both classes of cases, the time requisite means the time requisite for obtaining the copies actually accompanying the memorandum of appeal and not some other copy which the appellant might or might not have got.

(6) 43 Mad. 633 ; 38 M.L.J. 340 : 56 I.C. 73 (2).

The respondents' argument, if allowed, would lead to great confusion and enquiries into alleged laches or dilatoriness of the appellant in respect not of copies produced with the memorandum of appeal but about other copies which he may have got and used for purposes proper or improper with which the Court has nothing to do, or not got by reason of neglect, such as non-payment of copying fees with which also the Court has no concern, provided the appellant is able to show that in respect of the copies actually produced by him, he is within time according to law, *i.e.*, the time for appealing together with all the time requisite for obtaining the copy of judgment and decree. It is not denied that the appellant's omission to apply for a copy till the period fixed for appealing has nearly run out, cannot be used against him as a ground for not allowing him the full period requisite for obtaining the copy after he has applied. If so, why should the fact that he has in fact obtained another copy be so used? I see no reason either in the letter of the law or in any of the decisions or in convenience to adopt such a rule. We have no power to restrict the time granted by the statute by adding to it a limitation that, where an appellant has got more than one copy of judgment and decree, he ought, if he seeks exclusion of time for obtaining the copy, to use the first copy obtained by him. That is what the objection amounts to. As I understand it, all that the law requires and the decisions have laid down is, that, if an appellant invokes the aid of S. 12 of the Limitation Act, he will get only so much time allowed in excess of the proper time for appealing as is requisite, *i.e.*, properly required, for obtaining the copies which he actually uses for the appeal. In this case no allegation is made that more than the requisite time for obtaining the copies on which the appeal has been filed has to be allowed to sustain the appeal. I therefore agree with the judgment just delivered.

Petition dismissed.

A. I. R. 1934 Mad. 101

Appellate Civil.

No. 785 of 1929. (Decided on 8-11-33.)

Venkatasubba Rao, J.

Manapragada SWARNAPATHI ... *Appellant*

versus

Krovvidi SURYAPRAKASA RAO MINOR BY GRAND-FATHER AND GUARDIAN RAYASAM VIRABHADRADU ... *Respondent.*

(i) Declaratory suit—office of karnam—action of Collector alleged to be wrongful—Government when not made a party, suit not maintainable.

The prayer for a declaration that the plaintiff's selection under S. 15 (1) of Madras Act II of 1894 by the receiver of an estate, amounted to a valid appointment of himself as karnam and that the Collector's action in appointing the defendant was wrongful is not maintainable in a suit to which the Government has not been made a party.

In such a case the Court will refuse to pass a decree which the Government may in its discretion either give effect or to disregard, because the Court would not stultify itself by making an order which it cannot enforce. 19 M. L. J. 331 followed. [P, 102, C. 1.]

(ii) Specific Relief Act, S. 42—declaratory decree—discretion of Court—Government a proper party not impleaded—no decree can be passed in the absence of Government as a party.

Under S. 42 of the Specific Relief Act, the passing of a declaratory decree is discretionary with the Court, and whether the Government is a necessary party or not, when it is certainly a proper party, the Court will exercise a sound and proper discretion by refusing to pass a decree in the absence of the Government as a party. [P. 103, C. 1.]

Second appeal from the decree of the Court of the Subordinate Judge of Ellore.

Appellant:—by V. Govindarajachari.

Respondent:—by V. Viyyanna.

JUDGMENT.

To this suit neither the proprietor nor the Government has been impleaded as a defendant. Though in form the suit professes to be also for the recov[ery] of the office, the relief that is [re]ally pressed, is that relating to the declaration. The plaintiff asserts that his selection under S. 15 (1) of Madras Act II of 1894 by the receiver of the estate, amounted to a valid appointment of himself as Karnam and that the Collector's action in appointing the defendant was wrongful. The learned Subordinate Judge dismissed the suit, holding that the proper parties were not impleaded. The act which is complained of is that of the Collector, and yet the Government has not been made a party. Although the Collector's view was that the Receiver could not be treated as "Proprietor" within the meaning of S. 15 still the Sub-Collector, while exercising his powers under cl. 3 of that section, actually adopted, and gave effect to, the Receiver's recommendations, except in the case of the single appointment to which this suit relates. The Sub-Collector felt that the plaintiff's father so manoeuvred as to get all the offices held by the members of his own family, and it was on that ground that he refused to abide by the Receiver's recommendation. The question that would arise in these circumstances is, can a declaration be granted in the absence on the record of the Government? The defendant's position is that of a mere servant and the authority, whom the decree should seek to bind, is the Government and not the defendant. On a decree being passed, the defendant is not bound to vacate his office; nor can the plaintiff, without the Government's concurrence, perform the duties of his office. It is stated that it is the Government that pays the salary; the power of dismissal is under S. 16 vested in it. In *Sivamma* v. *Venkataramana Moorthy* (1), it has been held that

"the prayer for a declaration that the plaintiff is entitled to revenue registry, is one which is wholly inadmissible in a suit to which the Collector is not a party."

Act I of 1876 makes a distinction between separate registration and apportionment of the assessment. As pointed out by the Judicial Committee.

"As regards the apportionment of the assessment, an appeal limited in time does not lie to the Board of Revenue—S. 7............ ..The apportionment of the assessment is a matter which concerns the Government. It may affect the security of the revenue. Separate registration is a matter of private right with which the Government has no business to interfere."

Robert Fischer v. *The Secretary of State for India in Council* (2).

It is thus in regard to matters relating to separate registration alone, that the Civil Courts have jurisdiction. In respect of separate registration, the Government has no immediate interest in the question: still it has been held in the decision to which I have referred, by Benson and Bhashyam Ayyangar, JJ. that the Collector is a necessary party. That decision has remained unquestioned, and sitting as a single Judge, by that I am bound. The principle recognised there applies, in my opinion, to the case in hand. *Robert Fisher* v. *The Secratary of State for India in Council* (2) adverted to above, has been relied on by the appellant's learned Counsel for another purpose, but it is clearly distinguishable. There it must be noted the Government was in fact impleaded and as the Court's decision in a suit, to which the Government was a party, would, it may be assumed, be respected by its officers, it was held that the asking of a specific relief was unnecessary. Their Lordships point out that in the event of what might be considered improbable happening, the arm of the law was long enough and a further direction might be sought. The observations proceed upon the footing that the Government was before the Court, having been impleaded as a party. Then, as regards the view of Kumaraswami Sastri, J. in S. A. 1379 of 1926, I am, with the greatest respect unable to agree with it. The learned Judge observes that the action of any subordinate Government official, who refuses to give effect to a declaration of the Court, may be corrected by his superior officers. The question is not, whether the Government may choose to respect the Court's decision, but what is the remedy if it fails to do so? In the present case, as a matter of equity and justice the Sub-Collector thought that the defendant had a better claim. Supposing the Government persists in taking that view, is the Court to stultify itself by making an order which it

(1) 19 M. L. J. 331: 4 I. C. 162.

(2) 22 Mad. 270 : 26 I. A. 16.

cannot enforce? *Henendra Nath Roy* v. *Upendra Narain Roy and Secretary of State for India* (3) is not applicable There the Government was made a party, but the facts of that case illustrate an important distinction. What happened there was, that the Court was invited to declare a right and even after its declaration, the appointment was subject to the Government's approval. Supposing in that case the Government had not been made a party, without the Court's order being disregarded, the Government could still withhold its consent. Here the facts are entirely different. According to the appellant's contention, the Government has no option, it is bound to recognise the plaintiff's appointment. In such a case the Court will, as I conceive the matter, refuse to pass a decree which the Government may in its discretion either give effect to or disregard. Moreover, under S. 42 of the Specific Relief Act, the passing of a declaratory decree is discretionary with the Court and whether the Government is a necessary party or not, it is certainly a proper party. Having regard to the circumstances to which I have adverted, the Court will exercise a sound and proper discretion by refusing to pass a decree in the absence of the Government.

In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 43 Cal. 743 : 32 I. C. 437 (F. B.)

A. I. R. 1934 Mad. 103.

Appellate Civil.

No. 4 of 1931. (Decided on 9-11-33.)

Beasley, C. J. and Bardswell, J.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (represented by the Collector of Salem) ... *Appellant*

versus

KALYANASUNDARAM PANTULU ... *Respondent.*

Railway Protection Act (IV of 1885), S. 11—executive order under—occasion, whether urgent—Collector the sole Judge—interference of Civil Court—jurisdiction—whether order unreasonable—test.

The question whether or not an occasion is sufficiently urgent as to require the provisions of S. 11 of the Railways Act to be resorted to is one which the Collector alone is competent to Judge.

Civil Courts have no jurisdiction to interfere with the Collector's order unless it be shown that the Collector's order was wanton, arbitrary, capricious or unreasonable.

Where the Collector passed an urgent order requiring the owner of land adjoining a railway embankment to repair it, and on his failure to do so the Government carried out the repairs two years after the issue of the order.

Held, that the delay in the execution of repairs was not the test for determining whether the Collector's order was unreasonable. [P. 103, C. 2; P. 104, C. 1.]

Letters Patent Appeal against the order of Sundaram Chetty, J.

Appellant:—by the Government pleader.

Respondent:—by V. Ganapathi.

JUDGMENT.

Beasley, C. J.:—This is an appeal from a judgment of Sundaram Chetty, J. who in Second Appeal reversed the decision of first appellate Court. The question was one which arose under the Railway Protection Act IV of 1886 and S. 11 of that Act. Under that section the Collector of Salem treating the occasion as one of an emergency issued an order for repairs to be done to a railway embankment which was in danger of suffering injury by reason of the water in a tank which belongs to the respondent in this Letters Patent Appeal. Those repairs having been done under the Act, the Government sought to get by suit from the respondent here the amount of money expended for the purpose of effecting the repairs. The District Munsif of Krishnagiri gave a decree in favour of the Government but this decree was reversed on appeal by the Subordinate Judge who held that it was not shown that the repairs were of such of an urgent nature as to require them to be carried out under S. 11 of the Railway Protection Act. He held that the order made by the Collector was unreasonable and supported his finding with regard to that by the fact that, although the order of the Collector was dated February 1918, in fact the work specified in the order was not carried out until 1920 which in my view was not the correct test. In Second Appeal Sundaram Chetty, J. reversed

Railway Protection Act, S. 11.

the Subordinate Judge's decree holding that unless it was shown that the Collector had exercised the powers given to him with some ulterior motive or his order was wanton, arbitrary or capricious or unreasonable it could not be interfered with, that otherwise the Collector was the sole Judge of the emergency of the occasion but that should it be shown that in exercise of these powers any of the conditions already referred to were present, then of course his order could be set aside. With Sundaram Chetty, J's. view I entirely agree. It would lead to a chaotic state of affairs if Civil Courts were entitled to interfere with executive orders such as these. The question whether or not an occasion is sufficiently urgent as to require the provisions of S. 11 of the Railway Protection Act to be resorted to is one of which in my opinion, the Collector and the Collector alone, should be the Judge of and unless those defects already referred to are shown to exist in the case a Civil Court has no power whatever to interfere with the action of the Collector. Hence the decree of the District Munsif was a correct one and ought not to have been reversed by the first appellate Court. Sundaram Chetty, J's. judgment, therefore, was perfectly correct and the Memorandum of Objections which raises the main question for decision must be dismissed with costs. The appeal by Government is with regard to that part of our learned brother's order where he disallows Rs. 182 claimed by Government in respect of percentage charges at the rate of 24%. Our learned brother says:

"No good reason is shown for imposing this extra liability on the mittadar. It is stated that this percentage represents the probable cost of supervision, inspection, etc., in a rough and ready way. There is no evidence to show that the amount claimed is actually the cost incurred by the Government in respect of these works, I am not prepared to allow this sum as a proper item of cost to be borne by the Mittadar."

With that conclusion I quite agree.

The result, therefore, is that both the appeal and the Memorandum of objections are dismissed with costs.

Bardswell, J.—I agree.

Appeal and Cross-objections dismissed.

A. I. R. 1934 Mad. 104.

Appellate Civil

Nos. 554 to 556 of 1929.
(Decided on 13-10-33.)

Venkatasubba Rao, J.

PUJARI RAMASWAMI and others ... *Appellants*

versus

AKKIRAJU VENKATASUBBARAYUDU and others ... *Respondents.*

Service Inam—resumption—suit by villagers for declaration that alienations not valid and for directing the Government to make provision for the services—maintainability.

Where service Inam lands have been resumed, the Government cannot be directed by a court of law to appoint fresh persons to carry on the duties and to remunerate them by the grant of land or land-revenue.

Certain service Inam lands were resumed by the Government and *ryotwari* pattas issued in respect of them to the alienees themselves. The villagers brought a suit for a declaration that the alienations were invalid and that the Government be directed to resume and appoint fresh persons to carry on the duties and remunerate them by the grant of land or land-revenue.

Held, that the villagers (plaintiffs) have no right to compel the Government to take such a step.

Board's Standing Order No. 55 cannot be read as meaning that it is obligatory on the part of the Government to provide for the continuance of the services on the resumption of the land. [P. 104, C. 1.]

Second appeal against the decree of the District Judge of West Godavari at Ellore.

Appellants :—by B. Somayya.

Respondents:—by K. Kameswara Rao and V. Pattabhirama Sastri.

Government :—by The Government Pleader.

JUDGMENT.

The judgment of the lower appellate Court is a most perplexing one. There are three parties involved, namely, the villagers, the alienees and the Government, and the counsel of none of them is either able to follow the judgment or is prepared to support it, not even the plaintiffs' counsel who has expressed his inability to support it in its entirety.

The learned District Judge in the concluding paragraph of his judgment, says that he grants a declaration that the alienations are not valid. Why this declaration was granted, no one can tell, as none of the parties maintained that the alienations were valid. Again, in para. 12 the District Judge observes, that the Government would respect the declarations and act accordingly. The declarations apparently are, that the lands are service inam lands and that the alienations are invalid. I have already dealt with the declaration regarding the invalidity of the alienations; as regards the nature of the lands everyone admitted that they were service inam lands. Here again it is difficult to understand why the judge gave this declaration. Though the operative part of the judgment is thus innocuous, there are passages in it, to which exception has been taken. The lands were resumed by the Government and ryotwari pattas were issued in respect of them to the alienees themselves. It is stated in the judgment that there are some lands which have been alienated but have not yet been resumed. What those items are, has not been mentioned, and I am told that this statement is very probably a mistake. However that be, the Government cannot be compelled to resume the lands, and it is difficult to see what right the plaintiffs have got to compel the Government to take such a step. The main question, however, is, where the lands have been resumed, can the Government be directed by a Court of law to appoint fresh persons to carry on the duties and to remunerate them by the grant of land or of land-revenue? In the first place, there is nothing to show that the Government may not of their own accord provide for the services, but apart from that, I fail to see on what principle the Government can be compelled against their will, to make new appointments and remunerate the new offices. No authority has been cited in support of the view taken by the lower appellate Court, and I must remark that the learned Judge has misread even the *Board's Standing Order*, [No. 55] on which he professes to rely. He seems to think that there is something in that order, which makes it obligatory upon the Government to provide for the continuance of the services on the resumption of the lands. That the rule in question is not in the least capable of this interpretation, is conceded by all the parties.

In the result, the appeals are allowed and the suits are dismissed. The order of the lower appellate Court in regard to costs will stand. But in this Court each party shall bear his costs; I make this order as, having regard to the obvious defects in the judgment appealed against, the blame attaches to no party in particular.

Appeals allowed.

A. I. R. 1934 Mad. 105.

Appellate Civil.

No. 192 of 1931. (Decided on 19-10-33.)

Sundaram Chetty and Pakenham-Walsh, JJ.

KRISHNAN CHETTIAR and another ... *Appellants*

versus

MANIKAMMAL and another ... *Respondents.*

(i) Hindu Law—Hindu Law of Inheritance (Amendment) Act (II of 1929)—Act not retrospective—applicability—only to Hindu males dying after the enactment—'Hindu male dying intestate,' meaning of.

The expression 'a Hindu male dying intestate' in Act II of 1929 connotes a person whose death is to occur and not one who has already died.

Act II of 1929 is not retrospective in its operation and does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such person, the Hindu law as it stood before this Act should be applied. A. I. R. 1932 Lah. 851; 30 A. L. J. 384 dissented from; A. I. R. 1933 Lah. 1141 followed. [P. 108, C. 1.]

(ii) Interpretation of statutes—preamble—Act when retrospective.

The general rule is that an Act should not be construed to have retrospective operation, unless such a construction is clearly warranted by the express terms of the Act. When there is some doubt in this respect in the enacting part the preamble of the statute may be looked into for solving the doubt. [P. 106, C. 2.]

Appeal against the decision of the District Judge of North Arcot at Vellore.

Appellants :—by B. C. Seshachala Ayyar.

Respondents :—by T. R. Ramachandran.

JUDGMENT.

Sundaram Chetty, J:—This is an appeal preferred by one Krishna Chettiar against the order of the District Judge of North Arcot for the grant of a succession certificate in favour of the respondents in O. P. No. 31 of 1930. The last male owner was Ponnusami *alias* Subbu Chetti who died unmarried in or about 1916. His mother (Muthammal) succeeded to his estate as a limited owner under the Hindu law and died on 14th September 1929. The present respondents who are the sisters of the last male owner claiming to be the nearest heirs by virtue of Act II of 1929 sought for the issue of a succession certificate in their favour, in order to enable them to collect the debts due to the estate of the last male owner. This present appellant Krishna Chettiar opposed this application, contending that under the Hindu Law, he as the paternal uncle of the last male owner Ponnusami is entitled to succeed to the estate on the death of his mother and that Act II of 1929 would not apply to this case. The learned District Judge held that as sisters, the respondents have a preferential right over the paternal uncle, as the Hindu Law of Inheritance (Amendment) Act II of 1929 had come into force when the last limited owner (Muthammal) died. The correctness of that finding is challenged in this appeal.

Act, whether retrospective.

This appeal raises an important question of law. This question does not appear to have come up for decision in this High Court till now. The point for consideration is, whether this Act has retrospective operation in the sense that the change of law introduced in this Act affects also the estate of persons who have died before the Act. As this Act is not expressed to come into operation on a particular day, it must be deemed to have come into force on the day on which it received the assent of the Governor-General, *i.e.*, on 21st February 1929. The preamble of the Act is as follows:—

"Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate it is hereby enacted as follows."

By S. 1 of the Act, It is made applicable to the whole of British India and to the property of Hindu males governed by the Law of Mitakshara not held in coparcenary and not disposed of by Will. The change effected in the order of succession of certain heirs is declared in S. II, whereby a son's daughter, daughter's daughter, sister and sister's son should in the order so specified, rank next after a father's father and before a father's brother.

The question is, in respect of whose estate or property the altered order of succession among the heirs as fixed by this Act should apply. There is nothing in section 1, to clarify the doubt whether it covers also cases of male owners who died even before the passing of this Act. There is nothing explicitly stated to indicate that the Act has such a retrospective operation. When there is some doubt in this respect in the enacting part, we may legitimately look to the wording of the preamble of the statute for solving the doubt. The following passage in Maxwell on the Interpretation of Statutes, 7th Edition, at pages 37 and 38 is instructive:

"The preamble of a statute has been said to be a good means of finding out its meaning, and as it were a key to the understanding of it; and as it usually states or professes to state the whole object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt".

In this Act, the preamble says that it is in respect of the estate of a Hindu male *dying intestate*. According to the plain meaning of the words employed, it seems to us that the Act is intended to apply to cases of Hindu intestate males who died after the passing of this Act. We can perceive no ambiguity in the preamble. The expression "a Hindu male dying intestate" connotes a person whose death is to occur and not one who had already died. If it was meant that the Act should operate retrospectively so as to affect the estate of persons who died even before the Act, we must find clear words signifying such an intention. On the other hand,

the wording of the preamble indicates that the scope of the Act is otherwise.

It is argued that if succession opens after the passing of this Act even by the death of a limited owner, the provisions of this Act should apply in fixing the priority among the heirs of the last male owner. But in our view the mere circumstance of the succession opening after the passing of this Act is not enough to attract the provisions of this Act, but it must also be shown that the opening of the succession is in respect of the estate of a Hindu male dying intestate after the passing of this Act, as would be clear from the preamble. S. 2 of the Act merely refers to certain heirs taking precedence over others, but the query is whose heirs are meant in it. It is not clear from section I, whether they are the heirs of a Hindu male who died before or after the Act, but the answer if found in the preamble, and the doubt, if any, is solved by it.

The view that we take of the Act as it now stands receives strength, if we turn to the wording of the original Bill and the way in which it was amended by the Select Committee in which form the Act now stands. The bill was introduced in the Legislative Assembly on 22nd March 1928. Its preamble ran thus:

"Whereas it is expedient to alter the order in which certain heirs of a deceased Hindu dying intestate are entitled to succeed to his estate; it is hereby enacted as follows."

In sub-cl. (2) of cl. (1) of the Bill the latter portion is worded as follows:—

"But it applies only in the case of the property of Hindus, not being held in co-parcenary and not having been disposed of by will, to which the succession opens after the 31st day of July 1928."

In the Bill as amended by the Select Committee, the word "deceased" in the preamble was dropped out and the reference to the opening of succession was also omitted. The reason for the omission is stated thus in the report of the Select Committee:—

"We are also of opinion that it is unnecessary either to assign retrospective effect to the provisions of the Bill or to defer the coming into operation thereof, and we have therefore omitted the reference to the date on which the succession opens."

These omissions appear to be very significant and it seems to us that with the object of not extending the operations of this Act to all cases of succession opening after the Act, irrespective of the time of the death of the last male owner, but to limit its operation only to the cases of the Hindu male dying intestate after the Act coming into force, the aforesaid amendments have been effected. The fact that succession opens after the passing of this Act is not therefore the only test for the applicability of the provisions of this Act.

Statute—interpretation.

The general rule is that an Act should not be construed to have retrospective operation, unless such a construction is clearly warranted by the express terms of the Act. At p. 186 of Maxwell's book, it is observed that a fundamental rule of English law is that no statute shall be construed to have retrospective operation, unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. At p. 187, the learned author observes that a testator is presumed to have in view the state of the law when he made his will. If it be so, we can reasonably presume that a person competent to make a will is satisfied with the state of the law regarding the order of succession to his estate among his heirs, if he prefers to die intestate without making a will. If he wishes to prefer a remoter to a nearer heir he will certainly have recourse to the making of a will. If he does not make a will, it may be because he wishes that his property should devolve according to the existing law of succession. The policy of the legislature is not to make a subsequent enactment operative against the estate of such a man and thus frustrate his presumed intentions, unless for special and weighty reasons such a retrospective operation is found to be necessary. If Act II of 1929 is given such a retrospective operation, it would be frustrating the intentions of the last male owner who preferred to die intestate before the passing of this Act. Such an anomaly will not arise if this Act should be held to apply only prospectively.

We have been referred to a decision of the Lahore High Court reported in *Shib Dos* v. *Nand Lal* (1) and to another decision of the Allahabad High Court reported in *Bandhan Singh* v. *Daulata Kuar* (2). A similar question arose in both those cases, and the learned Judges have held that the provisions of this Act as to the order of succession are applicable to the estate of the last male owner though he died before the passing of this Act. In the latter case, it seems to have been almost taken for granted that the Act has such a retrospective operation. There is no discussion of the matters involved in the solution of this question in either of those judgments, and, for the reasons which we have stated, with great respect we express our dissent from those decisions. On the other hand, there is a later decision of the Lahore High Court holding a contrary view which is in accordance with the view we have taken. It is the decision of a single Judge reported in *Mt. Janki* v. *Mt. Sattan* (3). In that case also, there is no discussion, but the contention that Act II of 1929 is not retrospective and the sister was no heir at all previously and is not a preferential heir under the Act, as the Hindu male through whom she claims died before the passing of the Act, is stated to be correct.

A.L.R. 1933 Lah. 1141 Approved.

In view of what we have stated above, we come to the conclusion that Act II of 1929, does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such persons, the Hindu law as it stood before this Act should be applied. By so doing the appellant Krishna Chettiar would be a preferential heir (as the paternal uncle of the last male owner) to the respondents who are his sisters.

Act II of 1929, not retrospective.

We accordingly allow this appeal and dismiss O. P. No. 31 of 1930 with costs in both courts.

Appeal allowed.

(1) A. L. R. 1932 Lah. 851 : 13 Lah. 178 : 33 P. L. R. 423 : 138 I. C. 291.
(2) 30 A. L. J. 384.
(3) A. L. R. 1933 Lah. 1141 : 34 P. L. R. 964 : 146 I. C. 511.

A. L.R. 1934 Mad. 108.

Appellate Criminal No. 284, 285, 294, 359 and 417 of 1932 (Decided on 6-10-33).

Sundaram Chetty and Pakenham-Walsh, J.

(*Patri*) VENKATA HANUMANTHA RAO and others ... *Appellants*

versus

THE CROWN ... *Respondents*.

(i) Penal Code (XLV of 1860), Ss. 120-A and B, 409, 467, 477—charge of conspiracy in commission of criminal breach of trust and ' subsidiary acts to enable concealment of the breach of trust and prevent its detection'—specific offences constituting subsidiary acts, omission of, under count of conspiracy — forgery and destruction of records charged under separate heads—sanction for prosecution, if necessary—Criminal P. C. (V of 1898), S. 196-A.

Where accused were charged under S. 120-A, I. P. C. with having conspired to cheat a Bank by the commission of the offence of criminal breach of trust and "such subsidiary acts as may enable them to conceal that offence and thus prevent its detection" and no specific offence constituting the subsidiary acts were mentioned under the count of conspiracy but the accused were charged under separate heads under Ss. 467 and 477, I.P.C.

Held, that as the dominant charge was under S. 409 in respect of the count of conspiracy which is a cognisable offence and no other specific offences were mentioned in it, sanction under S. 196 A, Cr. P. C. was not necessary for the initiation for the prosecution, though additional charges relating to non-cognizable offences were framed under Ss. 467 and 477.

(ii) Criminal P. C. (V of 1898), S. 335—conspiracy, charge of, and offences committed in pursuance thereof—joint trial-whether constitutes misjoinder of charges—Penal Code (XLV of 1860), S. 120-A.

The offence of conspiracy and the offences committed in pursuance of it can be jointly tried, as they must be deemed to form one and the same transaction. The test is whether they are so related to one another in point of time or as cause and effect as to constitute one continuous transaction.

Criminal appeal against the judgment of the Sessions Judge of Guntur Division.

Appellants:—by S. Vepa, E. L. Ayyar, A. B. Viswanathan, A. Ramamurthy, P. S. Srinivasa Aiyangar.

Crown :—The Advocate-General, K. Venkataraghavachari, for the Public Prosecutor and Parakat Govinda Menon.

JUDGMENT.

Of this batch of appeals, the first four have been preferred by A. 1, A. 8, A. 2, and A. 3 respectively and the last one by A. 5, to A. 7. The persons charged and tried in the lower Court were eight, of whom the 4th accused was acquitted. The rest are the appellants before us. All these appellants were jointly charged for criminal conspiracy under S. 120-B, I. P. C. (charge No. 1). The 1st accused was further charged under S. 409, I. P. C. for criminal breach of trust in respect of moneys belonging to the Guntur Co-operative Urban Bank and held by him in trust for the said bank, aggregating to Rs. 25,340 between 15th February 1929 and 14th February 1930. He was charged for a similar offence to the extent of Rs. 24,607-4-9 between 15th February 1930 and 14th February 1931 (charges Nos. II-A and II-B). The rest of the appellants were charged individually for abetment of criminal breach of trust committed by the 1st accused in respect of various sums under S. 409, I. P. C. read with S. 109, (Charges Nos. III-A to III-D and III-F to III-L). All these offences are said to have been committed in pursuance of the aforesaid criminal conspiracy. Charge No. IV was framed against accused Nos. 1 and 2 for an offence under S. 471, I. P. C. read with S. 467 for using certain valuable securities (forged documents) as genuine with fraudulent and dishonest motives. The 1st accused was also charged under S. 467, I. P. C. read with S. 109 for having abetted the commission of the offence of forgery in respect of some documents in pursuance of the aforesaid conspiracy (charge No. V-A). A. 2, A. 3, and A. 5 to A. 7 were charged individually with the offence of forgery under S. 467, I. P. C., in respect of certain documents (charges Nos. V-8, V-C, and V-E to V-G). Under S. 477, I.P.C. A. 5, and A. 8 have been charged for having dishonestly and fraudulently attempted to destroy the Bank accounts and valuable securities and committed mischief in respect of the same by removing them from the bank office building, treating them with sulphuric acid and throwing them into a well on 14th February 1931 (charges No. VI-A and VI-B). A. 1 to A. 3 were charged for the abetment of this offence. The 1st accused was sentenced to transportation for life, and he and the other appellants were also sentenced to various terms of imprisonment ranging from five years to ten years. All the sentences were made to run concurrently.

Facts.

This case is a unique one, known as the Guntur Co-operative Urban Bank Fraud case. Both from the gravity of the offences with which the accused were charged and from the point of view that by these offences a public disaster was caused on account of the financial crash suffered by the bank, this case was bound to be one of considerable magnitude. I underwent a very elaborate trial which occupied 75 working days in the Sessions Court, and as many as 188 witnesses have been examined on the side of the prosecution, besides 49 witnesses examined as Court witnesses in the exercise of the discretion of the learned Sessions Judge for meeting the ends of justice. A large mass of documents and accounts have been exhibited. Voluminous is the evidence of Mr. R. Padmanabha Naidu, the Deputy Registrar of Co-operative Societies (P. W. 1). The record of his evidence alone has filled 140 printed pages of foolscap size and his evidence may be said to be a survey of the whole of the prosecution case regarding the various items of misappropriation. His evidence contains the history of this bank and also the rules and bye-laws governing its administration. P. W. 187 Mr. C. Venkataramanayya, C.I.D. Inspector of Police. He took up the investigation of this case under the orders of the Deputy Inspector-General of Police. Much interest was evinced by both these witnesses in bringing to light the various offences committed by the accused in a tangled web of complications. The learned Sessions Judge has bestowed on this complicated case a commendable degree of care and attention, and his judgment is so full, so analytical and lucid, that we found it to be of great help in understanding the salient features of this case. With a full mastery of the details, he has taken particular care to group them under appropriate headings for the purpose of clarifying the nature of the evidence bearing on the several charges. We have thought it unnecessary to recapitulate all that the learned Sessions Judge has mentioned in his well considered judgment. Suffice it to give a brief account of the case and to deal with the questions which the learned Counsel have thought fit to argue before us.

This Co-operative Bank was started in or about 1920 and the 1st accused has been its Secretary for nearly ten years from December 1922 till 23rd February 1931 on which date he resigned his appointment shortly after the bursting of the bubble. He was also the Treasurer and the Chief Executive Officer of the bank. He is the brother of Patri Seshagiri Rao (P. W. 127) whose son is the 8th accused. These two brothers live in adjoining houses. The 2nd accused is a cousin of the 1st accused being his paternal aunt's son. These three persons are closely related. The 2nd accused was at first a clerk in this bank and then became the Head Clerk holding that post for several years. The 8th accused has also been a clerk for some time in this bank. The 3rd accused was the night watchman of this bank from February 1929 and has been so far about two years. The 5th accused who is a retired Reserve Constable was the bill collector of the bank in April 1930 and November to January 1931 and was ostensibly so for some time both before and after the said period. The 6th accused who was a bill collector of this bank from April to June 1929 is the son-in-law of the 3rd accused. The 7th accused is an ex-Reserve Constable. He is said to have been very intimate with the 1st accused. As observed by the learned Sessions Judge, accused 1, 2 and 8 have been in the inner ring of the conspiracy, while accused 3 and 5 to 7 have been connected with the conspiracy at some stage or other and playing the secondary role.

This Co-operative Urban Bank was started in September 1920 with 22 members having 61 shares. When the 1st accused became the Secretary in December 1922 the number of members was only 50 and the number of loans 37. In the course of 8 years thereafter, the Bank underwent considerable development, its members numbering 2255 and the outstanding loans numbering 2141 (vide the final Audit Report Ex. JJJ). The amount due to the Bank from borrowers as principal was nearly 3¼ lakhs, whereas the amount due by the bank to depositors and to its principal creditor the Central Bank, was nearly 3½ lakhs. The share capital was a little over half a lakh. The bank had a reserve fund of nearly Rs. 5,000 and Rs. 2,000 worth of shares in the Central Bank. On 14th February 1931, the cash balance was less than Rs. 1,000. For some years before that date, the affairs of the Bank were not in a satisfactory condition. There were a *series* of misappropriation which the 1st accused as the Secretary and Treasurer of the bank, whom the prosecution would style as the arch culprit, was committing in various ways during the course of three or four years before the eventful Sivarathri Day (14th February 1931), when a large bulk of important documents and valuable securities kept in the bank premises were attempted to be destroyed by being treated with sulphuric acid and thrown in gunny bags into a well at Gorantla two miles from Guntur. It is rather amazing that such a systematic fraud practised by the 1st accused and his accomplices on such a large scale escaped detection at the earlier stages. It is unfortunate that the Board of Directors and some of the Presidents of the Bank who were functioning during the period in question have exhibited such supineness and lack of effective supervision. This is indeed deplorable.

The case for the prosecution is, that while the depletion in the resources of the Bank was taking place on account of the series of misappropriations slyly committed by the 1st accused, the financial equilibrim of the bank became patently unstable and on account of the large overdues there was pressure from several quarters. In January 1931, the District Bank threatened this bank with a suit for the recovery of a large sum of money due to it, unless immediate steps were taken to place this Bank on a sound footing. The Auditors' certificate gave a warning that the overdues were very heavy and the Directors should take speedy steps for their recovery.

Pressure also came from the Guntur Taluk Co-operative Union. Similarly, there was remonstrance by the Vice-President of the Guntur District Board in his capacity as Secretary of the Federation. All this was in January 1931. Insistence on the preparation of the overdues statement from the accounts with full details was unpalatable to the 1st accused. There was also pressure from some of the depositors whose deposits amounted to nearly half a lakh. Confidence in the bank was at stake, because re-payments were not properly made on the due dates in respect of fixed deposits. When matters were thus coming to a climax, the 1st accused according to the case for the prosecution made arrangements for the destruction of the important bank records and bonds to escape detection. Having made the necessary arrangements, he left Guntur for Hyderabad on the pretext that his wife was ill. On his recommendation, the Friday (13th February), which is usually the bank holiday was converted into a working day, so that the 15th might be taken as a holiday in substitution of it along with the 14th which was a public holiday for Sivarathri. The case of the prosecution is that on the night of 14th February the records and bonds of the Bank were packed in four gunny bags and taken in a cart and thereafter they were thrown into a well at Gorantla after being treated with sulphuric acid. This was not known to anybody, but the discovery of these records in the well was more or less providential on 17th February on account of the information given by some cow-herd boys. But for the recovery of these records, the dues of the bank amounting to some lakhs of rupees could not have been collected from the borrowers. (*Vide* the report of the Deputy Registrar dated 16th March 1931, Ex. RRR-2). Accused 5 and 8 have been charged directly for this offence, while accused 1 to 3 were charged for the abetment thereof. Curiously enough, on the early morning of 16th February 1931, Patri Seshagiri Rao (P. W. 127) who is no other than the brother of the 1st accused thought fit to send a report to the police (Ex. RRR-3), in which he stated that his younger brother's house where in the Guntur Urban Bank was located was broken open and ledgers and other books were removed from the office and were strewn in the yard. After mentioning some features indicating the commission of burglary, he stated that the 1st accused had taken his wife to Hyderabad for treatment, and also referred to the receipt of some anonymous letters by the Secretary threatening him for having instituted suits for the realisation of the amounts due to the Bank. He further said that the handle of the safe was kept loose in its place evidently showing that the safe was interfered with. The second accused after making the necessary arrangements for the destruction records of made himself scarce by going away to Samalkot. On the receipt of such a report, the Sub-Inspector (P. W. 173) went to the Bank office at about 7 A.M. and examined the scene of the alleged offence closely. After a careful enquiry he could not make out how the offenders could enter the bank office except through the adjoining house, and Seshagiri Rao was unable to suggest how the offenders could have entered the house. It is significant that in the report no mention was made of the loss of records. The Sub-Inspector found to his surprise that almost all the records had disappeared. He thereupon suspected that the records were removed not by any outsider but by those connected with the bank. He was of opinion thot the report suggesting the commission of burglary was false. Investigation was started in due course and a provisional charge sheet was filed on 9th April 1931. In the course of the investigation, the confession of the 5th accused was recorded by the Magistrate on 15th April 1931 (Ex. JJJ 3-1). This confession led to the discovery of the details of the process employed for the attempted destruction of the records. The names of P. Ws. 81, 83 and 84 were disclosed in the confession and then they were examined by the police. A second charge sheet was filed on 29th April 1931 including A. 7. A fifth gunny bag was recovered from the well on 30th April 1931 (*vide* the V. M's. report Ex. KKK-6). On 19th May 1931 the final charge sheet was filed against all the eight accused. The preliminary enquiry before the Magistrate was begun on 17th June 1931.

In the elaborate enquiry made in this case, the 1st accused came to be charged with a series of misappropriations of 92 items of moneys, 45 of which were between 15th February 1929 and 14th February 1930 and 47 between 15th February 1930 and 14th February 1931 (charges Nos. II-A and II-B). These items have been dealt with in ten groups. They show the various methods employed for misappropriating the moneys of the bank. Group I consists of 29 items of fictitious loans. These are treated as loans given by the Bank and debited in the Bank accounts but the moneys lent thereunder were misappropriated by the 1st accused as the so-called borrowers were only fictitious persons. Group 2 consists of seven items of forged bonds by means of which moneys were misappropriated. Group 3 consists of eight blank bonds besides one blank bond included among the forged bonds. Group 4 consists of three items of bonds executed by minors. Group 5 consists of six items of bonds of non-members, besides three such bonds included among the blank bonds. Group 6 consists of bonds taken on the pretext that the originals were missing. Group 7 consists of bonds taken on the pretext of adjusting old loans. Group 8 consists of bonds taken to accommodate the 1st accused. These are *benami* transactions. Group 9 consists of items of repayments misappropriated and also the misappropriation of the cash balance. Group 10 consists of bonds for which no consideration was paid. In such manifold ways, the 1st accused is said to have managed to misappropriate nearly half a lakh of rupees. After a full consideration of the evidence, the learned Sessions Judge finds with respect to charges II-A and II-B that all the items of misappropriation therein mentioned are proved except to the extent of Rs. 2,539 (vide paragraph 152 of his judgment). The charges of abetment of misappropriation committed by the 1st accused framed against accused 2, 3 and 5 to 8 are found by the learned Sessions Judge to have been proved. Such misappropriations are shown to have been made by the violation of several of the bye-laws extracted in para. 11 of the judgment of the lower Court. The learned Counsel for the appellants tried to point out some instances of breaches of some rules and bye-laws, even in respect of loans granted to persons of position about which there can hardly be any suspicion of dishonesty on the part of the Secretary. All that we could say is that, in respect of the items of misappropriation with which the accused have been charged, the defence of an accidental omission or mistake by oversight showing an innocent condition of mind seems to be out of question. On the other hand, the violation of rules and bye-laws in so many ways shows a systematic course of conduct adopted by the 1st accused with his accomplices for the perpetration of this huge fraud, and the cumulative effect of all the ways and means adopted, as shown by the nature of the bonds referred to in groups 1 to 10, is so forceful as to indicate the dishonest intention which is no other than the intention to cause wrongful gain to the 1st accused and wrongful loss to the Bank.

Mr. Vepa admits that in so far as the present accused are concerned, the sum and substance of all his arguments about irregularities simply comes to this; that it cannot be said that the 1st accused devised these irregularities for the purpose of effecting his fraud. All these really make little or no difference on the question of his guilt. In most cases of this sort it is the existence of irregularities which gives a loophole for committing criminal misappropriation of monies and we cannot see that it makes any material difference whether the accused devised these irregularities to cover the fraud or merely took advantage of existing irregularities for committing them. Nor has it been shown that the grant of loans of large amounts by the Secretary in anticipation of the sanction of the Board of Directors has ever been a recognised practice. The rule with regard to this matter is given in bye-law 38, second part, to the effect, 'Loans not exceeding Rs. 100 may in emergent cases be sanctioned by the President on the recommendation of the Secretary'. As pointed out in p. 8 of the judgment, bye-law 23 (a), as it originally stood, made the president ex-officio Treasurer while 23 (b) made the Secretary responsible for the executive administration

Chunnilal settled down as a trader at Karhibhaddar in the Sanjari Balod Tahsil of the Drug District and lived there till 1917, when he wound up his business and returned to his native country, where he died in the early part of 1920. It was alleged by the plaintiff that in 1917, while on his way from Karhibhaddar to his native country, Chunnilal along with his wife and four sons stayed for a few days with his cousin Madhoram at Rajnandgaon, where there was an agreement between Madhoram and Chunnilal about the former taking in adoption the latter's son Girdharilal, the actual ceremonies in connection with the adoption being postponed to a convenient date later on. On return to his native country Chunnilal gave away his last two sons in adoption to his brother Uttamchand and Agyaram.

What occurred after the death of Chunnilal is described by the plaintiff in paragraph 3 of the plaint in these words:—

Seth Chunnilal died at the close of Samvat 1976. Shortly after, that is, in April 1920, Seth Madhoram wrote a letter calling the plaintiff's mother with the plaintiff for giving him in adoption according to rites. The plaintiff's mother Barjobai agreed to give him in adoption to Seth Madhoram in accordance with the agreement made by the plaintiff's father in that respect in Samvat 1973. But the plaintiff's mother was ill at that time and could not leave home for Rajnandgaon according to the caste custom as a year had not expired after the death of her husband. For these reasons she did not herself go to Rajnandgaon but sent the plaintiff's elder brother Nainchand with him there, authorising him (Nainchand) to go to the place, perform the right of giving the plaintiff in adoption and give him in adoption on her behalf to Seth Madhoram."

Para. 5 of the plaint states that,

"The plaintiff and his brother Nainchand went to Rajnandgaon as stated above, and Seth Madhoram fixed Mitti Jeth Badi 13, Samvat 1977, corresponding to 16-5-20, for performing the adoption ceremony. On that date according to Dharm Shastra the plaintiff's elder brother Nainchand on behalf of the plaintiff's mother and Seth Madhoram himself and his wife, performed all the rites of adoption. All the particulars about the adoption were caused to be entered in a book and the signatures of some respectable persons were taken. The plaintiff's name was caused to be entered as that of (Seth Madhoram's) son in the genealogy of the Bhats. Seth Madhoram thus adopted the plaintiff as his son and kept him, joint with him. He (Seth Madhoram) caused his name to be entered as that of the plaintiff's father whenever necessary."

It was averred by the plaintiff that since his adoption he stayed with Madhoram as his son until 6 months after the latter's death when he was turned out by the defendant who is Madhoram's widow. As an adopted son of Madhoram he therefore claimed, in the suit out of which this appeal arises, possession of all the moveable and immoveable properties left by Madhoram at his death as described in the schedules attached to the plaint.

Although most of the pleas raised on behalf of the defendant in her written statement dated the 29th June, 1928, consist of bare denials of solid facts alleged by the plaintiff it is necessary to set out the principal ones in her own words, in order to see how far the evidence led by her supports them. After denying the visit of Chunnilal to her house in 1917 and the alleged talk of the plaintiff's adoption between her husband and Chunnilal, the defendant proceeds to give her own version as to what actually happened in the matter of the plaintiff's alleged adoption in para. 3 of the written statement as under:—

"That as regards the allegations in para 3 of the plaint the defendant says that so far as she is informed, her husband Madhoram had an intention to adopt the plaintiff and with that view had repeatedly requested his mother to come down to Rajnandgaon and give him in adoption and in the expectation that she would come a particular auspicious day had been selected and even invitations had been issued to caste fellows and others. In the meantime, however, he (Madhoram) had consulted his legal adviser, the late Mr. Bapurao Sadashiv as to whether in the eventuality of the mother not being present to give the boy away a valid adoption could take place, but he (Mr. Bapurao) gave his opinion against such a course and so a wire was sent to the mother urging her to come personally but still she did not come and sent the plaintiff with his brother Nainchand: Madhoram, therefore, did not take the boy in adoption but as on the day appointed some of the invited guests attended, *pansupari* and cocoanuts were distributed to them; no other ceremonies were performed; and there was no occasion for it; it is entirely false that Nainchand had been delegated by his mother with the authority to give away the plaintiff and that Madhoram took him in adoption from Nainchand's hands, it is also denied that such delegation could be made and would be valid in law."

In paragraph 7 of the written statement after denying that she turned the plaintiff out, 6 months after Madhoram's death, as alleged by the plaintiff, the defendant alleged that:—

"but the true fact is that as there was no adoption and Madhoram refused to treat him as an adopted son unless and until there was actual adoption and being chagrined at this, the plaintiff on the advice of his brother and mother left Rajnandgaon."

Again in paragraph 10 (*b*), (*c*) and (*d*) of the written statement it was alleged:—

"(*b*) That Madhoram entertained a desire to adopt plaintiff, as stated already, and had made all preparations but as he was advised not to accept any boy unless he was given away by his father or mother, he had to send urgent wire to plaintiff's mother requesting her to come personally and as she was hourly expected the invitations, already issued, were not countermanded until at the last moment seeing that the mother did not arrive, he (Madhoram) was in a fix, he would not send away the assembled guests unceremoniously and so the occasion intended to solemnize an adoption was celebrated as an ordinary *pansupari* party.

(*c*) That Nainchand being disappointed left the place leaving the plaintiff behind and promising to send the mother afterwards; the plaintiff being a boy of his caste and of the country was allowed to stay in Madhoram's house for some time but when it appeared that plaintiff's mother and brothers wanted to have a regular adoption deed written and registered before the mother came to Rajnandgaon to give the boy, Madhoram got annoyed and set his face against it and thereupon plaintiff was sent away from Rajnandgaon at Madhoram's cost.

(*d*) That Madhoram afterwards made a gift of his whole property to the defendant and she has been in possession ever since."

Besides pleading the invalidity of the plaintiff's adoption on the ground that his natural mother could not legally authorise her eldest son to deliver the boy to Madhoram at the time of the ceremonies in connection with the adoption, several other legal pleas were raised in defence but as they were not pressed in appeal it is not necessary to set them out here.

The plaintiff examined 55 and the defendant 64 witnesses and the parties also filed a large number of documents. In an exhaustive judgment the lower Court, after weighing the whole evidence in the light of the probabilities, arrived at the following findings on the main points of controversy between the parties:—

(*a*) that the plaintiff was adopted by Madhoram according to law,

(*b*) that Nainchand was authorised by his mother to perform, on her behalf, the formal act of giving the plaintiff in adoption to Madhoram, and

(*c*) that the property in dispute being the ancestral property of Madhoram he could not, in view of the plaintiff's adoption, make a gift of it to the defendant and therefore the deed of gift dated the 12th of July, 1925 (Ex. D. 13), though executed by him in defendant's favour, was void against the plaintiff. It was, however, held that this deed was not legally proved.

As a result of these findings a decree was passed against the defendant, to deliver to the plaintiff the immoveable properties described in schedule II of the plaint and to pay him Rs. 7,500 on account of the price of the moveable properties. It is against this decree that the defendant has lodged the present appeal.

Although as many as 26 grounds are set forth in the memorandun of appeal Mr. Kotwal, who opened the case for the appellant, attacked the decision of the Lower Court on the following points only:—

(1) that under the Hindu law the plaintiff's natural mother Barjobai had no right to delegate her eldest son Nainchand to attend the adoption ceremonies and perform on her behalf, the formal act of physically giving the plaintiff to Madhoram,

(2) that the plaintiff's story of the performance of the several ceremonies of his adoption, as supported by his witness, was absolutely false and that as a matter of fact nothing beyond what is admitted by the defendant in her written statement happened on the morning of the 16th of May, 1920, and

(3) that the deed of gift (Ex. D 13) was wrongly held unproved by the lower Court.

After Rao Bahadur Kinkhede for the plaintiff-respondent finished his argument, Rai Bahadur Choudhry replied on behalf of the defendant-appellant. He, however, sought permission to raise the two following new points on behalf of the appellant:—

(1) that inasmuch as, on the plaintiff's own case, Mt. Barjobai made no independent agreement with Madhoram about taking the plaintiff in adoption but merely

gave effect to the previous settlement arrived at between her husband and Madhoram in 1917, she had no right, in law, to authorise Nainchand to do the physical handing over of the plaintiff to Madhoram in fulfilment of the said settlement, and

(2) that even if the evidence of Nainchand be accepted as true, it fails to establish the physical delivery by him of the plaintiff to Madhoram and the latter's taking of the plaintiff in adoption as required by law.

Since Mr. Kotval in his opening address had admittedly not referred to these points and as the respondent's Counsel objected to their being raised even on payment of costs, we refused permission to Rai Bahadur Chowdhry to argue them for the first time in reply. In this connection we desire to note that all the arguments advanced by Mr. Kotval against the legality and the factum of the adoption were based on the facts admitted and alleged by the defendant herself in her written statment, *viz.*, that soon after the death of Chunnilal her husband Madhoram had made a proposal to Mt. Barjobai to come over and give to him the plaintiff in adoption; but that the offer was never accepted by Mt. Barjobi; the plaintiff's story of the agreement between Madhoram and Chunnilal in 1917 was expressly denied by the defendant in her written statement. Similarly it was not even suggested in the opening address by the plaintiff's learned Advocate that the evidence of Nainchand, even if true, did not, in law, amount to the physical delivery of the plaintiff by Nainchand to Madhoram but it was only argued that the plaintiff's evidence on this point as on other ceremonies connected with the adoption was incredible and opposed to the probabilities of the case and was far outweighed by evidence on the defendant's side which showed that nothing beyond the distributions of *pan supari* and cocoanuts occurred on the morning of the 16th of May, 1920 when people had assembled at the house of Madhoram on his invitation to witness the contemplated adoption of the plaintiff by him.

Giving in adoption.

In order to decide the specific question of law raised by the appellant's learned Counsel it is necessary, in the first instance, to determine what persons are competent under the Hindu Law to "give" in adoption, and secondly what is the real signification of the common expression "giving in adoption." According to Mr. Kotval this expression means and includes both the decision taken as well as its translation into action, by the physical act of delivery of the boy, by his natural parents to the adopting parents. In support of this contention reliance was placed by the appellant's learned Counsel on the following observations of their Lordships of the Privy Council which appear at the top of page 54 of the report of *Dhanraj* v. *Soni Bai* (1):—

"Admittedly, under the Hindu Law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else (Mayne's Hindu Law, paragraph 132). Consequently, a boy who has lost both his parents cannot be adopted."

The parties before their Lordships were Agarwallas and the defendant-appellant had set up his complete adoption in Brahmanical form in the year 1903 by alleging that his natural mother had given him in adoption. That the aforesaid observations were apparently made with reference to these peculiar facts of the case is clear from the further observations of their Lordships which immediately follow the quotation:—

"In 1903 both the parents of the defendant were dead. In order to establish his adoption as valid under the Hindu Law, he has put forward two allegations; *viz.*, that his mother before her death went actually through the formal ceremony of "giving" and that before she died she delegated the authority "to give" to his elder brothers. If she had already given him in adoption, the subsequent delegation of authority would seem to be superfluous. Any such delegation would, however, be invalid. The defendant, therefore, had to establish that in 1903, when his mother was alive, she gave him in adoption to Joharmal and that consequently he is vested with all the rights that appertains to an adopted son under the Hindu system."

It would thus be seen that their Lordships had neither an occasion nor were they invited to express their opinion on the soundness or otherwise of the law propounded in the last portion of para. 132 of Mayne's "Hindu Law and Usage" and which runs as under:

(1) 52 Cal. 482: 52 I. A. 231: 21 N. L. R (54): 30 C. W. N. 601: 87 I. C. 357.

"But what the law declines to sanction is the delegation by an authorised person to an unauthorised person of the discretion to give in adoption which is vested solely in the former. Where the necessary sanction has been given by an authorised person, the physical act of giving away in pursuance of that sanction may be delegated to another."

The original text of Vasistha which sanctions the right of giving a boy in adoption is translated by Sarkar Sastri at page 174 of his Treatise on Hindu Law (6th Edition) in these words :—

"A son sprung from the virile seed and the uterine blood is an effect whereof the mother and the father are the cause; the mother and the father are, therefore, competent to give, sell or disown him."

The only persons who can therefore lawfully give a boy in adoption are his father and mother. The nature of this right of gift and its limitation and the reason for confining its exercise to the parents only are thus stated, with appropriate precedents, by Sarkar Sastri at page 279 of his "Tagore Law Lectures on the Hindu Law of Adoption" (2nd Edition) :—

"Gift in adoption is attended with such serious consequences on the prospects of the boy given, that the power cannot be safely entrusted to any other than the parents. And as no gift is complete until the thing be actually delivered, the discretion which the parents alone may exercise in the matter can be evidenced only by the actual gift, the previous expression of consent is merely a promise to give which is liable to be revoked at any time, and is quite ineffectual in law, *Gourbullah* v. *Jugernatpersad*. Hence the law declines to sanction the delegation of the power by the parents to another person to be exercised after their death."

Delegation of physical delivery.

It should be observed that all the law requires is that the secular act of gift should be completed by the father or mother, but the physical act of giving the child in the religious ceremony of adoption may be vicariously performed by a delegate. Accordingly when the father died after making the gift, and the ceremonial giving was done by a brother of the adoptee, the adoption was held to be valid. *Venkata* v. *Subhadra* (2). So also where a mother allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid. *Vijiarangam* v. *Lakshman* (3).

But it has been held in Bombay that a Hindu does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism. *Sham* v. *Santabai* (4).

All the other eminent commentators on Hindu law, without exception, entertain identical views on the subject. In his treatise on Hindu law (3rd Edition) Trevelyan at page 149 says :—

"The power to give a son in adoption cannot be delegated to any person; but a father or mother may authorise another person to perform the physical act of giving a son in adoption to a named person"

Bhattacharya in his Hindu law (Vol. I, 3rd Edition at page 405) says :—

"The parents cannot delegte their power to another person so as to enable him, after their death, to give away their son in adoption. But after the necessary sanction has been given by the proper person, the act of giving away may be delegated to another or when the gift has been made by the proper person, another may be authorised to perform the necessary ceremonies."

The Right Honourable Sir D. F. Mulla in paragraph 477 of his Principles of Hindu law (7th Edition) says :—

"The *power* to give a boy in adoption belongs exclusively to his parents, and it can be exercised by them alone. Neither parent, therefore, can delegate that power to another person. But the *physical act* of giving the son in adoption may be delegated to another, as such an act involves no exercise of discretion."

Professor Gharpure at page 132 of his work on Hindu Law (4th Edition) says:—

"It should be noted that it is only the power to exercise his discretion, whether or not to give, that cannot be delegated. The physical act of giving may be done through another, if the giver is not in a position to do so."

Sir Hari Singh Gour in paragraph 769 of his Hindu Code (3rd Edition) sums up the law in his usual terse style in these words :—

"Adoption is the gift of his son by the natural father to another, and is completed on its acceptance, by the latter. This may partake of a contract followed up by stimultaneous or subsequent manual delivery and acceptance, which symbolize and complete the transfer of the boy from one parental control to another. The first essential of gift and acceptance can only be made by the parent of the child. It cannot be left to be performed vicariously. But if the contract of gift and acceptance is concluded between the principals competent to give and take, and either of them is through illness or otherwise unable to perform the only indispensable ceremony of corporeal giving and taking or of the Datt Homa, if necessary, its performance may be delegated to be performed by the wife, or another son on the part of the giver and any relation, such as the uncle, of the receiver."

(2) 7 Mad. 548.

(3) 8 Bom. H. C. R. 244.

(4) 25 Bom. 551 : 3 Bom. L. R. 89.

From the foregoing discussion we deduce the following propositions :—

(1) that the father or in his absence the mother of the boy and no other person possesses the legal right of giving him in adoption,

(2) that the expression "giving in adoption" only means "decision to give in adoption" by the exercise of the discretion of accepting the proposal of the adoptive father to give the boy in adoption to him, and

(3) that the performance of the formal act of physical delivery of the boy may be delegated by his parents to suitable persons, but not the power of decision to give away the boy in adoption.

The first point pressed for the appellant is thus quite untenable and we hold that Mt. Barjobai could, in law, delegate her eldest son Nainchand on her behalf to attend the adoption cermonies and perform the formal act of physically giving the plaintiff to Madhoram in adoption.

The second point pressed for the appellant requires the determination of the following questions :—

(*a*) Whether after deciding to accept Madhoram's proposal to give the plaintiff in adoption to him Mt. Barjobai had authorised her eldest son Nainchand to go to Rajnandgaon and on her behalf attend the ceremonies in connection with the adoption and make the formal physical delivery of the plaintiff to Madhoram.

(*b*) Whether Nainchand carried out his instructions and physically gave the plaintiff away to Madhoram in adoption and whether the latter accepted the plaintiff as his adopted son, and

(*c*) Whether the Datt Homa and other ceremonies, as alleged by the plaintiff, were performed, or, as alleged by the defendant, the assemblage dispersed because Madhoram refused to go through the ceremonies of the adoption, for the reason that Mt. Barjobai had not come to give the plaintiff in adoption. Before dealing with this matter it is convenient to state a few facts which are either proved or not disputed.

[The judgment then dealt with the facts and proceeded :]

Only one more argument of the learned Counsel for the appellant remains to be noticed in connection with the second point. It is the improbability of Madhoram executing the deed of gift (Ex. D. 13), in favour of the defendant, if he had really adopted the plaintiff as a son. But on the facts proved in the case we see no incongruity in this action on the part of Madhoram. It has already been seen to what extreme length Madhoram was irritated by the incessant demand of the plaintiff's natural brothers for securing a registered deed of adoption from him without complying with his reasonable suggestion of first giving him a deed of gift from the plaintiff's natural mother. Driven to despair and fearing that his nephew Sardarmal might create trouble after his death, Madhoram appears to have solved the tangle by gifting away the property to his wife in his lifetime. The plaintiff was admittedly a minor at the time of the execution of Ex. D. 13 and as Madhoram died within a year of its execution the plaintiff could not challenge it until after his own repudiation by the defendant as the adopted son of Madhoram. It is significant to note that in (Ex. D. 13) there is not the slightest allusion to the plaintiff. If, as the Counsel for the appellant contended, Madhoram honestly believed that the plaintiff's adoption was incomplete, he should have so stated in (Ex. D. 13)— and then perhaps such a statement might have carried some weight.

Having given our earnest attention to all the arguments of the appellant's learned Counsel we feel no hesitation in confirming the finding of the lower Court that the plaintiff is the validly adopted son of the deceased Madhoram and the defendant. He is consequently entitled to all the estate left by Madhoram. The finding that the property in dispute is ancestral was not challenged in arguments.

On point No. 3 we accept the contention of the appellant's Counsel that the learned Judge of the lower Court erred in holding, in paragraph 24 of his judgment, that the deed of gift (Ex. D. 13) was not proved as required by S. 68 of the Indian Evidence Act, for the reason that one of its attesting witnesses Keshrimal, though summoned, was not examined by the appellant to prove its execution by Madhoram. The learned Judge obviously overlooked the change in the meaning of the term "attested" effected by S. 2 of the Act No. XXVII of 1926 which as amended by Act X of 1927 runs as under :—

Evidence Act, S. 68—attestation.

In S. 3 of the Transfer of Property Act, 1882, after the definition of the word "instrument," the following shall be inserted, namely :—

"'Attested' in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

In *Veerappa Chettiar* v. *Subramania Ayyar* (5), a Full Bench of the Madras High Court held that the above provision is retrospective in its operation and we respectfully agree with this view. In the present case, Narsinghdas (D. W. 2), who identified Madhoram before the Sub-Registrar, deposed that before he signed Ex. D. 13 as an identifying witness he received a personal acknowledgment from Madhoram of his signature. Narsinghdas must then be deemed to be one of the attesting witnesses within the meaning of S. 68 of the Indian Evidence Act. We hold that the deed of gift (Ex. D-13) is duly proved.

But the proof of this deed does not affect the decision of the case in any way. The property in dispute being ancestral in the hands of Madhoram, he could not legally dispose of it by gift to his wife. The plaintiff, by virtue of his adoption, became a co-parcener of his adoptive father and on his death took the estate by survivorship.

(5) 52 Mad. 123 : 116 I. C. 367 : A. I. R. 1929 Mad. 1 (F. B.)

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

A. L. R. 1934 Nag. 38.

Appellate Civil.

No. 197-B of 1931. (Decided on 28-11-33.)

Pollock, A. J. C.

SHANKAR ... *Appellant*

versus

KESHAO ... *Respondent.*

Berar Inam Rules (1859), Rr. 5 and 9—inams in Berar, whether impartible—co-sharers entitled only to maintenance—grant to a person and his male issue in perpetuity, effect of—exclusion of co-sharers—succession to inam, principles of.

Inams in Berar are ordinarily, though not necessarily, impartible.

Where an inam was granted to *G* and his male issue in perpetuity and there was only a remark, in column 23 of the certificate, that there were many co-sharers without giving them the right of succession.

Held, that the inam was impartible and that co-sharers were only entitled to maintenance and not to a declaration or possession of their shares. 29 N. L. R. 210 *explained.*

Under Rule 19 of the Berar Inam Rules, when succession to an inam opens on the death of the Inamdar, the certificate should be given to the representative of the senior branch in preference to a representative of a junior branch though the latter is one degree nearer to the common ancestor.

Appeal against the decree of the Additional District Judge, Yeotmal.

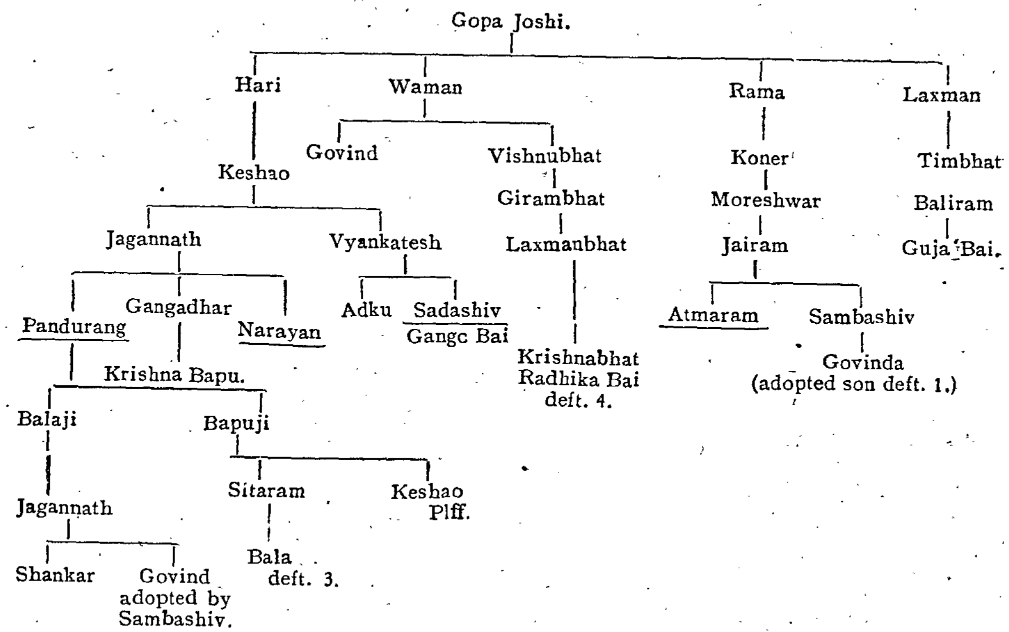
Appellant :—by A. V. Wazalwer.

Respondent :—by M. R. Bobde.

JUDGMENT.

This appeal arises out of a suit relating to an *inam* in Berar. The family tree of the parties has been set out in the first paragraph of each of the judgment of the lower Courts. The accuracy of that tree, so far as it goes, has not been challenged in this Court, but in order to

understand the case properly, I have made certain additions to it from the tree filed by defendant No. 1. The tree thus amended is as follows :—



The sole survivors are the plaintiff, the four defendants, and Sadashiv's widow Mt. Ganga Bai.

From the register of claims to hold land rent-free Ex. 4 D-1, it appears that *mauza* Pimpri, which was then in the Wun district but is now in the Wun Taluq of the Yeotmal District, was granted by Janojee Bhosley, Rajah of Nagpur to Waman Joshi in *mokasa jagir* for personal maintenance in 1762 A. D. In 1859 the Government of India made Inam Rules for the settlement of *Jagir* and *inam* claims in Berar, and in pursuance of these rules an investigation was made into claims to hold land rent-free. The Inam Commissioner who investigated the claim found that this *inam* had been enjoyed by the original grantee and his three brothers for an unknown period, by the original grantee's son Vishnubhat and his cousins for 20 years, and by Vishnubhat's son Girambhat, who was then the claimant, and his co-sharers for 40 years up to the year 1862. Column 17, which contains the list of present incumbents, shows that the *inam* was then enjoyed by the following co-sharers, who have been underlined in the above tree :—

1st branch.

Pandurang	...	8 pies.
Krishna	...	8 ,,
Narayan	...	8 ,,
Urku	...	1 anna.
Sadashiv	...	1 ,,

2nd branch.

Govind	...	2 annas.
Vishnubhat	...	2 ,,

3rd branch.

Atmaram	...	4 annas.

4th branch.

Guja Bai (widow of Baliram).	...	4 annas.

The Inam Commissioner stated that Rs. 37-9-0 had been paid yearly up to then, which amount was a little less than one-fourth of the net revenue, and recommended that the village should remain *khalsa* as it then was and that Rs. 40 per annum should be allowed to the claimants and his co-sharers and their descendants in perpetuity as a fixed equivalent to the right of *mokasa* in the village. The Commissioner and Resident recommended that the whole village should be granted rent-free in perpetuity to the family then holding it, but the Government of India in their letter of 3-12-66, Ex. 4 D. 2, decided that the *inam* should be released free for the life of the present incumbent and on quarter *jama* to his male issue in perpetuity. Girambhat was accordingly granted an *inam* certificate, of which Ex. 3 D. 1 is a copy, showing the *inam* as one granted to him for personal maintenance free for the life of present incumbent and on quarter *jama* to his male issue in perpetuity. Column 23 contains a remark that there are many co-sharers.

Laxmanbhat and Krishnabhat were successively recorded as the *inam* holders, and on the death of the latter inquiry was made to decide who should be recorded as the *inam* holder in his place. The Sub-Divisional Officer was of opinion that the grant was to the whole family and not the line of Waman alone, so that the male issues of Waman's brothers were entitled to succeed, and recommended that the *inam* certificate should be granted to Shankar, defendant No. 2, as representative of the senior line. The Deputy Commissioner held that in the absence of male issue of Waman, the *inam* should be resumed, *vide* Ex. 2 D-3. On appeal the Commissioner held that, in view of the entry in column 15 of the register recommending that the grant should be continued to the family then holding it, the grant was to the family and not to the individual grantee and should therefore not be resumed. He held that the grant was governed by r. 5 of the *inam* rules and directed that Shankar should be given the *inam* certificate.

The present suit arises out of that order. The plaintiff Keshao, alleging that Shankar was not giving proper accounts, sued for partition and separate possession of his share, and alternatively, if it were held that the village were impartible, for a declaration that he held a 9-anna share in the village and was entitled to a 9-anna share of the profits. He also claimed that he was a nearer heir to Krishnabhat, the last certificate-holder, than Shankar was, and asked that the certificate should be given to him and not to Shankar. The Court of first instance held that the *inam* was impartible and that no co-sharer was entitled to a declaration as to the amount of his share, but that the plaintiff Keshao, as the nearest heir of Krishnabhat, was entitled to the *inam* certificate. Shankar appealed against that decision and Keshao filed cross-objections contending that the first Court was wrong in holding that the *inam* was impartible and that the plaintiff was not entitled to a declaration as to the amount of his share and separate possession of that share. The lower appellate Court upheld the first Court's findings that the *inam* was impartible and that the plaintiff had no right to a declaration as to the extent of his share or possession of that share, and also that the plaintiff was entitled to the *inam* certificate, but it held that the plaintiff was not entitled to a declaration alone to that effect as he ought to have claimed the consequential relief of possession. It therefore set aside the decree of the first Court and remanded the suit, directing that the plaintiff should be allowed to amend the plaint so as to claim possession. The lower Courts have also held that Mt. Radhika Bai was not entitled to any share in the *inam* in view of the terms of the grant limiting it to male issues in perpetuity. Both Shankar and Mt Radhika Bai have appealed against that judgment. Keshao has also filed cross-objections, contending, *inter alia*, that the lower Court was wrong in holding the *inam* to be impartible. This judgment will dispose of both appeals and the cross-objections.

The first and most important question to be decided is whether the *inam* is impartible or not. It is admitted that the *inam*, as a personal or subsistence grant, is governed by Rule 5 of the Inam Rules, and sub-rule 2 of that rule provides that such *inams* should be continued to the grantee subject to the following conditions :—

First.—Successions limited to direct lineal heirs and undivided brothers ;

Second.—The Inam escheats to Government on failure of such heirs ;

Third.—Future alienation of the Inam is prohibited ; and

Fourth.—The right of adoption to an Inam is not recognized.

formed the opinion that there was a preconcerted arrangement between the girl and Nasrullah that when she heard her father conversing with Mohammad Raza, she should conclude that Nasrullah had made all preparations to run away with her. This statement also was put to him in cross-examination. He said that he might have made it, but he did not remember making it. It is urged that, taking all these circumstances into consideration, there is reason to suppose that the girl left home as the result of a preconcerted plan, and that she was not, as she now represents, terrorised into doing so, and compelled by force to do so. It is also pointed out that it is very significant that the girl's father made no report to the police until the 11th Novembee, that is to say, ten days after her disappearance. The explanation he gave of this delay in the Sessions Court was that if he had got his daughter back, he would not have made any report, or instituted any proceedings, in order to avoid disgrace in his community. This explanation is not very plausible, in view of the fact that the girl's disappearance must have been commonly known. In any case, the fact remains that no report was made to the police until ten days after the girl's disappearance.

Taking all the circumstances into consideration, I think that it is by no means impossible that the girl ran away from home of her own free will with Idu and Nasrullah, and was not abducted by them.

As regards the charge of rape, the learned Assistant Sessions Judge recognised that there was no evidence in support of the girl's statement. The medical evidence given by the Civil Surgeon, who examined her on the 22nd November, was that there was no sign of recent injury on her private parts, and that she was used to sexual intercourse. In these circumstances, even if it be taken that the appellants did have intercourse with the girl, there is nothing to support her allegation that they did so against her will, and it is at least possible that she was a consenting party. If, of course, it were certainly proved that she was at the time under the age of fourteen, her consent would have been immaterial, but if she was over sixteen, as I have held on the basis of the medical evidence, that she may have been, the appellants would not have been guilty of rape by the mere fact of having sexual intercourse with her. In the absence of any corroborative evidence that the appellants had sexual intercourse with the girl, and that if they did so, the intercourse was without her consent, the appellants ought not to have been convicted of rape. Nor on the conclusions I have arrived at ought they to have been convicted under S. 366, I. P. C. either.

The result is that I set aside the convictions and sentences of all the three appellants both under S. 366, I. P. C. and S. 376, I. P. C. and direct that they be released.

Conviction set aside.

A. L. R. 1934 Oudh 49.

Miscellaneous Civil. No. 210 of 1933. (Decided on 6-12-33.)

Nanavutty and Hasan, JJ.

DEPUTY COMMISSIONER, LUCKNOW ... *Applicant*

versus

MRS. D. AIKMAN ... *Respondent.*

Court-Fees Act, 1870, S. 19 (1) and Sch. I, Art. 11—Court-fee on probate of will—shares in joint names of husband and wife—'valuation of property' in S. 19-I, meaning of—gift by husband to wife of their joint shares—is not property of deceased husband under S. 19-I,—valuation statement unnecessary—shares not liable to Court-fee—investment or purchase in names of husband and wife jointly—presumption.

Where a husband makes investments or purchases in the names of himself and his wife, the presumption, in the absence of evidence to the contrary, is that he intended it as a gift to his wife and, on the death of the husband, the wife takes *it* as her absolute property and not as the property of her husband.

Whether, therefore, an express gift of the shares was made by the husband or not, neither the entirety of the shares nor the half share in the name of the wife is liable to Court-fee on her getting probate of her husband's will.

The shares need not be set forth in the annexure of the form referred to in S. 19-(*i*) of the Court-Fees Act.

The expression "valuation of the property" in S. 19-I means valuation of the property of the deceased. [P. 51, C. 2.]

Application under S. 19 *h* (4) of the Court-Fees Act.

Applicant :—by the Government Advocate.

Respondent :—by Jackson.

ORDER OF REFERENCE.

Smith, J.—This is an application under S. 19-*h*, Sub-sec. 4 of the Court-Fees Act, by the Deputy Commissioner of Lucknow, with reference to the assets of Mr. D. W. Aikman, who died on the 21st August, 1931, at a Hospital in London. His widow, Mrs. M. D. Aikman, applied to this Court for probate of his will on the 17th December, 1931, and probate was granted to her by a learned Judge of this Court on the 18th December, 1931, subject to the condition that if the estate turned out to be of greater value than was set out in the annexure to the application for probate, the additional Court-fee would be paid. Mrs. Aikman submitted an inventory, as required by S. 317 (1) of the Indian Succession Act, on the 17th March, 1932. Correspondence took place thereafter between her and the Registrar of this Court with a view to the removal of various defects in the inventory, and there was also correspondence with the Board of Revenue. A revised inventory was put in by Mrs. Aikman on the 14th March, 1933.

It appears from the present application that Mrs. Aikman objects to the payment of Court-fees on the properties that were held in the joint names of herself and her deceased husband, and that her Counsel requested the Board of Revenue to refer the matter to this Court. The Deputy Commissioner's contention is that Mrs. Aikman is liable to pay Court-fees on half the value of the shares that stood in the joint names of her and her husband, and there is also a contention as to the value of certain shares held by the late Mr. Aikman in the Ryam Sugar Company.

The shares that were held in the joint names are set out in para. 5 of the present application. The application sets forth in separate columns the number of the shares and their value as estimated by the Collector of Stamps at Calcutta and by the executrix (Mrs. Aikman). Paragraph 6 of the application shows the value of the Ryam Sugar Company shares according to the "Collector of Calcutta" and according to Mrs. Aikman.

On the application coming up for hearing some question arose as to whether it is maintainable, having regard to the proviso to Sub-sec. 4 of S. 19-*h* of the Court-Fees Act. According to that proviso, no such motion as is now before me shall be made after the expiration of six months from the date of the exhibition of the inventory required by the Indian Succession Act, the section of that Act now applicable is S. 317. The first inventory, as has been mentioned already, was put in by Mrs. Aikman on the 17th March, 1932, that is to say, over a year before the making of this present application. It is contended, however, by the learned Government Advocate that the period of six months prescribed in the proviso to Sub-s. 4 of the S. 19-*h* of the Court-Fees Act must be taken to run from the time of the presentation of the revised inventory, that is, from the 14th March, 1933. That contention may be supported by the principles laid down in a ruling of their Lordships of the Privy Council reported in *Bhubaneshwari Kumar* v. *Collector of Gaya*. (1) Furthermore, as has been said already, Mrs. Aikman's Counsel himself desired that the matter should be referred to this Court, and he has not pressed the objection that the application has been made by the Deputy Commissioner beyond time. It is therefore not necessary to say anything more on that point.

The number of the shares that were jointly held by Mrs. Aikman and her late husband is in two cases differently shown by the Collector of Stamps at Calcutta and by Mrs. Aikman herself, and the total valuation given by the Collector of Stamps is Rs. 2,06,807-6-0 as against Rs. 1,90,873-8-0 given by Mrs. Aikman. The difference in the numbers of the shares was explained to me by Mrs. Aikman's Counsel as being due to the fact that the numbers given by the Collector of Stamps at Calcutta include the shares that stood in the name of Mrs. Aikman alone, whereas she has given those that stood in the joint names of her and her late husband. This explanation is accepted by the learned Government Advocate, and he also accepts the total valuation of those jointly-held shares given by Mrs. Aikman. The only question remaining in regard to those shares

(2) 41 Cal. 556 (566);

is whether half their value must be regarded as the property of the deceased for the purpose of probate-duty. For Mrs. Aikman it is contended that she became entitled to the whole of those shares by right of survivorship, and that no duty is payable in respect of her late husband's share in them. As regards the Ryam Sugar Company shares, the valuation given by Mrs. Aikman was based upon the "Weekly Share Market Report" of Messrs. Place, Siddons & Gough, dated the 11th December, 1931, whereas the valuation given by the "Collector of Calcutta" is based upon the price of those shares given in the issue of "Capital", dated the 23rd December, 1931.

The question whether probate-duty is payable in respect of a half-share of the value of property (in this case shares) held jointly in the names of two persons, in the event of the death of either of them, is an important one, and is not free from difficulty. No authority, English or Indian, has been shown me on the subject. In these circumstances, I think it best that this application should be referred for the decision of the matters still at issue between the parties to a Bench of two Judges of this Court, as allowed by S. 14 (2) of the Oudh Courts Act, 1925. It is ordered accordingly.

JUDGMENT.

The facts of this case are stated at length in the order of reference of our brother Smith, J., and for the purpose of the decision of the points, which we are called upon to decide, it is not necessary to repeat them in full here.

The first and the main question for decision is as to whether Mrs. Aikman is liable to pay Court-fee duty on the probate in respect of certain shares which stood in the life-time of her husband in the joint names of herself and Mr. Aikman. The learned Government Advocate on behalf of the Deputy Commissioner asked us to hold that she is liable to pay Court-fee on half of the value of the shares. Mr. Jackson on behalf of Mrs. Aikman on the other hand contends that she is not liable to pay any duty at all in respect of these shares. His contention is that Mr. Aikman in his life-time made a gift of these shares in favour of Mrs. Aikman and the gift was effected by holding those shares in the joint names of both. In support of this contention Mr. Jackson produced Mrs. Aikman as a witness in the case. She has stated on oath as follows:—

"There are certain shares in certain companies which were held jointly in the name of my deceased husband and myself. Previous to this they were held in the name of my husband alone and he was the full owner of those shares but about twelve years ago he got the shares entered in our joint names saying to me that it was a gift of the whole in my favour in case I survived him. There were other shares which he bought originally in our joint names with the same intention."

There is no evidence in the case rebutting the sworn statement of Mrs. Aikman in the matter of the gift of the shares in question. We hold, therefore, that it is proved that the shares held in the joint names of the late Mr. Aikman and Mrs. Aikman were gifted in their entirety by the husband to his wife.

The amount of Court-fee duty on the probate of a will is prescribed by Art. 11 of the first schedule of the Court-Fees Act, 1870, and varies according to the "value of the property in respect of which the grant of probate is made." Under S. 19-I of the same Act an applicant for the grant of a probate is required to "file in the Court a valuation of the property in the form set forth in the third schedule."

Court-fees Act, S. 19-I & Sch. I, Art. II.

The form as prescribed in that schedule deals with the "property of the deceased." If, therefore, the shares in question are the property of Mrs. Aikman by virtue of the gift, as according to our opinion they are, then it follows that they are not the property of the deceased and consequently they are not required by law to be set forth in the annexure of the form referred to in S. 19-I of the Court-Fees Act. The expression "valuation of the property" in S. 19-I must mean valuation of the property of the deceased. On this reasoning the inevitable conclusion is that Mrs. Aikman is not liable to pay Court-fee duty either on the whole or the half of the value of these shares.

Mr. Aikman was a Scotchman and was a member of the Imperial Service of Engineers of India. He was presumably aware of the view held in England that holding property in the joint names of husband and wife has always been interpreted as a gift of the whole in favour of the wife. Mrs. Aikman states in her evidence that her husband "used to tell me over and over again that the effect of holding shares in our joint names would also be to exempt me from payment of duty thereon after his death".

The view referred to above is stated in para. 793 of Halsbury's Laws of England, Vol. 16 in the following words:—

"Where a husband purchases property or makes an investment in his wife's name, a gift to her is presumed in the absence of evidence of an intention to the contrary, and there is a similar presumption where the property is purchased or the investment made by the husband in their joint names, the wife in the latter case being entitled in the event of her surviving the husband. Where the purchase or investment is made by the husband in the joint names of husband and wife and third persons with regard to whom no presumption of gift arises, the third persons will presumably be trustees for the husband and wife and the survivor.

A gift is also presumed where money is deposited at a bank in the name of the wife, or shares or stock are transferred into her name, or where any such deposit or transfer is made in or into the joint names of both husband and wife, or where a mortgage or other security for money lent by the husband is taken in their joint names."

In *Dummer* v. *Pitcher*, (2) it was held that certain stocks transferred by a husband into the joint names of himself and his wife and also further purchases of similar stocks by the husband in the joint names of himself and his wife became by survivorship the absolute property of the wife.

On similar facts the same interpretation was adopted in *Low* v. *Carter*, (3).

In the case of *Coats* v. *Stevens*, (4) the facts were that a certain stock stood in the joint names of the husband and his wife. The husband made certain dispositions of this stock by his will. The Court held that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will.

In the case of *In re: Eykyn's Trust* Malins, V. C. said as follows:—

"The law of this Court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests money, stock, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband, but if he survives her then it reverts to him as joint tenant with his wife. This principle is established by the authority of *Dummer* v. *Pitcher*, (6) and cannot now be disputed."

These cases support the view which we have expressed above that Mrs. Aikman having survived her husband the shares in question are her absolute property and not the property of her deceased husband.

In the course of argument reference was also made to the provisions of 57 & 58 Vic. Ch. 30. Those provisions also in our opinion support the same view which we are taking in this case. Section 2 (1) of that statute is as follows:—

Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

(*a*) Property of which the deceased was at the time of his death competent to dispose;

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

(*c*) ....

(*d*) ....

Clearly if the shares in question are held, as we have held them, to be the absolute property of Mrs. Aikman, then they do not fall either under Cl. (*a*) or Cl. (*b*) quoted above.

Accordingly we hold that Mrs. Aikman is not liable to pay Court-fee on the value of the shares in question.

Another question to be decided is the determination of the value of certain shares held in the name of late Mr. Aikman alone in the Ryam Sugar Company. As regards this there was an agreement between the Counsel for the Deputy Commissioner and Counsel for Mrs. Aikman that the value of these shares may be taken at Rs. 26 per share. We accordingly hold that the value of these shares is at Rs. 26 per share.

Order accordingly.

(2) 39 Eng. Reports, 944.
(3) 48 Eng. Reports, 1005.
(4) 160 Eng. Reports, 29.
(5) (1877) 6 Ch. Div. 115 (118).
(6) 2 My. & K. 262.

A. L. R. 1934 Oudh 53 (1).

Reference Side. Criminal.
No. 37 of 1933. (Decided on 11-10-33.)

Raza, J.

THE CROWN ... *Petitioner*

versus

VIDYA SAGAR .... *Respondent.*

(i) Criminal P. C. (V of 1898), Ss. 303, 304 —verdict of jury not clear and definite—judge justified in sending case to jury for a clear verdict according to law.

Where the first verdict of the jury was not clear and definite, the Court can send the case back to the jurors for a clear verdict according to law.

(ii) Criminal trial—verdict of jury accompanied by a recommendation—whether recommendation is a part of the verdict.

When a recommendation was made by the jury which was not part of the verdict: *Held*, the verdict is not open to any objection.

Reference made by Sessions Judge, Fyzabad.

Petitioner:—By H. K. Ghosh, Faiyas Ali and Nasirullah Beg.

Respondent:—by R. F. Bahadurji.

JUDGMENT.

This is a reference under S. 438 of the Cr. P. C.

I have read the referring order of the learned Sessions Judge and the explanation of the learned Magistrate. Mr. Bahadurji has appeared to support the reference. The Assistant Government Advocate has appeared to oppose the reference.

I have heard the learned Counsel on both sides at some length. In my opinion the question which we have to consider and decide is a simple question. The whole revision depends upon the interpretation of the verdict of the jury.

The so-called first verdict was not clear and definite and so the learned Magistrate was not wrong in sending the case back to the jurors for a clear verdict according to law. The second verdict is, of course, a verdict according to law. The question is whether the recommendation made by the jurors in their verdict is or is not a part of the verdict. I have considered the verdict in question very carefully. In my opinion the recommendation in question is not a part of the verdict, and should not be treated as such. This being the case, I think the order of the learned Magistrate is not open to any objection and must be upheld. I see no sufficient reason to interfere. I reject the reference and return the record.

Reference rejected.

A. L. R. 1934 Oudh 53 (2).

Appellate Civil.
No. 305 of 1932. (Decided on 30-10-33.)

Hasan, C. J. and Raza, J.

Mst. PATRAJI ... *Appellant*

versus

RADHIKA BAKHSH SINGH... *Respondent.*

Limitation Act (IX of 1908), Ss. 5, 14—appeal from trial Court filed in Chief Court—proper forum, District Court—return of appeal memorandum by the Chief Court—presentation of the appeal to the District Court—limitation—excusing delay — gross negligence — good faith, necessity for.

Where an appeal which ought to have been filed in the District Court, was filed in the Chief Court and on the Chief Court returning the appeal for presentation to the proper Court the appellant presented the appeal to the District Court and the District Court dismissed the appeal on the ground that it is barred by limitation,

Held, (1) that the filing of the appeal in the Chief Court was found due to gross negligence, S. 59 of the Limitation Act was inapplicable;

(2) that the absence of words 'good faith' in S. 5 of the Limitation Act unlike S. 14 of the Limitation Act does not show that good faith is not necessary to be proved for excusing delay under S. 5 of the Limitation Act. A. L. R. 1933 Oudh 466 *followed.* [P. 54, C. 1.]

Appeal against the order of District Judge, Gonda.

Appellant:—by Hyder Husein and Qutub-ud-din.

Respondent:—by A. P. Sen.

JUDGMENT.

Hasan, C. J. and *Raza, J.*—The facts of this case are as follows:—The plaintiff-appellant instituted a suit in the Court of the Subordinate Judge of Gonda for a relief of declaration that a certain deed executed by her in favour of the defendant was null and void for the reasons stated in the plaint. This suit was dismissed by the Additional Subordinate Judge of Gonda on the 30th of October, 1930. The plaintiff then preferred an appeal from the decision of the trial Court to her husband "used to tell me over and over again that the effect of holding shares in our joint names would also be to exempt me from payment of duty thereon after his death".

The view referred to above is stated in para. 793 of Halsbury's Laws of England, Vol. 16 in the following words:—

"Where a husband purchases property or makes an investment in his wife's name, a gift to her is presumed in the absence of evidence of an intention to the contrary, and there is a similar presumption where the property is purchased or the investment made by the husband in their joint names, the wife in the latter case being entitled in the event of her surviving the husband. Where the purchase or investment is made by the husband in the joint names of husband and wife and third persons with regard to whom no presumption of gift arises, the third persons will presumably be trustees for the husband and wife and the survivor.

A gift is also presumed where money is deposited at a bank in the name of the wife, or shares or stock are transferred into her name, or where any such deposit or transfer is made in or into the joint names of both husband and wife, or where a mortgage or other security for money lent by the husband is taken in their joint names."

In *Dummer* v. *Pitcher*, (2) it was held that certain stocks transferred by a husband into the joint names of himself and his wife and also further purchases of similar stocks by the husband in the joint names of himself and his wife became by survivorship the absolute property of the wife.

On similar facts the same interpretation was adopted in *Low* v. *Carter*, (3).

In the case of *Coats* v. *Stevens*, (4) the facts were that a certain stock stood in the joint names of the husband and his wife. The husband made certain dispositions of this stock by his will. The Court held that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will.

In the case of *In re*: *Eykyn's Trust* Malins, V. C. said as follows:—

"The law of this Court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests money, stock, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband, but if he survives her then it reverts to him as joint tenant with his wife. This principle is established by the authority of *Dummer* v. *Pitcher*, (6) and cannot now be disputed."

(2) 39 Eng. Reports, 944.
(3) 48 Eng. Reports, 1005.
(4) 160 Eng. Reports, 29.
(5) (1877) 6 Ch. Div. 115 (118).

These cases support the view which we have expressed above that Mrs. Aikman having survived her husband the shares in question are her absolute property and not the property of her deceased husband.

In the course of argument reference was also made to the provisions of 57 & 58 Vic. Ch. 30. Those provisions also in our opinion support the same view which we are taking in this case. Section 2 (1) of that statute is as follows:—

Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

(*a*) Property of which the deceased was at the time of his death competent to dispose;

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

(*c*) ....

(*d*) ....

Clearly if the shares in question are held, as we have held them, to be the absolute property of Mrs. Aikman, then they do not fall either under Cl. (*a*) or Cl. (*b*) quoted above.

Accordingly we hold that Mrs. Aikman is not liable to pay Court-fee on the value of the shares in question.

Another question to be decided is the determination of the value of certain shares held in the name of late Mr. Aikman alone in the Ryam Sugar Company. As regards this there was an agreement between the Counsel for the Deputy Commissioner and Counsel for Mrs. Aikman that the value of these shares may be taken at Rs. 26 per share. We accordingly hold that the value of these shares is at Rs. 26 per share.

Order accordingly.

(6) 2 My. & K. 262.

A. L. R. 1934 Oudh 53 (1).

Reference Side. Criminal.
No. 37 of 1933. (Decided on 11-10-33.)

Raza, J.

THE CROWN ... *Petitioner*

versus

VIDYA SAGAR .... *Respondent.*

(i) Criminal P. C. (V of 1898), Ss. 303, 304 —verdict of jury not clear and definite—judge justified in sending case to jury for a clear verdict according to law.

Where the first verdict of the jury was not clear and definite, the Court can send the case back to the jurors for a clear verdict according to law.

(ii) Criminal trial—verdict of jury accompanied by a recommendation—whether recommendation is a part of the verdict.

When a recommendation was made by the jury which was not part of the verdict: *Held*, the verdict is not open to any objection.

Reference made by Sessions Judge, Fyzabad.

Petitioner:—By H. K. Ghosh, Faiyas Ali and Nasirullah Beg.

Respondent:—by R. F. Bahadurji.

JUDGMENT.

This is a reference under S. 438 of the Cr. P. C.

I have read the referring order of the learned Sessions Judge and the explanation of the learned Magistrate. Mr. Bahadurji has appeared to support the reference. The Assistant Government Advocate has appeared to oppose the reference.

I have heard the learned Counsel on both sides at some length. In my opinion the question which we have to consider and decide is a simple question. The whole revision depends upon the interpretation of the verdict of the jury.

The so-called first verdict was not clear and definite and so the learned Magistrate was not wrong in sending the case back to the jurors for a clear verdict according to law. The second verdict is, of course, a verdict according to law. The question is whether the recommendation made by the jurors in their verdict is or is not a part of the verdict. I have considered the verdict in question very carefully. In my opinion the recommendation in question is not a part of the verdict, and should not be treated as such. This being the case, I think the order of the learned Magistrate is not open to any objection and must be upheld. I see no sufficient reason to interfere. I reject the reference and return the record.

Reference rejected.

A. L. R. 1934 Oudh 53 (2).

Appellate Civil.
No. 305 of 1932. (Decided on 30-10-33.)

Hasan, C. J. and Raza, J.

Mst. PATRAJI ... *Appellant*

versus

RADHIKA BAKHSH SINGH... *Respondent.*

Limitation Act (IX of 1908), Ss. 5, 14—appeal from trial Court filed in Chief Court—proper forum, District Court—return of appeal memorandum by the Chief Court—presentation of the appeal to the District Court—limitation —excusing delay — gross negligence — good faith, necessity for.

Where an appeal which ought to have been filed in the District Court, was filed in the Chief Court and on the Chief Court returning the appeal for presentation to the proper Court the appellant presented the appeal to the District Court and the District Court dismissed the appeal on the ground that it is barred by limitation,

Held, (1) that the filing of the appeal in the Chief Court was found due to gross negligence, S. 59 of the Limitation Act was inapplicable;

(2) that the absence of words 'good faith' in S. 5 of the Limitation Act unlike S. 14 of the Limitation Act does not show that good faith is not necessary to be proved for excusing delay under S. 5 of the Limitation Act. A. L. R. 1933 Oudh 466 *followed*. [P. 54, C. 1.]

Appeal against the order of District Judge, Gonda.

Appellant:—by Hyder Husein and Qutub-ud-din.

Respondent:—by A. P. Sen.

JUDGMENT.

Hasan, C. J. and *Raza, J.*—The facts of this case are as follows:—The plaintiff-appellant instituted a suit in the Court of the Subordinate Judge of Gonda for a relief of declaration that a certain deed executed by her in favour of the defendant was null and void for the reasons stated in the plaint. This suit was dismissed by the Additional Subordinate Judge of Gonda on the 30th of October, 1930. The plaintiff then preferred an appeal from the decision of the trial Court to this Court. At the hearing of the appeal a preliminary objection was taken that it was not maintainable for the reason that the appeal should have been preferred to the Court of the District Judge of Gonda. This Court upheld the objection and by its order dated the 1st of December, 1931, directed that the memorandum of appeal be returned for presentation to the proper Court. The memorandum was actually returned to the appellant on the 2nd of December, 1931. On the 3rd of December of the same year it was presented to the Munsarim of the Court of the District Judge of Gonda. At the hearing of the appeal before the learned District Judge of Gonda an objection was taken on behalf of the respondent that the appeal in that Court was barred by limitation. The objection has been upheld and the appeal dismissed. From this order of dismissal the present appeal has been preferred.

The learned District Judge has found that the appellant has failed to prove that the presentation of the appeal in the Chief Court was due to a *bona fide* mistake of her Counsel. On the other hand the learned Judge has found that

"It was rather a case of gross negligence and therefore inexcusable."

On the basis of these findings the learned Judge has come to the conclusion that the appellant is not entitled to the benefit of S. 5 of the Indian Limitation Act, 1908.

Good faith, necessity for.

The argument in second appeal is that the element of 'good faith' is not necessary to bring a case within the purview of S. 5 of the Indian Limitation Act though it is so necessary for the purposes of S. 14 of the same Act. We are of opinion that the argument is untenable and the case is fully covered by a recent decision of a Full Bench of this Court in *Mitho Lal* v. *Jamna Prasad* (1).

We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) A. I. R. 1933 Oudh 466: 10 O. W. N. 1154: 146 I. C. 127.

A. I. R. 1934 Oudh 54.

Appellate Civil. No. 89 of 1932. (Decided on 30-10-33).

Smith, J.

Hafiz EWAZ MOHAMMAD... *Appellant*

versus

GHAFOOR KHAN and another ... *Respondents.*

Muhammedan Law—gift—gift *bil-iwaz-haq-ul-khidmat*—not a gift *hiba-bil-waz*—delivery of possession necessary.

Where a gift under the Muhammedan Law purports to be a gift *bil-iwaz haq-ul-khidmat*, it is not technically of the nature of a *hiba-bil-iwaz* (gift for consideration) and delivery of possession is necessary to validate it. Even if the transaction be regarded as a *hiba bil-iwaz*, *a bona fide* intention on the part of the donor to divest himself *in presenti* of a property and to confer it on the donee must be proved. 11 All. 1; 1 O. W. N. 89; 33 I. A. 58; A. I. R. 1933 Oudh 14 *referred to.* [P 55, C. 2.]

Appeal against the order of the Additional Subordinate Judge, Fyzabad.

Appellant:—by Hyder Husein and B. P. Misra.

Respondent No. 1:—by Nasirullah Beg.

JUDGMENT.

This is an appeal from a decision by the learned Additional Subordinate Judge of Fyzabad, dated the 18th February, 1932, by which he dismissed an appeal from a decision by the learned Munsif of Akbarpur, in that district, dated the 23rd February, 1931.

The plaintiff, who is the appellant now, sued for possession of a house at a place called Sakhrawal. This house was formerly in the possession of one Ghafoor Khan defendant No. 1, and according to the plaintiff, the latter is the owner of the *mahal* in which the house in suit is situated. According to the allegations in the plaint, Ghafoor Khan left the village about three years before the date of the institution of the suit, (1st September, 1930), and according to the village custom the house thereupon escheated to the plaintiff. His allegation as regards the defendant No. 2, Sattar, was that after the defendant No. 1, Ghafoor Khan, left the village. Sattar without any right took possession of the house. The plaintiff accordingly sued for possession of it.

It appears that on the 30th June, 1927, the defendant No. 1 executed a deed of gift of the house in dispute in favour of the defendant No. 2, who was related to him by marriage. It does not appear that the plaintiff based his cause of action on this transfer, but the Courts below have taken it into consideration, as well as the alleged abandonment of the village by Ghafoor Khan, in considering the question whether the house escheated to the plaintiff.

The defendant No. 1, who alone contested the suit, claimed that the house in suit is not situated in the plaintiff's zamindari at all, but that was found against him, and there is no longer any question on that point. As regards the defendant No. 1's abandonment of the village, the learned Munsif came to the finding that he never abandoned it. As regards the deed of gift by the defendant No. 1 in favour of the defendant No. 2, he found that the defendant No. 1 only surrendered half the house to the defendant No. 2, and that accordingly the plaintiff became entitled by the princ[...] of escheat to that half of the house o[...]. The plaintiff appealed from that decision, but his appeal was dismissed by the learned Additional Subordinate Judge, and he has now come here in second appeal.

The learned Additional Subordinate Judge came to the conclusion that Ghafoor Khan did not deliver possession of the entire house to the defendant No. 2, and never intended to do so. It appears that in 1930, he filed a suit against the other defendant for the cancellation of the deed of gift of the 30th June, 1927, but a compromise was arrived at by which each of the two defendants took half of the house in question. The learned Additional Subordinate Judge agreed with the Munsif in holding that there was no abandonment of the village by Ghafoor Khan such as would have entitled the plaintiff to possession of the house. As regards the transfer by Ghafoor Khan in favour of Sattar, he took the view that has already been indicated above, and he accordingly agreed with the findings of the learned Munsif, and dismissed the appeal.

As regards Ghafoor Khan's alleged abandonment of the village, that point is really concluded by the finding of the learned Additional Subordinate Judge that he did not abandon it. The house did not therefore escheat to the plaintiff on that ground. The main argument addressed to me was on the question of escheat by the transfer of the house by Ghafoor Khan to Sattar. The learned Additional Subordinate Judge, as has been said already, found as a fact that Ghafoor Khan did not deliver possession of the entire house to Sattar, and did not intend to do so. In these circumstances, it is urged on his behalf that the gift was not effective in respect of the whole house, but only in respect of the half which he actually surrendered to Sattar. On behalf of the appellant it was said that the gift to Sattar was of the nature of a *hiba-bil-iwaz*, and that to make it effective delivery of possession was not necessary.

It does not appear that the question of *hiba-bil-iwaz* was raised before the Courts below, but as it was raised before me, I have to consider it. In the case *Rahim Bakhsh* v. *Muhammad Hasan* (1), it was held that the fundamental conception of *hiba-bil-iwaz*, does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. In the case *Lal Bibi, Must.* v. *Masum Ali Khan, Nawab* (2), that view was dissented from, but in a later case, *Imdad Ali* v. *Ahmad Ali* (3), the view taken in the Allahabad decision that has been referred to was followed. In a still later case, *Amir Khan* v. *Hakumat Bibi* (4), a similar view was taken. In the present case the gift of Ghafoor Khan to Sattar purported to be *bil-iwaz haq-ul-khidmat*, but on the authority of the rulings that have been cited, with the exception of that reported in *Lal Bibi*, v. *Masum Ali Khan* (2), the deed was not technically of the nature of a *hiba-bil-iwaz*, and delivery of possession was necessary to validate it.

Even if the transaction in question be regarded technically as a *hiba-bil-iwaz*, it is contended for the answering respondent, Ghafoor Khan, that although delivery of possession was in that case

(1) 11 All. 1.
(2) 20 O. C. 41 : 38 I. C. 794.
(3) 1 O. W. N. 868 : A. I. R. 1925 Oudh 518 : 85 I. C. 400.
(4) 94 I. C. 392 : A. I. R. 1926 Oudh 474.

unnecessary, a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it on the donee, had to be proved. Reference was made in that connection to a decision of their Lordships of the Privy Council reported in *Chaudhri Mehdi Hasan* v. *Mohammad Hasan* (5), and also to a decision of this Court, *Mst. Khair-un-nisa*, v. *Karamatullah* (6). In view of the finding of the learned Additional Subordinate Judge that the respondent did not deliver possession of the entire house to the defendant No. 2, and that he did not intend to give him possession of the whole house, it must be held on the authority of the rulings just cited that there was no valid transfer of more than half the house in favour of the defendant No. 2 even if the transaction be regarded as of the nature of a *hiba-bil-iwaz*.

The result is that in my opinion the Courts below were correct in finding that by the transaction between the defendant No. 1 and the defendant No. 2 the plaintiff became entitled to possession of half the house in dispute, and not the whole of it. I accordingly dismiss the appeal, with costs in favour of the answering defendant-respondent, Ghafoor Khan.

Appeal dismissed.

(5) 33 I. A. 68: 28 All. 439: 3 A. L. J. 405 (P. C.).

(6) A. L. R. 1933 Oudh 14: 9 O. W. N. 1085: 142 I. C. 42.

A. L. R. 1934 Oudh 56.

Appellate Civil.

No. 164 of 1932. (Decided on 31-10-33.)

Hasan, C. J. and Allsop, J.

BHIRGU DATT and another ... *Appellants*

versus

GAYA PRASAD and another ... *Respondents.*

(i) Evidence Act (I of 1872), S. 91—pronote insufficiently stamped—transaction of loan can be proved by other evidence, though the rate of interest provided in the pronote cannot be proved.

Where a promissory note is insufficiently stamped, and is consequently inadmissible in evidence, the plaintiff is entitled to prove the loan transaction by other evidence and S. 91 of the Evidence Act does not in any way prevent him from doing so. When once the advance of money is proved and nobody's case being that it is a gift, a covenant to pay is implied though not the actual covenant to pay contained in the note. As the covenant to pay interest contained in the note cannot be proved, plaintiff is entitled to interest only as damages. in such a case. 28 All. 589 P. C. *referred to.* [P. 56, C. 1.]

(ii) Interest—promissory note inadmissible in evidence—award of interest as damages.

Though the promissory note is inadmissible in evidence, interest as damages can be awarded. [P. 57, C. 1.]

Appeal against the order of the Additional Subordinate Judge, Unao.

Appellants:—by H. D. Chandra.

Respondents:—by Hyder Husein.

JUDGMENT.

Hasan, C. J. and *Allsop, J.*—This is a second appeal against the appellate judgment of the Additional Subordinate Judge of Unao, dated the 29th of February, 1932.

The suit which has given rise to the appeal was originally decided by the Munsif of Purwa. It was a suit for the recovery of Rs. 500, with interest, on the allegation that the defendant-respondent Dwarka Nath and the father of the defendants-appellants, Bhirgu Datt and Jamna Prasad, had borrowed a sum of Rs. 500 from the plaintiff-respondent, Gaya Prasad. It was said that Ram Nath, the father of the defendants-appellants, Bhirgu Datt and Jamna Prasad, and Dwarka Nath had executed the Promissory Note in respect of this sum of money but the Promissory Note was insufficiently stamped and could not be produced in evidence. The suit was, therefore, based merely on the averment that the plaintiff-respondent had in fact lent a sum of Rs. 500 to Dwarka Nath and Ram Nath and that he was entitled to recover it.

The first question which arises is whether the plaintiff is entitled to prove the transaction by other evidence in the absence of the Promissory Note. According to the rule which has been laid down in this Court he can certainly do so. We may refer to the case of *Kunwar Bahadur* v. *Suraj Bakhsh* (1), S. 91 of the Evidence Act lays down that the terms of a contract or of an agreement or of other disposition of property may

(1) A. L. R. 1932 Oudh. 703: 9 O. W. N. 585: 139 I. C. 298. (F. B.).

matter before the trial Court, but only after the point is finally decided in the Revenue Courts, that is after the decision of any appeal on the point to the Commissioner or the Board of Revenue. With this modification of the order the application is rejected. The parties will bear their own costs.

CIV. REV. NO. 88 OF 1932.

This application is preferred against order No. 147 dated the 19th November, 1931. When the partition was re-opened and pleader-commissioners were appointed, they considered that following the judgment of this Court they should proceed *de novo* and should make a new *raibandi*. The Solanos obtained from the Court order No. 147 now impugned. That order points out that the judgment of the High Court did *not* direct that the old *raibandi* and *takhtabandi* should be ignored altogether. The view of the learned Subordinate Judge was that to avoid unnecessary harassment, delay and expense, the old *raibandi* should be acted upon unless there were good reasons for departing from it, and the present *takhtabandi* should only be disturbed and modified to meet the new situation caused by commutation or possibly to face new conditions in certain villages arising from some holdings having been improved or having deteriorated. He, therefore, instructed the commissioners to follow the old *raibandi* and *takhtabandi* so far as practicable. His idea was that parties should indicate any points in the old *raibandi* which require modification and the commissioners should determine whether there was good and sufficient reason for a modification.

In my opinion not only was there no material irregularity in the exercise of jurisdiction on the part of the learned Subordinate Judge but his order is a proper one with which there is no reason to interfere in revision. The rule is discharged with costs hearing fee two gold mohurs.

Agarwala, J.—I agree.

Order accordingly.

A. L. R. 1934 Pat. 33.

Appellate Civil.

No. 105 of 1930. (Decided on 9-8-33.)

Macpherson and Agarwala, JJ.

SATYA CHARAN SREEMANI ... *Appellant*

versus

SHIB CHARAN TRIGUNAIT ... *Respondent.*

(i) Chota Nagpur Tenancy Act (Bengal Act VI of 1908), Ss. 80, 84 (3)—preparation of Record of Rights applies to non-agricultural lands—presumption of correctness of entries.

Section 80 of the Chota Nagpur Tenancy Act authorises the Local Government to direct the preparation of a Record of Rights in respect of the lands in any local area. There is nothing in the section to indicate that non-agricultural lands are excluded and the presumption of correctness with regard to entries in the Record of Rights applies to non-agricultural lands as well. [P. 35, C. 1.]

(ii) Record of Rights—entry—presumption of correctness—evidence required to rebut the presumption.

The statute requires that the evidence relied on to rebut the presumption must show definitely that the entry is incorrect and evidence which merely suggests a doubt as to the correctness of the entry, or evidence about which it is arguable that some other person might have reached a conclusion different from that of the Settlement Officer is not sufficient to rebut the presumption of correctness attaching to an entry in the Record of Rights. [P. 36, C. 2.]

Appeal from a decision of the Subordinate Judge of Dhanbad.

Appellant:—by A. B. Mukerji and U. N. Banerji.

Respondent:—by Khurshaid Husnains N. N. Roy and Gunendra Nath Roy.

JUDGMENT.

Agarwala, J.—The dispute in this suit relates to five small parcels of land situate in *mauza* Angarpathra in the Manbhum district of Chota Nagpur which belongs to certain persons who may conveniently be called the Trigunaits and who hereinafter will be referred to as the lessors.

In 1894 the lessors granted a mining lease of 100 bighas of land to Jogendra Sreemani and, a few days later, a similar lease of 101 bighas lying east of Sreemani's grant to Nagendra Mitra. In each instance the demised land was divided into two blocks by the railway line which runs through the *mauza* from west to east. The plaintiff-appellants No. 2, the National Coal Company, are the present sub-lessees of the land leased to Sreemani while the defendant-respondents, who are also Trigunaits and own a one-third share of the proprietary interest, have acquired the leasehold interests of Nagendra Mitra.

On the 8th of January, 1925, the Record-of-rights in respect of Angrapathra was finally published. Plots 306, 357 and 358, which plaintiffs allege fall within the boundaries of their grant south of the railway line, were recorded on the basis of possession in the gairmazrua malik khatian of the defendants-respondents' tenure, and plots 341 and 342, which they allege fall within their grant north of the line were recorded as appertaining to plaintiffs' leasehold but in the possession of the defendants as subordinate tenure-holders to the plaintiffs and as holding "*belagan, kabil lagan*."

The present suit was instituted on the 2nd of March, 1928, by Satya Charan Sreemani, son of Jogendra Sreemani, and the National Coal Company. Plaintiffs prayed for a declaration of their title to the disputed plots and for recovery of possession aud for a declaration that the eastern and southern boundaries of their grants are as shown in a map prepared by a commissioner appointed for the purpose in Title Suit No. 132 of 1910. The learned Subordinate Judge found that there were no materials before him from which the boundaries between the plaintiff's and defendants' leasehold lands could be ascertained; that the plaintiffs had never been in possession of the plots in dispute; and that the defendants' title to these plots must be presumed from the fact that they were, and had always been, in possession of them. He therefore dismissed the suit and the plaintiffs have preferred this appeal.

Record-of-rights applies to non-agricultural lands.

The first contention of the appellants is that in so far as their title to the disputed plots has been recorded in the Record-of-rights, the onus of displacing the presumption of correctness attaching to the entry by reason of S. 84 (3) of the Chota Nagpur Tenancy Act, 1908, lies on the respondents. In reply to this contention it was argued on behalf of the respondents that the land in dispute being non-agricultural land the preparation of the Record-of-rights was *ultra vires* the survey authorities and that, consequently no presumption of correctness attaches to the entries in it. In support of the first part of this proposition reference was made to the decisions in *Raniganj Coal Association, Limited* v. *Judoonath Ghose* (1), *E. J. Rooke* v. *Bengal Coal Company Limited* (2) and *Bhola Nath Das* v. *Raja Durga Prasad Singh* (3). The first of these cases was a suit for recovery of rent and one of the questions which arose was whether it was governed by the general law of limitation contained in Art. 116 of the Limitation Act, 1908, or by Art. 2 of Schedule III of the Bengal Tenancy Act, 1885. The question whether Ch. X of the Bengal Tenancy Act relating to the preparation of the Record-of-rights applied did not arise. *E. J. Rooke* v. *Bengal Coal Campany* (2) was also a suit to recover rent and the only question agitated was whether the suit was entertainable by the Revenue Court or whether it should have been instituted in the ordinary Civil Court.

In the third case, *Bhola Nath Das* v. *Raja Durga Prasad Singh* (3), the lessor sued for recovery of royalty due under a mining lease and on the question of limitation the Court relied on the decision in *Raniganj Coal Association, Limited* v. *Judoonath Ghose* (1). None of these cases assist in the solution of the question now under consideration.

Reference was also made to *Bipradas Pal Choudhry* v. *Azam Ostagar* (4), *Raja Sasi Kanta Acharjya Bahadur* v. *Sandhya Moni Dasya* (5), *Chand Mia Munshi* v. *Tukamia* (6) and *Rai Brindaban Prasad* v. *Captain Maharaj Kumar Gopal Saran Narayan Singh* (7). In the case of *Bipradas Pal Chowdhry* v. *Azam Ostagar* (4) it was held that S. 105 of the Bengal Tenancy Act does not apply to non-agricultural land situated in a mufassal municipality, *i.e.*, that with regard to such land an application for settlement of rents is not entertainable by

(1) 19 Cal. 489.
(2) 28 Cal. 485: 5 C. W. N. 840.
(3) 12 C. W. N. 724.
(4) 46 Cal. 441: 52 I. C. 412.
(5) 26 C. W. N. 483: 34 C. L. J. 504: 65 I. C. 4.
(6) 28 C. W. N. 516: A. I. R. 1924 Cal. 667; 80 I. C. 805.
(7) 104 I. C. 514: A. I. R. 1928 Pat. 36.

a Re.enue officer in cases where a settlement of land revenue is not being made or is not about to be made. The decision is not an authority for the proposition that the Chota Nagpur Tenancy Act excludes non-agricultural land from survey operations. Furthermore, in that case a Record-of-rights had been prepared under S. 103 of the Bengal Tenancy Act and there is nothing in the report of the appeal to indicate that it was held, or even contended, that the preparation of the record was *ultra vires*.

In the case of *Raja Sasi Kanta Acharjya Bahadur* v. *Sandhya Moni Dasya* (5) it was contended that no presumption of correctness attached to an entry in the Record-of-rights that certain lands were chandinia or bazar land, the argument being that such land is not subject to the Bengal Tenancy Act. It was found as a fact that the land was agricultural land. Furthermore, it was held that the presumption of correctness attaching to the Record-of-rights did arise although their Lordships expressed an opinion that the force of the presumption in the case of *bazar* lands is not as great as in the case of "matters which are rightly and properly included in the record-of-rights." A similar view was taken in the case of *Chand Mia Munshi* v. *Tukamia* (6). These two cases were cited with approval in the case *Rai Brindaban Prasad* v. *Captain Maharaj Kumar Gopal Saran Narayan Singh* (7). These cases, so far from supporting the respondents' contention, are cases in which the presumption as to the correctness of an entry in the Record-of-rights was treated as arising even with regard to non-agricultural lands. The weight to be attached to a rebuttable presumption necessarily depends on the circumstances of each case. The cases cited, therefore, cannot be taken to be authorities for the proposition that an entry in the Record-of-rights, with respect to non-agricultural lands is, in law, entitled to less weight than a similar entry with respect to agricultural lands.

Section 80 of the Chota Nagpur Tenancy Act, 1908, authorizes the Local Government to direct the preparation of a Record-of-rights "in respect of *the lands*" (not necessarily the agricultural lands) "in any local area, estate, or tenure or part thereof". Unless the notification expressly excludes non-agricultural lands there is nothing in this provision to indicate that such lands, situated in the area or estate to be surveyed, are to be excluded. Indeed in *Iswar Chandra* v. *Jogendra* (8) it was held that in the absence of a notification of exclusion under S. 101, Sub-sec. (1) of the Bengal Tenancy Act, the mere fact that land is non-agricultural, as for example, homestead land situated within a municipality, is not sufficient to exclude it from the operation of Ch. X relating to the preparation of the Record-of-rights.

Among the particulars which the Revenue Officer may be directed to record under the Chota Nagpur Tenancy Act are—

Section 81 (*a*)—the name of each tenant or occupant;

(*c*)—the situation and quantity and one or more of the boundaries of the land held by each tenant or occupier.

Section 84 (3) requires that

"every entry in a record of-rights which has been finally published shall be evidence of the matter referred to in such entry and *shall* be presumed to be correct until it is proved, *by evidence*, to be incorrect."

It is not suggested that non-agricultural land was expressly excluded from the survey of Manbhum. The principles followed in the preparation of the Record-of-rights of land in the occupation of mine-owners are stated thus in Mr. Gokhale's Final Report of the Survey and Settlement Operations of the District of Manbhum, 1918-25:—

"(*a*) Where a mine-owner had also taken a lease of the surface, he was automatically given a *khewat* and treated as any ordinary tenure-holder. The uncultivated land on which the colliery actually stood was recorded in the *anabad khatian*.

(*b*) Where the mine-owner had merely obtained permission to occupy a part of the surface for purposes of working the mine or had acquired waste land for mining purposes only, the lands in actual possession of the mine-owner were recorded in a separate *khatian*. No rent was attested and in the column for s..tus the words 'colliery company' ..ere written.

(8) 98 I. C. 137: A. I. R. 1927 Cal. 126.

(c) Where the land occupied by a mine-owner was not demarcated on the ground and its boundary could not be definitely ascertained, the buildings and other details were surveyed and linked up with the surrounding waste land on the map and the name of the mine-owner or colliery company shown against the plot in the *ashiae mashhur* or list of notable objects but no *khewat* or *kaatian* was prepared. Such cases were very few."

The plaintiffs' right to the surface of the land covered by their grant was established in a previous suit with the lessor (*see* Ex. 18, the judgment of the High Court).

The next contention of the learned Advocate for the respondents was that, even though the entries must be presumed to be correct until proved to be incorrect, their incorrectness may be established by reference to the state of things existing before the Record-of-rights was prepared. In this connection reference was made to *Rama Nath Saut* v. *Official Trustee of Bengal* (9), *Adu Mandal* v. *Hira Lal Mistry* (10), and *Chand Ray* v. *Bhagwati Charan Goswami* (11). In the first of these cases it was held that the presumption under S. 103-B of the Bengal Tenancy Act, 1885, may be rebutted by evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings, and, in the second case, that an entry in Settlement Records may be shown to be wrong by reference to the proceedings that had been taken by the revenue authorities. Similarly, in the Patna case, the proceedings which led up to the finally published record-of-rights were held to be admissible for the purpose of rebutting the presumption. The view is now well-established by authority and is not challenged though caution is required in its application to particular cases.

The next stage in the contention on behalf of the respondents was that, when evidence has been adduced by both sides, the presumption is rebutted if the evidence in support of the entry is unreliable. In *Rai Kiran Chandra Roy Bahahur* v. *Srinath Chakravarti* (12), which was cited for the respondents, it was held that when the correctness of an entry is investigated in the Civil Courts, and the parties adduce evidence on the point in controversy, the entry loses its weight when the evidence discloses *no foundation* for it. In the next case cited on this point, *Bogha Mower* v. *Ram Lakhan Misser* (13), it was held that the fact that the *only evidence* on which the settlement officer based the entry does not support his conclusions, is the strongest possible proof that the entry is incorrect. These authorities cannot usefully be applied to the facts of any case unless all the materials on which the settlement officer based his conclusions are known. Under the statute the duty of a Court of law is, plainly, to presume an entry in the Record-of-rights to be correct until it is proved, by evidence, to be incorrect. The statute requires that the evidence relied on to rebut the presumption must show definitely that the entry is incorrect and, in my opinion, evidence which merely suggests a doubt as to the correctness of the entry, or evidence about which it is arguable that some other person might have reached a conclusion different from that of the settlement officer, is not sufficient to rebut the presumption of correctness attaching to an entry in the record-of-rights.

Presumption of correctness of entries.

The points in dispute between the parties in the present appeal depend upon the correct ascertainment of the boundaries of the plaintiffs' lease on the east and south-east of the land demised.

[The judgment then considered the documentary evidence and proceeded.]

The learned Court below, on an examination of the evidence afforded by the maps already referred to, came to the conclusion that they were of no assistance in ascertaining correctly the boundary-line between the lands of the contesting parties. With that conclusion I am unable to agree for the reasons already stated. The survey map agrees with the appellants' previous maps in respect of the boundary between the two leases of

(9) 29 C. W. N. 517 : A. I. R. 1925 Cal. 799 : 87 I. C. 1014.

(10) 33 C. W. N. 196 : A. I. R. 1929 Cal. 255 : 117 I. C. 539.

(11) 2 Pat. 814 : A. I. R. 1924 Pat. 248 : 81 I. C. 326.

(12) 31 C. W. N. 135 : A. I. R. 1927 Cal. 210 : 100 I. C. 453.

(13) 27 C. L. J. 107 : 41 I. C. 804.

1894, in regard to plot 345 in which are included 306 and 358. In this respect the survey record is in support of appellants' contention.

With regard to the question of possession, it is admitted by the plaintiffs that the defendants are in possession of the three disputed plots south of the Railway line, namely, plots 306, 357 and 358. The plaintiffs allege that they were dispossessed from these three plots in 1916 and subsequently. Ashutosh Datta, a defence witness and one of the defendants' servants, stated that the hut on plot 306 was constructed in December, 1916. Satya Charan Sreemani (plaintiff No. 1) deposed that the hut was constructed in 1918 and the magazine on plot 358 in 1916. The only serious criticism of the latter's evidence on this point is that in the suit of 1920 there was no claim in respect of plots 306 and 358. The reason he gives for this is that at that time he was not certain whether he was entitled to the surface rights or not. The surface rights formed the subject-matter of litigation between the plaintiffs on the one side and the lessors, the receiver of their estate and one Gaeriballabh Bose on the other side. Eventually the High Court in appeal decided that the surface rights in the land covered by their title deed belonged to the plaintiffs. The judgment of the High Court is Ex. 18. The defendants have not offered themselves for cross-examination, and in view of the admission in the evidence that the hut was not erected until 1916, I see no reason to disbelieve the evidence of the Plaintiff No. 1 and I hold that he was dispossessed from plots Nos. 306 and 358 not earlier than December of that year. The suit was instituted on the 2nd of March, 1928, and is therefore within time so far as these plots are concerned.

Like sub-plots 306 and 358, sub-plot No. 357 lies within plot 345 and it has been found to fall within the leasehold land of the plaintiffs. On the eastern side of plot 357 and contiguous to it, in defendants' plot 305, the latter have opened a quarry. In the suit of 1920 the plaintiffs alleged that the defendants had extended this quarry into plot No. 357 and had thus dispossessed them in that year. Satya Charan Sreemani denied in his evidence that the defendants had been in possession of this plot prior to 1920. D. W. 3, Purna Chandra Hazra, on the other hand, states that the quarry had been worked by Nagendra, the original lessee of the defendants' land. In this he is corroborated by Girish Chandra Chandra (D. W. 4) and P. C. Hazra (D. W. 3). The earliest date to which the magazine on plot 358 can be referred December, 1916. Satya Charan Sreemani admitted that the magazine on plot 358 was constructed in December, 1916, by the defendants. The probability is that this was required in connection with the quarrying operations and would therefore suggest that the defendants were already engaged in quarrying near the place where the magazine was erected. The plaintiffs withdrew the suit of 1920 with permission to institute a fresh suit. No fresh suit has been instituted. The evidence in the case, in my opinion, is insufficient to hold that the plaintiffs have been in possession of plot No. 357 within twelve years of the present suit.

The other two plots in dispute, Nos. 341 and 342, are north of the Railway line and have been recorded as being in the possession of the defendants. The Revenue Officer noted in Ex. 22, the decision of the objections under S. 83 of the Chota Nagpur Tenancy Act, that the defendants had been realizing tolls for carts passing over these plots since 1917 or 1918. In para. 23 of the plaint it was alleged that the plaintiffs had extracted coal from these two plots and that they ran a tramway line and carted coal over them. These allegations were not specifically denied in the written statement, although in paragraph 20 it was denied that the plaintiffs had any right or concern with any of the disputed plots. The evidence in support of the defendants having levied a toll from carts passing over the land consists of the statements of (D. Ws. 4 and 5). The former, Girish Chandra, deposed that he owned a plot of land east of Nagen's land on the north of the Railway line and that he paid commission to the defendants for carts loaded with coal passing over their land. He also stated that the plaintiffs' tram-line is the boundary between the lands of the plaintiffs and defendants. (D. W. 5) is the defendants' cashier. He deposed that carting commission had been realized since 1914, but that he did not know the land in respect of which the commission was realized. With regard to these two plots plaintiff No. 1 deposed that coal had been extracted from both plots by plaintiff No. 2, that in 1927 the defendants han taken possession of a part of the surface of 341 by erecting a shed on it but that the plaintiffs were still in possession of the whole of plot No. 342 on which they stacked coal, manufactured soft coke and ran a tram line which also passed over a portion of plot 341. Ashutosh Datta (D. W. 1), a servant of the defendants, denied that the plaintiffs stacked coal on plot 342 and alleged that they had manufactured coke on the plot since the end of 1928 only, *i.e.*, since the institution of the suit. To the same effect is the evidence of the respondents' manager (P. W. 2). Exhibit E is a notice sent by the defendants to the plaintiffs on the 8th of July, 1928, protesting against the latter manufacturing coke on the defendants' land. In cross-examination plaintiff No. 1 stated that the pithead from which these two plots were mined was 100 feet west of plot 342. From this it was argued by the respondents that the pit had nothing to do with plots 341 and 342. They did not, however, take effective steps to disprove the plaintiffs' allegation which, therefore, remains uncontradicted. The pit has been full of water since about 1921. From Ex. 20, the order of the Attestation Officer, it appears that the latter inspected all the disputed plots. He noticed coal belonging to various collieries stacked on plot 342 but saw no reason to suppose that carting commission had been realized for carting coal over this particular plot.

The conclusion of the Revenue Officer in 1924 in dealing with the objection filed by the present defendants under S. 83 was that the latter had managed to take possession of plots 341 and 342 within "the last six or seven years" *i.e.*, in 1917 or thereabouts. There is nothing to support the entry in the Record-of-rights that the defendants were subordinate tenure-holders under the plaintiffs in respect of these two plots, the entry being based solely on the fact that defendants realized carting commission. The entry which he made in the record is entirely inconsistent with his own finding of adverse possession for six or seven years only. Admittedly defendants do not hold on a grant from appellants. Even assuming that they have realized a toll from carts since 1917, this also is not necessarily inconsistent with the plaintiffs' possession. The land has been found to be within the latter's grant, and, therefore, the appellants are entitled to possession unless the defendants succeed in establishing a settlement with themselves from the plaintiffs, or that they have acquired a title by adverse possession. They have not set up a title by adverse possession and do not claim under a settlement from the plaintiffs. There is no reliable evidence that the defendants realized carting commission prior to 1917. The plaintiffs' suit was brought within twelve years of this, so that, in view of the finding as to their title, they are entitled to recover possession.

In the result, therefore, I would grant the plaintiffs a declaration that the eastern and south-eastern boundaries of their grant are as shown in the map (Ex. 4-b), made by Upendra Mohon Das Gupta of possession of plots 306, 341, 342 and 358 fall within the plaintiffs' lease, a decree for recovery according to which plots 306, 341, 342, 357 and 358 and an injunction prohibiting the defendants from entering upon the plaintiffs' leasehold land except plot 357 of the cadastral survey map (in respect of which the plaintiffs have failed to prove they were in possession within twelve years of suit and in respect of which the appeal is therefore dismissed).

The plaintiffs will be entitled to half their costs in both Courts. The decree should take note of the extra Court-fees realized on the plaint and memorandum of appeal.

Macpherson, J.—I agree.

Order accordingly.

A. L. R. 1934 Pat. 38

Appellate Civil.

No. 1244 of 1931. (Decided on 27-7-33).

Rowland, J.

DHARICHHAN SINGH and other ... *Appellants*

versus

MAHABIR SINGH and others ... *Respondents.*

(i) Registration Act (XVI of 1908), Ss. 17 & 49—unregistered agreement to give Mukarari lease—not admissible to prove the contract in a suit for specific performance.

An unregistered document by which the defendant agreed to give a *mukarari* lease of immovable property is inadmissible in evidence to prove the agreement sought to be specifically enforced in a suit for specific performance of the agreement.

A document hit by S. 17 of the Registration Act could not be used except in accordance with S. 77 of the Registration Act to support a suit for specific performance. Case Law Reviewed [P. 40, Cs. 1 & 2.]

(ii) Transfer of Property Amending Act (XXI of 1929), S. 10 (3) (b) & S. 15-no retrospective operation—suit commenced before the Amending Act—Amending Act does not govern the case.

When a suit was commenced before the Amending Act XXI of 1929, it is not governed by the Amending Act and consequently the doctrine of part performance did not apply to the case. Section 15 expressly saves such proceedings. [P. 43, C. 1.]

Second Appeal against a decision of Subordinate Judge of Chapra.

Appellants :—by P. Dayal, B. P. Sinha and Sambhu Barmeshwar Prasad.

Respondents :—by S. M. Mullick and Hareshwar Prasad Sinha.

JUDGMENT.

This is an appeal by the plaintiffs Nos. 1, 2 and 3 who had sued for specific performance of a contract into which it is said defendant No. 6 had entered with these plaintiffs to give them a *mukarrari* lease of 8 *cuttahs*, 6 *dhurs* of land. This land was part of an area of 16 *cuttahs*, 7 *dhurs* which was the site of a market in village Musehari. The landlords of the village were Shamnarain Singh and Basudeo Prasad Singh who each held 8 annas and on partition between them in 1916 Basudeo Prasad Singh became exclusively entitled to 8 *cuttahs*, 1 *dhur* and Shamnarain to 8 *cuttahs*, 6 *dhurs* of the market land. The share of Basudeo Prasad including 8 *cuttahs*, 1 *dhur* of the *bazar* land was purchased by the plaintiffs on 21st May 1926. The share of Shamnarain Singh including the 8 *cuttahs*, 6 *dhurs* of the *bazar* land was bought at an auction sale by defendant No. 6 Rambhawan Singh.

Facts. The above facts are common ground. The plaintiffs alleged that Rambhawan in December, 1927 entered into negotiations with the plaintiffs and agreed to give them *mukarrari* of these 8 *cuttahs*, 6 *dhurs* on a *salami* of Rs. 200, and a nominal rent of four annas a year; that this was agreed between the parties on 21st December, 1927 and that a document embodying the agreement was executed on 22nd December, 1927. It is for specific performance of this agreement that the suit was brought. It is said that defendant No. 6 was at the time in need of money as certain property of his was being put up for sale in execution of a decree, the date fixed being 22nd December, 1927. Defendant No. 6 at or about the same time was negotiating with Harbans Singh defendant No 5 to raise money by a usufructuary mortgage of his 8 annas share in the village. On 22nd December, 1927, stamp papers were bought by defendant No. 6 of which one bearing a stamp of Rs. 20, was destined for the usufructuary mortgage in favour of defendant No. 5 and the other bore a stamp of Rs. 2-8-0; and it was the plaintiff's case that this was intended for the execution of the *mukarrari* lease in their favour. The plaintiffs alleged payment on 22nd December, 1927, of the entire *nazarana* of Rs. 200 which it is said was utilised in satisfying the decree against Rambhawan and saving his property from being sold. Rambhawan on that same day executed a *mukarrari* deed and affixed his thumb impression and made it over to the plaintiffs but by one pretext or another put off registering it. Thereafter it is said that defendant No. 5 brought defendant No. 6 into collusion with himself and on 15th February, 1928 procured defendant No. 6 to execute a *mukarrari* deed on a *salami* of Rs. 800, in favour of defendants Nos. 1 and 4 of whom according to the plaintiffs, defendant No. 1 was a servant of defendants Nos. 5 and 6. A stamp valued at Rs. 9 for this document was bought on 15th February, 1928, and the document executed on that same day. The *zarpeshgi* in favour of defendant No. 5 was executed on the 26th February and both documents were registered on the 27th February, 1928. It is alleged that so far as the *mukarrari* was concerned, the transaction was done collusively with knowledge of the plaintiffs' prior contract and with the intention of defrauding the plaintiffs. The suit was instituted on the 20th December, 1928. Defendant No. 6 did not contest the suit; defendant No. 5 denied all the allegations regarding the contract and defendants Nos. 1 and 4 took a similar position. The suit was decreed by the Munsif but this decision was reversed and the suit dismissed by the Subordinate Judge. The Munsif had held that the document dated the 22nd December 1927, propounded by the plaintiffs was not admissible in evidence but that by oral evidence and in the light of the circumstances the plaintiffs had proved the contract alleged by them. Therefore he gave the plaintiffs a decree. The Subordinate Judge agreed with the view of the Munsif that the *mukarrari* deed of the plaintiffs being unregistered was inadmissible in evidence. He examned the rest of the evidence propounded by the plaintiffs and the circumstances of the case and held the story of the plaintiffs to be improbable and the evidence in support of it unsatisfactory.

It is contended and the contention is irresistible that if the Subordinate Judge had admitted in evidence this document, there is possibility amounting to probability that his decision on the merits might have been otherwise; and it is therefore of importance to consider whether he was right in refusing to admit the document as evidence.

In *Uma Jha* v. *Chetu Mandar* (1) a Division Bench of this Court gave a decree for specific performance of a contract of sale admitting in evidence an unregistered document expressed to be a sale deed. The suit was instituted for a direction to the defendants to register the *kebala* but the decree was given for the execution and registration of a fresh document within three months from the date of the order. Das, J. observes:

"I know of no authority which decides that an agreement for sale has to be registered under the Registration Act. The true view is that although a *kebala* which had not been registered is inoperative as a *kebala*, yet it is admissible in evidence in a suit to enforce specific performance of the contract which must be deemed to have preceded the execution of the *kebala*."

Conflict of case-law referred to.

This decision follows *Surendra Nath Nag Choudhury* vs. *Gopal Chunder Ghosh* (2) where Mookherji, J. accepted the argument presented to him that

(1) 7 P. L. T. 730: A. I. R. 1925 Pat. 89: 95 I. C. 187.

(2) 12 C. L. J. 464: 8 I. C. 794.

"the mere execution of a lease by the defendants did not convert the executory contract into an executed contract; that the agreement between the parties was that the defendants would execute in favour of the plaintiff a lease and register it so as to make it an instrument operative in law and that the mere execution of the documenct which was never registered by reason of the default of the defendants was not complete performance of the contract."

If I understand correctly the reasoning of these decisions, it would seem to have been held that where parties enter into a contract for a transfer of immoveable property, and a deed is executed, even then until the contract is fulfilled by registering the deed it does not require registration and the unregistered deed can be proved. It would seem to follow that the requirement of law that certain dealings with land must be registered and failing that, they will be void is entirely nugatory because such dealings so long as they remain unregistered are not to be considered complete so as to come within the bar of the statute and once registered they are relieved from it as having fulfilled the requirement of the law. The penalty attaching to non-fulfilment of the law's demand for registration would in this view never attach to any document whatever so as to preclude its being used to prove a contract embodied in it. This is a surprising proposition. But in *Surendra Nath Nag Choudhury's* case (2) a number of authorities are collected in support of such a view of the law The Judges of the Calcutta High Court, however, were not unanimous as will be seen by referring to *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (3). This was a suit for specific performance and the contract had been reduced into a written instrument dated 15th January, 1917 which however was unregistered. It purported to be a lease for five years. Rankin, J., held that the unregistered document was inadmissible in evidence for the purpose of proving the agreement sought to be specifically enforced and that apart from the said document, it was not open to the Court to find any prior or independent oral agreement. Rankin, J. saw no escape from the plain words of S. 17 (1) and S. 49 of the Registration Act. And in the Patna High Court there is authority in *Maharani Janki Kuer* v.

(3) 49 Cal. 507: 26 C. W. N. 329: 69 I. C. 877.

Brij Bhikhan Ojha (4) for a similar view. A lease from year to year or for any term exceeding a year if reduced to writing requires registration under S. 17 of the Registration Act and if unregistered cannot be used in evidence under S. 49 of the same Act to prove any transaction affecting the property. The document being excluded, S. 91 of the Evidence Act would come into operation so as to preclude oral and other evidence of its terms from being given. In that particular case the party propounding the unregistered lease was in fact in possession and the lease was permitted to be used for a collateral purpose, that is to say, for explaining the nature of his possession. It was only to this limited extent and for this limited purpose that the document was admitted. The authorities in India were thus conflicting, when the Privy Council decision in *Dayal Singh* v. *Indar Singh* (5) was pronounced. The document in question was an agreement for the sale of certain immoveable property embodying an acknowledgment of receipt of a part of the consideration money. Now it has been explained in the concluding sentence of S. 54 of the Tranfer of Property Act that a contract for sale of immoveable property does not of itself create any interest in or charge on such property and the Courts in India had for a long time been agreed in recognising unregistered documents embodying contracts for sale of immoveable property as being documents not of themselves creating any interest in or charge on such property but merely documents entitling the holder within the meaning of S. 17 (2) part (V) to obtain another document which will when executed create or declare etc., a right and title in land. The Courts had treated such documents as admissible even in cases where at the time of execution of the document earnest money had been paid and was acknowledged in the document itself. Unfortunately it escaped notice that S. 55 (6) of the Tranfer of Property Act gives the transferee a right to a charge on the property for his earnest money and the Privy Council holding that to this extent the agreement to sell created

(4) 3 Pat. 349: 5 P. L. T. 541: A. I. R. 1924 Pat. 641: 79 I. C. 26.

(5) 53 I. A. 214: 7 P. L. T. 661: A. I. R. 1926 P. C. 94: 98 I. C. 508.

an interest in immoveable property found that such a document needed to be registered and for want of registration was inadmissible in evidence. The result of this decision was that in 1927 the Legislature took action by amending the Indian Registration Act so as to add an explanation to Sub-sec. 2 of S. 17, where by a contract for sale of immoveable property is not to be deemed to require registration merely because it acknowledges receipt of part or all of the purchase money.

Within about a year after this amendment, came the decision in *Skinner* v. *Skinner* (6). The document before their Lordships contained words expressed to be an absolute conveyance and contained also a promise to execute a registered document, if required. The suit was for specific performance of the agreement of sale and for possession of the property, and the principal issue in the case was whether the document was admissible in evidence. The Board formulated two questions, first, whether the document comes within the provisions of S. 17 of the Indian Registration Act and so required registration, and secondly, whether if registration was necessary it could form the basis of a suit for specific performance, notwithstanding the provision of S. 49. On the first question, their Lordships held that the document was a sale deed requiring registration.

Ss. 17, 49 of the Registration Act.

In dealing with the second point, they held that a document hit by Ss. 17 and 49 could not be used as evidence of a contract to sell, or as the basis of a suit for specific performance. This I think is the essential point that their Lordships intended to lay down. They cited with approval *Sanjib Chandra Sanyal's* case (3) where Rankin, J. had said:

"If I admit the document at all, it seems to me that I would be receiving it as evidence of a transaction affecting the property. If upon its true construction, it is meant to take effect as a present demise, I cannot treat it as something else or as evidence of a transaction different in nature and so avoid the statute."

At any rate, this much their Lordships did lay down and it is sufficient

(6) 56 I. A. 363: 11 P. L. T. 1: A. I. R. 1929 P. C. 269: 119 I. C. 633.

authority for me to say that in the case before me the document, is within the mischief of Ss. 17 and 49 and cannot be used as evidence of an agreement to sell or as a foundation of a suit for specific performance.

A passage in their Lordship's Judgment has been much discussed and I think misunderstood, where it is said :

"An agreement for the sale of immoveable property is a transaction 'affecting' the property within the meaning of the statute inasmuch as, if carried out, it will bring about a change of ownership."

I belive their Lordships merely intended to re-state as a general proposition the principle which was applied in a particular case by Rankin, J. They cannot have meant to obliterate the distinction he had drawn between "a present demise". and "a transaction different in nature."

It has however been supposed by many that their Lordships have laid down that an agreement for sale itself is hit by Ss. 17 and 49. It seems to be an amazing suggestion that their Lordships could conceivably ignore both S. 54 of the Transfer of Property Act and the explanation added in 1927 to S. 17 of the Registration Act; and can only have been entertained by those who had not studied *Ramling Parvatayya* vs. *Bhagvant Sambhuappa* (7) which their Lordships cite with approval. There the Bombay High Court held that the document before them was not a deed of sale but an agreement to sell; that it was not hit by Ss. 17 and 49, and that it could be used as the basis of a suit for specific performance and as evidence of the agreement to sell; and this notwithstanding that it contained a recital of receipt of the consideration money.

The confusion, I think, arises from failure to realise that the word 'affecting' in S. 49 is not one of the words used in S. 17 to describe documents that ought to be registered. If the difference in language is remembered there need not I think be any real difficulty. In *Madiraju Jagannadha Rao* v *Somu Lakshminarayana* (8) it is said :

"I do not think that............every agreement for sale of immoveable property should be treated after the decision of the Privy Council, to be an agreement affecting immovable property within the meaning of S. 19."

If the learned Judge instead of using the words "agreement affecting immovable property" had said "agreement hit by Ss. 17 and 49" or had said "document creating any title in immovable property" he would have I think expressed accurately their Lordships' intention. In other decisions it may have been thought that their Lordships went further; but it does not seem to have been doubted that at any rate their Lordships held this much that a document hit by S. 17 could not be used except in accordance with S. 77 of the Registration Act to support a suit for specific performance. That was what was decided in *K. Satyanarayana* v. *Y. China Venkatarao* (9).

Between the years 1927 and 1929 a Special Committee of the Indian Legislature was engaged in examining proposed amendments to the Transfer of Property Act and other connected Acts bearing on the same subject. In this connection the Committee had before it a proposal to amend S. 49 of the Registration Act and the Special Committee reported :—

"We propose that Ss. 48 and 49 should be amended to empower Courts to admit unregistered documents in evidence in giving effect to the doctrine of part peformance'

(Gazette of India, dated the 20th August, 1927, Part V, page 103). The Select Committee's report on this section (Gazette of India, dated 9th March, 1929, Part V, page 42) is in identical terms. In the notes on clauses, it is said :

"Section 49 enacts that a document which is required to be registered, and is not registered, cannot be received in evidence. It has been held by the Judicial Committee that such documents, although not admissible for the purpose of proving the transaction purported to have been effected by them, are admissible in evidence for collateral purposes, such as for ascertaining the nature of possession—43 Mad. 244 (P. C.). In giving effect to the doctrine of part performance when transactions are not complete owing to the omission of registration, it is necessary that Courts should be empowered to admit them in evidence for the purpose of proving party performance. A proviso has accordingly been added to the section."

(7) 50 Bom 334 : 28 Bom. L. R. 591 : A. I. R. 1926 Bom. 375 : 96 I. C. 334.

(8) 58 M. L. J. 688 : 31 L. W. 817 : A. I. R. 1930 Mad. 683 : 125 I. C. 549.

(9) 49 Mad. 302 : 50 M. L. J. 674 : A. I. R. 1926 Mad. 530.

(Gazette of India, dated 9th March, 1929, Part V, page 75).

These extracts do not read as if the Committee regarded themselves as making any sweeping change in the law; but the proviso which was enacted by S. 10 (3) (*b*) of Act XXI of 1929 runs thus :

"Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of S. 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

Scope of the Amending Act of 1929.

If the present case had had to be determined on a reading of the law as so amended, it could be argued that the disputed document would have had to be admitted in evidence. But the amendment cannot assist the plaintiff whose suit was commenced before it came into force. Such proceedings are expressly saved by S. 15. For the reasons above given, I have no doubt that the Subordinate Judge was right in treating the document as inoperative and inadmissible in evidence. He went on to discuss the other evidence and held that the plaintiffs had not suceeded in proving the fact of any such agreement having taken place. In the course of the discussion of the evidence he refers to certain discrepancies in the oral evidence; and in the memorandum of appeal it is pointed out that in some respects the references to the evidence are inaccurate. The decision, however, was based on the facts and circumstances in general and I do not think that the inaccuracies pointed out have made any difference to the decision of the case. The circumstances and probabilities were very strongly against the plaintiffs, particularly the fact that the stamp paper used for the plaintiffs' agreement was bought by defendant No. 6 on the same occasion on which he bought the stamp for usufructuary mortgage in favour of defendant No. 5, for which an explanation has been given by the defendants which the Subordinate Judge has accepted; and the fact that the plaintiffs took no steps to get the document compulsorily registered [illegible] bring their suit till 364 days [illegible] alleged agreement.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1934 Pat. 43.

Appellate Civil. No. 309 of 1932. (Decided on 12-7-33.)

Wort, A. C. J. and Kulwant Sahay, J.

LAKHI PRASAD SINGHANIA and another ... *Appellants*

versus

UGRAMOHAN MISRA and others ... *Respondents.*

(i) Provincial Insolvency Act (V of 1920), S. 6, Cl. (*g*)—act of insolvency—notice of suspension of payment—acts which constitute suspension explained.

The principles to be borne in mind in coming to the conclusion as to whether a debtor has committed an act of insolvency by expressing his inability to pay debts, are :—

1. A mere statement by a debtor that he is unable to pay his debts, however insolvent he may be, is not necessarily a notice within the meaning of the Act that he is suspending or about to suspend payment.

2. The second principle is that one has to ascertain what the words used by the debtor would reasonably and ordinarily mean to the mind of a creditor.

3. The third is that in construing the statement of the debtor it has to be seen whether he has clearly indicated that not only he is not going to pay a particular creditor but that he intends to deal with his creditors collectively. Although no written notice of such suspension is necessary, yet it must be in a sense formal and must not merely be the result of a casual conversation.

Where, therefore, the debtors offered such cash as was in their possession and security for the remainder of the debt, *Held*, that the statement cannot be construed as a notice of suspension at all under Cl. (*g*) of S. 6 of the Provincial Insolvency Act. There must be a clear indication of intention to decline to pay any one creditor, but to treat with the creditors collectively. (1891) A. C. 316 : (1906) A. C. 442 *referred to.* [P. 45, C. 1. & P. 46, C. 1.]

(ii) Provincial Insolvency Act—provisions, similar to English Bankruptcy—authorities decided under English law applicable to India.

The Provincial Insolvency Act is the same as the Bankruptcy Act of England and the authorities which have been decided from time to time in England are necessarily authorities for India also. [P. 44, C. 2.]

Appeal against the decision of the Additional District Judge of Bhagalpur.

Appellants :—by S. M. Mullick, S. N. Bose, and K. P. Sukul.

Respondents :—by K. N. Lal.

made statements which were largely opposed to that statement or admission to which I have just been referring. Some of their witnesses went so far as to say that the appellants had stated that they were going to suspend payment. There is some difference or some conflict in the evidence as to exactly when they were going to suspend payment as there is also some conflict as to the exact words which were used. But this is a matter as I shall presently point out for the learned District Judge.

To sum up that part of the case, it is clear as I have said that the admission alone is insufficient. The learned Judge has expressed no view as to the value of the evidence given by the respondents. He has relied solely upon the admission of the appellants. That being so and it also being a fact that the learned Judge has not considered the question of whether the other act of insolvency was committed or not, it becomes necessary for the learned Judge to come to a conclusion on that question. Had the evidence been such that we could have come to the conclusion that the alleged suspension of payment could not have been made out, that part of the case would have been finally disposed of by this Court. But having regard to the circumstances to which I have referred in some detail, it becomes necessary whilst sending the case back for the learned Judge to determine the question of whether the other act of insolvency had been committed for him also to determine the question of whether the appellants had given notice of suspension. For that purpose he must not only take into consideration the so-called admission of the appellants but also the evidence of the respondents and come to a finding of fact accordingly. The appellants will be entitled to adduce such evidence as they were about to adduce when it appears that they were stopped by the learned District Judge. As far as can be seen from the record the respondents adduced the whole of the evidence which they thought necessary in the circumstances and if in fact they closed their case, as the order-sheet seems to show, then they will not be entitled to adduce further evidence in the case. To repeat myself the appellants will be entitled to adduce evidence as to the alleged act of insolvency based on the alleged fraudulent conveyance; also on the question of whether they are in a position to pay their creditors or not. That being so the case will go back to the learned Judge to be heard and determined according to law. The order of adjudication will be set aside and necessarily the vesting order will go with it. The costs of this appeal will abide the result of the hearing before the learned District Judge. Let the records be sent down at once.

Kulwant Sahay, J.—I agree.

Case remanded.

A. I. R. 1934 Pat. 46.

Appellate Civil.
No. 1351 of 1931. (Decided on 25-8-33.)

Dhavle, J.

BHUP PANDAY ... *Appellant*

versus

NARBADESHWAR PRASAD NARAIN SINGH ... *Respondent.*

(i) Civil P. C. (V of 1908), S. 2 (2) & O. 41, r. 23 & O. 43, r. 1, Cl. (u)—order of remand not on a preliminary point—whether amounts to a decree.

No appeal lies from an order of remand when the judgment of the Court of first instance is not based on a preliminary point.

So far as Patna High Court is concerned, it is settled that an order of remand cannot be treated as a decree merely because it sets aside the decree of the trial Court. 7 P. L. T. 535 : 6 Pat. 380 *followed.* [P. 47, C. 2.]

(ii) Civil P. C. (V of 1908), S. 2 (2)—finding embodied in order of remand—not a decree even though it determines rights of parties.

A mere finding embodied in an order of remand even though it is final cannot amount to a decree. The definition of a decrees under S. 2, (2) C. P. C., must be taken along with the provisions of the Code regarding the stage at which a decree may be prepared. 39 Bom. 339 at p. 346 : 45 Bom. 27 : 7 M. I. A. 283 : 8 P. L. T. 9 *referred to.* [P. 48, C. 1.]

(iii) Civil P. C. (V of 1908), S. 115—order of remand not coming under O. 41, r. 23—no appeal—revision, whether competent.

Where there is no question of jurisdiction involved in the case, no revision lies against an order of remand not covered by O. 41, r. 23. [P. 48, C. 2.]

Appeal against a decision of the Additional Subordinate Judge Chapra.

Appellant :—by Rai T. M. Sahay.
Respondent :—G. P. Singh.

JUDGMENT.

This is an appeal from an order of remand. The suit was for redemption of a *zerpeshgi* mortgage. The plaintiff's case was that the mortgagee had been more than repaid the entire mortgage debt by reason of the fact that notwithstanding the stipulation in the mortgage bond requiring the mortgagee to pay, the plaintiff himself had to pay the Government revenue and cesses on the mortgaged property on account of the failure of the mortgagee to do so. It appears that the shares mortgaged formed parts of two separate accounts both numbered 4 in *Tauzi* Nos. 73 and 249, and the plaintiff produced certain *challans* showing payment of the Government revenue and cesses for these separate accounts. The defendant on his part produced certain *challans* showing payment by him; but some of the *challans* mentioned 3, as the number of the separate accounts. The mortgage bond itself did not give the number of the separate accounts. The trial Court accepted the *challans* produced by the defendant as proof of the fact that he had all along paid the Government revenue and cesses as stipulated in the mortgage bond and accordingly passed a preliminary decree declaring that the mortgage money Rs. 787-8-0 was due from the plaintiff to the defendant and that if the plaintiff paid it into Court within two months, the defendant shall deliver up all documents in his possession, etc.

On appeal the Additional Subordinate Judge held that there was no reason why the payment on account of the separate accounts No. 3 should be credited in favour of the mortgagee; and he considered that the mortgage should be allowed an opportunity of filing copies of some *challans* relating to separate accounts No. 4 before the final account was made, as it was represented that the defendant had lost some of the *challans*. He, therefore, set aside the preliminary decree passed by the trial Court and remanded the case to the Munsif

"for giving an opportunity to the respondent for filing copies of the alleged lost *challans*, if any, and then to make an account on the principle pointed out above and pass a decree accordingly."

The mortgagee defendant appeals.

It has been urged on behalf of the plaintiff-respondent that the appeal is incompetent. There is no dispute that the order of remand passed by the lower appellate Court does not come within O. 41, r. 23 which does not apply to cases where the trial Court has disposed of the whole suit. There is also no dispute that the only order of remand from which an appeal is provided by the Code is an order passed under O. 41, r. 23 see O. 43, r. 1 (*u*). It has, however, been urged on behalf of the appellant that the order of the lower Court amounts to a decree, inasmuch as, it sets aside the preliminary decree passed by the trial Court. There are some reported decisions where such a contention has been accepted. But it is settled in this Court that an order of remand cannot be treated as a decree merely because it sets aside the decree of the trial Court—see *Parmanand Kumar* v. *Bhon Lohar* (1) and *Chaudhary Chundrika Prasad Singh* v. *Mithu Rai* (2). The learned Advocate for the appellant has also urged that the order of the lower Appellate Court is a decree within the definition and explanation given in S. 2 (2) of the C. P. C. A decree is defined as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and is preliminary, when further proceedings have to be taken before the suit can be completely disposed of. The contention of the appellant is that the lower Court has conclusively determined that the appellant is not to have any credit for the sums paid in by him in respect of the separate accounts No. 3. The definition of a decree is undoubtedly couched in very wide terms, but it is now settled law that not every finding will amount to a decree even though it may conclusively determine the rights of the parties with regard to some of the matters in controversy in the suit. As has been pointed out in such decisions as *Cahnmalswami* v. *Gangadharappa* (3) and *Dattatraya Purshottam* v. *Radhabai* (4) the definition in S. 2 of

(1) 7 P. L. T. 535 : A. I. R. 1926 Pat. 457 : 97 I. C. 105.
(2) 6 Pat. 380 : A. I. R. 1927 Pat. 296 : 163 I. C. 722.
(3) 39 Bom. 336 : 16 Bom. L. R. 954 : 26 I. C. 855.
(4) 45 Bom. 627 : 23 Bom. L. R. 92 : 60 885.

the C. P. C. must be taken along with the provisions of the Code regarding the stage at which a decree may be prepared. To hold otherwise would mean that an appeal may be heard piece-meal, and that is as undesirable as it seems to be opposed to the scheme of the Code as a whole—see *Maharaja Maheshur Singh* v. *The Bengal Government* (5) and *Jawahir Lal* v. *Fateh Mahton* (6). In the case of redemption suits there is specific provision in O. 34 r. 7 requiring the Court to pass a preliminary decree on defined lines; the decree is either to order that an account be taken or to declare the amount due, and to direct what is to happen if the plaintiff does or does not pay. A comparison of this rule with O. 20 r. 17 makes it clear that directions by the Court with regard to the mode in which the account is to be taken or vouched will not at least in redemption suits amount to preliminary decrees. In *Raja Peary Mohan Mookerjee* v. *Manohar Mookerjee* (7) directions regarding the period of account and the method of accounting were taken to amount to a preliminary decree, but the suit was not based on a mortgage. In our own Court, Ross, J. held in *Balaram Manjhi* v. *Jagannath Manjhi* (8) that an order of remand directing a partition according to certain principles laid down by the Court of first appeal was not appealable. The lower appellate Court in the present instance did not, in my opinion, even purport to give formal expression to an adjudication which conclusively determined the substantive remedial rights of the parties see *Municipal Committee of Nasik* v. *The Collector of Nasik* (9) already referred to. On the contrary, it set aside the decree of the Munsif and remanded the case to him for taking an account on the principle laid down and to pass a decree accordingly. This last decree when passed by the trial court will be the preliminary decree in the suit as provided in O. 34, r. 7.

The contention of the respondent must, therefore, be accepted. I hold that no appeal lies. There is no question of treating the memorandum of appeal as an application in revision, because an application in revision was made by defendant and dismissed by Scroope, J., see *Dhup Pandey* v. *Narbdeshwar Prasad Narayan Singh* (Civil Revision No. 362 of 1931 disposed of on the 10th, July 1931) to which the learned Advocate for the appellant has quite properly drawn my attention. It is also clear that there is no question of jurisdiction involved in the case at this stage see *Permanand Kumar* v. *Bhon Lohar* (1) already referred to.

The Appeal is accordingly dismissed as incompetent. The respondent is entitled to his costs.

Appeal dismissed.

(5) 7 M. I. A. 283.
(6) 8 P. L. T. 9: 97 I. C. 1.
(7) 27 C. W. N. 989: 38 C. L. J. 255: 74 I. C. 373.
(8) 92 I. C. 684: A. I. R. 1925. Pat. 760.
(9) 39 Bom. 422: 17 Bom. L. R. 324: 28 I. C. 589.

A. L. R. 1934 Patna 48.

Appellate Civil.

No. 291 of 1930. (Decided on 8-8-33.)

Macpherson and Agarwala, JJ.

JUGESWAR PRASAD ... *Appellant*

versus.

RAMDHARI MAHTO and others ...*Respondents.*

Bengal Land Revenue Sales Act (XI of 1859), Proviso to S 37—Bengal Tenancy Act (VIII of 1885), S. 35, 30 (*b*)—enhancement of rent at the instance of auction-purchaser of Taluq—previous engagement with the defaulting proprietor for fixty of rent—how far valid.

Where the proprietor of a Taluka granted a *domai patta* in 1912 to a *Kaimi* occupancy raiyat, the meaning of which was that the rent of the holding was fixed and not subject to diminuition or enhancement and in 1914 the estate was sold under the Revenue sales Act for default of payment of arrears of revenue and purchased by the plaintiff.

Held, that (1) the *doami Patta of 1912* being an engagement subsequent to the permanent settlement is not binding on the purchaser and he is entitled to enhancement of the rent under the provisions of the law for the time being in force, *i.e.*, under S. 30 (*b*) of the Bengal Tenancy Act.

(2) Having regard to the fact that the *doami patta* of 1901 (which was an enhancement) was submitted to by the raiyat in return for consideration and that consideration having failed, S. 35 of the Bengal Tenancy Act also would come into play, *i.e.*, a fair and equitable rent taking all circumstances into consideration besides the rise in the price of food crops would have to be fixed. Case law reviewed and discussed.

Appeal against a decision of Subordinate Judge of Patna.

Appellant:—by B. C. Sinha.

Appellant:—by Mir Ahmed Khan.

Respondent:—by Jai Krishen.

ORDER OF REFERENCE.

After sale of attached property judgment-debtor preferred objection that the decree was void and could not be executed. Parties had referred their dispute to arbitration out of Court. Award was delivered in pursuance thereof which effected mortgage of Hukam Chand's property consisting of one house and two shops for Rs. 3,000 to be paid by the mortgagee Lorindaram; the mortgage was to be with possession for a period of a year and a half to be counted from date of the award, i. e. 7th April 1930. Arrangement as regards repayment of mortgage money was also laid down therein and it is this portion of the award which is in controversy.

On 7th April application for filing the award was presented in Court; parties' statements were recorded wherein they accepted the terms of award and on 8th April the award was filed and decree was passed in accordance with it which was worded as follows:

"Decree in favour of plaintiff against defendant in accordance with the award of the arbitrator."

Lorinda Ram has now taken out execution of this decree and has prayed for recovery of his mortgage money with certain item due for rent by sale of the mortgaged property. He has been met with the objection that the award required registration and being unregistered, it could not be acted upon; the decree based upon such an award was without jurisdiction and therefore a nullity. This objection has been overruled by the execution Judge and his order has been upheld by the learned District Judge. Hence this further appeal. By S. 10 of Act XXI of 1929 which amends Transfer of Property Act the following clause has been added to S. 17 (1) (d), Registration Act:

"(c) non-testamentary instrument transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare any right, title or interest . . . of the value of one hundred rupees or upward to or in immovable property."

There is no doubt that if Act XXI of 1929 applies to this Province, the present award does come within the provisions of S. 10 and it does require registration. The question then arises whether it is incorporated in the decree and as such the objection as to registration evaporates: S. 17 (2) (vi).

To sum up, the following questions require an answer in this case: 1. Does the decree entitle Lorinda Ram to recover mortgage money and rent due by execution or does it (and the award which it follows) merely declare a mortgage; 2. Does Act XXI of 1929 extend to this Province, and if not is the amendment of Registration Act effected thereby in force wherever the latter Act is in force? 3. Do the terms of the decree incorporate the whole of the award and therefore as award is now part of the decree, question of registration does not arise.

These are important questions and I would like them to be decided by Bench and accordingly refer it there.

JUDGMENT.

Saaduddin, A. J. C.—The facts of this case are given in the referring order dated 9th June 1933 and need not be repeated.

It is urged by appellant and not disputed by respondent that the terms of the decree do include and incorporate by necessary implication the award of the arbitrator. The objection as to registration therefore does not hold good and the simple question for adjudication is: whether this decree is an executable decree or merely declaratory that the property is held by the decree-holder in mortgage for a sum of Rs. 3,000 on the terms and conditions laid down in the award. We think that the present case is covered by the authority of a ruling of the Lahore High Court reported as *Banu Mal* v. *Paras Ram* (1). There the parties entered into a compromise and a decree was passed in terms of the compromise; of course the decree recited the terms of the compromise, but that, as noted above does not cause any material difference. The decree provided that:

"In future defendant No. I shall be liable to pay interest on the principal mortgage money from Manager Sudhi 3rd S. 1980 in accordance with the terms given in the mortgage deed and this payment shall be subject to the terms mentioned in the mortgage deed. In other words, with

(1) 30 P. L. R. 701: A. I. R. 1930 Lah. 110: 120 I. C. 597.

regard to future interest the terms mentioned in the mortgage deed shall be acted upon. In default of payment of any instalment for two years together the plaintiff will be entitled to take possession of the land."

Defendant in that case made a default in payment of interest and the plaintiff in execution sought possession under the terms of the compromise decree. With reference to this the learned Judge observed:

"The main question in appeal before me has been the question whether the decree is merely declaratory or it is directory. The test laid down in *Lalibai* v. *Valiram Ghanshamdas* (2) is whether there is a direct order against any one or in favour of any one, or whether the decree merely declares rights and obligations on the part of any one. In view of this test and considering the language of the decree and the circumstances connected with the case including the question of suit having been one for possession, I am of opinion that this paragraph must be taken to have been merely declaratory, whatever might be said about first paragraph."

Precisely the same is the case here. In this case too the defendant has defaulted payment and the recovery of the mortgage money is sought by execution of the decree. Neither the award nor the decree which incorporated it gave any direction for recovery of the amount by the plaintiff from the defendant. It simply declared that for this amount certain property of the defendant was to remain in mortgage with the plaintiff for a period of one and a half years. There was no immediate order passed for recovery of the amount. We therefore hold that this decree was merely declaratory of the rights and obligations of the parties and was not capable of enforcement in execution proceedings. On this view the order passed directing execution of the decree is *ultra vires*.

It has been urged before us that as this is a new objection raised by the judgment-debtor in this Court for the first time in argument, it should not be allowed to be argued. It is not a new objection in the sense in that it has been taken for the first time. It was raised before the execution Judge and was decided by him in his order dated 21st November 1932. No doubt it was not mentioned in this specific form in the grounds of appeal before the lower appellate Court nor was it entered in the memorandum of appeal in the Court, but it has not come as a surprise to the respondent, and as it is a question of law apparent on the face of the record, we do not see how we can avoid it.

In view of our conclusion on the question of the exact effect of the decree, it is not necessary for us to go into other issues raised in the referring order. For the reasons given above we accept this appeal and set aside the order of the executing Judge dated 21st November 1932. Parties to bear their own costs throughout.

Appeal accepted.

2. 7 S. L. R. 192 : 24 I. C. 861.

A. I. R. 1934 Pesh. 6.

Appellate Civil.

Nos. 71 & 38 of 33 (Decided on 17-11-33.)

Middleton, J. C.

TIKAYA RAM KHUSHHAL RAM .. .. *Appellant*

versus

GHANSHAM DAS and others. *Respondents.*

(i) Decree—declaratory—not executable—mer insertion of clause that recovery can be made in future—does not alter its nature.

Where a decree is merely declaratory in nature and therefore cannot be executed, the mere insertion of a clause that recovery can in future be made by execution cannot change its nature.

[P. 7, C. 2.]

(ii) Practice—new point—not dealt with in the order appealed nor mentioned in the memo of appeal but raised at the preliminary hearing and noted at the time of issue of notice—does not take respondent by surprise.

When a point raised in the original objections was not dealt with in the order under appeal and was not mentioned in the written memorandum of appeal, but was raised at the preliminary hearing of the appeal and was noted at the time when notice was issued to the respondents,

Held, that the point did not take the respondent by surprise and that it may be decided by the appellate Court, where it is a question of law apparent on the face of the record.

[P. 7, C. 2.]

Appeal against the judgment of the Subordinate Judge, Dera Ismail Khan.

Appellant:—by Kazi Mir Ahmad Khan.

Respondents:—by Diwan Chand.

JUDGMENT.

On 7th May 1930 a decree was granted in favour of the respondents in terms of an award of arbitrators which had been made out of Court. The terms of the award were copied out on the back of the decree-sheet. The award stated that the present appellant owed certain sums to the respondents and determined the amount owing upon the date of the award as being Rs. 6,844-13-6 and it declared that certain property belonging to the appellant would be considered, as mortgaged with possession to the respondents, but that the appellant should continue to occupy that property on payment of Rs. 42-13-0 per month as rent. The period of the mortgage was fixed at two years and it was specifically noted that the rent and also the mortgage sum after that period should be realized by execution. The respondent decree-holders applied for execution on 2nd April 1933 and the judgment-debtor entered various objections, amongst them being that the decree was declaratory and not executable. The objections were rejected by order of the executing Court dated 1st June 1933 against which the judgment-debtor has preferred the present appeal.

The allegation that the decree was declaratory and incapable of execution by reason thereof was not entered in the grounds of appeal, nor was it dealt with specifically in the order under appeal, but it was raised at the preliminary hearing and has been argued at length before me. In connection with this point the appellant relies upon a judgment of the Bench of this Court dated 18th July 1933 in *Hukamchand* v. *Lorinda Ram* (1). In that case execution had been taken out in respect of a decree based on an award of a very similar nature. There too the award determined the amount due from the judgment-debtor and declared that certain property should be mortgaged for a specific term. The only difference between the award now under consideration is that in it there is the additional clause that the rent and the mortgage sum shall be realizable by execution. The judgment of this Bench of this Court referred to above after citing a ruling of the Lahore High Court in *Banumal* v. *Paras Ram* (2) proceeded as follows:

"In this case too the defendant has defaulted payment and the recovery of the mortgage money is sought by execution of the decree. Neither the award nor the decree which incorporated it gave any direction for recovery of the amount by the plaintiff from the defendant. It simply declared that for this amount certain property of the defendant was to remain in mortgage with the plaintiff for a period of $1\frac{1}{2}$ years. There was no immediate order passed for recovery of the amount."

In view of these features of the decree the Bench held that it was one merely declaratory of the rights and obligations of the parties and was not capable of enforcement in execution proceedings. In every respect these remarks can be applied to the present decree with the exception that there was a direction that the amount could be recovered by execution. There was however no immediate order for recovery of any amount. Where a decree is merely declaratory in nature and therefore cannot be executed, the mere insertion of a clause that recovery can in future be made by execution cannot change its nature. I therefore find that in the present case the award and the decree based upon it were declaratory. By them the amount due from one party to the other was determined and in satisfaction of that amount certain property was declared to be under mortgage. Learned counsel for the respondents has argued that this is a point which should not be considered in appeal. It was raised in the original objections; it was not dealt with in the order under appeal; and was not mentioned in the written memorandum of appeal. It was however raised at the preliminary hearing of the appeal and was noted at the time notice was issued to the respondents and has not taken the respondents by surprise. It is moreover a question of law apparent on the face of the record and therefore must be decided by this Court.

In view of my decision on this point other points raised in appeal need not be considered. Suffice it to say that the contention that no notice was served upon the appellant before the decree was recorded and the allegation that counsel who nominally appeared on his behalf was not authorized to do so are points negatived by the normal presumptio-

(1) A. I. R. 1934 Pesh. 4.

(2) 30 P. L. R. 701 : A. I. R. 1930 Lah. 4 : 120 I. C. 597.

that the proceedings of a Court are conducted regularly in accordance with law, a presumption which has not been rebutted by any evidence whatsoever. For the reasons recorded on the main point I accept the appeal and set aside the order of the executing Court dated 1st June 1933. Parties to bear their own costs throughout.

Appeal accepted.

A. L. R. 1934 Pesh. 8

Appellate Civil.

No. 68/17 of 1933 (Decided on 1-8-33.)

Middleton, J.C. and Saaduddin, A.J.C.

THE COMMERCIAL CREDIT CORPORATION, LTD., LAHORE .. *Appellants*

versus

BEHARI LAL and others .. *Respondents.*

Hire-purchase—contract—owner empowered to seize and sell property in default of payment of instalments—sale of car to third party under the default covenant—property in possession of Police at time of sale—delivery by Police to hirer—seizure by surety who paid instalments defaulted—attachments—sale by Court in execution of decree against hirer—purchaser from owner, rights of, against execution purchaser—cause of action bad for recovery of amount of execution sale against owner—Civil P. C. (V of 1908), O. 21, r. 63—appropriate relief—jurisdiction.

Defendant sold a car to one J under a hire-purchase contract whereby the former was empowered to sell and seize the car in default of payment of instalments. Acting under the covenant defendant sold the car, which was in the possession of the Police to one B. Meantime A, who was surety for J paid the arrears and, under defendant's authority, took possession of the car when it arrived at D. I. Khan. The car was attached and sold in execution of a decree which one L had against J. B, filed objection to the attachment, and, on its rejection, filed a suit under O. 21, r. 63, Civil P. C. which was also dismissed. Without filing an appeal B brought the present suit against defendant for recovery of the amount for which the car was sold in execution of L's decree and damages.

Held (1) that the D. I. Khan Court had jurisdiction to try the suit as it was A's act in seizing the car under defendants' authority that deprived B of possession of the car at D. I. Khan.

(2) that B's remedy was against the execution purchaser, L, and the cause of action should have been given as the amount he paid to d[illegible] for the car and incidental damages.

(3) that B should have pursued his first action up to appeal.

(4) that as the defendant had a valid right to sell the car to B and the sale was completed, subsequent dispossession of the latter by a third party would not entail on defendant liability for refund of the price or damages to B. [P. 9, C. 2.]

Second Appeal from the order of the District Judge, Dera Ismail Khan.

Appellant:—by Mool Chand.

Respondent:—by Beli Ram.

ORDER.

Saaduddin, A.J.C. (7—7—33).—Jiwan Shah got a Dodge car on hire-purchase system from appellant which meant that the car continued to be appellant's property till all the instalments and other dues were fully paid up and in case of default power was reserved to appellant under the agreement to seize the car and treating it as his property sell it. Jiwan Shah failed to keep up his engagement and appellant exercising that power sold the car to Beharilal for Rs. 800 authorizing him to take possession from the police with whom the car at the time was in connection with some case. On the termination of the criminal proceedings Police however returned the car to Jiwan Shah. It was contended and there is, so the learned District Judge says, overwhelming evidence to show that in taking delivery from the Police Jiwan Shah was acting as agent of Beharilal.

In the hire-purchase contract, one Allah Baksh had stood surety for Jiwan Shah and on the latter's failure to pay instalment appellant served the said Allah Bakhsh with a notice demanding immediate payment of the balance of instalments which amounted to Rs. 143218. Allah Bakhsh paid the amount to appellant and when the car arrived at D. I. Khan took possession of it. While in his possession the car was attached in execution of a decree Lalchand had against Jiwan Shah. Behari Lal and Allah Bakhsh both objected to this attachment but their objections were disallowed and the car was sold for Rs. 2,300.

Behari Lal in these proceedings claimed the sum of Rs. 2,300 the price at which the car was sold and Rs. 400 as costs and damages. He was met with the objection that Dera Ismail Khan Court had no jurisdiction to hear the case and that on the merits he was not entitled to any

relief. The assessment of damages was also objected to, but that is a minor point. The question of jurisdiction depends on the fact whether any act of the appellant deprived the plaintiff of the possession of car at D. I. Khan. It has been found that Allah Baksh was authorised by appellant to seize the car and therefore it was under appellant's authority that Allah Baksh deprived the plaintiff of his possession, assuming that Jiwan Shah's possession was that of the plaintiff and this dispossession took place at D. I. Khan. If this finding is correct, in my opinion D. I. Khan Court had undoubted jurisdiction in the matter.

Hire-purchase contracts.

On the merits, I am not quite sure whether the plaintiff's suit can proceed in the absence of Lalchand and further I am not quite clear what the position of Allah Baksh is. Notice to respondents.

FINAL JUDGMENT.

Saaduddin, A.J.C. (1-8-33.)—The facts of this case so far as they are relevant to the controversy before us are given in the order dated 7th July, 1933 admitting this appeal to a final hearing, and need not be reproduced here. The question for our consideration is whether or not plaintiff has disclosed any cause of action against the appellant.

It is not now denied that Jiwan Shah got delivery of the car from the Police as an agent of the plaintiff, and it is admitted that the car was attached at D. I. Khan as the property of Jiwan Shah and sold in execution of Lalchand's decree. If the plaintiff's position is that Jiwanshah was not the owner and the sale was invalid, obviously his remedy lay against Lalchand, the decree-holder, who in execution of the decree got the car sold. As a matter of fact he did file objections against attachment and on their being rejected, he did file a suit under O. 21, r. 63, C. P. C. Unfortunately his suit was dismissed but he did not take further proceedings in appeal and instead of carrying those proceedings to their finish, instituted the present suit against the Company for recovery of the amount for which the car had been sold, an entirely inconceivable position. Having adopted a particular remedy, it was his duty to carry the proceedings to a final conclusion through all stages. He could not stop short in the middle and turn round in the way he has done.

In case the cause of action is bad the original sale by the Company in favour of Plaintiff failed on account of defect of title, it is not understandable how the Plaintiff can sue for the amount for which the car was sold in execution. All that he could reasonably ask for is the refund of his purchase money and any damages which he had suffered. As noted in the Order of 7th July 1933 the original sale by the Company in favour of Jiwan Shah was under the hire-purchase system. It is plain that on the failure to pay instalments, the Company was entitled to seize the car and to sell it. There can then be no question that at the time when the sale in favour of Plaintiff took place, the Company had a valid right to sell the car, and according to the position now arrived at, Plaintiff's agent did take delivery of the car by virtue of sale. Thus the sale was a completed transaction. If the Plaintiff was deprived of possession later on by a third party, which third party, it is not proved in this case, had any title superior to that of Company, the Company cannot be liable either for the refund of the price or for damages.

Remedy of owner's vendee.

For the foregoing reasons, we accept this appeal, set aside the decrees passed by the Courts below and dismiss Plaintiff's suit with costs throughout.

Appeal accepted.

A. L. R. 1934 Pesh. 9

Appellate Civil.

No. 131-2 of 33 (Decided on 13-6-33.)

Middleton, J. C. and Saaduddin, A. J. C.

MOHAMMAD HAFIZ UMARDARAZ KHAN .. *Appellant*

versus

MOHAMMAD AKBAR KHAN and another .. *Respondents.*

(i) Stamp Act, S. 2 (2) and Sch. I, Arts. [illegible] document, construction of—when containing [illegible] mise to pay otherwise than on demand and [illegible] five years after execution—no bill of excha[nge] pronote—Stamp duty changeable.

A document which contains a promise [illegible] otherwise than on demand and is [illegible] years after execution, falls within [illegible] tion of a pronote as given in th[illegible]

Instruments Act. The stamp duty leviable upon it is the same as upon a Bill of exchange for the same amount payable otherwise than on demand, under Art 49 Sch. I of Stamp Act. It is not a bill of exchange. [P. 10, C. 1&2.]

(ii) Stamp Act, S. 2 (2)—Bill of exchange—definition of, not exhaustive—Hundi—meaning of the term.

The definition of a Bill of exchange given in S. 2 (2) of the Stamp Act is not a complete definition but only mentions specific documents which are included in the term "bill of exchange". There is no legal definition of Hundi but the term is usually held to cover bills of exchange written in an oriental script. [P. 10 C. 2.]

Appeal from the order of the Senior Subordinate Judge, Dera Ismail Khan.

Appellant:—by S. N. Bali.

Respondents:—by Chela Ram and Ghulam Rabbini.

JUDGMENT.

The appellant's suit for the recovery of Rs. 5,500 principal and interest based upon a document executed by the defendants in favour of the plaintiff on 14th December 1926 has been dismissed on the ground that the document is inadmissible in evidence as being improperly stamped. The document definitely falls within the definition of a pro-note as given in the Negotiable Instruments Act. It is however a promise to pay otherwise than on demand and is payable five years after execution. Hence under Art. 49, Sch. 1, Stamp Act, the same duty is leviable upon it as upon a bill of exchange for the same amount payable otherwise than on demand. That duty is admittedly Rs. 37-8-0 and the document is written on a paper bearing impressed non-judicial stamps of that amount. The Court below however considered that the fact that the document was chargeable for duty as a Bill of exchange meant that it was to be stamped as a Bill of exchange. We cannot accept this view. All that the law lays down is that the amount of duty is to be the same and not necessarily that it is to be paid in the same manner. The lo[illegible]r Court thereafter referred to the de[illegible]n of a Bill of exchange given in [illegible]), Stamp Act, which is not a com[illegible]lefinition but only mentions specific [illegible]nents which are included in the term [illegible]of exchange". The original defini[illegible] with which this must be read is [illegible] the Negotiable Instruments Act. [illegible]e of the principal and necessary features of a Bill of exchange is that there should be three parties, of whom one orders a second to pay a third. The document in suit is bilateral, is a mere promise to pay and contains no order to pay. It is therefore not within the basic definition of a Bill of exchange: nor does it fall within the description of any of the documents which are included in a "Bill of exchange" by the supplementary definition in the Stamp Act. We must hold that it is not a Bill of exchange.

The lower Court in our opinion has made yet one further mistake. Noticing that a bill of exchange includes a "hundi" it has considered that all Bills of exchange should be stamped and be on the paper prescribed in R. (4), Ch. 2, Stamp Rules of 1914. Clearly that rule can only apply to the document if it is in fact a "Hundi" There is no legal definition of a "Hundi" but the term is usually held to cover Bills of exchange written in an oriental script. As we have found that this document is not a Bill of exchange, it follows that it is not a "Hundi". This being so, R. 4 applied by the Court below is not applicable, and we must turn to R. (5), which lays down the nature of the stamp which should be placed on a promissory note. There is no specification as to the paper used, provided it bears a stamp of the proper value, which according to the heading of the chapter in which the rule is contained should be an impressed stamp. The document in suit is on a paper bearing impressed stamps and the amount of these impressed stamps amounts to the correct duty. We must therefore reverse the finding of the Court below and declare that the document is admissible in evidence and can form the basis of the present suit. We set aside the order of dismissal and remand the suit for decision upon its merits under O. 41, r. 23, C P. C. Stamp on appeal to be refunded; other costs in both Courts to follow the final event. Pleader's fee 3 per cent.

Case remanded.

A. L. R. 1934 Pesh. 11

Revisional Civil.

No. 248 of 1932 (Decided on 12-1-33.)

Fraser, J. C.

GHULAM RASUL and others .. *Petitioners*

versus

SAMUNDAR SHAH and others .. *Respondents.*

(i) Practice—revision—not governed by any laws of limitation.

Held, that legally a revision is not governed by any laws of limitation.

(ii) Practice—revision—lower appellate court's order contrary to law—interference.

Where the lower appellate court's order was contrary to the provisions of an Act, the order was set aside on revision.

Revision from the order of the District Judge, Peshawar.

Petitioners:—by P. C. Kapur.

Respondents:—by Abdul Latif.

ORDER.

Facts.

This is a revision against the order of the District Judge, Peshawar, accepting an appeal and dismissing plaintiff's suit. This had been brought with the sanction of the Collector under S. 92, C. P. C. The Collector had not obtained the previous sanction of the Local Government. Therefore on the authority of a recent Privy Council ruling in *Prem Narain* v. *Ram Charan* (1) the District Judge held that the suit did not lie. He accepted the appeal and dismissed the suit and also the cross-objections, for the suit had been partly dismissed. A preliminary objection is raised to this revision on the score of limitation. It would be barred by time, unless the period occupied in obtaining the copy of the judgment of the trial Court were included. It is the practice of this Court to require a petitioner on revision to file a copy of this judgment as well as of the judgment of the lower appellate Court. Counsel relies upon a ruling of my learned colleague in *Zarghunshah* v. *Said Rahim* (2). The Additional Judicial Commissioner held that the same rule should apply in revision as in second appeals. His opinion was considerably influenced, I think, by the fact that there was before him a concurrent finding on facts by the Courts below. The case is different in the present instance, for owing to what is admittedly a mistake on the part of the District Judge, the parties have not been allowed the right of appeal at all.

Limitation.

Legally a revision is not governed by any laws of limitation. Consequently I should not be out of order in holding that on the facts of the present case this revision should be regarded as within time.

As already remarked, on the merits it must succeed. The District Judge's order is dated 10th May 1932. On 8th April 1932 there was passed by the legislature a validating Act to counter act for pending cases and appeals the effects of the very Privy Council decision to which the District Judge referred. This Act is No. 11 of 1932, the Public Suits Validating Act, 1932. It provides that suits and appeals pending at the commencement of the Act shall not be deemed to be invalid on the ground that the previous sanction of the Local Government had not been obtained as required by S. 93, C. P. C. This Act had been in force for a month

Revision—interference.

before the District Judge's judgment was pronounced, and it is somewhat curious that its existence was unknown both to the District Judge and to the counsel on both sides. Admittedly it applies to the present case. The District Judge, therefore, was bound to hear and decide the appeal on the merits. The revision is accepted. The District Judge's order is set aside. The records are returned to him with directions to decide the appeal and the cross-objections on the merits. It was the duty of the plaintiffs to bring the existence of Act 11 of 1932 to the notice of the District Judge. They will therefore pay costs on this revision.

Revision a[illegible]ed.

(1) A. L. R. 1932 P. C. 55: 59 I. A. 121: 62 M. L. J. 249: 55 C. L. J. 54: 136 I. C. 461. (P.C.)
(2) C. R. No. 225 of 1930.

A.L.R. 1934 Pesh. 12

Appellate Civil.

No. 74/39 of 1933 (Decided on 24—10—30)

Middleton, J.C., and Saaduddin, A.J.C.

PEOPLES BANK OF NORTHERN INDIA, LTD., KOHAT .. *Appellants*

versus

BODH RAJ and others .. *Respondents.*

Civil P. C. (V of 1908), S. 34 & O. 20, r. 11—instalments—discretion of Court—principles.

As regards instalments and interest, which is a discretionary matter, it must be exercised on judicial principles. Where there is no reason proved that the debtor should be granted an unusual concession, the normal course should be followed. [P. 13 C. 1.]

Appeal against the decree of the Subordinate Judge, Kohat.

Appellant:—by P. Raghu Nath.

Respondents:—by S. Mahammad Aurangazab Khan.

JUDGMENT.

Middleton, J.C.—The plaintiff-appellants sued the respondents for a sum of Rs. 5,751-13-0 on the basis of a *pronote* executed by the latter on 30th December 1929 for Rs. 5,968-7-0. In their plaint they admitted some subsequent payments which they deducted from interest and capital, thus arriving at the sum sued upon the balance due. The *pronote* itself contains a stipulation for payment of simple interest at 9 per cent per annum. The *pronote* was one based upon the outstandings due at the time of its execution on account of the borrowing of Rs. 5,000 on three separate *pronotes* during the first three months of 1927. The defendants admitted execution, but claimed that they had never borrowed Rs. 5,000 that they had been persuaded to purchase shares of that value in the plaintiff company on the promise of being made directors, that they had done so, and had not been made directors.

As regards the payments subsequent to the *pronotes*, they admitted the amount to be correct, but claimed that it should have been deducted from principal and not from interest. No issue was framed upon the basis of the last contention and nothing has been [illegible] about it in this appeal. Various [illegible] framed concerning the alleged connection of the *pronote* with the purchase of shares, and the trial Court came to the conclusion that the purchase of shares was a separate transaction from the borrowing of money, and that whether the money borrowed was paid for the purchase of shares or not, it did not affect the borrowing transaction. There were also issues at to whether the plaintiffs were entitled to interest and costs and whether the defendants were entitled to payment by instalments. As regards interest, the Court found that the contract rate of 9 per cent per annum was not heavy and should be granted, and also thatas the defendants were not prepared to pay, they should pay the costs of the suit. In respect of instalments, the Court relied upon the statement of a solitary witness for the defendants who said that the defendants were Zamindars and that agricultural industry was suffering from depression. Finally it granted a decree for the amount claimed with costs and fixed instalments, Rs. 250 to be paid every January and Rs. 500 in every July. It did not allow any interest after the date of institution of the suit in its decree, although it had not discussed such interest in the judgment. The plaintiffs come up in appeal asking for interest up to the date of realization and asking that the decree for the whole amount be made immediately executable.

There is evidence upon the record that when the respondents borrowed Rs. 5,000 they represented themselves as owning houses, bungalows, land and stocks of corn worth Rs. 30,000. The only evidence they have produced in support of their claim to be given the indulgence of instalments is that they do carry on work as agriculturists and that agriculture is suffering from the general depression. Their solitary witness does not even allege that agriculture is their only source of livelihood, or that they are not owners of property sufficient to pay off the decree. Learned counsel for the appellants relies upon the normal features of a decree for a debt bearing interest, whilst counsel for the respondents has not been able to show any grounds for belief that the respondents are in such circumstances that they should be allowed any special indulgence. Counsel for the respondents has argued that the respondents were persuaded to accept the

to the Nattalin creditors there is no doubt; that the Nattalin creditors were, or were represented by, members of the Chettyar community in Nattalin is not in dispute, and it is also common ground that the creditors to whom the transfers were made were all creditors who had lent money to the insolvent firm through Karapaya. Of course from a financial point of view it did not matter to Karapaya whether he executed the transfers or not, because he was only the managing agent and not a partner of the firm. But it may be that Karapaya, like the unjust Steward in the Bible story, thought that it would be a prudent course in his own interest to repay *pro tanto* by transfers of property or outstandings those creditors who had entrusted money to the firm through him at Nattalin, and who were, or who were represented by, his Chettyar friends carrying on business in the same town. In my opinion in the circumstances obtaining in the present case there was no room, as the learned trial Judge, Das, J., observed, for the doctrine of "pressure" to operate. When these transfers were made both the creditors and their representatives and Karapaya were apprehensive of the financial difficulty in which the insolvent firm was placed, and in my opinion the irresistible inference to be drawn from the evidence is that these transfers were voluntarily made by Karapaya with the intention of preferring the Nattalin creditors who had lent money to the firm through Karapaya at Nattalin.

It was further urged on behalf of the appellants that these transfers were made because of pressure brought to bear upon Soliappa and Chithambaram, two of the three partners in the insolvent firm. But such pressure if it existed, in my opinion, did not operate upon the mind of Karapaya when he made the transfers, because he did not purport to act upon instructions from his principals but was deliberately making these transfers without reference to them, and acting upon his own initiative as the managing agent of the firm at Nattalin.

I am clearly of opinion that the decision of the learned trial Judge as regards the transfers which are the subject-matter of appeals Nos. 172, 173 and 174 of 1932 was correct, and must be upheld.

As regards appeals Nos. 245, 246 and 247 of 1932 which also arose out of petitions presented by the Official Assignee under S. 56 of the Presidency Towns Insolvency Act, Sen, J. at the hearing of the petition passed an order in favour of the Official Assignee. These three transfers were also executed by Karapaya at the instance of Chettyars who were carrying on business at Nattalin on the 18th of July, 1931. The only substantial difference that I can see between these three cases and appeals Nos. 172 to 174 of 1932, is that in appeals Nos. 245 to 247 of 1932 the transfers were presented for registration, not by Karapaya but by or on behalf of the transferees themselves. In other respects, in my opinion, all six cases stand very much upon the same footing. There is no doubt that in each of these three cases demands for repayment of the debts were made both upon the principals and upon Karapaya. But, in my opinion, the transfers were not made by Karapaya by reason of any pressure that was brought to bear upon him by or on behalf of the transferees.

It appears that on the early morning of the 18th of July, the Chettyars who were representing these transferees happened to hear that Karapaya was making transfers to certain Nattalin creditors of the property of the firm at Nattalin, and in each case the representatives of these transferees stated that on receiving this information they also went to Karapaya, demanded repayment of their debts, and accepted transfers from Karapaya. The intention with which Karapaya made the transfers in these cases, in my opinion, was precisely the same as the intention with which he transferred the property of the insolvent firm to the creditors in the earlier cases. As I appraise the situation in all six of these cases what really happened was that, when it became known both to the creditors and to Karapaya that there was imminent danger of the collapse of the insolventfirm, Karapaya took counsel with his friends who were Chettyars at Nattalin with a view to the Nattalin creditors who had lent money to the firm through Karapaya obtaining some share of the assets of the firm by way of repayment of their debts before the crash occurred. As the result of these deliberations the transfers under consideration were executed. I can se no ground in such circumstances for holding that the transfers were executed by Karapaya because of pressure that had been brought to bear upon him by the transferees. I do not believe that Karapaya made these transfers because of any pressure in the legal sense from the creditors. On the contrary I am satisfied that he executed the transfers voluntarily and deliberately in order to prefer the Nattalin creditors to those creditors who had not lent money to the insolvent firm through him at Nattalin.

For these reasons, in my opinion, the decision of Sen, J. was correct, and must be upheld. The result is that all six appeals fail, and they are dismissed.

The cases represented by appeals Nos. 245, 246 and 247 of 1932 are to be treated as one consolidated case, and the cases represented by appeals Nos. 172, 173 and 174 of 1932 are also to be treated as one consolidated case for the purpose of costs.

The Official Assignee is entitled in each consolidated case to ten gold mohurs a day as costs of the hearing in the Court below, and to ten gold mohurs in each consolidated case as the costs of the appeal.

The three respondents in each case will bear one-third of the costs awarded in the respective cases both of the hearing and of the appeal.

Mya Bu J.—I agree.

Appeal dismissed.

A. L. R. 1934 Rang. 14.

Revisional Criminal.

No. 311-A of 1933. (Decided on 20-6-33.)

Mya Bu and Dunkley, JJ.

THE CROWN Petitioner

versus

MOHAMED Respondent.

Criminal P. C. (V of 1898), S. 388 (1) & (2)—sentence of imprisonment in addition to a sentence of fine—former a nominal sentence only—provisions of S. 388, whether apply—scope of Sub-s. (1)—distinction between Sub-ss. (1) & (2).

Whenever a sentence of imprisonment is passed in addition to a sentence of fine, even if the sentence of imprisonment is a nominal sentence only, the provisions of S. 388, Cr.P.C., have no application and the execution of the sentence in default of payment of fine cannot be suspended.

The provisions of Sub-s. (1) of S 388 are not applicable to a case where the sentence is a sentence of imprisonment combined with a sentence of fine, and it makes no difference whether the sentence of imprisonment is merely nominal or for a substantial term

There is a clear distinction between the provisions of Sub-s. (1) of S 388 which refer to a sentence passed in a trial and the provisions of Sub-s. (2) which refer to an order made by a Criminal Court for the payment of money, but which is a punishment inflicted on an offender for a criminal offence. [P. 15, C. 1.]

Criminal revision against the order of the Second Additional Magistrate of Bogale.

The Crown:—by Tun Byu (Assistant Government Advocate).

JUDGMENT.

In his Criminal Regular Trial No. 9 of 1933 the Second Additional Magistrate of Bogale convicted the respondent of an offence under S. 420 of the I. P. C. and sentenced him to suffer imprisonment till the rising of the Court, and to pay a fine of Rs. 150, or in default of payment of the fine to undergo two months' imprisonment. As the respondent was unable to pay the fine at once and prayed for time in which to pay it, the Magistrate, purporting to act under the provisions of S. 388, Sub-s. (1) of the Cr. P. C., granted the respondent fifteen days' time in which to pay the fine, on his executing a bond as required by the provisions of Cl. (*b*) of Sub-s. (1) of S. 388.

The action of the Magistrate in granting time for the payment of the fine was, in our opinion, illegal, and not justified by the provisions of S. 388. Sub-S. (1) of S. 388 says:

"When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine," . . . . .

The provisions of this sub-section are perfectly clear, and plainly refer solely to cases in which a sentence of fine only is passed. They are not applicable to a case where the sentence is a sentence of imprisonment combined with a sentence of fine, and it makes no difference whether the sentence of imprisonment is merely nominal, as in the present case, or is for a substantive term.

It has been suggested that the provisions of Sub-s. (2) of S. 388 might cover a case like the present. The provisions of Sub-s. (2) are to the following effect:

"The provisions of Sub-s. (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith."

It is plain that the provisions of this sub-section refer to an order for payment of money which order is not a sentence passed upon an accused person. There is a clear distinction between the provisions of sub-section (1), which refer to a sentence passed in a trial, and the provisions of sub-section (2), which refer to an order made by a Criminal Court for the payment of money, but which is not a punishment inflicted on an offender for a criminal offence. The provisions of this latter sub-section refer to cases like that of the payment of compensation, under S. 250 of the Cr. P. C. or the payment of the penalty on a bond under S. 514.

In our opinion, whenever a sentence of imprisonment is passed in addition to a sentence of fine, even if the sentence of imprisonment is a nominal sentence only, the provisions of S. 388 of the Cr. P. C., have no application, and the execution of the sentence of imprisonment in default of payment of fine cannot be suspended.

Order accordingly.

A. L. R. 1934 Rang. 15 (S. B.).

(Special Bench.)

Reference Side Civil.

No. 10 of 1933. (Decided on 10-7-33.)

Page, C. J., Das and Mya Bu, JJ.

COMMISSIONER OF INCOME-TAX, BURMA ... *Petitioner*

versus

FIRM K. A. R. K. CHETTYAR ... *Respondents.*

Income tax Act (XI of 1922), S. 26—trading-loss—what constitutes—reconstitution of a firm—estimated depreciation of the assets on the occasion and for the purpose of—not a trading-loss.

At the time of the reconstitution of the assessee firm on admitting a new partner, a valuation of the assets of the business was made and it was found that the old firm possessed *inter alia* immoveable property which was acquired by it in the ordinary course of business and the assessees' claim to be entitled to deduct a sum of Rs. 34,561 which represents the estimated loss of the capital value of the immoveable property referred to above.

Held, that the sum of Rs. 34,561 was not a trading loss which accrued during the accounting year but was the estimated depreciation of the assets of the firm based upon a revaluation of such assets made for the purpose, and on the occasion of the reconstitution of the firm.

Reference by Commissioner of Income-tax, Burma.

Petitioner:—by A. Eggar.

Respondents:—by N. M. Cowasjee and Daniel.

JUDGMENT.

Page, C. J.—In this case the K. A. R. K. Chettyar Firm, carrying on business as money-lenders in Pyu in the Toungoo District, was assessed for the year 1931-32 upon the profits and gains of the firm in the accounting year 1930-31. By a partnership agreement executed on 16th July, 1930, the firm was newly constituted an additional partner being taken into the firm which previously had consisted of five partners. Thereafter the business was carried on by the six partners, the shares of the new partner being different from the shares of the five partners in the old firm. The assessment upon the firm and the partners under S. 26 (*a*), Income-tax Act, was based on the profits of the business that had been earned during the accounting year. Now, at the time when the firm was reconstituted a valuation of the assets of the business had been made but, as was pointed out by the assessees in a note to the Assistant Commissioner of Income-tax explaining the grounds of the appeal to him from the Income-tax Officer, this was only a valuation of the stock and property forming the assets of the old firm. The old firm possessed *inter alia* immoveable property which was acquired by it in the ordinary course of business. This property was let out on lease, and taxable profits in the form of rent accrued therefrom to the assessees. The assessees now claim to be entitled to deduct from the trading profits in the accounting year a sum of Rs. 34,561 as being a trading loss. This sum of Rs. 34,561 represents the estimated loss of the capital value of the immoveable property under the valuation to which reference has been made.

For the purpose in hand it is immaterial whether the business is treated as having remained the property of the original partnership, or as having be[illegible] transferred to the new partnership, [illegible] we express no opinion upon that question. It must not be taken, however, that as at present advised we should be prepared to differ from the view taken by the Commissioner of Income-tax that the effect of the transaction was that a new firm was constituted. The sole question that arises in the present reference is whether this sum of Rs. 34,561 was a trading loss realised during the accounting year. It does not purport to be anything of the sort, and the valuation upon which it is based was not made for the purpose of ascertaining the trading loss of the business during the accounting year, but for the purpose of obtaining a revaluation of the assets of the business having regard to the impending change in the constitution of the firm. Further, no evidence was adduced in respect of the immoveable property which is alleged to have decreased in value to the extent of Rs. 34,561 that there was any realized loss of profit during the accounting year or afterwards. In the assessment order a deduction is allowed for the loss resulting from the sale of a house during the accounting year, and it appears that the practice of the income-tax authorities in connexion with such assessments as that under consideration, where immoveable property is received during the accounting year in repayment of a loan by the assessee, is that if during the year the property is sold and the proceeds of the sale are less than the loan the repayment of which they represent the difference is allowed as a trading loss in the business of the assessee. Unless and until property taken in repayment of loans is sold or otherwise disposed of for value there can, of course, be no realized trading loss in respect of such property during the accounting year. In my opinion this sum of Rs. 34,561, in the circumstances disclosed in the present case, was not a trading loss which accrued during the accounting year, but was the estimated depreciation in the value of the assets of the firm based upon a revaluation of such assets made for the purpose, and on the occasion, of the reconstitution of the firm.

For these reasons, in my opinion, the answer to the question propounded is in the negative. Costs ten gold mohurs.

Das, J.—I agree.

Mya Bu, J.—I agree.

Reference answered.

A. I. R. 1934 Rang. 16.

Appellate Civil.

No. 8 of 1933. (Decided on 27-4-33.)

Page, C. J.

S. P. K. A. PALANIAPPA CHETTYAR ... *Appellant*

versus

DAW HNIN THET and another ... *Respondents.*

Mortgage—execution of two mortgages—prior mortgage found to contain wrong area of lands—third mortgage with correct acreage in favour of the first mortgagee—first mortgage, whether can be used as a shield against the second mortgage.

On 16th May, 1923, defendants Nos. 1 and 2 mortgaged the property in dispute to defendant No. 3 for Rs. 5,500. Subsequently they mortgaged the same property with other property to the plaintiff for Rs. 3,000. After the execution of the second mortgage it was discovered that the area of the lands mortgaged by the first deed of 16th May, 1923, was wrong and consequently a third mortgage deed was executed in favour of the third defendant for Rs. 5,000 with the correct acreage.

Held, that under the circumstances there was an intention on the part of the 3rd defendant to retain his rights under the mortgage of 16th May, 1923, and that he was entitled to set up that deed as a shield against the plaintiff's mortgage.

Second appeal against the judgment of the District Judge, Tharrawaddy.

Appellant:—by P. K. Basu.

Respondents:—by Ba Han.

JUDGMENT.

This case, in my opinion, presents no difficulty. On 16th May, 1923, defendants Nos. 1 and 2 mortgaged the property in dispute to defendant 3 for Rs. 5,500. On 5th January, 1928, defendant Nos. 1 and 2, mortgaged the same property with other property to the plaintiff for Rs. 3,000. It appears that after the mortgage to the plaintiff was executed it was discovered that whereas in the mortgage of 16th May, 1923, the acreage of the plot in dispute was stated to be 19·04 acres, it should have been of 10·94 acres, and what happened was explained by defendant 3 in his evidence at the trial. He stated:

"The area of the lands mortgaged by Ex. 1 was found to be wrong. Hence we were asked to execute a fresh mortgage deed. I repaid a sum of Rs. 500 towards the mortgage debt due on Ex. 1. Hence the second deed was executed for Rs. 5,000."

mismanagement and neglect of his duties, that he has wrongfully alienated a portion of the trust property, that he has allowed the temple and the premises to fall into ruins and has suffered it to be encroached upon, that he has failed in his duties as Poojari, that he does not perform the "Pooja" with any sanctity, and in general grossly misbehaves in the execution of the trust.

The defendant in his written statement denied *inter alia* that the property was trust property; he denied that he is only a "Poojari" of the temple; he also denied the allegations of mismanagement and neglect of duty and breach of trust. He contended that the plaintiffs have not such an interest in the trust property as would entitle them to bring the suit, and that the provisions of S. 92, C. P. C., are not applicable. The issues are as follows:

1. Was any valid trust created with regard to Survey No. 9, K. 15, Lyari Quarter and was the said property validly dedicated to public purposes of a charitable and religious nature or is it private property burdened with the object of maintaining a temple therein? 2. Is the defendant not a descendant of Chotirgir and as such entitled to succeed to the property in dispute? 3. Were Chotirgir, Motigir and the defendant owners or merely "poojaris" of the temple in dispute permitted or suffered to act as such and to appropriate the offerings made in the temple for the purpose of looking after it? 4. Is the defendant guilty of any of the acts mentioned in para 10 of the plaint and the further particulars thereof furnished by the plaintiffs? 5. If so, does his conduct amount to a breach of trust within the meaning of S. 92, C.P.C.? 6. Have the plaintiffs such an interest in the property in suit as to entitle them to bring this suit? 7. Is the plaintiff entitled to any, and if so, which of the reliefs claimed by him in para 15 of the plaint? 8. General.

The early history of the temple of Kali in Karachi is obscured by time and its foundation cannot be known. According to the witness Chandumal Tarachand there is a tradition that the temple was in existence even before the Mahomedan conquest of Sind. Both sides are agreed that it is a very ancient temple. Their Lordships of the Privy Council observed in *Lakshmana Goundan* v. *Subramania Aiyar* (1) that the question whether a temple was ever dedicated to the public must be decided by inferences. In *Deokinandan* v. *Brij Nandan* (2) it was held that the *indicia* must be carefully considered. In a case where there is an actual dedication in writing, *e. g.*, a will, or a trust deed, the question whether a temple is a public or a private temple, may merely depend on the construction of a document. But, where, as in this case, there is no documentary evidence of any trust and the origin of the temple goes back to hoary antiquity, all that the Court has to rely on are *indicia* and the *indicia* relied on by parties in such cases are often held by the Courts to be inconclusive. It has been held that it is not sufficient for those who allege that a temple is a public temple to prove that it is used for public worship, *Goverdhangir* v. *Vishingir* (3) that it is not sufficient to prove user by the public: see judgement of Kemp, A.J.C., in Ex. 53 that it is not sufficient to prove customary "lagas" or gifts for the upkeep of the temple: *Goverdhangir* v. *Vishingir* (3) and *Giriji Nand D*[illegible] v. *Sailaja Nand Datta* (4). On the [illegible] hand, it has been held that it is not [illegible]cient for those who contend that a te[illegible] is a private temple to prove that no acc[illegible] were kept. *Lakshmana Goundan* [illegible] *Subramania Aiyar* (1) and *Oseri* v. *B*[illegible]*mukund Das* (5) that Government records describe the temple as private: *Lakshmana Goundan* v. *Subramania Aiyar* (1) that the temple passed from Guru to chela: *Goverdhangir* v. *Vishingir* (3): that respectable local witnesses allege that the temple is private or that admission has been changed: *Lakshmana Goundan* v. *Subramania Aiyar* (1). In the present case both parties allege the existence of many of the above *indicia* as supporting their respective contentions and rely on their alleged cumulative effect. There is no doubt that in Hindu law the dedication of property to an idol is not only lawful but commendable (Mulla Hindu Law, Ed. 6, p. 492): a trust is not required for the purpose, the

(1) 9 C. W. N. 112: 19 L. W. 253: 81 I. C. 518 (P.C.).

(2) 5 P. L. T. 231: A. I. R. 1924 Pat. 502: 76 I. C. 89.

(3) 15 S. L. R 33: 63 I. C. 370-38.

(4) 23 Cal. 645.

(5) 7 S. L. R. 129: 24 I. C. 712.

dedication may be inferred from circumstances. The evidence relied on by both sides may be roughly divided into five heads *viz.*, evidence relating to

1. Tradition, 2. Government records. 3. User. 4. Lagas. 5. Public repute.

With regard to the evidence under the first head, Mr. Chandumal, who is an octogenarian and the son of an octogenarian states, that he once asked his father "How can "Kali" save the people?" and that they had a conversation about the Kali temple. His father told him that the temple of Kali was in existence before the conquest of Sind and even before the Mahomedan conquest; that the work of the temple was formerly carried on by Brahmins who looked after it. His father used to tell him that the Kalankote temple was the oldest temple of all in Karachi and that it was a public temple. The statement about the Brahmins being at one time in charge of the temple is in accordance with the evidence of Ghanshamdas Menghjimal who deposed to the fact that Brahmins used formerly to put ...n at the temple and worship there; that ... two Brahman worshippers were ...aram and Karamchand, the latter ...g his father's maternal grandfather. ...ing the time when the Brahmins ... in charge, a fakir named Maha...agir came from Baroda and was employed at the temple for sweeping and cleaning utensils. The Brahmins got him married to Ram Bharti's sister and they had two sons Chotirgir and Tikamgir. Tikamgir died young and Chotirgir left no children. He accordingly adopted Hemandas, the son of Chellaram, who changed his name to Motigir. Chotirgir and Motigir were only worshippers. They had no proprietary rights. When Motigir got charge of the temple the Brahmans' "Lagos" were discontinued, for he was the son of Bania and the Brahmans did not recognize him as a "guru." The witness when he attained years of discretion used to see Chotirgir at the temple. He learnt about the events which occurred before that from his uncle Fatumal who was 80 when he died. Mr. Chandumal's earliest memory was also of Chotirgir in charge of temple. Mr. Chandumal's father also told him that the Brahmans put a servant, in whom they had confidence, in charge of ...e temple and that he was a "Bawa" ... "Brahman." Mr. Chandumal said he thought the man's name was "Ganashgir" but he could not exactly remember. The defence called evidence to prove that one Babootgir was the proprietor of the Kalankote temple before Mahadevgir and that his shrine is in the temple. Defendant Devigir said he heard it from his father and mother, *viz.*, Motigir and Jamnabai. The allegation about Babutgir's shrine was denied by plaintiff, who stated, that the shrine, referred to, was the shrine of Sanpatbai, the wife of Mahadevgir.

The evidence of defendant is open to the objection that, while plaintiff and his witnesses are only interested to the extent that they are members of the Hindu community, the defendant is personally affected by the suit, his evidence is highly interested evidence. Instead of being a mere worshipper in charge of the temple, he becomes, if successful, the absolute owner of the temple. I am not prepared to accept the story about Babutgir as proved. The defendant has called Pahlaj Barti to prove that Mahadevgir and Chotirgir were owners. Pahlaj is the brother of defendant's former partner in the motor omnibus business, while Pahlaj stated at one time that his father, uncles and elderly people had told him that Mahadevgir and Chotirgir were proprietors. His later admission rendered his evidence of little value to the defence, for he said: 'I know this much that Mahadevgir was in charge. I cannot say how he got possession'. Kimatmal Kundanmal, another defence witness, when examined in chief, merely gave a succession of names and the order in which they came. He said his father and grandfather told him that Babutgir came first, then Mahadevgir. Thereafter Chotirgir. After Chotirgir, Motigir. After Motigir, Devigir. Subsequently in cross-examination he added that he was told they were proprietors. Kimatmal was adjudicated an insolvent. He states that he was discharged six years ago. Another defence witness Nenumal admitted that he had lent Rs. 2,500 to the defendant which had not been repaid. His evidence was not disinterested. Another witness Hira deposed to information alleged to have been received from his uncles that the temple belonged to the Bawas. One of the uncles, he admitted, was alive and well, but he was not called.

There remains the evidence of Omkargir who says he was told by Budgir when young that Chotirgir was the proprietor of the temple. Budgir was 60 years old. The defence evidence on this point of the case did not impress me as reliable. Mr. Chandumal's evidence for the plaintiff has been criticised by the defendant's pleader on the ground that he thought that the name of the servant, whom the Brahmans put in charge of the temple, was Ganashgir not Mahadevgir. The discrepancy does not seem to me a ground for rejecting the evidence as false. Even younger men than Mr. Chandumal, who is 81, found it difficult sometimes to remember names correctly. It is difficult to imagine that this old gentleman, a retired master in a Mission School, a leading member of his community, the father of a leading member of the Karachi Bar, has come to Court with a fabricated story of what he heard from his father. He and Ghanshamdas are not personally interested in the dispute: they have only the interest, which any other Hindu in Karachi might have, of protecting the rights of the Hindu community.

There is, however, a defect which reduces the value of the evidence given on behalf of the plaintiff and is an additional weakness on a great part of the defence evidence on this part of the case. The value of the evidence admissible under Ss. 32, 49 and 60, Evidence Act, as their Lordships of the Privy Council observed in *Garudwaja Parshad* v. *Supurundhwaja Parshad* (6) depends on the character of the witnesses who depose to what they heard from deceased persons and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay. In some instances we do not even know the names of the deceased persons who are alleged to have given information, and the only deceased person about whose character evidence has been given in this suit is Motigir, the father of defendant. An admission was obtained from the plaintiff that he was a "good and pious man." Again it is difficult to say with regard to some of the statements alleged to have been made by deceased persons regarding the temple, whether the statements were based on facts within their knowledge or based on hearsay. It can, I think, b... inferred that when a reference was made to Brahman worshippers at the temple in the olden time, the deceased knew what they were talking about. The evidence of Mr. Ghanshamdas shows that all Hindu formerly used to make a point of goin... to the temple on the occasion of the annual fair, so they would see the Brahmans, and I think it can be inferred tha... the statements of deceased persons t... the temple was a public temple was an expression of their opinion for what it was worth, but no such inference can in my opinion be made as regards incidents and details regarding the history of the temple, how such and such a person came to hold this or that office, or whence he came. The plaintiff Mulchand has deposed to an alleged admission by Chotirgir that the temple was a public temple. Chotirgir died in 1892. It would be a remarkable feat of memory for the witness to recall remarks casually overheard by him when he was a lad some 40 years before he gave evidence. There is no corroboration with regard to the alleged admission and I am not prepar... to hold that it is proved.

With regard to the statemen... buted to Jamnabai and Motigir tha... were "owners", it is a curious c... dence that defendant when he first all... to the information he received from Motigir about Chotirgir, stated that Motigir told him that prior to him his father Chotigir was "in charge of" the temple. The words "in charge of" are a little unusual to use with regard to an owner. Defendant hastened to add that Chotirgir was the owner. There is nothing improbable in the assertion that Motigir and Jamnabai told defendant that the property belonged to them. [The judgment after discussing certain documentary evidence not material for the purposes of the report proceeded:]

The plaintiff's case, however, seems to me to rest on a sure footing so far as the evidence relating to user by the Hindu public and the payment of fixed lagas by the Hindu community and public repute are concerned. The facts proved by the plaintiff appear to me more cogent than those in *Lakshmana Goundan* v. *Subramania Aiyar* (1) in which their Lordsh... of the Privy Council held that the te... was a public temple. In that

(6) 23 All. 37: 27 I. A. 238: 10 M. L. J. 267: 5 C. W. N. 33.

owner had encouraged members of the Hindu public of various castes to attend his temple free of charge on certain days of the week and worship in the greater part of the temple.

In the present case Hindus of all communities have been visiting the Kalankote temple without charge or let or hindrance on every day of the week. To such an extent has the practice of Hindus worshipping at the temple been established that on a certain occasion, *viz.*, the Kalankote Fair, it is not only the privilege, but it has actually come to be regarded as the duty of every Hindu in Karachi to attend the temple. The evidence shows that this obligation is recognized with regard to the Kalankote temple alone in Karachi. Certain *indicia* no doubt are relied on by the defence as rebutting the inference that the temple is a public temple. The same *indicia* were present in *Lakshmana Goundan* v. *Subramania Aiyar* (1) if anything in a more marked decree. In that case respectable local witnesses had deposed to the fact that the temple was private. In the Calcutta case, as in this case, there ...n omission to render accounts. In ...se too the priest was referred to ...owner in Government records and ...dence forthcoming in the Govern... records was not in that case weak... by such words as "temple of the Goddess Kali Kalankote per DevigirMotigir" which are found in Ex. 11 in this case. In the Calcutta case the Tahsildars on no less than three occasions had reported to the Collector that the temple was private. In the present case the Deputy Collector in his reply dated 13th October, 1928 to the letter of defendant's pleader observed that plot 4 was shown as private property in his office records but that plot 9 was shown as "temple of the Goddess Kali Kalankote per Devigir Motigir."

I think it is not only a legitimate inference but that there can be no other inference in the present case, than that the temple in suit is a public temple. In *Chairman, Howrah Municipality* v. *Khethra Kristo Mitter* (7) Mookerji, J., pointed out that an implied dedication arises by operation of law from the acts of the owner and that it is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made but rather on the principle that the owner having allowed the public to enjoy the user for a particular purpose is estopped from denying the right of the public to the enjoyment of such user. In *Lakshmana Goundan* v. *Subramania Aiyar* (1) the owner with the income he derived from offerings and fees efficiently maintained the temple as if it was a public temple and discharged all the expenses connected with the temple and the worship of the idol there. In the present case the evidence shows that until the disputes with regard to the present temple arose, fixed and compulsory "lagas" or offerings were collected by a great number of Hindu communities from their own members on occasions such as marriage and paid to the temple. Other offerings were also made to the temple.

With the offerings and lagas from the Hindu public and with the rent derived from a few huts on the temple plot the Bawas of the temple of Kalankote similarly discharged their duty of maintaining the temple and paid the expenses connected with the temple and the worship of the idol. The evidence seems to me to indicate that the temple was maintained as a public temple. In *Goverdhangir* v. *Vishingir* (3) no doubt it was laid down that evidence of public worship alone would not be sufficient to justify a Court in holding that a particular property had been dedicated to the public, but *Goverdhangir* v. *Vishingir* (3) was decided prior to the decision of the Privy Council in *Lakshmana* v. *Subramania Aiyar* (1) and the facts are distinguishable.

In *Goverdhangir* v. *Vishingir* (3) as Kincaid, J. C., pointed out, there was no evidence to justify the Court in holding that the house was used as a public temple. There was merely a room in a house containing some images and a trident. The premises in the present suit have long been referred to as a Hindu temple. They were referred to in a Government plan as long ago as in 1874 as a Hindu temple (Ex. 44), and that is its description in Ex. 10 and Ex. 11. The user and worship connected with the Kalankote temple is by no means comparable as in the case of the temple in *Goverdhangir* v. *Vishingir* (3) with the kind of user and worship which would take place when a

(7) 13 Cal. 1290 : 4 C. L. J. 343 at p. 348 : 10 ...1044.

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